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Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act

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TYRANNY OF THE JUDICIARY: JUDICIAL DILUTION OF CONSENT UNDER SECTION 2 OF THE VOTING RIGHTS ACT

James Thomas Tucker*

"Every man takes the arm of the law for his protections as more effectual than his own, and therefore every man has an equal right in the formation of the government and of the laws by which he is to be governed and judged."¹ When Thomas Paine wrote these words over two hundred years ago, he captured the essence of American democracy. Having a voice in government means more than merely casting a ballot. Instead, the basic right of all qualified citizens to grant or withhold their consent mandates "fair and effective representation": a right to elect representatives and participate in the decision making processes of government.

At the same time, the Founding Fathers recognized that voting itself posed a danger to a representative democracy. Majority factions were particularly troubling because the principle of majority rule empowered them to silence the voices of those in the minority. Consequently, the constitutional Framers installed the federal courts as "judicial referees" that would protect minorities from the tyranny of the majority. When it enacted the Voting Rights Act of 1965, Congress also envisioned that the judiciary would play an active role in protecting the right of minorities to give or withhold their consent.

Yet, courts have opted for a more passive approach that directly undermines the voices of minorities in government. Out of "respect" for the democratic process, the judiciary has protected consent only to the extent that it can do so in a "principled" manner that does not overturn the will of the majority. As a result, minority voters no longer must raise their voices against the tyranny of the majority, but the tyranny of the judiciary. This Article discusses the impact of the judiciary's ill-advised

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This Article is dedicated to those who are denied a voice in the political process. I am grateful for the assistance of Professor Lani Guinier, who graciously served as my thesis advisor and provided me with invaluable advice and critical analysis of my views throughout this endeavor. Furthermore, I appreciate Professor C. Edwin Baker's suggestions, which helped me develop a more complete discussion of some of the constitutional issues discussed herein. In addition, a special thanks to my academic advisor Professor Pamela Harris, Denise McGary, Cynthia McKinney, and all of the faculty and staff at the University of Pennsylvania School of Law who assisted me throughout the year. Moreover, I would be remiss if I did not acknowledge the special contributions of my fellow LL.M. classmates, whose diverse experience and cultural backgrounds enriched my stay at Penn. Finally, I am indebted to my wife Sue, whose love and unfailing support made this Article possible.

¹ Thomas Paine, *Dissertation on First Principles of Government*, in COMMON SENSE AND OTHER POLITICAL WRITINGS 169 (Nelson F. Adkins ed., 1st ed. 1984).

approach to claims brought under section two of the Voting Rights Act, and proposes an alternative approach more consistent with the democratic theories embodied in the Constitution and section two.

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*Our slavery is complete as long as we are subject to regulations made by a legislature, in the election of which we had not a voice, and over whose members we have not the least controul. If any thing could add to a slavery in its nature so perfect, it would be, that we are under the government of a power whose views may be distinct, and whose interests may be the opposite of ours.*²

INTRODUCTION

Over one thousand voices joined in unison, singing "We shall overcome." The trial stopped momentarily, while the echoes of these words drowned out the answer of the witness on the stand. An eerie silence settled over the courtroom before the attorney's examination of the witness resumed. Outside, the protesters were marching arm in arm down the narrow boulevard in front of the courthouse, temporarily blocking traffic. At first blush, the scene was reminiscent of Montgomery, Alabama at the height of the civil rights movement. But this was Tallahassee, Florida, in February 1996.³

In fact, throughout the United States, this scene has been replayed many times in the last few years. However, the scenes differ from those of some thirty years past. The protesters are no longer turning to federal judges for changes which will secure for them true equality under the law, irrespective of race, color, or creed. That battle has been won.⁴ Instead, the protesters raise their voices against the changes that

² JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 128 (1989) (quoting Anonymous, *The Usurpations of England the [C]hief Sources of the Miseries of Ireland; and the Legislative Independence of this Kingdom, the [O]nly Means of [S]ecuring and [P]erpetuating the Commercial Advantages [L]ately [R]ecovered* 28 (Dublin, 1780) (emphasis added)). Reid points out that, while this quote is from a writer advocating the right of Irish Protestants to representation, it also supports the same case for American colonials. *See id.* This Article will demonstrate that the quote could have been written today on behalf of many minorities attempting to participate in the American political process.

³ *See Residents Rally to Keep Brown's District Intact*, ST. PETERSBURG TIMES (Fla.), Feb. 20, 1996, at 4B; *Blacks Rally for District*, TAMPA TRIB., Feb. 20, 1996, at 6.

⁴ Of course, "equality under the law" does not necessarily mean that equality has been attained in society. The vast disparities between whites and a number of minority groups in household income, education, home ownership, and health coverage, among other things, are a testament to the continuing presence of inequalities. *See generally* COUNCIL OF ECONOMIC ADVISORS, *CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN* (Sept. 1998) (estimating 1997 census data of social and economic indicators); ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (rev. ed. 1995) (summarizing and comparing 1990 census data of whites and minorities). The point merely is that there are no longer overt racial inequalities codified by law.

federal judges are making in how the law is interpreted.⁵ As a result of these changes, the fabric of the equality they have gained seems to be unraveling.

This paradigm shift presents several issues, none of which can be resolved easily. Perhaps the most important issue is determining how "equality" is defined. It is axiomatic that equality cannot always be taken at face value. Treating all racial and ethnic groups alike under all circumstances, without regard to socioeconomic differences and other present effects of past discrimination, only might exacerbate inherent inequalities further.⁶ In other words, the "shackled runner" argument still has merit in America today.⁷ In voting rights cases, the majority's dilution of a

⁵ Compare Rep. Brown Apologizes Over Aide's Klan Remarks, ORLANDO SENTINEL, Feb. 14, 1996, at D3 (stating that an aide to Congresswoman Brown remarked that "[t]here was a time when the people we were concerned about wore white sheets—now they wear black robes"), with Jesse Jackson, *White Sheets, Blue Suits, Black Robes*, NEW PITT. COURIER, June 26, 1996, at A7. Jesse Jackson wrote:

We have witnessed the return of the white sheet crowd, sneaking in by night to burn the churches of our people. We have watched the mean spirited maneuvers of the blue suit crowd, the Gingrich Congress and many of our state legislatures, as they try day after day to wipe out a half-century of social progress. Last week, we saw the return of the black robes crowd, who with each decision, roll back a little more of Dr. King's reconstruction.

Id. Reverend Jackson made his comments in response to the Supreme Court's decisions in *Shaw v. Hunt*, 517 U.S. 889 (1996), and *Bush v. Vera*, 517 U.S. 952 (1996). See Jackson, *supra*.

⁶ For example, as some members of the Senate Judiciary Committee pointed out in a separate statement on the Voting Rights Act of 1965, the "equal application" of literacy tests "would abridge 15th [A]mendment rights" because "the educational differences between whites and Negroes" resulting from past discrimination in education effectively would preclude many blacks from being able to register to vote. S. REP. NO. 89-162 (1965), reprinted in 1965 U.S.C.C.A.N. 2508, 2554 (identifying the views of 12 members of the Judiciary Committee relating to the Voting Rights Act of 1965).

⁷ The image of the "shackled runner" was suggested by President Lyndon Johnson in a 1965 commencement speech at Howard University. See Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS—1965, at 636 (1966). Policymakers have used the "shackled runner" argument to illustrate the compelling need for affirmative action to remedy past discrimination:

Imagine a hundred-yard dash in which one of the two runners has his legs shackled together. He has progressed ten yards, while the unshackled runner has gone fifty yards. At that point the judges decide that the race is unfair. How do they rectify the situation? Do they merely remove the shackles and allow the race to proceed? Then they could say that "equal opportunity" now prevailed. But one of the runners would still be forty yards ahead of the other. Would it not be the better part of justice to allow the previously shackled runner to make up the forty-yard gap, or to start the race all over again? That would be affirmative action toward equality.

Mary C. Segers, *Justifying Affirmative Action*, in JAMES C. FOSTER & MARY C. SEGERS ET AL., *ELUSIVE EQUALITY: LIBERALISM, AFFIRMATIVE ACTION, AND SOCIAL CHANGE IN AMERICA* 78 (1983) (quoting Earl Raab, *Quotas by Any Other Name*, COMMENTARY, Jan.

1972, at 4). The significant degree of underrepresentation of African-Americans, Hispanics, and other significant racial and ethnic groups is the most obvious reason why continued scrutiny of electoral systems is required. *See generally* MARTIN CARNOY, *FADED DREAMS: THE POLITICS AND ECONOMICS OF RACE IN AMERICA* 112-15 (1994) (noting that what little black political power there is exists at the local, not the national level); HACKER, *supra* note 4, at 235-36 ("Many black Americans still complain that almost all of the people governing them are white Not only has every president of the United States been white, but at this writing so are every governor and all but one senator Indeed, there are still many black Americans who have yet to be represented by a person of their race at any governmental level."); REDISTRICTING IN THE 1990S: A GUIDE FOR MINORITY GROUPS 25-27, 37-41, 52 (William O. O'Hare ed., 1989) (describing underrepresentation of blacks and Hispanics throughout the United States); Richard L. Engstrom & Michael McDonald, *The Election of Blacks to Southern City Councils: The Dominant Impact of Electoral Arrangements*, in *BLACKS IN SOUTHERN POLITICS* 245, 255 (L. Moreland et al. eds., 1987) (finding a large degree of minority underrepresentation in Southern municipalities); For an extensive discussion of minority representation in the South, see *QUIET REVOLUTION IN THE SOUTH* (Chandler Davidson & Bernard Grofman eds., 1994). It is important to note, however, that section 2 of the Voting Rights Act is not an affirmative action statute, but a means to ensure that all voters have fair and equal access to the political system. *Cf. Shaw v. Reno*, 509 U.S. 630, 675 (1993) (White, J., dissenting).

[S]tate efforts to remedy minority vote dilution are wholly unlike what has been labeled "affirmative action." To the extent that no other racial group is injured, remedying a Voting Rights Act violation does not involve preferential treatment. . . . It involves, instead, an attempt to *equalize* treatment, and to provide minority voters with an effective voice in the political process.

Id.; *see also* Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing?"*, 14 CARDOZO L. REV. 1237, 1247 (1993) (noting that voting rights remedies cannot be characterized as "affirmative action" because they emphasize equal treatment, not that "the claims of minorities are given *more* weight than those of identically situated whites"); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1202 (1996) ("[T]he Court's attempt to integrate voting rights law into its more general approach to affirmative action is both misguided and incoherent."); James Thomas Tucker, *Affirmative Action and [Mis]representation: Reclaiming the Civil Rights Vision of the Right to Vote* (forthcoming 1999) (on file with author) (criticizing the obstructionist tactics of opponents of minority voting rights to label efforts to secure equal minority participation in the political process as "affirmative action"). *But see* S. REP. NO. 417, at 232 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 402 (additional views of Sen. East) (arguing that section 2's disclaimer on the right to proportional representation will be ineffective because "analogous disclaimer language contained in Title VII has not prevented courts from using affirmative action as a remedy"); *see also id.* at 92-93, *reprinted in* 1982 U.S.C.C.A.N. at 266 (additional views of Sen. Thurmond) (finding it "difficult . . . to believe" that the "constructive effort" required under the 1982 amendments to the bailout provisions of the Act is "intended to be employed as anything other than a vehicle to promote 'affirmative action' principles of civil rights of the voting process"); ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 181 (1992) (describing how the guarantee of voting rights to minorities has shifted to a guarantee of fair results); Anthony A. Peacock, *Shaw v. Reno and the Voting Rights Conundrum: Equality,*

minority group's voting power⁸ through consistent, overwhelming opposition to the minority group's candidate of choice,⁹ can render the "equal" right to vote virtually meaningless. Quite simply, there are no easy solutions to the dilemma of trying to treat all people alike in a voting system, while still affording everyone equality of opportunity. Contrary to what a majority of the present Supreme Court might believe, this problem cannot be avoided simply by declaring abstract commitments to protecting the right to vote.¹⁰ Rigid, mechanical, court-created rules fail to account for varying local contexts and difficulties in implementation, and inherently are inconsistent with the flexible and adaptable protection Congress intended to provide in the Voting Rights Act.¹¹

The Supreme Court's narrowing of the scope of voting rights claims has set these events in motion. For example, in *Shaw v. Reno*,¹² the Court recognized, for the first time, the viability of an equal protection challenge to race-based districting plans designed to *enhance* minority representation. While some would argue this result is not surprising in light of the Court's Fourteenth Amendment jurisprudence,¹³ it has had a far-reaching impact. Indeed, the Court expressed concern in other cases that federal courts, the States, and the Department of Justice were using the Voting Rights Act to create enclaves of safe districts for different racial and ethnic groups.¹⁴ In

The Public Interest, and the Politics of Representation, in AFFIRMATIVE ACTION AND REPRESENTATION: *SHAW V. RENO* AND THE FUTURE OF VOTING RIGHTS 127, 151 (Anthony A. Peacock ed., 1997) [hereinafter AFFIRMATIVE ACTION AND REPRESENTATION] (indicating that, in the wake of the 1982 amendments to section 2, "the VRA had become an unequivocal tool of affirmative action"); Abigail Thernstrom, *Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031, 2031 (1996) (asserting that protection of minority voting rights is nothing more than an attempt to "provide maximum protection for minority candidates from white competition").

⁸ See *infra* note 240 (discussing whether the right to vote is an individual right, a group right, or both).

⁹ See generally Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 24 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter CONTROVERSIES IN MINORITY VOTING] ("Ethnic or racial minority vote dilution may be defined as a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group.").

¹⁰ See *infra* notes 264-66, 295-300 and accompanying text (discussing the "majoritarian default" position, whereby failing to address an issue in order to avoid making difficult value choices is itself a substantive decision).

¹¹ 42 U.S.C. § 1973 (1994); see *infra* notes 507-80 and accompanying text.

¹² 509 U.S. 630 (1993).

¹³ See *infra* notes 674-84 and accompanying text.

¹⁴ See *Bush v. Vera*, 517 U.S. 952, 969-76 (1996); *Miller v. Johnson*, 515 U.S. 900, 922-27 (1995); see also *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring) (criticizing "the currently fashionable mechanism of drawing majority-minority single-member districts" which have been "aptly characterized as a process of 'creating racially 'safe boroughs.'") (quoting *United States v. Dallas County Comm'n*, 850 F.2d 1433, 1444

perhaps the most telling statement of what this change in the law meant for these groups, Justice Thomas observed, in *Holder v. Hall*, "that practice now promises to embroil courts in a lengthy process of attempting to undo, or at least minimize, the damage wrought by the system we created."¹⁵

The timing of these decisions apparently could not have been worse, in light of the appearance that political equality for blacks was close at hand.¹⁶ When Congress enacted the Voting Rights Act in 1965, there were only three black legislators in the eleven southern states, six black members of Congress (none from the Deep South), and fewer than 280 blacks elected to political office nationwide. By 1996, there were more than 250 black legislators in the eleven southern states, thirty-nine black members of Congress, and more than 8,200 blacks elected to political office nationwide.¹⁷ Their election had given their constituents hope in two critical respects. First, it appeared that the promise of "one person, one vote"¹⁸ was no

(11th Cir. 1988) (Hill, J., concurring specially))). Some commentators agree with the Court. See Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 69-73, 93; Abigail Thernstrom, *More Notes from a Political Thicket*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 108-12, 115-16. But see Bernard Grofman, *The Supreme Court, The Voting Rights Act, and Minority Representation*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 190-91 (stating that the claim that the Justice Department has engaged in a policy of maximizing minority electoral success is mistaken and the "bleaching" argument—that the Department has sought to use majority-minority districts to advance Republican interests—is rebutted by the enforcement policies under the Clinton administration).

¹⁵ 512 U.S. at 905 (Thomas, J., concurring).

¹⁶ Some writers question, however, whether black electoral success actually translates into true political empowerment. They instead argue that isolated electoral success simply might alter the location of disenfranchisement from the ballot box to the legislature. See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 117-18 (1994); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 41-43 (1991); discussion *infra* notes 457-506 and accompanying text. During the debates on passage of the Fifteenth Amendment, Thaddeus Stevens recognized that giving blacks the unimpeded right to cast ballots and elect candidates neither guaranteed they would be protected from white hostility nor ensured their economic prosperity. See *infra* note 182; cf. *infra* note 20 (discussing whether electoral success leads to beneficial outcomes).

¹⁷ See Bill Rankin, *Perspective: Electoral Districts and the Courts—An Act Under Attack*, ATLANTA J. & CONST., June 8, 1997, at G6; see also QUIET REVOLUTION IN THE SOUTH, *supra* note 7, at 383-86 (outlining the impact of the Voting Rights Act); Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 9, at 42-44 (describing increases in minority voter registration and officeholding after passage of the Voting Rights Act); Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L.J. 271, 271-72 (1995) (outlining the impact of the Voting Rights Act); Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 2-6 (1995) (discussing increases in minority representation after the 1990 Census).

¹⁸ *Gray v. Sanders*, 372 U.S. 368, 381 (1963); see also *supra* note 314 and accompanying text (discussing what "one person, one vote" seems to guarantee); cf. discussion *infra* notes

longer just an aspiration, but was finally coming to fruition. Second, it seemed that increased political representation had led to greater economic development and opportunities for blacks and other racial and ethnic groups who had been neglected for so long.¹⁹ In the midst of this apparent victory, the rules of the game seemed to have been changed irrevocably.²⁰

293-325 and accompanying text (identifying what the Court has concluded "one person, one vote" actually guarantees).

¹⁹ The question of whether black electoral success has led to beneficial outcomes for the black community has been debated widely. Black Americans often have maintained the "conviction that through politics they could influence government to act to improve their social and economic status." Milton D. Morris, *Black Electoral Participation and the Distribution of Political Benefits*, in *THE RIGHT TO VOTE*, reprinted in *MINORITY VOTE DILUTION* 271, 271-85 (Chandler Davidson ed., 1989). Many commentators have found that substantive benefits in fact do flow to the black community. See, e.g., RUFUS P. BROWNING ET AL., *PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS* (1984); JAMES W. BUTTON, *BLACKS AND SOCIAL CHANGE: IMPACT OF THE CIVIL RIGHTS MOVEMENT IN SOUTHERN COMMUNITIES* 15-26 (1989); Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1277-79 (1989). Some judges have reached similar conclusions. See generally *Johnson v. Mortham*, 926 F. Supp. 1460, 1499-502 (N.D. Fla. 1996) (three judge panel) (Hatchett, J., dissenting) (discussing the many benefits to the black and white communities of north central Florida which resulted from Congresswoman Corrine Brown's representation in a majority-minority district); *Hays v. Louisiana*, 862 F. Supp. 119, 128 (W.D. La. 1994) (three judge panel) (Shaw, J., concurring) (noting "the great benefits that are derived by an increase in minority representation in government"), *vacated*, 515 U.S. 737 (1995). On the other hand, many scholars disagree, finding that black electoral success does not always translate into "substantive representation," i.e., a situation in which "tangible policy and other benefits [are secured] for minority voters." Richard H. Pildes & Kristen Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 277 (1995). For examples of such conclusions, see PETER APPLEBOME, *DIXIE RISING* (1996); Ankur J. Goel et al., Comment, *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control, and the Implication of Being Darker Than Brown*, 23 HARV. C.R.-C.L. L. REV. 415, 418 (1988) ("Traditional civil rights strategies sought equality for people of color through access to the dominant white culture, and were grounded in a vision of integration This concept of equality promoted integration at the expense of economic and political empowerment, and has been described as 'noneconomic liberalism.'"); GUINIER, *supra* note 16, at 66-69 (critiquing the "responsiveness assumption" of black electoral success theory, whereby black voters are said to "gain substantive policy influence by electing racial compatriots with special attachment to and understanding of the black community and its distinctive interests"); Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1382 (1995) (reviewing *QUIET REVOLUTION IN THE SOUTH*, *supra* note 7) (observing that in southern politics, as "the Black population reaches a critical mass, White voters begin to see Black participation as a credible threat; in reaction, White voters band together and develop more conservative preferences").

²⁰ There has been extensive debate over whether the narrowed scope of voting rights claims actually will diminish the electoral success of minority candidates and flow of benefits to minority communities. Professor Carol Swain believes it will not:

When the Supreme Court actually has ventured into the "political thicket,"²¹ it has done so half-heartedly, clinging to its own fixed, mechanical notions of "one person, one vote"—population equality among districts²²—at the expense of what the majority in *Reynolds v. Sims* termed "fair and effective representation."²³ The Court has been particularly uneasy in addressing vote dilution challenges, which require a significant deviation in treatment from the comparatively easier cases of numerical malapportionment and mechanisms that cause the outright denial of the ballot. Instead, proof of minority vote dilution demands looking at election results and determining whether those results are "fair."²⁴ The Court's discomfort largely is premised on its belief that assessing the fairness of electoral outcomes necessarily requires it to adopt and to impose a particular democratic theory on the States.²⁵

Voting rights activists, I believe, have overstated their case against the Court. African-Americans and Hispanics have not been harmed by the Court's redistricting decisions. Despite dire predictions to the contrary, Congress has not been "bleach[ed]." Minority legislators, in fact, performed much better than was predicted during the 1996 elections, as black Democrats who stood for re-election in invalidated districts were returned to office by respectable margins.

Carol M. Swain, *Not "Wrongful" by Any Means: The Court's Decisions in the Redistricting Cases*, 34 HOUS. L. REV. 315, 318-19 (1997); accord Abigail Thernstrom, *More Notes from a Political Thicket*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 117-21 (describing the argument that "[b]lack candidates cannot get elected in majority-white settings" as "bleak and wrong," and pointing to black electoral success). Conversely, some scholars have argued that the strong showing of minority candidates in the 1996 elections was more a product of incumbency and high voter turnout by voters from the candidates' own constituencies, and does not accurately reflect the need for continued judicial protection of minority voting rights. See Clarence Page, *Results are Deceptive in Redrawn Black Districts*, HOUS. CHRON., Dec. 1, 1996, at 3; see also Bernard Grofman, *The Supreme Court, The Voting Rights Act, and Minority Representation*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 195-99 (summarizing statistics to rebut arguments by Swain and Thernstrom that minority districts are unnecessary); Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205, 248-57 (1995) (analyzing statistics to rebut arguments by Swain and Thernstrom that minority districts no longer are necessary). For additional discussion of the potential impact of *Shaw v. Reno* and other recent voting rights decisions on minority representation, see generally Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 45-48.

²¹ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

²² See *infra* notes 322-23 and accompanying text.

²³ *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

²⁴ Cf. Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 9, at 262 ("[T]he voting rights controversy is really another variant of a long-standing dilemma in democratic theory: How should minority rights be balanced against the majority will in a system of government that derives its legitimacy from the consent of the governed?").

²⁵ Justice Thomas perhaps best articulated this discomfort in *Holder v. Hall*, 512 U.S. 874 (1994). See *infra* notes 591-629 and accompanying text; see also *infra* note 322 (collecting

Surely, it is troublesome that the least democratic branch of government even should be in a position to make sweeping changes to one of the most basic rights United States citizens possess: the right to vote.²⁶ The Court's outward expression of disdain for adopting a democratic theory, however, merely begs the question and hides an inner truth. The Court (or at least certain members of the Court) *has* adopted a democratic theory, and it is inconsistent with the theory selected by the people's representatives in Congress.²⁷

Essentially, the Supreme Court has advanced a democratic theory that primarily protects the individual right to cast a ballot and only sparingly protects against other impediments to minority participation in the democratic process.²⁸ This democratic theory clashes with the type of relief from vote dilution that Congress afforded minority groups in section 2 of the Voting Rights Act of 1965.²⁹ Congress intended section 2 to reach past the ballot box and examine the actual outcome of elections to determine "whether minorities have equal access to the process of electing their representatives."³⁰ Thus, section 2 codifies the democratic theory that having a meaningful voice in the political process includes being able to join together with other like-minded individuals to elect a candidate of choice, free from sustained, discriminatory vote dilution by another group or groups of individuals. Moreover, the democratic model adopted by Congress in section 2 also is consistent with the Court's constitutional role in our political system.³¹ The result of the Court's intransigence to fulfilling faithfully its constitutional check on majority factionalism is that "consent of the governed"³² often means little more than "consent of the

citations of justices who have criticized the Court for engaging in matters of democratic theory in the "one person, one vote" cases).

²⁶ As John Agresto has observed, there is a "great paradox regarding judicial review": Citizens trust the Court to apply basic constitutional principles "to work out our present and our future in terms of our inheritance from the past. But that selfsame power contains within it the most serious of potential dangers, the possibility that the judiciary will substitute its principles for the Constitution's, and then actively enforce its visions autonomously and unchecked." JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 156-57 (1984).

²⁷ See *infra* notes 581-848 and accompanying text (discussing reliance of federal courts on majoritarian default instead of the constitutional conception of democracy). In the context of section 2, this position is particularly perverse. Many members of the Court have rejected a constitutional conception of voting rights in order to avoid advancing a democratic theory. See *supra* note 25 and accompanying text. However, the Court also has rejected a majoritarian conception of voting rights by disregarding the democratic theory advanced by Congress in the amended section 2. See *infra* notes 591-712 and accompanying text.

²⁸ See *infra* notes 293-506, 591-712 and accompanying text.

²⁹ See Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1994)); *infra* notes 507-80 and accompanying text.

³⁰ S. REP. NO. 417, at 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214.

³¹ See *infra* notes 48-280 and accompanying text.

³² See *infra* note 71 and accompanying text.

majority”—only one half of the republican equation; and those in a minority are left without a meaningful voice in government.

This Article will discuss the implications of the Court's usurpation of democratic theory with regard to minority vote dilution claims brought under section 2. It will examine how application of the Court's narrow view of the right to vote has permitted lower federal courts essentially to rewrite section 2 in a way that virtually assures a finding of no liability in all but the most egregious circumstances. In addition, the Article will show how the Court's discomfort with overturning the will of the majority—as expressed in elections—has encouraged the lower courts to “explain away” even the most obvious cases of polarized voting. What has resulted, the Article will argue, is the virtual evisceration of section 2 as a meaningful remedy for minorities who have been denied access to the political process.

Part I begins by discussing the role of democratic theory in evaluating voting rights claims. This discussion will provide some enlightenment as to the reasons the Court has embarked on a dangerous, if not undemocratic, path in the voting rights arena. As an initial matter, it will trace the development of the consent theory of democracy espoused by James Madison and reflected in the Constitution and Reconstruction Amendments.³³ The examination of this development will lead to an analysis of the role of the judiciary in protecting voting rights. Part I also will describe how the Framers intended the courts to act as “judicial referees” on the political playing field, regulating the voting game to ensure that each participant has a fair and equal opportunity to consent to their government.³⁴ This Part concludes with a proposal for nothing less than “judicially active” referees who, subject to certain constitutional and practical limitations, will not be afraid to stop the game when they observe one of the participants commit a foul.

Part II examines how the Supreme Court has fared in its role as referee. It will demonstrate that functionally, the Court has examined the right to vote under a “process democracy” continuum comprised of five types of claims: “structural process” or “pure process” claims;³⁵ “quasi-structural process” claims;³⁶ “geography process” claims;³⁷ “submersion process” or “perverted process” claims;³⁸ and “parliamentary process” claims.³⁹ The first section will describe the “one person, one vote” cases, wherein the Court professed to adopt a pure process approach to malapportionment by treating it as a deprivation of individual access to the political process. The second section will examine the Court's treatment of process democracy claims, in which the Court generally has treated pure process claims as the most favored and, hence, the most protected, unlike parliamentary process claims, which have received no protection at all from the Court (except to the extent that the

³³ See *infra* notes 61-207 and accompanying text.

³⁴ See *infra* notes 208-80 and accompanying text.

³⁵ See *infra* notes 347-84 and accompanying text.

³⁶ See *infra* notes 385-418 and accompanying text.

³⁷ See *infra* notes 419-46 and accompanying text.

³⁸ See *infra* notes 447-56 and accompanying text.

³⁹ See *infra* notes 457-506 and accompanying text.

outcomes the parliamentary process generates implicate a constitutional right independent of the right to vote). The second section concludes with a description of an alternative approach for judicial referees to follow along the continuum of process democracy rights, consistent with congressional intent codified in section 2 of the Voting Rights Act.

Part III assesses, in detail, the record of the Supreme Court and the lower federal courts in policing perverted process claims (vote dilution claims under section 2 of the Voting Rights Act). After discussing the democratic theory Congress adopted when it repudiated the *Bolden* intent test⁴⁰ in favor of a results test⁴¹ in the 1982 amendments to section 2, Part III will review the Court's interpretation of those amendments in *Thornburg v. Gingles*⁴² and other cases. It also will outline how the Court's line of decisions following *Shaw v. Reno*,⁴³ while creating a claim "analytically distinct" from actionable vote dilution, at the same time simplified the lower courts' redefinition of section 2 by shifting vote dilution claims away from a group focus and towards an individual focus. The *fait accompli* then will be seen in a number of lower court decisions, which this Part will use to illustrate the devastating consequences of this paradigm shift.⁴⁴ These courts have placed a virtually insurmountable evidentiary burden on vote dilution claimants through methodology which "explains away" dilution, namely, by attributing the presence of racially polarized voting to unprotected non-racial causes, by completely deferring to state interests, or by refusing to impose a race-conscious remedial plan. Part III will illustrate that the democratic theory adopted by Congress and embodied in section 2 has been disregarded in favor of an inconsistent judicial view of what "voting" means in the American democratic system.

Part IV will show how the federal courts can lift themselves "out of the so-called 'political' arena and into the conventional sphere of constitutional litigation"⁴⁵ in assessing claims under section 2. It issues a challenge to the courts to deconstruct theoretically the revived intent test they created and to return to their proper constitutional roles of securing the right to vote for all voters. Part IV also will reemphasize briefly the point made in Part I that protection of minorities from the

⁴⁰ See *infra* note 551 and accompanying text.

⁴¹ See *infra* notes 545-59 and accompanying text.

⁴² 478 U.S. 30 (1986).

⁴³ 509 U.S. 630, 652 (1993).

⁴⁴ These decisions include, among others, Judge Higginbotham's majority opinion in *League of United Latin American Citizens, Council No. 4434 v. Clements* ("LULAC II"), 999 F.2d 831 (5th Cir. 1993) (en banc) (rejecting section 2 claim because minority group's electoral losses were attributable to "partisan politics"), *cert. denied*, 510 U.S. 1071 (1994), and Judge Tjoflat's opinions in both *Solomon v. Liberty County, Florida*, 899 F.2d 1012 (11th Cir. 1990) (en banc) (per curiam decision of court evenly divided on the proper standards for analyzing a section 2 vote dilution claim), *cert. denied*, 498 U.S. 1023 (1991), and *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc) (holding that the state's interest in maintaining its judicial election system precluded implementation of remedies for any section 2 violations that had occurred), *cert. denied*, 514 U.S. 1083 (1995).

⁴⁵ *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

“tyranny of the majority” is a fundamental constitutional value which always has been consistent with the Madisonian vision of democracy in this country.⁴⁶ It will urge the rejection of a narrower, individualist view of voting rights (which is perfectly proper for other types of voting claims), in favor of the broader group rights focus which was a principal part of the democratic theory adopted by Congress for vote dilution claims. It then will describe a proper reading of the results test which is consistent with what Congress intended, as well as with the constitutional limits on Congress to adopt remedial measures under the Fourteenth and Fifteenth Amendments. Finally, it will suggest that federal courts should avoid their shortsighted focus on alternative causal explanations for widespread, systemic, racially-polarized voting, and return to the fundamental democratic principle codified in section 2: determination of whether minority voters are denied their voice in government by having “less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice.”⁴⁷ In that manner, this Article suggests that federal courts will resume their proper role as judicial referees in protecting the process of democracy and related outcome democracy rights of all Americans to exercise that most fundamental of rights: the right to vote.

Until the federal courts return to the proper decision-making process, judicial tyranny will continue unabated. It is time for judges, in the name of so-called “neutral principles,” to stop intervening to dilute and undermine the broad protection afforded by section 2 of the Voting Rights Act. Instead, the courts must fulfill their constitutional role as impartial referees and apply section 2 in the manner that Congress intended. These judicial referees also must recognize which rules of the game to apply. Just as it is improper to enforce the rules of football when umpiring a baseball game, it also is improper to apply an individual focus to a group right (vote dilution), or a constitutional standard (the intent test) when a congressional standard (the results test) is appropriate. Section 2 will have meaning only when all players are allowed to participate in the game of consent, and an appropriate balance is struck between respect for majority rule and protection of minorities from the tyranny of majority factionalism. Only then will the federal courts begin to enforce a view of

⁴⁶ Cf. GUINIER, *supra* note 16, at 3 (“The tyranny of the majority, according to Madison, requires safeguards to protect ‘one part of the society against the injustice of the other part.’”); see also THE FEDERALIST NO. 10, at 78-84 (James Madison) (Clinton Rossiter ed., 1961) (discussing ways to control the tyranny of factions). For an interesting discussion of the Court’s citations to *The Federalist Papers* in its decisions, see Buckner F. Melton, Jr., *The Supreme Court and The Federalist: A Citation List and Analysis*, 85 KY. L.J. 243 (1996-1997).

⁴⁷ 42 U.S.C. § 1973(b) (1994) (emphasis added). As outlined in notes 507-80 and accompanying text, *infra*, this language shows that section 2 covers two distinct areas. First, it protects the rights of groups of voters to have a fair opportunity to select the representatives of their choice. Second, it guards against attempts by the majority to deny groups fair and effective participation through parliamentary processes that undercut their representation.

“voting” that is consistent with the democratic theories embodied in the Constitution and section 2.

I. VOICES IN GOVERNMENT: UNDERSTANDING AND PROTECTING CONSENT

Voting rights have been contentious in this society because the definition of those rights necessarily implicates a particular view of democracy. But what is “democracy?” James Madison described it as a system in which “the people meet and exercise the government in person.”⁴⁸ Quite obviously, the current system of government in the United States does not meet Madison’s definition. Instead, the United States operates under what Madison termed a “republican government,” in which the people “assemble and administer [government] by their representatives and agents.”⁴⁹ Accepting as true the premise that Americans live under a republican form of government, therefore, it is that type of government to which this Article refers by the term “democracy.”

In order to function properly, democracy mandates that the governed have a voice in their government. Because voting is the only structural mechanism for expressing the voice of the people, it is a fundamental right “preservative of all rights.”⁵⁰ But what is the nature of the right to vote? For some, it signifies citizenship in a community.⁵¹ Others stress the symbolism of the right, either by

⁴⁸ THE FEDERALIST NO. 14, *supra* note 46, at 100 (James Madison). Madison’s definition of “democracy” is really a definition of “direct democracy”—the view that “[n]o one represents people’s interests better than the people themselves.” DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 95 (1996). A well-functioning direct democracy necessarily requires a small constituency. *See* DAVID HELD, MODELS OF DEMOCRACY 163 (2d ed. 1996). In the United States today, direct democracy mainly is present in New England town meetings. *See* MUELLER, *supra*, at 97-98. For an in-depth discussion of town meetings in Selby, Vermont, *see* JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 39-135 (1980).

⁴⁹ THE FEDERALIST NO. 14, *supra* note 46, at 100 (James Madison); *see also* THE FEDERALIST NO. 10, *supra* note 46, at 82 (James Madison) (stating that in a republican government, government is delegated to a small number of citizens elected by the rest, “whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations”).

⁵⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1876).

⁵¹ *See generally* *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (“To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”); KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 94 (1989) (“Voting is the preeminent symbol of participation in the society as a respected member, and equality in the voting process is a crucial affirmation of the equal worth of citizens.”); Jennifer K. Brown, Note, *The Nineteenth Amendment and Women’s Equality*, 102 YALE L.J. 2175, 2177-78 (1993) (describing suffrage as “the first right of a citizen” because it is “the very essence of self-government”); Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 4 (1987) (arguing that voting is a means by which a “community confirms an individual person’s membership, as a free and equal citizen”); Pamela S. Karlan, *The Right to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-12 (1993)

itself⁵² or through its exercise.⁵³ Functionally, the right to vote is the way to choose who stands in and speaks for the voters in government.⁵⁴ Therefore, voting can be seen as a right to join with other like-minded individuals to elect a candidate of choice.⁵⁵ In addition, voting can be a means of expression, not only at the ballot box, but through the deliberative process in government.⁵⁶ Voting is also about power, as a

(explaining that one aspect of the right to vote is "civic inclusion," an outcome-independent right to become a member of a community by casting a ballot that is counted); Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 210 (1994) ("The issue of women's access to the vote became a means of asserting their citizenship . . ."); see also *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (observing that the result of the disenfranchisement of black voters was to discriminatorily deprive them "of the benefits of residence in Tuskegee, including *inter alia*, the right to vote in municipal elections," taking away their citizenship in the community).

⁵² See generally JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 56 (1991) (describing voting as "the identifying feature of democratic citizenship in America, not a means to other ends"); cf. *infra* notes 555-63 and accompanying text (discussing Justice Thomas's view that the right to vote is a symbolic right that does not include a right to representation).

⁵³ See generally *infra* note 592 (noting Justice Scalia's belief that the vote is a "mechanism for participation"); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451 (1989) (stating that one way to view the right to vote is "instrumental," when "[p]olitical participation is valued . . . as a means to defend or further interests formed and defined outside politics . . . [and] the experience of participation itself neither contains any positive values nor affects the content of anyone's or any group's interests and ends"); see also Lind, *supra* note 51, at 105-06 (noting that although "voting ought to be transformative . . . it is a disquieting fact that the value of the vote seems more symbolic than substantive").

⁵⁴ See generally *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression."); *Storer v. Brown*, 415 U.S. 724, 735 (1974) ("[The purpose of elections is] to winnow out and finally reject all but the chosen candidates."); *United States v. Classic*, 313 U.S. 299, 318 (1941) ("From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates.").

⁵⁵ See generally 42 U.S.C. § 1973(b) (1994) (establishing a cause of action for situations in which "members of a class of citizens . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"); GUINIER, *supra* note 16, at 125 ("[T]he right of the individual to participate politically is a right best realized in association with other individuals."); Karlan, *supra* note 51, at 1712-16 (noting that a second aspect of the right to vote is "aggregation," the right "to combine individual preferences to reach some collective decision"); see also *infra* notes 240 (collecting citations of those who view the right to vote as a group right).

⁵⁶ See generally AMY GUTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 131 (1996) (asserting that political participation is important in a representative government to improve "the greater chance for the genuine public conversation that deliberative democracy seeks"); Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 478 (1988) (describing the importance of "diversity of perspective" in voting that enables voters "to

method of participating in post-election policymaking⁵⁷ or obtaining desired results and benefits.⁵⁸ The right to vote can be some, or possibly all, of these things. But most of all, the right to vote rests on the republican principle that the actions of government must be based upon the consent of the governed.⁵⁹

This Part of this Article describes the consent theory of democracy and the role of judges as “referees” in enforcing that theory. The first section discusses how the Founding Fathers established the constitutional basis of consent by designing a political system mediating between majority rule and the need to protect minorities from the tyrannies of majority factionalism.⁶⁰ The Framers intended judges to play

enlarge those deliberations of which they are a part”); Michelman, *supra* note 53, at 451 (explaining that under a “constitutive” view of the right to vote, the value of the right is “not in any ulterior end but in the ends-affecting—the dialogic—experience of the engagement itself”); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985) (observing that under a republican view of government, voting was but one part of a broader deliberative democracy in which “[d]ialogue and discussion among the citizenry were critical features in the governmental process”); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 331 (1993) (describing an “‘expressive’ approach to participation” through voting); see also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 93-94 (1948) (arguing that freedom of speech is a product of “the necessities of self-government by universal suffrage”).

⁵⁷ See generally GUINIER, *supra* note 16, at 36 (“A meaningful right to vote contemplates minority participation in post-election policymaking as well as pre-election coalition building and deliberation.”); Karlan, *supra* note 51, at 1716-19 (discussing “governance,” the third aspect of voting—the right to be an integral part of “the practice of decisionmaking through representatives”).

⁵⁸ See generally Unita Blackwell, Part of Mississippi Freedom Summer, 1964: “Representation and the Right to Participate,” in HARRY HAMPTON ET AL., *VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S*, at 180 (1990)

(I was only told when I started off that if I registered to vote, I would have food to eat and a better house to stay in ‘cause the one I was staying in was so raggedy you could see anywhere and look outdoors. My child would have a better education. At that particular point, our children only went to school two to three months out of the year. That was what we were told. It was the basic needs of the people.);

see also Pildes & Donoghue, *supra* note 19, at 281, 301 (describing some of the advantages of cumulative voting as including “tangible substantive benefits” and receipt of “a fairer distribution of public services”).

⁵⁹ See *supra* notes 69-122 and accompanying text. For an additional discussion of what the right to vote meant to blacks in the civil rights movement, see Tucker, *supra* note 7, at Part I.

⁶⁰ The United States is not unique in adopting a consent-based approach to government. For example, international law expressly recognizes the fundamental right of people to give or withhold their consent to their government. See generally Universal Declaration of Human Rights, Dec. 10, 1948, art. 21(3), U.N. Doc. A/811 (“The will of the people shall be the basis of the authority of government; and this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or

a unique role in this "Madisonian compromise," by empowering them to be active referees who would maintain order on the political playing field. The second section of Part I discusses the manner in which the Reconstruction Amendments further expanded upon and shaped the rules of the game that the judicial referees have to observe in protecting the consent of the governed. Finally, the third section examines the way judges should fulfill their roles as referees, as well as the proper scope of their powers to regulate consent in our political system.

A. *The Constitutional Basis of Consent*

Today, the principal method by which people exercise their voice in government is through the selection of their representatives in that government.⁶¹ However, that was not always the case. In the years leading up to the American Revolution, the right to elect members of Parliament was denied to roughly ninety percent of the people of Great Britain and all of those living in the American colonies.⁶² Instead,

by equivalent free voting procedures."); International Covenant on Civil and Political Rights, Dec. 19, 1966, part III, art. 25, 999 U.N.T.S. 172

(Every citizen shall have the right and the opportunity . . . (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.);

International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, part I, art. 5(c), 660 U.N.T.S. 212

(State parties undertake . . . to guarantee . . . [p]olitical rights, in particular the rights to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.).

⁶¹ There are other ways to have a voice in government independent of the right to vote which often are more meaningful than the exercise of the ballot. For example, placing an advertisement in a newspaper to promote a particular position often can have a substantially greater impact on legislation than a single vote cast for a representative. Alternatively, one can run for political office. The point simply is that the manner in which most individuals have a voice in government is through their ballot.

⁶² See REID, *supra* note 2, at 52, 54-55. Even in the most representative colonial legislatures, suffrage only was extended to one-sixth of the population. Women, children, servants, and those without property all were ineligible to vote. See FORREST McDONALD, NOVUS ORDO SECLORUM 161-62 (1985); CITIZENS' COMM'N ON CIVIL RIGHTS, BARRIERS TO REGISTRATION AND VOTING: AN AGENDA FOR REFORM 24-26 (1988) [hereinafter BARRIERS TO REGISTRATION AND VOTING]. Of course, "much of the white male population . . . possessed the right to vote" in the colonial legislatures. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 167 (1969) (noting that "from 50 to 80 percent of the adult white males were eligible to vote in the colonial period," and because white adult males comprised only 20 percent of the population, only "10 to 16 percent of the *whole population* [was] . . . eligible to vote by the eve of the Revolution"). See also Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial*

a meaningful voice in government came in many forms at the time: "shared interests,"⁶³ "shared burdens,"⁶⁴ and "virtual representation."⁶⁵ The Stamp Act controversy of 1765 shattered these theories of representation,⁶⁶ replacing them with the idea of actual representation⁶⁷ expressed by "no taxation without

and Early National America, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 20 (Donald W. Rogers ed. 1990) [hereinafter VOTING].

⁶³ The "shared interests" doctrine rested on the notion that one had a voice in government if there was an elected member of that government who shared the same economic, political, or social interest. There would be no harm in being unrepresented because the elected member would protect this "Identity of Interests" to the benefit of the unrepresented individual. REID, *supra* note 2, at 45-48.

⁶⁴ "Shared burdens" meant that elected members of a government were burdened by the same laws they imposed upon unrepresented individuals, "sharing with them the consequences, costs, and hardships of the statutes they enacted, the taxes they imposed, and the penalties they decreed." *Id.* at 48-50.

⁶⁵ "Virtual representation" was the most common explanation for why those denied suffrage nevertheless were represented in government. This idea applied with equal force to non-electors in both Britain and the colonies, and was described as follows: "None are actually, all are virtually represented; for every Member of Parliament sits in the House, not as Representative of his own Constituents, but as one of that august Assembly by which all the Commons of *Great Britain* are represented." WOOD, *supra* note 62, at 174 (quoting Thomas Whateley, *The Regulations Lately Made [C]oncerning the Colonies and the Taxes Imposed upon Them, Considered* 109 (London, 1765)). For an additional discussion of virtual representation, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 166-67 & n.6 (1967); REID, *supra* note 2, at 50-62; WOOD, *supra* note 62, at 173-81. Americans always were uncomfortable with the idea of virtual representation because of its focus on national, and not local, interests. The American colonials believed it was necessary to have local representatives who would have sufficient knowledge of local problems to be able to correct these problems through legislation. See REID, *supra* note 2, at 84, 133-36.

⁶⁶ Prior to the passage of the Stamp Act, Britain taxed only those provinces which had been given actual representation in Parliament. See REID, *supra* note 1, at 26, 131 (noting that Lord Chatham acknowledged that the American colonies were subject to the acts of Parliament, but could not be taxed without representation). Imposition of the Stamp Tax on the American colonies violated the principle of shared interests and shared burdens because no member of Parliament shared the colonies' interest or burden—the colonies were unrepresented and no one in Great Britain had to pay the tax. See *id.* at 62. Similarly, once the identity of interests between the electors of Britain and the unrepresented colonies no longer was present, the doctrine of virtual representation no longer was legitimate (if, indeed, it ever was). See BAILYN, *supra* note 65, at 167-69.

⁶⁷ See WOOD, *supra* note 62, at 597; see also *id.* at 600 ("The representation of the people, as American politics in the Revolutionary era had made glaringly evident, could never be virtual, never inclusive; it was acutely *actual*, and always tentative and partial." (emphasis added)). The Tories attacked actual consent by suggesting that if this Whig view of voting was correct, "then no man could be bound by a law unless he had personally voted for a representative." *Id.* at 183.

representation.”⁶⁸ Suffrage itself became “a basic prerequisite of representation”⁶⁹ and the foundation for the belief that “all lawful government is founded on the consent of those who are subject to it.”⁷⁰

After the American Colonies secured their independence from Britain, the task of ensuring that government in America would derive its “just powers from the consent of the governed” fell to the Founding Fathers.⁷¹ One core element of Madisonian democracy, consistent with the idea of consent of the governed, required the republican principle of majority rule: “the idea that all the adult citizens of a republic must be assigned equal rights, including the right to determine the general direction of government policy.”⁷² Majority rule raised the related question of who would get the right to vote. There was widespread debate on this point at the Constitutional Convention.⁷³ The delegates finally opted for a scheme making voter

⁶⁸ McDONALD, *supra* note 62, at 28.

⁶⁹ WOOD, *supra* note 62, at 182.

⁷⁰ GARRY WILLS, *INVENTING AMERICA* 248 (1978) (quoting James Wilson). Consent was seen as an important part of government for a number of reasons. First, consent endowed legitimacy on government. Second, consent created a sense of obligation among the people to obey their government’s laws. Third, a government’s laws received binding force from the consent of the people. *See* REID, *supra* note 2, at 17-18; *see also* WOOD, *supra* note 62, at 600-02 (discussing how consent cemented the principle that “the rulers had become the ruled and the ruled the rulers”); A. John Simmons, *Tacit Consent and Political Obligation*, 5 PHIL. & PUB. AFF. 274, 290 (1976) (observing that “consent, be it tacit or express, may still be the firmest ground of political obligation”); *see generally* Harry Beran, *In Defense of the Consent Theory of Political Obligation and Authority*, 87 ETHICS 260 (1976-1977) (discussing in detail consent as a basis for government); *infra* notes 327-334. The principle of consent as a basis for republican government had its origins in the works of Thomas Hobbes and John Locke, and the even earlier writings of Marsilius of Padua. *See* HELD, *supra* note 48, at 46-47, 77, 80-82. For a discussion of the contributions of Hobbes and Locke to *The Federalist Papers*, *see generally* DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984) (examining Locke’s impact); GEORGE MACE, *LOCKE, HOBBS, AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF THE AMERICAN POLITICAL HERITAGE* (1979) (examining the impact of both Locke and Hobbes on *The Federalist Papers*).

⁷¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Framers envisioned consent would come in two stages. First, the Constitution itself had to be accepted by popular consent of the governed. Second, the government would have to rely upon “continuing consent of the governed in regular elections.” David F. Epstein, *The Political Theory of the Constitution*, in *CONFRONTING THE CONSTITUTION* 77, 122 (Allan Bloom ed., 1990) [hereinafter *CONFRONTING THE CONSTITUTION*].

⁷² ROBERT A. DAHL, *A PREFACE TO DEMOCRACRATIC THEORY* 31 (1956); *accord* RICHARD B. MORRIS, *WITNESSES AT THE CREATION* 217-18 (1985); *see also* THE FEDERALIST NO. 10, *supra* note 46, at 80 (James Madison) (discussing the republican principle of majority vote); THE FEDERALIST NO. 22, *supra* note 46, at 146 (Alexander Hamilton) (noting the “fundamental maxim of republican government, which requires that the sense of the majority should prevail”).

⁷³ *See* McDONALD, *supra* note 62, at 238-39. Madison proposed that suffrage for electing

qualifications the same, "from time to time, as those of the electors of the several States, of the most numerous branch of their own legislatures."⁷⁴ Of course, many States had limited the franchise to prevent "the lowest and most ignorant of mankind" from participating in the "important business" of voting.⁷⁵ It would be up to later generations to expand the electorate.⁷⁶

The second core element of Madisonian democracy focused on protecting minorities from the untrammelled excesses of majority factionalism,⁷⁷ what has been referred to as "protective democracy."⁷⁸ The Framers of the Constitution were well

members of the House be limited to freeholders because he feared the propertyless would lack respect for property rights and be subject to manipulation by those with property. The constitutional convention rejected Madison's proposal. See Nathan Tarcov, *The Social Theory of the Founders*, in CONFRONTING THE CONSTITUTION, *supra* note 71, at 180-87. Nevertheless, most states restricted suffrage to property holders until well into the nineteenth century. See Sean Wilentz, *Property and Power: Suffrage Reform in the United States, 1787-1860*, in VOTING, *supra* note 62, at 31-41.

⁷⁴ MCDONALD, *supra* note 62, at 238 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 178 (Max Farrand ed., 1937) (record of Aug. 6, 1787 proceedings)); see U.S. CONST. art. I, § 2, cl. 1 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); see also THE FEDERALIST NO. 52, *supra* note 46, at 325-26 (James Madison); THE FEDERALIST NO. 57, *supra* note 46, at 351 (James Madison).

⁷⁵ WOOD, *supra* note 62, at 168. These limitations on suffrage were not seen by the Whigs as inconsistent with the republican principles of consent and majority rule. See *id.* at 168-69; MCDONALD, *supra* note 62, at 54-55. Instead, the republican principles viewed equality of voting as "equality before the law." Thus, the Whigs had no problem denying the right to vote to slaves, women, or children because they "did not have standing in law equal to that of freemen." *Id.* at 54.

⁷⁶ See generally U.S. CONST. amend. XV, § 1 (declaring that the right to vote cannot be denied to former slaves and people of color); U.S. CONST. amend. XVII, cl. 1 (giving electors qualified to vote under state law the right to vote for the two United States Senators from their respective States); U.S. CONST. amend. XIX, cl. 1 (declaring that the right to vote cannot be denied to women); U.S. CONST. amend. XXIII, § 1 (giving the right to vote for President and Vice-President to residents of the District of Columbia); U.S. CONST. amend. XXIV, § 1 (providing that the right to vote in federal elections cannot be denied to those unwilling or unable to pay poll tax); U.S. CONST. amend. XXVI, § 1 (stating that the right to vote cannot be denied to citizens eighteen years of age or older).

⁷⁷ Madison equated the threat of majority tyranny with the legislature and the threat of minority tyranny with the executive, viewing each as "equally undesirable." DAHL, *supra* note 71, at 9 (discussing THE FEDERALIST NO. 48, *supra* note 46, at 309 (James Madison)). However, Madison viewed majority factions as a greater danger to the republic than minority factions. See *infra* text accompanying note 83. In addition, the Federalists viewed the executive branch as "a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body." THE FEDERALIST NO. 73, *supra* note 46, at 443 (Alexander Hamilton).

⁷⁸ "Protective democracy holds that, given the pursuit of self-interest and individually motivated choices in human affairs, the only way to prevent domination by others is through

versed in the troubling role of factions and parties in republican government through David Hume's writings on the subject.⁷⁹ Hume believed there were essentially two types of factions: personal and real. "Personal factions—those of rival families and their connections—he saw as arising most readily in small republics, where 'every domestic quarrel . . . becomes an affair of state.'"⁸⁰ Hume divided "real" factions into those based upon interest, principle, and affection.⁸¹ Factions based upon majority interest and affection were the ones most troubling to Madison. Minority factions were not difficult to remedy because "relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."⁸² On the other hand, majority factions were particularly problematic because "the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens."⁸³ Quite obviously, "[i]f a majority be united by common interest, the rights of the minority will be insecure."⁸⁴

the creation of . . . institutions" accountable to the will of the people. HELD, *supra* note 47, at 75. In addition to Madison, Jeremy Bentham and James Mill also subscribed to a distinctly protective form of democracy. *See id.* at 88-100. For an examination of one view of how the Supreme Court has applied a protective democracy model to voting rights cases, see James A. Gardner, *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 45 U. PA. L. REV. 893 (1997).

⁷⁹ For a discussion of Hume's impact on Madison's discussion of factions, see generally GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981); Marc M. Arkin, "The Intractable Principle:" *David Hume, James Madison, Religion, and the Tenth Federalist*, 39 AM. J. LEGAL HIST. 148 (1995).

⁸⁰ McDONALD, *supra* note 62, at 162-63 (quoting 3 DAVID HUME, *PHILOSOPHICAL WORKS* 130-33 (Thomas H. Green & Thomas H. Grose eds., 1886)).

⁸¹ *See id.* at 163; *cf.* THE FEDERALIST NO. 10, *supra* note 46, at 78 (James Madison).

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

Id.

⁸² THE FEDERALIST NO. 10, *supra* note 46, at 81 (James Madison).

⁸³ *Id.*

⁸⁴ THE FEDERALIST NO. 51, *supra* note 46, at 323 (James Madison). Madison also alluded to the protection of minorities from race persecution during his remarks at the Constitutional Convention:

We have seen the mere distinction of color made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man. What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The holders of one species of property have thrown a disproportion of taxes on the holders of another specie. The lesson we are to draw from the whole is that where a majority are united by common sentiment, and have an opportunity, the rights of the minor party become insecure.

MORRIS, *supra* note 72, at 203.

It is evident, then, that the two core elements of Madisonian democracy are inherently at odds with one another.⁸⁵ As a result, the "Madisonian compromise" was an attempt to mediate "between the power of majorities and the power of minorities, between the political equality of all adult citizens on the one side, and the desire to limit their sovereignty on the other."⁸⁶ Madison's efforts to reach this compromise were two-fold.⁸⁷ First, the dangers of majority factions could be reduced by creation of a national government whose legislation would be the supreme law of the land, and which would be "more likely to center on men who possess the most attractive merit and the most diffusive and established characters."⁸⁸ Presumably, these men could pursue "the true interest of the country free from the turbulence and clamors of 'men of factious tempers, of local prejudices, or of sinister designs.'"⁸⁹ Second, Madison seized on Hume's "radical suggestion that a republican government⁹⁰ operated better in a large territory than in a small one."⁹¹ Madison argued:

⁸⁵ See DAHL, *supra* note 71, at 90.

⁸⁶ *Id.* at 4.

⁸⁷ See generally McDONALD, *supra* note 62, at 165-66 (describing Madison's plan "to create a national government that would have the power to veto state legislation," while at the same time minimizing problems created by factions).

⁸⁸ THE FEDERALIST NO. 10, *supra* note 46, at 83 (James Madison).

⁸⁹ WOOD, *supra* note 62, at 505 (quoting Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 275 (Julian P. Boyd ed., 1950)). Wood criticizes this notion by observing:

The Federalist image of a public good undefinable by factious majorities in small states but somehow capable of formulation by the best men of a large society may have been a chimera. So too perhaps was the Federalist hope for the filtration of the natural social leaders through a federal sieve into political leadership. These were partisan and aristocratic purposes that belied the Federalists' democratic language.

WOOD, *supra* note 62, at 615.

⁹⁰ See *supra* note 49 and accompanying text.

⁹¹ WOOD, *supra* note 62, at 504. As James Wilson noted at the Pennsylvania Ratifying Convention, history seemed to support Montesquieu's conclusion that republics operated better in small countries, while large countries were destined to be ruled by a despot. It appeared unlikely, however, that Americans would be willing to accept this result:

On one hand, the United States contain an immense extent of territory, and, according to the foregoing opinion, a despotik government is best adapted to that extent. On the other hand, it was well known, that, however the citizens of the United States might, with pleasure, submit to the legitimate restraints of a republican constitution, they would reject, with indignation, the fetters of despotism.

Thomas L. Pangle, *The Philosophical Understandings of Human Nature Informing the Constitution*, in CONFRONTING THE CONSTITUTION, *supra* note 70, at 12 (quoting James Wilson, Speech Before the Pennsylvania Ratifying Convention (Nov. 24, 1787), in SELECTED POLITICAL ESSAYS OF JAMES WILSON 163 (Randolph G. Adams ed., 1930)).

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.⁹²

Madison was optimistic that the combined effect of these solutions would be "a republican remedy for the diseases most incident to republican government."⁹³

But who would protect the republic from the tyranny of factionalism if Madison's two solutions failed? What if the Madisonian notion of "minorities rule"⁹⁴ was wrong because an insular majority could be formed out of "clusters of cooperating minorities"?⁹⁵ What if the executive stood idly by and allowed the legislature to ride rough-shod over the rights of those in the minority or, even worse, directly assisted the legislature? Would the republic be destroyed?

Madison's answers to these questions was in the negative, resting on the principle of separation of powers.⁹⁶ Montesquieu had popularized the importance of separating the basic functions of government,⁹⁷ what Madison called "a first principle of free government."⁹⁸ Madison himself expressed the idea of separation of powers by paraphrasing Montesquieu in *The Federalist No. 47*: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."⁹⁹ Separation of powers was abandoned

⁹² THE FEDERALIST NO. 10, *supra* note 46, at 83 (James Madison); *see also* WOOD, *supra* note 61, at 504-05 (discussing Madison's views on increasing the geographical size of a republic to cure the defects from which smaller republics suffered). McDonald labels this idea as "tinged with wishful thinking," but notes that it allowed the Federalists to overcome two important obstacles to the creation of a federal government. First, it rebutted Montesquieu's notion that republican government only was suited for small geographical territories. Second, it buttressed the argument that a federal government properly could be entrusted with power over the whole nation. *See* McDONALD, *supra* note 62, at 166.

⁹³ THE FEDERALIST NO. 10, *supra* note 46, at 84 (James Madison); *see also* THE FEDERALIST NO. 85, *supra* note 46, at 521 (Alexander Hamilton) ("The additional securities to republican government . . . to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the Union will impose on local factions and insurrections . . .").

⁹⁴ DAHL, *supra* note 71, at 133 (describing Madison's belief that "specific policies tend to be products of 'minorities rule'" in the sense that groups of minorities would have to join together to form a majority on any particular piece of legislation, thereby rendering tyranny by the majority improbable).

⁹⁵ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 81 (1980).

⁹⁶ THE FEDERALIST NO. 47, *supra* note 46, at 300-01 (James Madison).

⁹⁷ *See* MONTESQUIEU, *THE SPIRIT OF THE LAWS* (David W. Carithers ed., 1977).

⁹⁸ WOOD, *supra* note 62, at 152 (quoting James Madison, *Government of the United States*, NAT'L GAZETTE (Phila.), Feb. 6, 1792, *reprinted in* 6 THE WRITINGS OF JAMES MADISON 91 (Gaillard Hunt ed., 1900-1910)).

⁹⁹ THE FEDERALIST NO. 47, *supra* note 46, at 301 (James Madison); *cf.* MONTESQUIEU,

only to the extent it was necessary for the power of the three branches of government to mix in a system of checks and balances.¹⁰⁰ Americans initially had embraced the idea of separation of powers to prevent tyranny by the executive¹⁰¹ and, later, to prevent tyranny by the legislature.¹⁰² It was the judiciary, however, that benefited the most from “this new, enlarged definition of separation of powers.”¹⁰³ Thus, in the event that the other elements of Madisonian democracy failed to prevent majority factionalism, the task of saving the republic from itself would fall to the judiciary.¹⁰⁴

The delegates to the Constitutional Convention generally agreed that the courts had the power to strike down unconstitutional legislative acts, although the power of judicial review was not included expressly in the Constitution.¹⁰⁵ As Hamilton wrote:

[T]he courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in

supra note 97, at 202 (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be then no liberty.”); *id.* at 202 (“[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.”).

¹⁰⁰ See MCDONALD, *supra* note 62, at 258. Checks and balances meant that “each of the parts of the mixed constitution was supposed to restrain the power of the others in the interest of a harmonious whole.” *Id.* at 81. Thus, constitutional checks and balances were yet another constraint on the excesses of majority factionalism. See DAHL, *supra* note 71, at 82-83.

¹⁰¹ See WOOD, *supra* note 62, at 156-58 (describing concerns in 1776 with the ability of strong state governors to control other branches of the government).

¹⁰² See *id.* at 452-53 (describing concerns in the 1780s with the dangers of legislative power and the ability of the legislatures to encroach upon the powers of the executive).

¹⁰³ *Id.* at 454. In an insightful article, Sotirios Barber argues that a reading of *The Federalist Papers* supports an active judiciary and its attendant judicial activism. See Sotirios A. Barber, *Judicial Review and The Federalist*, 55 U. CHI. L. REV. 836 (1988).

¹⁰⁴ But see AGRESTO, *supra* note 26, at 31 (“The modern defense of judicial power which sees the Court as, by its nature, a liberal institution and the protector of minorities from oppressive majorities requires of us too much historical and philosophical forgetting.”); DAHL, *supra* note 71, at 58-60 (“Americans are inclined to believe that the Supreme Court is the *deus ex machina* that regularly saves American democracy from itself. This view is difficult to support by the actual decisions of the Court.”).

¹⁰⁵ See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 15-16 (1965); MCDONALD, *supra* note 62, at 254-58. The Supremacy Clause, U.S. CONST. art. VI, cl. 2, was viewed as one source for the judicial branch to exercise judicial review over acts of both the state and federal legislatures. See MCDONALD, *supra* note 62, at 255-56; MORRIS, *supra* note 72, at 218. But see William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 22 (1969) (“It is clear . . . that the supremacy clause itself cannot be the clear textual basis for a claim by the judiciary that this prerogative to determine repugnancy belongs to it.”). For a thorough discussion of the foundations of judicial review, see DAHL, *supra* note 71, at 105-112; WOOD, *supra* note 62, at 453-63; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the principle of judicial review).

fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.¹⁰⁶

Moreover, independence of the judiciary was essential "to guard the Constitution and the rights of individuals" from those who would embrace "dangerous innovations in the government, and serious oppressions of the minor party in the community."¹⁰⁷ Therefore, it is clear that under Madisonian democracy, the judiciary would protect minority groups from being deprived of their constitutional rights by the majority.¹⁰⁸ The only remaining question is the extent to which such justice, that "great cement of society,"¹⁰⁹ can "be pursued until it is obtained, or until liberty be lost in the pursuit."¹¹⁰ In other words, the issues remain whether the Constitution encompassed the right to vote, and whether the courts should protect it from majority encroachments.

The answer lies in the republican principle of consent.¹¹¹ If "[t]he fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE,"¹¹² then without question "the right to suffrage" must be protected "as a

¹⁰⁶ THE FEDERALIST NO. 78, *supra* note 46, at 467 (Alexander Hamilton).

¹⁰⁷ *Id.* at 469; *see also* MCDONALD, *supra* note 62, at 253-54 (discussing the debate at the Constitutional Convention on the issue of judicial independence).

¹⁰⁸ *See supra* text accompanying notes 85-104.

¹⁰⁹ THE FEDERALIST NO. 17, *supra* note 46, at 120 (Alexander Hamilton).

¹¹⁰ THE FEDERALIST NO. 51, *supra* note 46, at 324 (James Madison).

¹¹¹ *See supra* notes 70-72 and accompanying text.

¹¹² THE FEDERALIST NO. 22, *supra* note 46, at 152 (Alexander Hamilton); *see also* THE FEDERALIST NO. 37, *supra* note 46, at 227 (James Madison) ("The genius of republican liberty seems to demand . . . that all power should be derived from the people."); THE FEDERALIST NO. 39, *supra* note 46, at 241 (James Madison) ("[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people It is *essential* to such a government that it be derived from the great body of the society"); *id.* at 244 ("The House of Representatives will derive its powers from the people of America."); THE FEDERALIST NO. 46, *supra* note 46, at 294 (James Madison) ("The adversaries of the Constitution . . . must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone"); THE FEDERALIST NO. 49, *supra* note 46, at 313-14 (James Madison) ("As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority" when there are changes to the Constitution or one branch encroaches on the power of another.); THE FEDERALIST NO. 57, *supra* note 46, at 352 (James Madison) (stating that members of the House of Representatives must have "an habitual recollection of their dependence on the people"); THE FEDERALIST NO. 85, *supra* note 46, at 527 (Alexander Hamilton) (referring

fundamental article of republican government."¹¹³ A corollary to this basic tenet of republican government requires consent of the people at the crucial stage of the decision-making process.¹¹⁴ If a majority of the electorate is permitted consistently to deny the consent—i.e., the right to vote—of some of the people at the crucial stage of the decision-making process, then the outcome of that process is inherently illegitimate.¹¹⁵ To hold otherwise would reward the majority for its tyranny and encourage continued pursuit of its own “passions” or “interests,”¹¹⁶ something clearly inimical to the republican principle of consent.¹¹⁷ Consequently, the role of the judiciary in resolving this problem is evident: “unblocking stoppages in the

to “[t]he establishment of a Constitution . . . by the voluntary consent of a whole people”). Indeed, one of the principal defects of the Articles of Confederation was that they were not based upon the consent of the people. *See generally* THE FEDERALIST NO. 43, *supra* note 46, at 279 (James Madison) (“It has been heretofore noted among the defects of the Confederation that in many of the States it had received no higher sanction than a mere legislative ratification.”).

¹¹³ THE FEDERALIST NO. 52, *supra* note 46, at 326 (James Madison).

¹¹⁴ *Cf.* DAHL, *supra* note 71, at 145 (stating that the “normal” American process is “one in which there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision”); ELY, *supra* note 95, at 100-01 (“The Constitution . . . has sought to assure that . . . a majority not systematically treat others less well than it treats itself—by structuring decision processes at all levels to try to ensure . . . that everyone’s interests will be actually or virtually represented (usually both) at the point of substantive decision.”). It generally is true that the critical stage of the decision-making process is “during vote counting in elections and legislative bodies.” DAHL, *supra* note 71, at 66. As Part II of this Article will show, however, that is not always the case. *See infra* notes 281-580 and accompanying text.

¹¹⁵ *Cf.* KARST, *supra* note 51, at 223 (observing that Charles Black and Alexander Bickel “agreed on the central function of the idea of legitimacy: assuring the public, and a defeated minority in particular, that the government’s exercise of power was legitimate”); *id.* at 195 (legitimacy is important because “both the rulers and the ruled—in American society, political majorities and minorities—need to belong and to believe that the rulers can offer justification for the exercises of power”); GUTMAN & THOMPSON, *supra* note 56, at 28 (“Members of the losing minority can accept majoritarianism as a fair procedure when it yields incorrect results because it respects their status as political equals. The results of majority rule are legitimate because the procedure is fair, not because the results are right.”); Abrams, *supra* note 55, at 478 (“[N]onminority participants may favor enhanced minority participation because of concern for the legitimacy of the governmental system.”); Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE L. & POL’Y REV. 354, 357 (1991) (“[T]he legitimacy of the courts is enhanced if all major groups in society see some of ‘us’ on the court, even if one of ‘them’ tries a particular case.”).

¹¹⁶ *See supra* note 83 and accompanying text.

¹¹⁷ *Cf.* EPSTEIN, *supra* note 70, at 132 (“[P]opular government is less well suited to protecting the rights of each part of the community—an end that . . . is both fundamental in itself and also generally a necessary condition for the public good as a whole.”).

democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage."¹¹⁸

Notwithstanding its strong rhetoric and the broad powers it gave to judges to protect the voices of the people, the Framers' constitutional model of consent was inconsistent, if not incomplete, in at least one critical respect.¹¹⁹ On the one hand, the Madisonian compromise purported to protect minorities from the tyranny of the majority.¹²⁰ On the other hand, the Constitution itself embodied one of the clearest possible examples of majority tyranny: recognition of black slavery. Moreover, even those blacks who were free only enjoyed limited rights of citizenship which they held at the pleasure of the state legislatures.¹²¹ As a result, the consent model of democracy could not be realized fully until these disparities were corrected. The next section of this Article focuses on the Reconstruction Amendments¹²² and their central role in elevating blacks and other minorities to an equal legal status with whites, or those in the majority. The discussion shows how the three Amendments completed the constitutional consent model and further defined the crucial role of judicial referees under that model.

B. *Blacks and Consent: The Reconstruction Amendments*

Blacks always have been a part of American politics, although the strength of their voice in government has varied considerably since the foundation of the Republic. From the colonial era until the ratification of the Fifteenth Amendment, black political participation primarily came in the form of "pressure or nonelectoral politics,"¹²³ and only secondarily through "electoral politics," or the actual opportunity to cast a ballot that would be counted.¹²⁴ While few states specifically barred the right of suffrage to free blacks prior to 1787,¹²⁵ people of the period

¹¹⁸ ELY, *supra* note 95, at 117.

¹¹⁹ Obviously, black males were not the only ones denied the right of consent. See generally *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (holding that the Constitution did not confer the right of suffrage upon women).

¹²⁰ See DAHL, *supra* note 71, at 4.

¹²¹ See Smith, *supra* note 725, at 239.

¹²² See U.S. CONST. amend. XIII-XV.

¹²³ HANES WALTON, JR., *BLACK POLITICS: A THEORETICAL AND STRUCTURAL ANALYSIS* 17-21 (1972). From the Colonial Era until the Civil War, pressure or nonelectoral politics "evolved from attempts to attain freedom, to maintain the status of a 'free man of color,' to remove discriminatory practices from different communities, and to have suffrage rights given, extended, or returned." *Id.* at 17-18. Much of the pressure politics transpired through the efforts of the National Negro Convention Movement and related white Abolitionist movements. See *id.* at 26-28.

¹²⁴ *Id.* at 21-26.

¹²⁵ During the colonial and revolutionary era, the only colonies which expressly denied suffrage to blacks were Georgia (1761-1787), North Carolina (1715-1735), South Carolina (1716-1787), and Virginia (1723-1787). See W. Roy Smith, *Negro Suffrage in the South*, in *STUDIES IN SOUTHERN HISTORY AND POLITICS* 231-32, 234 (James W. Garner ed., 1914).

generally accepted that blacks did not have the right to vote.¹²⁶ This result is unsurprising when viewed in the context of the Constitution itself, wherein black slaves were treated as only “three fifths of all other Persons.”¹²⁷

In *Dred Scott v. Sandford*,¹²⁸ the Supreme Court confirmed the widely held belief that it was unnecessary for government to obtain consent from blacks, free or otherwise.¹²⁹ According to Chief Justice Taney, blacks were not and could not

¹²⁶ Legislation disenfranchising blacks was not thought to be necessary. As Smith observed:

In the early days, probably for two or three generations, the negro was looked upon as an alien and in consequence was excluded from political privileges by the English common law. By the time he had ceased to be regarded as an alien, slavery had existed long enough to be taken as the normal status of his race, and he was still denied the right to vote.

Id. at 232.

¹²⁷ U.S. CONST. art. I, § 2, cl. 3, *amended* by U.S. CONST. amend. XIV, § 2. The Confederate Constitution of 1861, which incorporated almost verbatim more than 90% of the United States Constitution, *see* GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* 125 (1995), included similar language. *Cf.* CONFEDERATE STATES OF AMERICA CONST. art. I, § 2, cl. 3 (1861) (“three-fifths of all slaves”), *reprinted in* ANASTAPLO, *supra*, at 345. As originally enacted in the United States Constitution, the three-fifths compromise mediated between the treatment of slaves as property subject to taxation, and as persons subject to representation. Madison articulated the southern view for this compromise as follows:

[W]e must deny the fact that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property. In being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another—the slave may appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property. In being protected, on the other hand, in his life and in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others—the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property. The federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property. This is in fact their true character.

THE FEDERALIST NO. 54, *supra* note 46, at 337 (James Madison). Madison himself accepted this logic. *See id.* at 340.

¹²⁸ 60 U.S. (19 How.) 393 (1857).

¹²⁹ Significantly, the Court also struck down the Missouri Compromise, which prohibited slavery in any state or territory of the United States north of 36° 30' north latitude, holding that the federal government could not deprive a citizen of the right of property in a black slave. *See id.* at 449-54.

become "citizens" of the United States as the term was used in the Constitution, absent a constitutional amendment:

[T]he legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.¹³⁰

Allowing the individual states to decide whether blacks were citizens (of that state), in addition to their constitutional power to determine voter qualifications,¹³¹ did not make states amenable to granting blacks the franchise. By 1865, most states limited suffrage to white males.¹³² Only two of the thirty-six states then in the Union, Maine and Vermont, never had imposed any legal limits on the suffrage of blacks.¹³³ Blacks also fully exercised the right to vote in Massachusetts, New Hampshire, and Rhode Island. In addition, blacks were allowed to vote in New York, as long as they met certain qualifications not required of whites—namely, they had to own property worth two hundred fifty dollars and be citizens residing in the state for at least three years.¹³⁴ It is worth noting, however, that in those states which granted free blacks

¹³⁰ *Id.* at 407. However, Chief Justice Taney also made it clear that a state could confer state citizenship upon blacks and other "aliens":

For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons . . . The rights which he would acquire would be restricted to the State which gave them.

Id. at 405.

¹³¹ See U.S. CONST. art. I, § 2, cl. 1.

¹³² These states, with the year the restrictions were imposed either by state statute or constitution, included Delaware (1792), Kentucky (1792), Ohio (1803), New Jersey (1807), Maryland (1810), Louisiana (1812), Indiana (1816), Mississippi (1817), Connecticut (1818), Illinois (1818), Alabama (1819), Missouri (1821), Tennessee (1834), North Carolina (1835), Arkansas (1836), Michigan (1837), Pennsylvania (1838), Florida (1845), Texas (1845), Iowa (1846), Wisconsin (1848), California (1850), Minnesota (1858), Oregon (1859), Kansas (1861), West Virginia (1863), and Nevada (1864). See WALTON, *supra* note 123, at 36; W. Roy Smith, *Negro Suffrage in the South*, in STUDIES IN SOUTHERN HISTORY AND POLITICS, *supra* note 125, at 237-40. Georgia law did not limit expressly suffrage to white adult males, although the clause in its constitution limiting suffrage to "citizens and inhabitants of this state" was interpreted that way. WALTON, *supra* note 123, at 36; W. Roy Smith, *Negro Suffrage in the South*, in STUDIES IN SOUTHERN HISTORY AND POLITICS, *supra* note 125, at 237-40.

¹³³ See WALTON, *supra* note 123, at 36.

¹³⁴ See WALTON, *supra* note 123, at 21; W. Roy Smith, *Negro Suffrage in the South*, in STUDIES IN SOUTHERN HISTORY AND POLITICS, *supra* note 125, at 237-40. Many blacks were

the franchise during this period, blacks comprised only a small fraction of the total population.¹³⁵

The Reconstruction Amendments ultimately would elevate black men to equal citizenship.¹³⁶ The first step towards conferring upon blacks full citizenship and its most manifest right, suffrage, was to abolish slavery altogether. Abolition came slowly; in fact, immediately after the Civil War broke out, it looked like it might not happen at all, in any form.¹³⁷ Nevertheless, preliminary steps were taken beginning in 1862 with the abolition of slavery in the District of Columbia and federal

allowed to vote in various locations in the remaining thirty states, although such voting was more the result of arbitrary application and enforcement of state constitutions and election laws, than it was of legal enfranchisement. See WALTON, *supra* note 123, at 21-26; W. Roy Smith, *Negro Suffrage in the South*, in STUDIES IN SOUTHERN HISTORY AND POLITICS, *supra* note 125, at 237-39.

¹³⁵ See generally A. Caperton Braxton, *The Fifteenth Amendment: An Account of Its Enactment*, Address Delivered Before Virginia State Bar Association for the Year 1903, at 2 (1934) ("Of men over twenty years of age, in 1860, there were in New Hampshire, 91,954 whites and 149 negroes; in Vermont, 87,462 whites and 194 negroes; in Massachusetts, 339,085 whites and 2,512 negroes and, in New York, 1,027,305 whites and 12,989 negroes."). However, because of poll taxes and literacy requirements in Massachusetts, and property and residency requirements in New York, "in 1860, there were only about 2,500 negro voters, not one of whom resided outside of New York or New England." *Id.* In fact, prior to 1865, as the size of the free black population increased, the number of states allowing free blacks to vote correspondingly decreased. See WALTON, *supra* note 123, at 22-23, 25.

¹³⁶ See *infra* note 195 and accompanying text.

¹³⁷ Initially, the northern states attempted to appease the secessionist southern states by enticing them back into the Union. On March 2, 1861, two-thirds of each house of Congress passed a proposed thirteenth amendment to the Constitution which permanently would have guaranteed the existence of slavery in states where it then existed. The amendment failed to take effect after being ratified by only two states. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 155 (1996); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 13 (1990); DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* 108 (1993). Even Abraham Lincoln expressed a willingness to compromise on the issue of slavery as late as August 22, 1862, shortly before he issued the preliminary emancipation proclamation:

I would save the Union. I would save it the shortest way under the Constitution . . . My paramount objective in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps save the Union; and what I forbear, I forbear because I do *not* believe it would help to save the Union. I shall do *less* whenever I shall believe what I am doing hurts the cause, and I shall do *more* whenever I shall believe doing more will help the cause.

Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), in ANASTAPLO, *supra* note 127, at 138-39.

territories,¹³⁸ the repeal of the Fugitive Slave Act,¹³⁹ and the enactment of the second Confiscation Act,¹⁴⁰ which freed all slaves owned by those in the rebellion who escaped to Union lines or were confiscated (as property) by the Union Army.¹⁴¹ Acting pursuant to his war powers, President Abraham Lincoln issued his preliminary emancipation proclamation in September, 1862,¹⁴² followed by his final Emancipation Proclamation on January 1, 1863,¹⁴³ which freed all persons held as slaves in States and parts of States that had seceded from the Union.¹⁴⁴ Still, it was widely believed that Lincoln's actions were unconstitutional (particularly in light of the *Dred Scott* decision), and that no mere executive order or act of Congress would suffice to abolish slavery.¹⁴⁵ In addition, the Emancipation Proclamation left slavery in place in the states remaining loyal to the Union (such as Delaware and Kentucky),¹⁴⁶ and there was some concern that nothing would prevent the return of slavery at the end of the Civil War. A constitutional amendment was needed. It came in the form of the Thirteenth Amendment,¹⁴⁷ which the Senate passed on April 8, 1864,¹⁴⁸ the House passed on January 31, 1865,¹⁴⁹ and three-fourths of the states ratified by December 18, 1865.¹⁵⁰

¹³⁸ See KYVIG, *supra* note 137, at 157; MALTZ, *supra* note 137, at 13.

¹³⁹ See KYVIG, *supra* note 137, at 157; MALTZ, *supra* note 137, at 13.

¹⁴⁰ See KYVIG, *supra* note 137, at 157; MALTZ, *supra* note 137, at 13.

¹⁴¹ See KYVIG, *supra* note 137, at 157; MALTZ, *supra* note 137, at 13-14.

¹⁴² See KYVIG, *supra* note 137, at 157; MALTZ, *supra* note 137, at 13-14.

¹⁴³ See KYVIG, *supra* note 137, at 157-58; MALTZ, *supra* note 137, at 13-14.

¹⁴⁴ For a full text and commentary about the Emancipation Proclamation, see ANASTAPLO, *supra* note 127, at 135-67. The Emancipation Proclamation did not include those States and parts of States that had remained loyal to the Union because Lincoln believed his war powers constitutionally limited him to taking actions only against those states in the rebellion. See *id.* at 157-59; KYVIG, *supra* note 137, at 158.

¹⁴⁵ See KYVIG, *supra* note 137, at 158; MALTZ, *supra* note 137, at 14; RICHARDS, *supra* note 137, at 110.

¹⁴⁶ See KYVIG, *supra* note 137, at 158. During the Civil War, two of the other loyal slave states, Missouri and Maryland, passed constitutional amendments abolishing slavery. See MALTZ, *supra* note 137, at 25-26.

¹⁴⁷ The Thirteenth Amendment states:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII.

¹⁴⁸ See CONG. GLOBE, 38th Cong., 1st Sess. 1490 (1864), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES 69 (Alfred Avins ed., 1967).

¹⁴⁹ See CONG. GLOBE, 38th Cong., 2d Sess. 531 (1865), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 86.

¹⁵⁰ See KYVIG, *supra* note 137, at 162.

It became evident almost immediately that the Thirteenth Amendment did not go far enough. The Amendment clearly reversed the *Dred Scott* decision to the extent it allowed the federal government to deprive slave owners of their "property,"¹⁵¹ but there was widespread disagreement over whether the effects of the Amendment went any further. Many congressmen argued the Amendment "guaranteed freedman natural rights,"¹⁵² while others, along with President Andrew Johnson, maintained that it "did no more than dissolve the master/slave relationship and that section two [the enforcement provision] gave Congress no power to grant blacks any other rights."¹⁵³ Meanwhile, the southern states were recalcitrant in defeat by ratifying the Thirteenth Amendment, while at the same time imposing harsh Black Codes that came perilously close to the restoration of slavery.¹⁵⁴ Congress responded by a failed attempt to enact the Freedmen's Bureau Bill,¹⁵⁵ and succeeded in enacting the sweeping Civil Rights Act of 1866 over President Johnson's veto.¹⁵⁶ While the Civil

¹⁵¹ See *supra* note 129.

¹⁵² MALTZ, *supra* note 137, at 27-28.

¹⁵³ *Id.* President Johnson was openly hostile to the idea of federal imposition of black suffrage. See President Andrew Johnson, Exchange between the President and Negro Spokesmen on Suffrage (Feb. 6, 1866), in RECONSTRUCTION, THE NEGRO, AND THE NEW SOUTH 22-28 (LaWanda & John H. Cox eds., 1973) [hereinafter RECONSTRUCTION] (decrying black suffrage as leading to a race war because of the "enmity and hate" between whites and blacks, arguing it was improper for the federal government to force suffrage on states that did not want it, and opining that setting voter qualifications was a matter exclusively belonging to the states).

¹⁵⁴ See KYVIG, *supra* note 137, at 163-64; MALTZ, *supra* note 137, at 37-39. The Black Codes "'set up elaborate systems of bound apprenticeship, labor restrictions, vagrancy laws, limits on property ownership and craft employment,' virtually chaining a black to his habitat." RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 23 (1989) (quoting MORTON KELLER, AFFAIRS OF STATE 203 (1977)). In addition, they placed limits on blacks in freedom to contract, to assemble, to bear arms, to receive an education, and to preach as ministers, and prevented blacks from suing or testifying against whites. Punishment for violating the Black Codes often meant being sold as a laborer—essentially, slavery. See *id.* at 23-24 & n.21; RICHARDS, *supra* note 137, at 126-27.

¹⁵⁵ See MALTZ, *supra* note 137, at 48-49; The Vetoed Freedmen's Bureau Bill (1866), reprinted in RECONSTRUCTION, *supra* note 153, at 43-47. Among other things, the Bill would have given the Freedmen's Bureau national jurisdiction over civil rights issues relating to blacks and indefinitely extended the life of the Bureau (which initially was scheduled to end one year after the cessation of hostilities). After it passed both houses of Congress, President Johnson vetoed the Bill. See MALTZ, *supra* note 137, at 48-49.

¹⁵⁶ See CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 205, 210; Civil Rights Act (Apr. 9, 1866), reprinted in RECONSTRUCTION, *supra* note 153, at 69-73. As enacted, the Civil Rights Act of 1866 did several things. First, in section 1, it defined a number of civic and economic rights. See MALTZ, *supra* note 131, at 61-62. Specifically, it declared that blacks and all other "persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States." CONG. GLOBE, 39th Cong., 1st Sess. 3215 (1866), reprinted in THE RECONSTRUCTION

Rights Act of 1866 largely repudiated the Black Codes,¹⁵⁷ there was a great deal of concern over whether the Act was constitutional. The only basis for congressional authority to enact the law was the Thirteenth Amendment, and it was doubtful that the Amendment authorized anti-discrimination measures and the conferral of citizenship on former slaves (especially in the face of the *Dred Scott* decision).¹⁵⁸ Moreover, Republicans feared that "a hostile president, not to mention unrepentant southern states, would seek to undermine legislative measures" passed by Congress.¹⁵⁹

Accordingly, a constitutional amendment was proposed that would give binding force to the anti-discrimination and citizenship provisions of the Civil Rights Act of 1866.¹⁶⁰ The Republicans developed a two-fold approach to the proposed amendment: first, they would include a number of measures in a single amendment forcing the ratifying states to "confront a take-it-or-leave-it, all-or-nothing choice";¹⁶¹

AMENDMENTS' DEBATES, *supra* note 148, at 243. The Act guaranteed the rights of blacks as citizens, except those convicted of crimes:

the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id. Section 2 established criminal penalties for violations of any rights outlined in section one of the Act taken "under color of any law, statute, ordinance, regulation, or custom." *Id.* For a discussion of the Civil Rights Act of 1866, see BERGER, *supra* note 154, at 22-30; MALTZ, *supra* note 137, at 61-78.

¹⁵⁷ Compare *supra* note 154 (describing the Black Codes), with *supra* note 156 (describing the Civil Rights Act of 1866).

¹⁵⁸ See BERGER, *supra* note 154, at 20-22; see also MALTZ, *supra* note 137, at 62-63 (discussing problems presented by the Act, including its application to private discrimination). In his veto message to Congress, President Johnson raised many of these issues, and particularly was concerned over the extent of federal intrusion into areas traditionally regulated by the States. See CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866) (message from President Johnson), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 193-95. The fight over passage of the Civil Rights Act of 1866 marked the beginning of the Civil War between President Johnson and Congress over who would have control over Reconstruction. Historians generally have labeled the period from the end of the Civil War until 1867 as "Presidential Reconstruction," and the period from 1867 until 1876 as "Congressional Reconstruction" or "Radical Reconstruction." See Chuck Stone, *Up from Slavery: From Reconstruction to the Sixties*, in BLACK POLITICAL LIFE IN THE UNITED STATES 37 (Lenneal J. Henderson, Jr. ed., 1972).

¹⁵⁹ KYVIG, *supra* note 137, at 165.

¹⁶⁰ Proposals for the amendment actually began to circulate while the Civil Rights Act of 1866 still was being debated. See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 57 (1986).

¹⁶¹ KYVIG, *supra* note 137, at 167; see MALTZ, *supra* note 137, at 80-81. Kyvig observes

second, they would make the amendment their “peace treaty,” dictating terms under which southern states that had seceded could be restored fully to the Union.¹⁶² The Fourteenth Amendment¹⁶³ was adopted by the Senate on June 8, 1866,¹⁶⁴ by the

that this approach was an intentional departure from earlier amending practice, in which different proposals would be considered individually. See KYVIG, *supra* note 137, at 166-67. According to Kyvig, the Republicans adopted this tactic to allow Congress (and not the ratifying states) to make important decisions about content, and also to “encourage the construction of an amendment around a coalition of interests” that might be only advocates of particular parts of the amendment. *Id.*; accord MALTZ, *supra* note 137, at 94.

¹⁶² See WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND PASSAGE OF THE FIFTEENTH AMENDMENT* 22 (1965); MALTZ, *supra* note 137, at 80; WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 43-44 (1988).

¹⁶³ The Fourteenth Amendment states:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, in Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

House on June 13, 1866,¹⁶⁵ and ratified by three-fourths of the States by July 28, 1868.¹⁶⁶

Sections 1 and 5 are the most important parts of the Fourteenth Amendment in terms of securing the rights of full citizenship for blacks.¹⁶⁷ Section 1, which was considered widely by Congress to be one of the less important parts of the

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

¹⁶⁴ See CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 137, at 237.

¹⁶⁵ See CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 137, at 238.

¹⁶⁶ See Proclamation of Ratification (July 28, 1868), reprinted in RECONSTRUCTION, *supra* note 153, at 88; GILLETTE, *supra* note 162, at 24. For a discussion of the debates in Congress, the states, and the press over the passage of the Fourteenth Amendment, see, for example, BERGER, *supra* note 154, at 37-42, 82-87 (focusing on the ratification debate over the Fourteenth Amendment in the press and in the states); JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 1-10 (1997) (examining the ratification process of the Fourteenth Amendment in southern states); CURTIS, *supra* note 160, at 57-91 (providing an historical account of the framing of the Fourteenth Amendment in Congress); NELSON, *supra* note 162, at 40-63 (discussing the drafting and adoption of the Fourteenth Amendment in Congress and the states). Ratification was secured from the southern states largely through congressional imposition of the Military Reconstruction Act of 1867, which took away all political power of rebellious southern governments and placed it in the hands of the military until they accepted the Fourteenth Amendment. See KYVIG, *supra* note 137, at 172-73. Thaddeus Stevens, an ardent Pennsylvania abolitionist and leader of the Radical Republicans in the House of Representatives, rationalized this forced imposition of black suffrage on the South by stating that "if it be just, it should not be denied; if it be necessary, it should be adopted; if it be a punishment to traitors, they deserve it." GILLETTE, *supra* note 162, at 31 (quoting CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148; see also *infra* notes 182-83 (discussing Stevens's political and economic motives for trying to secure black suffrage).

¹⁶⁷ Sections 3 and 4 of the Amendment were measures designed to punish rebellious southerners in their public and private capacities, respectively. See ANASTAPLO, *supra* note 127, at 180. For a discussion of section 2, see *infra* notes 175-86 and accompanying text. Congressional Reconstruction forced the southern states to enfranchise all black males over the age of twenty-one, while at the same time disenfranchising whites who had fought for the Confederacy. The net effect was the enfranchisement of 672,000 blacks compared to a total white electorate of 925,000, of which 100,000 whites were disenfranchised and 200,000 disqualified from holding office. See Chuck Stone, *Up from Slavery: From Reconstruction to the Sixties*, in BLACK POLITICAL LIFE IN THE UNITED STATES, *supra* note 158, at 39.

Amendment,¹⁶⁸ essentially codified section 1 of the Civil Rights Act of 1866.¹⁶⁹ The first clause, declaring that all persons born or naturalized in the United States are citizens of the United States and the state in which they reside, expressly overruled the contrary holding in *Dred Scott*.¹⁷⁰ The remaining three clauses of section 1,

¹⁶⁸ See MALTZ, *supra* note 137, at 93. In fact, there was very little argument about section 1 in the floor debates. According to Maltz, only two “nominal Republicans,” both Johnsonian allies, attacked the provision as an intrusion upon states’ rights. *Id.* at 94.

¹⁶⁹ Compare *supra* note 154 (Civil Rights Act of 1866), with U.S. CONST. amend. XIV, § 1; see also BERGER, *supra* note 154, at 40-42. Thaddeus Stevens noted the similarities between the two, but argued that the Amendment was needed nevertheless. According to Stevens, without the Amendment there would be little to stop a subsequent Congress, dominated by “the South with their copperhead allies,” to repudiate the Civil Rights Act. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 212. In addition, the Amendment directly resolved the question of the constitutional basis for passage of the Civil Rights Act, as many Congressmen, including Stevens, noted. See, e.g., *id.* (statement of Rep. Stevens); CONG. GLOBE, 39th Cong., 1st Sess. 2461 (1866) (statement of Rep. Finck), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 213; *id.* at 2462 (statement of Rep. Garfield), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 213; see also *supra* note 158 and accompanying text (discussing concerns about the constitutionality of the Civil Rights Act of 1866).

¹⁷⁰ See ANASTAPLO, *supra* note 127, at 173-74; see also *supra* notes 128-30 and accompanying text (describing the holding in *Dred Scott*). As the congressional debates make evident, the Citizenship Clause also clarified a latent ambiguity in constitutional law over what constituted “citizenship.” See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2764-67 (statement of Sen. Howard) (introducing and explaining the proposed Fourteenth Amendment), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 218-21; *id.* at 2768-69 (statement Sen. Wade) (expressing concern over how the word “citizen” would be interpreted in the proposed Amendment), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 222; *id.* at 2869 (statement of Sen. Howard) (offering an amendment to the proposed Amendment defining the word “citizen”), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 223; *id.* at 2890-97 (statements of Sen. Clark, Conness, Cowan, Doolittle, Fessenden, Hendricks, Howard, Johnson, Saulsbury, Trumbull, and Van Winkle) (debating who was included in the proposed definition of “citizen” and considering an amendment to specifically exclude “Indians not taxed”), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 223-29; *id.* at 2938 (statement of Sen. Hendricks) (explaining section 1 of the proposed Amendment after a Republican caucus), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 229; *id.* at 3031-33 (statement of Sen. Henderson) (arguing that the proposed Amendment did nothing to change the current definition of “citizen”), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 234-35; *id.* at 3040 (statement of Sen. Fessenden) (offering an amendment to include the words “or naturalized” in the proposed Amendment), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 237; *id.* at 3148 (statement of Sen. Stevens) (commending the proposed Amendment’s resolution of the definition of “citizen”), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 237

including the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause, were intended to guarantee the rights of equal treatment before the law to blacks (and others by implication, including non-citizens in the case of the latter two clauses).¹⁷¹ In other words, the remainder of section 1 “gave specific meaning to American citizenship.”¹⁷² The enforcement power contained in section 5 was seen as crucial to ensuring that section 1 of the Amendment had continued vitality and meaning: It provided that *Congress*, not the courts, was to ensure the mandates of section 1 were kept through appropriate enforcement legislation.¹⁷³ In this manner, the federal government could maintain a presence in the South (and later, in other parts of the country), where the governments “were all too often either

¹⁷¹ See KYVIG, *supra* note 137, at 167.

¹⁷² *Id.* at 168. A number of questions concerning the scope of these protections have been raised. First, there has been much disagreement over whether the Privileges or Immunities Clause of section 1 was intended to incorporate the Bill of Rights and apply it to the states. This issue is complicated by the fact that Senator Jacob Merritt Howard and Representative John Bingham, its drafter, repeatedly stated that incorporation was intended, notwithstanding the fact that many moderates in Congress and the ratifying state legislatures apparently believed the contrary to be true. See MALTZ, *supra* note 137, at 113-18. Second, there is some question about the extent of federal power that was intended to be permitted under section 1 to regulate education and the right to vote. See *id.* at 109-13 (education), 118-20 (right to vote). Third, scholars widely have debated over the extent to which a demarcation was made between citizens in the Privileges and Immunities Clause, and “all people” in the Due Process and Equal Protection Clauses. See *id.* at 96-102. Finally, there has been much discussion over the extent to which section 1 authorized legislation impacting upon private, and not state, actions. See *id.* at 102-06. Resolution of these questions about the range of powers authorized by section 1 is beyond the scope of this Article. For additional discussion, see generally BERGER, *supra* note 154 (giving background information on the Fourteenth Amendment and concluding that the Amendment was intended to have a narrow scope applying only to southern states); BOND, *supra* note 166 (examining the ratification process of the Fourteenth Amendment in the southern states); CURTIS, *supra* note 160 (analyzing historical arguments against the incorporation theory and concluding that the Fourteenth Amendment was intended to require the states to respect the guarantees of the Bill of Rights); MALTZ, *supra* note 137 (discussing similar Fourteenth Amendment analyses).

¹⁷³ See U.S. CONST. amend. XIV, § 5; ANASTAPLO, *supra* note 127, at 177, 181-82; BERGER, *supra* note 154, at 89-90. *But see* CURTIS, *supra* note 160, at 130 (“Republicans repeatedly said that the passage of the amendment put enforcement of its principles beyond the power of congressional majorities. These statements clearly presuppose *judicial* enforcement.” (emphasis added)). Berger addresses Curtis’s assertion, and it seems that the plain language of section 5, not to mention the Court’s interpretation of section 5 in *Ex parte Virginia*, 100 U.S. 339, 344-46 (1879), and subsequent cases, shows that Berger has the better of the two arguments. The reason for allowing Congress—and not the Court—to define the scope of the Fourteenth Amendment is that “[f]rom at least *Dred Scott* onward the Court was in ill repute.” BERGER, *supra* note 154, at 90. See also ANASTAPLO, *supra* note 127, at 177. The Court’s lackluster performance in giving content to the Reconstruction Amendments until well into the twentieth century supports this reasoning (although Congress did not fare much better on this account).

unwilling or unable to provide protection for the fundamental rights of blacks and Republicans.”¹⁷⁴

Section 2 of the Fourteenth Amendment largely was shaped to prevent an incongruous result posed by the first two Reconstruction Amendments. The Thirteenth Amendment had emancipated approximately four million slaves in the South.¹⁷⁵ The subsequent conferral of full citizenship upon southern blacks by section 1 of the Fourteenth Amendment—making them “whole persons” under the Constitution—inherently was inconsistent with the three-fifths clause of Article I of the Constitution.¹⁷⁶ As a result, the three-fifths clause had to be eliminated in favor of treating former black slaves as whole persons for purposes of congressional apportionment.¹⁷⁷ However, northern Republicans were concerned with the perverse outcome of the rebellious southern states gaining approximately fifteen additional electoral votes and seats in the House of Representatives as a consequence of a forty percent increase in population used to calculate representation.¹⁷⁸ At the same time, three matters further complicated the issue of southern representation. First, “[d]oubts were entertained whether Congress had power, even under the amended Constitution, to prescribe the qualifications of voters in a State, or could act directly on the subject.”¹⁷⁹ Second, black suffrage in the northern states was a practical impossibility because of its unpopularity,¹⁸⁰ while at the same time Republicans

¹⁷⁴ MALTZ, *supra* note 137, at 104.

¹⁷⁵ See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 18 (1975).

¹⁷⁶ See *supra* note 127 and accompanying text.

¹⁷⁷ See generally S. REP. NO. 112, CONG. GLOBE, 39th Cong., 1st Sess. 7 (1866), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 94 (“By an original provision of the Constitution, representation is based on the whole number of free persons in each State, and three-fifths of all other persons. When all become free, representation for all necessarily follows.”).

¹⁷⁸ See Braxton, *supra* note 135, at 16; GILLETTE, *supra* note 162, at 21-22, 24-25; ROBERT M. GOLDMAN, “A FREE BALLOT AND A FAIR COUNT”: THE DEPARTMENT OF JUSTICE AND THE ENFORCEMENT OF VOTING RIGHTS IN THE SOUTH, 1877-1893, at 4 (1990). The Senate Report noted that “[a]s a consequence the inevitable effect of the rebellion would be to increase the political power of the insurrectionary States, whenever they should be allowed to resume their positions as States of the Union,” and concluded that “the necessity for some fundamental action in this regard seemed imperative.” S. REP. NO. 112, CONG. GLOBE, 39th Cong., 1st Sess. 7 (1866), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 94.

¹⁷⁹ *Id.*; see U.S. CONST. art. I, § 2, cl. 1 (giving states the power to establish voter qualifications); see also JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 12 (1909) (“[R]egulation of the suffrage was a matter properly belonging to the state governments.”).

¹⁸⁰ See GILLETTE, *supra* note 162, at 25-27; MATHEWS, *supra* note 179, at 17. Between 1865 and 1869, constitutional amendments extending the franchise to blacks were passed in only two states where the issue was placed before the voters. See GILLETTE, *supra* note 162, at 26-27; Braxton, *supra* note 135, at 43-45. In 1868, in both of these states (Iowa and Minnesota), black males over 21 made up less than a fraction of one percent of the voting age

recognized that obtaining black suffrage in the southern states was crucial to their party's continued vitality.¹⁸¹ Third, many favored black suffrage both as a reward for black service in the Union army during the Civil War, and also as a means for blacks to protect themselves from southern hostility.¹⁸² The result of reconciling these competing concerns was a provision that "simply excluded from the basis of

population. See Braxton, *supra* note 135, at 43-45. In addition, Minnesota had rejected black suffrage on two previous occasions (in 1865 and 1867), *see id.* at 44, and passage only could be secured by "placing the suffrage question on the presidential ballot to discourage ticket splitting, and concealing the issue by labeling the question not 'Negro suffrage' but rather 'revision of section 1, [A]rticle 7.'" GILLETTE, *supra* note 162, at 26. Seven states (Connecticut and Wisconsin in 1865; Kansas and Ohio in 1867; Michigan and Missouri in 1868; and New York in 1869) where the question of repealing discriminatory voter qualifications was considered, *see supra* note 132 and accompanying text, two territories (Colorado in 1865, and Nebraska in 1866), and the District of Columbia in 1865, rejected black suffrage by popular referenda. See GILLETTE, *supra* note 162, at 25-26; W. Roy Smith, *Negro Suffrage in the South*, in *STUDIES IN SOUTHERN HISTORY AND POLITICS*, *supra* note 125, at 240 n.2. In 1866, the Wisconsin Supreme Court ordered black suffrage based upon the results of an 1849 referendum. See GILLETTE, *supra* note 162, at 27.

¹⁸¹ See Braxton, *supra* note 135, at 16-17; GILLETTE, *supra* note 162, at 24-25; GOLDMAN, *supra* note 178, at 4-5. Prior to passage of the Fourteenth Amendment, Governor Oliver Morton of Indiana expressed concerns over whether southern blacks were capable of exercising the franchise intelligently and suggested enfranchising them gradually until they were educated like northern blacks. See Braxton, *supra* note 135, at 21; GILLETTE, *supra* note 162, at 48 & n.8.

¹⁸² See Braxton, *supra* note 135, at 8-10, 24-25; GILLETTE, *supra* note 162, at 22. Thaddeus Stevens openly questioned whether giving southern blacks the right to vote would, in fact, secure their protection from hostile whites and ensure their future prosperity:

In my judgment, we shall not approach the measure of justice until we have given every adult freedman a homestead on the land where he was born and toiled and suffered. Forty acres of land and a hut would be more valuable to him than the immediate right to vote.

CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 212. In other words, Stevens believed suffrage alone would not make blacks truly equal, particularly if the southern plantation system was still in place. Instead, blacks also needed to possess "equal opportunity in a free-labor economy," backed by economic power that would allow them to be able to have meaningful political opportunities. ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863-1867, at 108 (1990) (abridged version of RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (1st ed. 1988)). Therefore, Stevens proposed to "break the power of the South's traditional ruling class" by confiscating 400 million acres owned by the wealthiest 10% of southerners. *Id.* at 107. Such action would, according to Stevens, "transform the Southern social structure, and create a triumphant Southern Republican [P]arty composed of black and white yeomen and Northern purchasers of planter land." *Id.* Most of the other Radical Republicans rejected Stevens' call for economic equality, believing that suffrage would be sufficient by itself to allow blacks to achieve social equality. See *id.* at 107-08. One need only look at the continued economic submersion of blacks in this country to realize that these hopes were misguided. See *supra* note 4.

representation eligible male citizens to whom the vote was denied," with no reference to "race or color."¹⁸³

The language and effect of section 2 were weak because they created little more than a disincentive for southern states to deny the franchise to blacks discriminatorily, with no similar disincentive for northern states. Accordingly, it became evident that a more sweeping voting amendment was needed.¹⁸⁴ This conclusion was confirmed by the 1868 elections, in which violence and intimidation against black voters in the South was widespread.¹⁸⁵ Moreover, it became politically expedient for Republicans to confront the delicate issue of black suffrage again directly because the 1868 election returns demonstrated their increasing vulnerability to Democrats in the northern states.¹⁸⁶

As a result, maintenance of Republican political hegemony in the North was one of the principal factors that motivated the passage of the Fifteenth Amendment, even

¹⁸³ GILLETTE, *supra* note 162, at 24. The enacted section 2 reconciled all of the competing issues at the expense of a strong guarantee for and protection of the black vote. First, although directed at the country as a whole, blacks made up such a small percentage of the total population in northern states, *see* BUREAU OF THE CENSUS, *supra* note 175, at 22, that it really only affected the southern states. *See* MATHEWS, *supra* note 180, at 14; Braxton, *supra* note 135, at 28. Second, section 2 left voter qualifications squarely in the hands of state legislatures, avoiding any infringement upon traditional state powers. *See* Braxton, *supra* note 135, at 28. Third, there was a widespread belief that the southern states would not want to risk the loss of political power prescribed under section 2 and, therefore, would grant blacks the right to vote. *See id.* In this sense, section 2 "was intended to reduce Southern representation until the Negro would be in a position to divide, if not dominate, the political power of the South." GILLETTE, *supra* note 162, at 25 (quoting JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 180 (1956)). Thaddeus Stevens largely was responsible for the passage of this narrow protection of black suffrage, defeating a proposal by Robert Dale Owen which would have afforded broader black suffrage after 1876. *See* GILLETTE, *supra* note 162, at 24. Interestingly enough, Stevens later recognized that section 2 would do little to guarantee Republican success, and he proposed a fifteenth amendment that better would secure that goal through universal black suffrage. *See id.* at 34-35; *see also supra* note 182 (discussing Stevens's recognition of the limitations of black suffrage).

¹⁸⁴ There was some question whether Congress should enfranchise blacks by statute or by constitutional amendment. *See* GILLETTE, *supra* note 162, at 24. The experience and problems with the Civil Rights Act of 1866, however, mediated in favor of a constitutional amendment that would not be subject to constitutional challenge and could not be repudiated easily by a future Congress that might be hostile to black suffrage. *See* GILLETTE, *supra* note 162, at 50-53; MALTZ, *supra* note 137, at 146-47.

¹⁸⁵ *See* GILLETTE, *supra* note 162, at 41-42.

¹⁸⁶ *See* GILLETTE, *supra* note 162, at 40-45; GOLDMAN, *supra* note 178, at 5. In the 1868 elections, Democrats made gains in the House of Representatives and Ulysses S. Grant was elected president with a plurality of only 300,000 votes. *See* GILLETTE, *supra* note 162, at 40-41. Furthermore, the Republicans doubted they would be able to muster in the Forty-First Congress the two-thirds majority required to pass a constitutional amendment, making it imperative to pass the amendment during the third session of the "lame duck" Fortieth Congress. *See* GILLETTE, *supra* note 162, at 45-46; MALTZ, *supra* note 137, at 142.

in the face of widespread discrimination against southern blacks in the voting process.¹⁸⁷ A. Caperton Braxton, writing with a distinctly southern view on the issue,¹⁸⁸ opined:

The principal agencies which contributed to [black suffrage] were: First, gratitude to the negro soldiers who had served in the Federal armies—to “save the Union,” as it was said; second, apprehension lest the so-called “rebel element” regain control of the Federal Government; and third, the desire to perpetuate the Republican [P]arty in power. Thus we have, as the inspiration for negro suffrage, gratitude, apprehension and politics—these three; but the greatest of these was politics.¹⁸⁹

John Mabry Mathews, who authored what was considered for the first half of this century the seminal legislative history of the Fifteenth Amendment, also agreed that politics and not principle was the dominant factor.¹⁹⁰ William Gillette reached a

¹⁸⁷ But see FONER, *supra* note 182, at 105, 108 (describing the core of Radical Republican ideology as requiring that “a powerful national state must guarantee blacks equal political standing and equal opportunity in a free-labor economy,” and observing that “[f]or decades, long before any conceivable political benefit derived from its advocacy, Stevens, Sumner, and other Radicals had defended the unpopular cause of black suffrage and castigated the idea that America was a ‘white man’s government’”); LaWanda & John H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. S. HIST. 303, 317 (1967) (“In challenge to the dominant pattern of interpretation from Braxton through Gillette, we should like to suggest that Republican [P]arty leadership played a crucial role in committing this nation to equal suffrage for the Negro not because of political expediency, but *despite* political risk.”); Glenn M. Linden, *A Note on Negro Suffrage and Republican Politics*, 36 J. S. HIST. 411, 419 (1970) (providing statistical evidence to support the Cox thesis that “many Republicans were genuinely concerned with the principle of equal suffrage . . . and that these congressmen were not acting solely for political purposes”). For a responsive analysis to these theses, see GOLDMAN, *supra* note 178, at 8-9.

¹⁸⁸ Braxton portrays the northern Republicans who supported black suffrage as a “masterful coterie of political bigots and fanatics,” Braxton, *supra* note 135, at 34, and describes Charles Sumner of Massachusetts as “an impractical idealist . . . [whose] love for the negro, and hatred of Southern white men, amounted almost to a mania.” *Id.* at 20. In addition, Braxton describes southerners as innocent, “helpless” victims of rampant radical Republicanism gone mad. *Id.* at 34, 50, 49-51. Furthermore, he characterizes Republican attempts to enfranchise southern blacks as hypocritical in light of the fact that few northern states allowed blacks the right to vote, and even suggests that northern Republicans were motivated by the consideration that “the negro might be induced thereby to remain in the South.” *Id.* at 27.

¹⁸⁹ *Id.* at 7.

¹⁹⁰ See MATHEWS, *supra* note 180, at 20-21. Mathews also placed those engaged in the suffrage debate into four distinct categories:

The groups of men favoring a suffrage amendment of some kind were, therefore, the politicians, who aimed at congressional control over Southern elections, the nationalists, who desired a strong central government, and the universal suffragists, or humanitarians, as they may be called, who were laboring to base

similar, although more qualified, conclusion: "The Fifteenth Amendment had a limited object—first, to enfranchise the northern Negro, and second, to protect the southern Negro against disfranchisement."¹⁹¹ Thus, some less than admirable intentions motivated the adoption of the Fifteenth Amendment. The Amendment was passed by the House on February 25, 1869,¹⁹² by the Senate on February 26, 1869,¹⁹³ and was ratified by three-fourths of the state legislatures by March 30, 1870.¹⁹⁴

The Fifteenth Amendment is deceptively elegant in its simplicity. Section 1 states "[t]he 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

the enjoyment of political rights upon no distinction less comprehensive than humanity itself. Over against all three of these, and opposed to a suffrage amendment of any kind, were the local autonomists, proud of local tradition and jealous of national interference in local concerns.

Id. at 22. Gillette criticized these categories as an oversimplification of the dynamics which led to the passage of the Fifteenth Amendment. *See* GILLETTE, *supra* note 162, at 77 n.128.

¹⁹¹ *Id.* at 77; *see also id.* at 50 ("[T]he primary objective was to make Negro voters in the North; the secondary objective, to keep Negro voters in the South."); *id.* at 48-49, 89-90, 164-65 (describing the political undertones involved in framing the Fifteenth Amendment). Republican Congressman George S. Boutwell, a leading sponsor of the Fifteenth Amendment, estimated that it would enfranchise about 150,000 blacks in northern states. *See* CONG. GLOBE, 40th Cong., 3d Sess. 561 (1869) (statement of Rep. Boutwell), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 337.

¹⁹² *See* CONG. GLOBE, 40th Cong., 3d Sess. 1563-64 (1869), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 410.

¹⁹³ *See* CONG. GLOBE, 40th Cong., 3d Sess. 1641 (1869), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 417.

¹⁹⁴ *See* GILLETTE, *supra* note 162, at 81, 128; Proclamation of Ratification (Mar. 30, 1870), *reprinted in* RECONSTRUCTION, *supra* note 153, at 108-09. Ratification in the states was simplified by the passage of legislation in early 1867 which granted black suffrage in the District of Columbia and the federal territories, required black suffrage as a condition of Nebraska's statehood, and mandated universal black suffrage in the secessionist southern states as a precondition to their return to the Union. *See* GILLETTE, *supra* note 162, at 29-32; MALTZ, *supra* note 137, at 124-31. By the time the Amendment was sent to the states, 20 out of 37 states permitted blacks to vote. *See* GILLETTE, *supra* note 162, at 80. Republicans also controlled most of the state legislatures, and gained the support of President Grant in their fight to secure ratification. *See id.* at 79. Ratification encountered few problems in the South, New England, and much of the middle West, where blacks already had the right to vote, but was obtained only with a great deal of difficulty in the middle Atlantic states and Indiana and Ohio. *See id.* at 159. The remaining states, particularly those in the West (with the exception of Nevada), were firmly against ratification. *See id.* at 158. In many states, ratification was secured by irregularities, such as passage with less than a quorum of total members present, votes on the Amendment before it was certified to the state legislatures, and even ratification of the wrong version of the Amendment (later corrected through a vote on the correct version). *See id.* at 92-158 (examining state legislatures' reception of the Fifteenth Amendment by region); Braxton, *supra* note 135, at 69-77.

condition of servitude.”¹⁹⁵ Unfortunately, the Amendment’s simple elegance, resulting from the bitter struggle to secure its passage, weakened it considerably. First, the Amendment did not contain an affirmative grant of universal suffrage,¹⁹⁶ but rather established “impartial” suffrage¹⁹⁷—that is, “a negative injunction that voters could not be disbarred by race *only*.”¹⁹⁸ As a result, there was nothing in the Amendment that prevented states from adopting literacy or property qualifications, as long as they applied the qualifications in a non-discriminatory manner.¹⁹⁹

¹⁹⁵ U.S. CONST. amend. XV, § 1.

¹⁹⁶ As one commentator noted at the time, the Fifteenth Amendment was “more remarkable for what it does not do than for what it does contain.” FONER, *supra* note 182, at 192. In the western states, the Chinese were left disenfranchised. The most notable people excluded from coverage under the Amendment were women, *id.* at 192-93, who would not secure the right to vote until 1920. See U.S. CONST. amend. XIX.

¹⁹⁷ GILLETTE, *supra* note 162, at 78.

¹⁹⁸ *Id.* at 57 (emphasis added); see MALTZ, *supra* note 137, at 147-55. Congress was concerned about allowing federal intrusion into the traditional state realm of setting voter qualifications. See *supra* note 179 and accompanying text.

¹⁹⁹ See GILLETTE, *supra* note 162, at 57-61, 74-75, 90; MALTZ, *supra* note 137, at 155-56. In fact, proposals by Senator Henry Wilson of Massachusetts and Representative Samuel Shellabarger of Ohio to have the Amendment prohibit literacy tests and poll taxes were considered and rejected by Congress. See GILLETTE, *supra* note 162, at 49-50, 71; Braxton, *supra* note 135, at 62-64. Shellabarger explained in an impassioned plea to Congress why it was necessary to go beyond simply eliminating voter discrimination on the basis of “race, color, or previous condition of slavery”:

The consideration which I say seems to me almost fatal to [Massachusetts Representative George S. Boutwell’s] plan is, that it leaves still, substantially, the great mischief unremedied which the exigencies upon us demand that we shall correct; and that is, that it leaves to the States the power to make discriminations as to who shall vote. These discriminations may be on the score of either intelligence or want of property, or any other thing than the three things enumerated in his proposition.

....

[H]is amendment is one which . . . will add to the mischiefs it aims at remedying instead of relieving them. That happens in this way: he simply prohibits the States from exercising the power of disfranchising for either of the three grounds . . . thus by plain inference authorizing the States to disfranchise upon any other grounds than these three.

CONG. GLOBE, 40th Cong., 3d Sess. App. 97-98 (1869) (statement of Rep. Shellabarger), reprinted in THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 148, at 347. Shellabarger’s prescient point largely foreshadowed the South’s subsequent use of other methods to deny suffrage to blacks, even though these methods frequently were applied in a discriminatory fashion in apparent violation of the language of section 1 of the Fifteenth Amendment. Nevertheless, as Gillette observes, “a refusal to ban these tests weakened the [A]mendment was of course widely recognized in the South, but in the North it was precisely this omission which would promote ratification and rally moderates.” GILLETTE, *supra* note 162, at 71.

Similarly, the Amendment failed to guarantee the right of blacks to run for and hold office, after such a guarantee was removed from the Joint Committee's final report because of fears it would jeopardize ratification.²⁰⁰ Nonetheless, Congress hoped that the self-enforcing negative proscription contained in section 1 would be sufficient to prevent subsequent efforts to disenfranchise blacks.²⁰¹

At the same time, Congress recognized the need for future policing of the Amendment by the federal government, and enacted an enforcement clause just as it did with the Thirteenth and Fourteenth Amendments.²⁰² Unlike section 1, section 2 of the Amendment was an affirmative grant of power to Congress to regulate suffrage. The intended scope of this power, however, is hard to gauge because of the conspicuous absence of amplifying information in the legislative history.²⁰³ According to what Gillette calls an "artful dodge,"²⁰⁴ Congress intentionally left the reach of section 2 ambiguous, primarily leaving it up to subsequent congressional legislation (and to a much lesser extent, the untrustworthy courts) to provide the necessary clarification.²⁰⁵ Nevertheless, one thing is clear about section 2: like section 5 of the Fourteenth Amendment, it only would be as protective of black consent as the various federal government actors allowed it to be. The overall efficacy of the Fifteenth Amendment would rise or fall on acts of legislative grace, the extent of the Court's reading of section 1 and deference to congressional exercise of its section 2 enforcement powers, and the willingness of the executive branch actually to enforce federal civil rights and voting laws.²⁰⁶

²⁰⁰ See *id.* at 50, 62, 71; GILLETTE, *supra* note 162, at 60-61. See also CONG. GLOBE, 40th Cong., 3d Sess. 1626 (1869) (statement of Sen. Edmunds), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 148, at 412 ("Some vague fear, I suppose, fills the mind of some trembling convert to liberty that his people will not be satisfied to give the negro the right to run against themselves for some office, but they are willing to confer upon him the boon of voting for them."); MALTZ, *supra* note 137, at 154 (quoting Sen. Edmunds).

²⁰¹ See GILLETTE, *supra* note 162, at 49-50.

²⁰² See U.S. CONST. amend. XV, § 2.

²⁰³ See GILLETTE, *supra* note 162, at 72.

²⁰⁴ *Id.*

²⁰⁵ See *id.* at 72-73 & n.108. This ambiguity caused great concern to many members of both parties during ratification because of fear that it would give the federal government a blank check to intrude upon the traditional state arena of regulating voter qualifications. See *id.* at 91.

²⁰⁶ The combined failure of all three branches of government in their respective tasks goes far to explain the decades of overt and veiled discrimination which closely followed the passage of the Reconstruction Amendments and existed even after the passage of the Voting Rights Act of 1965. For a more comprehensive treatment, see, for example, GOLDMAN, *supra* note 178; CHARLES V. HAMILTON, *THE BENCH AND THE BALLOT: SOUTHERN FEDERAL JUDGES AND BLACK VOTERS* (1973); J. Morgan Kousser, *The Undermining of the First Reconstruction—Lessons for the Second*, in MINORITY VOTE DILUTION, *supra* note 19, at 27-46; J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 9, at 135-64; STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969* (1976); UNITED STATES COMMISSION

The result of "The Second American Constitutional Revolution,"²⁰⁷ accompanying the ratification of the Reconstruction Amendments, seemed to be the completion of what the first American constitutional revolution had failed to do. It recognized that slavery is inconsistent with a free democratic society. In addition, it acknowledged that all blacks are citizens entitled to equal treatment and respect with their white counterparts. Furthermore, it established the principle that blacks must be given a fair and equal opportunity to give or withhold their consent to their government. Each of these results is concordant not only with the constitutional framework of consent originally established by the Framers, but actually repairs the injury done to Madisonian democracy by the continued subordination of such a large segment of the American population.

Having outlined the basic democratic theory embodied in the American constitutional framework, this Article now will provide a closer look at how the federal courts should perform their roles within that framework. The final section of this Part will describe the judicial referee model, in which federal courts necessarily make substantive decisions in the delicate balancing of majority rule with minority consent. Part II will make it evident that, absent such judicial decision-making, the Madisonian compromise is rendered little more than a unilateral recognition of one principle (most likely majority rule) at the expense of the other (most likely protection of minorities from the tyranny of majority rule). Under such conditions, the only thing "compromised" under our Madisonian model is the right of *all* voters to have a fair and equal opportunity to give or withhold their consent.

C. *Judicial Referees and the Regulation of Consent*

Today, it has become fashionable to criticize the so-called "judicial activism" of courts when they intervene in the workings of the political process.²⁰⁸ Detractors

ON CIVIL RIGHTS, VOTING IN MISSISSIPPI (1965); XI WANG, BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1865-1891 (1996); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973); WASHINGTON RESEARCH PROJECT, THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH (1972); D. Grier Stephenson, Jr., *The Supreme Court, the Franchise, and the Fifteenth Amendment: The First Sixty Years*, 57 UMKC L. REV. 47 (1988). The remainder of this Section will focus on the respective roles of Congress and the Court in the protection of consent.

²⁰⁷ KYVIG, *supra* note 137, at 154; see RICHARDS, *supra* note 137, at 108-48.

²⁰⁸ One definition of "judicial activism" is:

Judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions into legislative and executive matters.

BLACK'S LAW DICTIONARY 847 (6th ed. 1990). This broad definition, and others like it, leaves a lot of room for interpretation and makes the issue of what constitutes "judicial activism" a moving target. No judge is immune from the label, whether conservative or liberal. See generally BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION:

decry the actions of unaccountable federal judges who overrule the will of the majority. They steadfastly maintain that judges are in no position to make substantive choices affecting the right to vote.²⁰⁹ Critics rail against the propriety of judges giving content to, much less formulating, matters of democratic theory.²¹⁰

According to many commentators, judicial discretion must be hamstrung whenever it is possible to do so in this area.²¹¹ In fact, the Supreme Court has adopted just such an approach to protect the right to vote. Specifically, the majority, led by Justices O'Connor, Scalia, and Thomas, believe that the Court can occupy a sacred neutral ground where the justices do not have to engage in any substantive

TURNING BACK THE LEGAL CLOCK 3-5 (1990) (asserting that both conservative and liberal judges have used judicial activism to advance their particular goals); Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 979 (1989):

The "judicial activism" reflected by *Marbury* and so criticized by today's conservatives (and yesterday's liberals) is really "judicial naturalism"—judges doing what comes naturally It should not seem remarkable that a "conservative" judge is just as likely to tease out different meanings from the written word as are "liberal" judges.

See also Mark Tushnet, *Conservative Constitutional Theory*, 59 TUL. L. REV. 910, 925 (1985) ("Conservatives have made criticism of liberal judges' judicial activism an important part of their political ideology, but they have been unable to develop an alternative theory of judicial review."). For a general discussion of judicial activism, see, for example, CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY?* (1991); *JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE* (Kenneth M. Holland ed., 1991); *SUPREME COURT ACTIVISM AND RESTRAINT* (Stephen C. Halpern & Charles M. Lamb eds., 1982); *THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT* (David F. Forte ed., 1972); Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539 (1981); Lino A. Graglia, *Judicial Activism: Even on the Right, It's Wrong*, 95 PUB. INTEREST 57 (1989); Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385 (1969).

²⁰⁹ See generally Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1586 (1988) ("Whatever else one believes the [majoritarianism] concept includes, there is surely general agreement that it does not normally include substantive decisionmaking by officials who are deliberately shielded from any form of popular control.").

²¹⁰ See generally Robert H. Bork, *The Case Against Political Judging*, NAT'L REV., Dec. 8, 1989, at 25 ("The structure of government the Founders of this nation intended most certainly did not give courts a political role."); see also *infra* notes 298, 575-83 and accompanying text. But see RONALD DWORKIN, *A MATTER OF PRINCIPLE* 146 (1985) ("Law . . . is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory.").

²¹¹ See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (contending that judges should respect majoritarianism and accord deference to the will of elected officials by interpreting the Constitution according to the original intent of the Framers); GARY L. MCDOWELL, *CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER* (1988) (arguing that judges should use various means at their disposal to limit their scope of review over cases).

decision-making.²¹² In reaching this conclusion, however, these justices have engaged in the kind of “judicial activism” which must be avoided: disregarding congressional and constitutional intent by judicially rewriting section 2 of the Voting Rights Act.²¹³ In short, this Article argues that these criticisms largely are misplaced, and constitute little more than a fatal misapprehension of the important role that judges must play in regulating the political process under the consent model of democracy. These critics have turned Madisonian democracy on its head.

Under the consent theory of democracy, it is up to the courts to strike an appropriate balance between two polar opposites: absolute respect for majority rule (at the expense of minority rights), and unfettered attempts to achieve the fairest or best results for minority groups (at the expense of majority rule). History shows that the Supreme Court has a mixed record in reaching a plausible middle ground.²¹⁴ Yet, that is no reason for the Court to give up on ensuring there is full protection for equality of opportunity of all voters, including minority groups that are fenced out of the democratic processes and outcomes by a powerful, self-interested majority: “What is demanded is a way of allowing the Court to contribute to the process of democratic rule in a manner that neither minimizes its potential contributions nor gives the Court the right to rule against that democratic will which it was designed to inform.”²¹⁵ The issue of how the Court strikes that balance remains.

The judicial referee analogy provides some guidance. Kathleen Sullivan has pointed out that, under a republican system of government, citizens as “voters . . . are, collectively, the final referees or judges of political contests.”²¹⁶ This statement is accurate, to the extent it embodies the republican principles of consent of the governed and majority rule. In this sense, then, the people are referees over who serves in government. On the other hand, as John Ely observed, the judiciary also acts as a referee, but in a different manner: Judges dispassionately oversee the process of selecting the people’s representatives, as well as the substantive outcomes those representatives generate through a “representation-reinforcing approach” envisioned by the Framers.²¹⁷ The extent to which judges must intervene is dictated

²¹² See *infra* notes 591-712 and accompanying text. See also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997) (describing the view of “textualism” in which “judges have no authority to pursue . . . broader purposes or write . . . new laws”).

²¹³ See *infra* notes 581-848 and accompanying text.

²¹⁴ See *supra* note 104; see also discussion *infra* notes 293-506 and accompanying text.

²¹⁵ AGRESTO, *supra* note 26, at 38.

²¹⁶ Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 674 (1997).

²¹⁷ ELY, *supra* note 95, at 88; see also League of United Latin Am. Citizens, Council No. 4434 v. Clements (“LULAC I”), 914 F.2d 620, 631 (5th Cir. 1990) (noting that judicial selection processes “determine the referees in our majoritarian political game”), *rev’d sub nom.* Houston Lawyers Ass’n v. Texas Attorney Gen., 501 U.S. 419 (1991). As discussed *infra* notes 326-506 and accompanying text, however, Ely is wrong in concluding that the judges can regulate the political process through a strictly process-based theory without having to engage in substantive decision-making.

by the play of the participants in the political process: the government administrators who are responsible for conducting elections, those who serve as elected representatives, as well as the people themselves. The more these participants depart from the rules of the game—concern and respect for the equal opportunity of all groups of voters to give their consent to government and receive fair treatment in substantive outcomes—the more the courts, as referees, must intervene. Of course, as a significant limitation on her power,²¹⁸ a judicial referee cannot do so without a case or controversy before her.²¹⁹ This restriction is akin to saying that judges cannot interfere at all with the political process or its outcomes unless there is a game which they have been designated to referee.

Assuming there is such a game, how does a judicial referee regulate consent in a principled manner? Preliminarily, the court must determine what right is alleged to have been violated: Has the claimant's right to ballot access been denied? Was her ballot given less weight than someone else's? Were there systemic defects that gave her group less opportunity than other groups of voters to elect the candidate of its choice? Did the majority in the representative body discriminate against her group by imposing unequal outcomes upon them? The source of authority for judicial intervention turns on this inquiry. When a judicial referee intervenes temporarily to stop the play in the voting rights arena, she looks to two sources for her rules: the Constitution and congressional enactments pursuant to the enforcement clauses of the Fourteenth and Fifteenth Amendments (especially the Voting Rights Act). The particular source of the referee's rules is critical, because it fixes the nature and scope of substantive decision-making in which the judicial referee can engage.

The Court has expansive powers in its interpretation of self-executing constitutional provisions governing the right to vote (namely, the first section of the Fourteenth and Fifteenth Amendments). Judges may establish *both the floor and the ceiling* (that is, the minimum and maximum extents) of rights secured under these sections. There are certain limits on the Court in this area of judicial decision-making. First, other provisions of the Constitution implicitly or explicitly might prevent a particular judicial interpretation.²²⁰ Second, the Court must interpret faithfully the self-executing sections in a manner consistent with their subject matter and constitutional purposes.²²¹ Third, to the extent it is possible,²²² the Court must

²¹⁸ This Article includes references to both "his" and "her." Unless the context of their use indicates otherwise, these possessive pronouns should be read as gender neutral.

²¹⁹ See U.S. CONST. art. III, § 2.

²²⁰ For example, a court could not interpret the Equal Protection Clause of the Fourteenth Amendment as requiring that noncitizens be allowed to run for president because of the express language to the contrary included in Article II of the Constitution. See U.S. CONST. art. II, cl. 5.

²²¹ For example, a court can find that discriminatorily denying a person the right to vote on the basis of his race is a violation of section 1 of the Fifteenth Amendment, but it cannot use that same provision as a basis for striking down a law which bars all blacks from receiving government benefits. The latter example would be unconstitutional under section 1 of the Fourteenth Amendment. There is some overlap between the Reconstruction Amendments, with denial of the right to consent frequently falling within the language of

abide by the principle of stare decisis²²³—for if the Court will not respect its own legal precedent, the other branches of government and the people at large will have no reason to do so. Fourth, from a more practical perspective, if the Court's constitutional interpretations depart too much from the will of the people, those interpretations may be subject to modification by constitutional amendment. Moreover, while neither the executive nor legislative branches can diminish the power of the judiciary over the self-executing provisions, they might narrow the efficacy of the Court's powers by refusing to fund or prosecute enforcement actions.²²⁴ In this manner, the totality of these restrictions can circumscribe the Court from engaging in overly expansive interpretations of the self-executing sections.²²⁵

both the Fourteenth and Fifteenth Amendments. The Court's decision in *Gomillion v. Lightfoot* provides a good example of this overlap. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *infra* notes 425-31 and accompanying text.

²²² Stare decisis should not prevent the Court from overruling precedent that has been decided in a manner which is inconsistent with the Constitution. For example, the Court did not simply choose to overrule the doctrine of "separate but equal" established in *Plessy v. Ferguson*, 163 U.S. 537 (1896), when it decided *Brown v. Board of Education*, 347 U.S. 483 (1954)—the Constitution compelled it to do so. See generally *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are unworkable or are badly reasoned '[the] Court has never felt constrained to follow precedent.'" (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

²²³ See BLACK'S LAW DICTIONARY 1406 (6th ed. 1990) (defining stare decisis: "To abide by, or adhere to, decided cases").

²²⁴ Unfortunately, the legislative and executive branches can undermine the Court's ability to protect the consent of all voters, even when there is no question that an unconstitutional exclusion of certain voters has occurred. This lack of enforcement is one reason why blacks largely were denied the ability to cast ballots in elections even after the Reconstruction Amendments were ratified. See generally *Giles v. Harris*, 189 U.S. 475, 488 (1903)

(The bill imports that the great mass of the white population intends to keep the blacks from voting. . . . [R]elief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.).

See also *supra* note 206. The 1975 amendments to the Voting Rights Act helped to reduce the effects produced by the lack of official enforcement of voting rights. The amendments included a fee-shifting provision to encourage individual citizens to act as "private attorneys general" in the enforcement of claims brought under the Act. See Pub. L. No. 94-73, 89 Stat. 400, 404 (1975); S. REP. NO. 94-295, at 40-43 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 806-10; see also Martha S. Davis, *Attorney Fee Awards in Voting Rights Litigation*, 34 S.D. L. REV. 303 (1989) (elaborating on the private attorneys general concept).

²²⁵ As Emma Jordan pointed out in two separate articles published in 1985, however, there is little danger that the Court will engage in an overly expansive definition of the right to vote protected by the Fifteenth Amendment. In fact, the Court's narrow interpretation of the Amendment has led to the opposite result. Jordan proposes that the courts should exercise a more "direct role . . . in defining the nature of the protection afforded under the [F]ifteenth [A]mendment," instead of leaving that task almost entirely to Congress. Emma C. Jordan, *The Future of the Fifteenth Amendment*, 28 HOW. L. J. 541, 545 (1985); see also Emma

Conversely, judges are much more limited in their interpretative powers over congressional legislation passed under the enforcement sections of the Fourteenth and Fifteenth Amendments.²²⁶ The legislative and judicial history of the Reconstruction Amendments shows that the Court can set the *floor but not the ceiling* of rights secured under these sections.²²⁷ The enforcement sections of the Reconstruction Amendments expressly provide for a continuing congressional role in the protection of consent.²²⁸ In one sense, then, they are no different than congressional powers extant in the Necessary and Proper Clause of the Constitution.²²⁹ But in another more important sense, they recognize that the Court's lengthy history—which at times has demonstrated the Court's reticence to assume fully the mantle of protecting minorities from majority factionalism—requires a more active congressional role. Reading the three Reconstruction Amendments together demonstrates that the only way for Congress to fulfill its role is to have broad enforcement powers.²³⁰ It is up to Congress to pass comprehensive legislation to

Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 390 (1985) (“[T]he conceptual failure of the United States Supreme Court and commentators to fulfill the promise of fair and effective representation is due to a persistent refusal to embrace fully the independent rights afforded by the [F]ifteenth [A]mendment.”).

²²⁶ See Mathews, *supra* note 180, at 97-126 (discussing judicial interpretation of enforcement actions under the Fifteenth Amendment).

²²⁷ See *supra* notes 173, 202-06 and accompanying text.

²²⁸ See *supra* notes 173, 202-06 and accompanying text.

²²⁹ U.S. CONST. art. I, § 8, cl. 18. As Madison observed: “Without the *substance* of this power, the whole Constitution would be a dead letter.” THE FEDERALIST NO. 44, *supra* note 46, at 284 (James Madison).

²³⁰ The Supreme Court recognized as much in affirming the constitutional validity of the Voting Rights Act of 1965. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), Chief Justice Warren observed that section 2 of the Fifteenth Amendment allowed Congress to “use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.” *Id.* at 324. Consequently, the expansive test used for congressional enactments under the Necessary and Proper Clause applied to legislation passed pursuant to the Fifteenth Amendment: “Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Id.* at 326 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)); see also *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (affirming the constitutionality of section 4(e) of the Voting Rights Act and holding that section 5 of the Fourteenth Amendment similarly granted Congress “the same broad powers expressed in the Necessary and Proper Clause”).

In its five-to-four decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court struck down provisions in the Voting Rights Act Amendments of 1970 that extended the right to vote to 18-year olds in state and local elections. *Id.* at 118, 124-31. The holding in *Mitchell* clarified that the judiciary, not Congress, was responsible for defining the scope of the self-executing section 1 of the Fourteenth Amendment, and that Congress could not exercise unlimited enforcement powers under section 5 of the Fourteenth Amendment. See *id.* At least

one commentator has argued, in light of *Mitchell*, that the enforcement clauses of the Reconstruction Amendments preclude Congress from defining substantive rights at all, suggesting a retreat from the expansive language of *Morgan*. See Donald Francis Donovan, Note, *Toward Limits on Congressional Enforcement Power Under the Civil War Amendments*, 34 STAN. L. REV. 453 (1982). But see Archibald Cox, *The Supreme Court 1965 Term—Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) (arguing that the holding in *Mitchell* does not restrict the broad recognition of congressional powers under the enforcement sections provided by the decision in *Morgan*). Such a limitation would be inconsistent with the legislative intent of the Reconstruction Amendments. The judiciary clearly has the exclusive purview to determine the scope of the self-executing, substantive sections, and Congress cannot narrow the rights the Court has defined under these sections. See generally *Katzenbach v. Morgan*, 384 U.S. 641 (1966), in which the Court observed:

Section 5 [of the Fourteenth Amendment] does not grant Congress power to exercise discretion in the other direction and to enact “statutes so as in effect to dilute equal protection and due process decisions of this Court.” We emphasize that Congress’ power under Section 5 is limited to adopting measures to enforce the guarantees of the Amendment; *Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees*. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by Section 5—a measure “to enforce” the Equal Protection Clause since that clause of its own force prohibits such state laws.

Id. at 651-52 n.10 (emphasis added). By the same token, however, the legislative history also indicates that Congress can broaden the scope of substantive rights under the Amendments pursuant to the enforcement sections. This conclusion is inescapable in the face of congressional skepticism over the ability of the judiciary to enforce adequately the self-executing provisions of the Reconstruction Amendments at the time of their passage. See *supra* notes 173, 205 and accompanying text. Of course, application of the *McCulloch* test shows that congressional power under the enforcement sections is circumscribed further in two respects. First, under its enforcement powers, Congress cannot enact legislation which either explicitly or implicitly is inconsistent with another provision of the Constitution. Second, the congressional enactment must be within the subject matter of the particular amendment. See generally *City of Boerne v. P.F. Flores*, 117 S. Ct. 2157 (1997) (striking down the Religious Freedom Restoration Act of 1993 as exceeding congressional enforcement powers). The Court in *Flores* observed:

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment].”

Id. at 2164. Therefore, it seems that one can reconcile *Mitchell* with *Morgan* simply by concluding that extension of the franchise to 18-year olds in state and local elections was not within the proper scope of the Fourteenth Amendment. Such a conclusion certainly is consistent with the legislative history of the Amendment, which does not contain an affirmative grant of the right to vote. See *supra* notes 196-98 and accompanying text. For an interesting treatment of the congressional powers under *Morgan*, see generally Stephen L.

effectuate consent as required by the presence of majority tyranny²³¹ and the ebb and flow of the Court's interpretations of the self-executing sections of the Reconstruction Amendments.²³² When the Court fails to respect the scope of *congressional protection* under the enforcement sections (something that the Framers of the Amendments undoubtedly anticipated),²³³ Congress is empowered to expand or retract that protection. That is precisely what happened when Congress passed the 1982 amendments to the Voting Rights Act in response to the Supreme Court's narrow interpretation of section 2 in *Bolden*.²³⁴

In determining whether or not the asserted right fits within a particular set of rules, the judicial referee is forced to give content to those rules, subject to the limitations just discussed. The reason for such judicial decision-making is quite simple; the problem with these rules is that they are very general, and not self-applying. What does it mean to say that "[n]o State shall . . . deny to any person within its jurisdiction the *equal protection* of the laws?"²³⁵ When does a group of voters "have *less opportunity* than other members of the electorate to participate in

Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986) ("The *Morgan* power . . . is best understood as a tool that permits the Congress to use its power to enact ordinary legislation to engage the Court in a dialogue about our *fundamental* rights, thereby 'forcing' the Justices to take a fresh look at their own judgments.").

²³¹ Although Congress itself is one "majority," the majority referred to here is majority tyranny in particular localities, especially the South. At the same time, it is clear that Congress can (and often does) pass legislation that reflects tyranny of the majority over racial and ethnic minority groups. The Framers of the Fifteenth Amendment recognized that possibility when they chose to enact a constitutional amendment protecting the right to vote in lieu of statutory protection that easily could be taken away by a subsequent Congress. See *supra* note 184; see also *supra* note 179 and accompanying text (explaining that a constitutional amendment also was passed because of fears that any statutory enactment protecting the right to vote would be an unconstitutional infringement of state power to determine voter qualifications).

²³² For example, in *Lassiter v. Northampton County Election Board*, 360 U.S. 45 (1959), discussed *infra* notes 363-65 and accompanying text, the Court held that literacy tests which are not discriminatory on their face or in their effect are constitutional under the Fourteenth Amendment. Congress responded by enacting § 4(a) of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 438, which created a per se ban on literacy tests in certain jurisdictions "covered" under § 4(b) of the Act. In *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), the Court upheld this ban as a proper exercise of congressional power pursuant to its enforcement powers under section 2 of the Fifteenth Amendment. *Id.* The Court reached the same conclusion when Congress extended the ban in the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314. See *Oregon v. Mitchell*, 400 U.S. at 112. For an additional discussion of the use of congressional enforcement powers to expand protection for voting rights, see *City of Rome v. United States*, 446 U.S. 156, 173-78 (1980).

²³³ See *id.*

²³⁴ See *infra* notes 551-59 and accompanying text.

²³⁵ U.S. CONST. amend. XIV, § 1 (emphasis added).

the political process and to elect representatives of their choice?"²³⁶ Judicial referees of necessity must make substantive decisions about when to apply these rules. It is not possible (or even desirable) to use bright-line tests because the factual circumstances of each case must be evaluated to discern whether majority rule has subsumed the ability of a group of voters to give their consent. By analogy, when a referee in a football game calls "defensive pass interference," he has not created the rule that it is wrong for a defensive player to deter excessively the ability of the intended receiver to catch the ball. At the same time, however, the referee must make a substantive decision as to whether the defensive player has made a great play or has acted too aggressively; this decision, and others like it, gives content to the rule. The same holds true for judicial referees. There are many close calls and, sometimes, the judicial referees make mistakes. Nevertheless, the key is for the judiciary properly to assume its role as referee over the political process²³⁷ without exercising unfettered discretion "in construing the rules of the game" and, thereby, "acting as a referee while out on the playing field."²³⁸

In the case of voting rights, the judicial referee should give substantive meaning to the governing rules consistent with the consent model of democracy. Because courts cannot avoid substantive decision-making in defining and protecting the right to vote, this Article urges courts to make their decisions in accordance with the consent model, which always has been a fundamental basis of the United States' democratic system.²³⁹ But how does the judicial referee give content to the rules? The referee does so by asking two related questions. First, has the consent of a particular individual or group been denied?²⁴⁰ This inquiry can be quite simple when

²³⁶ 42 U.S.C. § 1973(b) (1994) (emphasis added).

²³⁷ Cf. Stephen L. Carter, *The Right Questions in the Creation of Constitutional Meaning*, 66 B.U. L. REV. 71, 73-74 (1986) ("Although judges and scholars sometimes forget the fact, the courts take their authority from and act within that integrated structure [of checks and balances and the sharing of power] even as they interpret it, and therefore ought to be self-consciously reserved about the tension between their dual roles as player and referee.").

²³⁸ *Id.* at 74; see also ELY, *supra* note 95, at 103 ("[T]he referee is to intervene only when one team is gaining unfair advantage, not because the 'wrong' team has scored.").

²³⁹ See *supra* notes 61-506 and accompanying text.

²⁴⁰ There has been widespread disagreement about whether the right to vote is an individual right, a group right, or both. Compare ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 7 (1987) ("In the American constitutional tradition, it is often said, there are no group rights to representation."); James U. Blackscher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 HOW. L.J. 633, 681 & n.222 (1996) (declaring that voting is an individual right); James U. Blackscher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 48 (1982)

(It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political association that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.);

and Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 53-54 (asserting that voting is an individual right, and "protection against vote dilution is an individual right with a group dimension, but not a group right"); *with* Bush v. Vera, 517 U.S. 952 (1996) (identifying justices who believe that redistricting is a group right); GUINIER, *supra* note 16, at 125 & n.21 (stating that voting is a group right); Abrams, *supra* note 56, at 453-54 (stating right to vote in context of vote dilution is a group right); T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 600-01 (1993) (declaring that voting is a group right); Alexander M. Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970S, at 57, 59 (Nelson W. Polsby ed., 1971) ("We have, since Madison, realized that people tend to act politically not so much as individuals as in groups."); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1599 & n.37 (1993) ("I take the position that the right of the individual to participate politically is a right best realized in association with other individuals, i.e., as a group."); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 884 (1995) ("[T]he right to effective voting is incomprehensible without that conception of the group."); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1856-59 (1992) [hereinafter Issacharoff, *Polarized Voting*] (stating that voting is a group right), and *with* Bruce Cain, *Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist, and Reformer*, in POLITICAL GERRYMANDERING AND THE COURTS 117, 130 (B. Grofman ed., 1990) [hereinafter GERRYMANDERING] (stating that representation is both a group and an individual right, but voting rights protected under Voting Rights Act embody a group rights/compensating position); Samuel Issacharoff, *The Redistricting Morass*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 214 ("Once the conditions of equal weight and access to the ballot are satisfied, there is little in the way of individual rights that concerns the electoral process. Attention must at this point shift to group rights to differentiate a fair from an unfair system."); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 248-53 (1993) (asserting that voting is a right of both the individual and the group); Karlan, *supra* note 51, at 1709-20 (explaining that voting is a continuum, ranging from the individual right to cast a ballot, a group right to aggregate with other like-minded individuals to elect a candidate of choice, and both an individual and a group right to practice decision-making through representatives); Anthony A. Peacock, *Voting Rights, Representation, and the Problem of Equality*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 7 ("To the extent that the VRA guarantees more than the right to cast a ballot, allowing claims for minority vote dilution, it protects group rights."); Mark E. Rush, *The Price of Unclear Precedents: Shaw v. Reno and the Evolution of Voting Rights Jurisprudence*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 37-38 (describing a "multifaceted voting right," with ballot and primary access an individual right, and vote dilution a group right). *See generally* Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 9, at 262-64 (observing that proponents of proportional systems emphasize group rights, while proponents of majoritarian systems view voting rights in the context of individuals). This Article affirms the beliefs of those who conclude that voting rights are both an individual and a group right. Determination of which one it is depends upon the particular factual circumstances. As Part II demonstrates, the closer the asserted right approaches access to the ballot, the more likely it should be treated

the case involves individual access to the ballot: whether the person in question has been allowed to cast her ballot. In sharp contrast, the closer the inquiry moves to election or legislative outcomes, the more difficult it is to establish whether consent has been denied. Nevertheless, it is still possible for a judicial referee to discern whether a violation of consent has occurred through an examination of circumstantial evidence of its warning signs. For example, in vote dilution cases brought under section 2 of the Voting Rights Act (requiring examination of election outcomes),²⁴¹ the Senate Report identified a number of factors to be considered, including the extent of racial polarization in elections, whether particular features of the voting system in question enhance the possibility of discrimination, the extent of electoral success, and so forth.²⁴² Similarly, legislative outcomes can be evaluated to determine whether the legislature has meted out different treatment to a particular

as an individual right. See *infra* notes 281-580 and accompanying text. In contrast, group rights exist the more the asserted right requires an inquiry into voting outcomes. For example, in the context of vote dilution claims, which are rested upon an examination of election outcomes, it only can make sense to talk of voting rights in the context of group rights. After all, it is incongruous for an individual person to say, "My vote was diluted by the 300,000 people who voted for the other guy"; instead, it is more accurate for that person to say, "I am a member of a group of 150,000 black voters that consistently is outvoted by a group of 300,000 white voters that does not worry about political accountability to us." As will be discussed in further detail, Congress expressly adopted a group-rights focus when it outlawed vote dilution in the 1982 amendments to the Voting Rights Act. See *infra* notes 564-66 and accompanying text.

²⁴¹ The importance of identifying the source of protecting consent cannot be overemphasized. Vote dilution challenges brought under the self-executing sections of the Fourteenth and Fifteenth Amendments are subject to the much more rigid evidentiary standard enunciated in *Washington v. Davis*, 426 U.S. 229, 239-42 (1976), which requires proof of discriminatory purpose in the establishment or maintenance of the challenged electoral system or feature.

²⁴² See S. REP. NO. 417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N.177, 206-07; see also *supra* notes 549, 569-74 and accompanying text. In his *Holder* concurrence, Justice Thomas contended that the *White-Zimmer* factors outlined in the Senate Report provide nothing more than "a list of possible considerations that might be consulted by a court attempting to develop a gestalt view of the political and racial climate in a jurisdiction, but a list that cannot provide a rule for deciding a vote dilution claim." *Holder v. Hall*, 512 U.S. 874, 938 (1994) (Thomas, J., concurring). He then went on to conclude that the only rule of decision available to reviewing courts is a mathematical resort to proportionality. See *id.* at 939-45. Justice Thomas is in error. No mechanical rule of decision, whether it is proportionality or something else, can be used adequately to evaluate whether consent has been denied wrongfully. As will be shown in Part II, see *infra* notes 281-580 and accompanying text, that is precisely why courts must engage in a functional approach, closely looking at the specific facts of the challenged voting structure or mechanism and its effect on consent, without undue reliance on any single factor. Lack of proportionality might be indicative of a problem, but it is not sufficient by itself to prove a violation of section 2. See 42 U.S.C. § 1973(b) (1994); *Johnson v. DeGrandy*, 512 U.S. 997, 1011-12 (1994).

group for irrational or unacceptable reasons. The line-drawing here is not an exact science, but it still is possible.

Second, the judicial referee must ask whether the denial of consent is permissible. This question forces an inquiry into what "consent" requires to ensure the legitimacy of outcomes. In a very fundamental sense, actual consent must be given.²⁴³ Actual consent, however, does not mean that a failure to cast a successful vote (i.e., one in which the voter's chosen candidate or issue prevails) has denied a person of her right to vote.²⁴⁴ Absent unanimity, there always are going to be some voters who are on the losing side in an election.²⁴⁵ Moreover, to the extent that elections measure consent, they "do not establish it for long" because "[m]asses of people do not make clear-cut, long-range decisions."²⁴⁶ Instead, actual consent is denied when the political system either precludes an individual from casting a ballot (either completely or at the stage of the election when the decision actually is made),

²⁴³ See, e.g., HARRY BERAN, *THE CONSENT THEORY OF POLITICAL OBLIGATION* 149 (1987); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 100 (1975).

²⁴⁴ Justice Thomas has suggested that this is the meaning of actual consent. See *Holder*, 512 U.S. at 899 (Thomas, J., concurring) (criticizing the Court's approach in vote dilution cases, in which "votes that do not control a representative are essentially wasted; those who cast them go unrepresented and are just as surely disenfranchised as if they had been barred from registering"). Justice Thomas's criticism echoes the Tories' attacks on actual consent. See *supra* note 67. For a critique of actual consent, see JOHN RAWLS, *A THEORY OF JUSTICE* 13, 337 (1971); JULES STEINBERG, *LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT* 120 (1978). See also BERAN, *supra* note 243, at 56-58 (summarizing and critically analyzing the views of Hume, Rawls, and Steinberg).

²⁴⁵ Cf. STEPHEN NATHANSON, *SHOULD WE CONSENT TO BE GOVERNED?* 114 (1992) ("How should we interpret the requirement that governments must be consented to in order to be just? If we take this to mean that a government or law is legitimate only if every person under its jurisdiction consents to it, then we are led to . . . anarchis[m]."); Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 653 n.213 (1997) ("[T]he presence of involuntary members is necessary for a 'public' organization."). As Professor Samuel Issacharoff observed:

Nor can the problem of identifying individual voting rights be packaged as the right to vote for a winning candidate. In any contested electoral system this condition cannot be satisfied. Some voters will fail to have their electoral preferences satisfied if elections are to have any meaning. Indeed, if the right to vote for a winning candidate were a genuine condition for democratic rule, the former Soviet Union would have the upper hand since all voters in a one-party election system are guaranteed the ability to vote for the winning candidate—and only the winning candidate.

Samuel Issacharoff, *The Redistricting Morass*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7, at 214.

²⁴⁶ BICKEL, *supra* note 243, at 16; see also EPSTEIN, *supra* note 70, at 137-38 (noting Rousseau's criticism that consent in Great Britain—which was exercised only when the people elected members of Parliament—was insufficiently democratic, and that this criticism also could be made of consent in the United States).

or bars a sufficiently large and cohesive group of voters²⁴⁷ from having an equal voice in or ability to affect the decision-making process.²⁴⁸ Such a systematic denial of actual consent ultimately renders the government outcomes illegitimate.²⁴⁹

The need for actual consent raises a related question: Must a minority group be required to give assent through its own representative, or can someone else represent the group's interests in government? The answer depends upon the context of the minority group's ability to participate in government. Clearly, there is no requirement that a minority group have "descriptive representation," whereby the representative is like the members of the group when he "stands for" them.²⁵⁰ In fact, descriptive representation by itself can disserve minority groups whose representatives need support from the majority in order to get preferred substantive outcomes.²⁵¹ In many cases, therefore, it is possible for a minority group to be represented by officials they either could not (because they lived in a different district) or did not elect. In this sense, consent can be satisfied through virtual representation and not actual representation²⁵²—"substantive representation"²⁵³ by

²⁴⁷ See generally *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (requiring section 2 plaintiffs to show they belong to a minority group which is sufficiently large and geographically compact to form a majority in a single-member district, minority political cohesiveness, and majority bloc voting). Limited protection, however, is afforded under the consent democracy model even to groups that are too small to elect a representative or influence policy decisions made in the legislature. Majority factionalism cannot deprive members of that group of their constitutional right to receive nondiscriminatory outcomes. See *supra* notes 460-62, 475-83 and accompanying text.

²⁴⁸ Obviously, actual consent also can be denied in other ways. For example, the Court has recognized as a "fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud." *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

²⁴⁹ See *BICKEL*, *supra* note 243, at 107-11; *ELY*, *supra* note 95, at 103 (describing "malfunctions" in which the "the process is undeserving of trust" when it excludes or disadvantages the political "outs"); *supra* note 115.

²⁵⁰ See *HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION* 60-91 (1967). John Adams was a proponent of descriptive representation, arguing that a representative legislature "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them." *Id.* at 60 (quoting Letter from John Adams to John Penn (Jan. 1776), reprinted in 4 *JOHN ADAMS, THE WORKS OF JOHN ADAMS* 205 (Boston, Little, Brown & Co., 1865)). See also *infra* notes 255, 485, 554, 640 and accompanying text.

²⁵¹ See *CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 189 (1993).

²⁵² See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (suggesting that virtual representation is sufficient because "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district"); see also *GUINIER*, *supra* note 16, at 130-32 (discussing virtual representation in the context of redistricting); Samuel Issacharoff, *The Redistricting Morass*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7, at 216 (discussing the assumptions of virtual representation in the context of redistricting).

²⁵³ *SWAIN*, *supra* note 251, at 5 (describing substantive representation as "the

someone "acting for" the interests of the minority group.²⁵⁴ By the same token, however, fair representation is not enough. If members of a minority group are denied an equal opportunity to participate in the process of selecting representatives of their choice (all they have is virtual or descriptive representation), then all government outcomes, regardless of how fair or unfair they may be, are illegitimate.²⁵⁵ Actual consent demands, therefore, that minority groups have an equal opportunity to participate in the democratic process and an equal voice in government decision-making, regardless of whether members of that group actually have elected representatives.

Assuming that consent has been denied for impermissible reasons, the judicial referee then must engage in her most difficult task under the Madisonian model: Namely, she must balance protection of the minority group's right to consent against the principle of respecting majority rule. This issue is the key point at which critics rage the most against the temerity of the least representative branch engaging in substantive decision-making.²⁵⁶ But it is at this time, more than any other, that the unique position of the judiciary in the United States' constitutional framework demands *more, not less, judicial decision-making*. Madison recognized as much.²⁵⁷ This process is not as open-ended as it sounds. The reviewing court is constrained to stay within the bounds of authority delegated to it by the constitutional or statutory source of its power.²⁵⁸ In addition, the factual record must be sufficient to persuade the referee that a judicial intrusion into the political arena is necessary.²⁵⁹ Finally,

correspondence between representatives' goals and those of their constituents").

²⁵⁴ See PITKIN, *supra* note 250, at 112-43.

²⁵⁵ See *supra* notes 114-15; see also *supra* notes 457-506, 507-80 and accompanying text. For an example of descriptive representation that denies consent because it is not "actual representation," see *infra* note 701. See also *Solomon v. Liberty County, Florida*, 865 F.2d 1566, 1581 (11th Cir. 1988) (noting that a black candidate, "although black, may not have been perceived as a black candidate"), *vacated*, 873 F.2d 248 (11th Cir. 1989) (en banc), and *cert. denied*, 498 U.S. 1023 (1991).

²⁵⁶ See, e.g., *infra* notes 591-629 (discussing Justice Thomas's *Holder* concurrence).

²⁵⁷ See *supra* notes 94-118.

²⁵⁸ See *supra* notes 167-74, 195-206, 220-234 and accompanying text.

²⁵⁹ In fact, at least two circuits (the Fifth and Eleventh) require district courts reviewing vote dilution cases to make detailed findings of fact pursuant to Federal Rule of Civil Procedure 52(a). See, e.g., *League of United Latin Am. Citizens, Council No. 4552 v. Roscoe Indep. Sch. Dist.*, 123 F.3d 843, 846 (5th Cir. 1997); *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979), *vacated on other grounds*, 704 F.2d (5th Cir. 1983); see also *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (adopting as precedent the decisions of the Fifth Circuit issued prior to October 1, 1981). These detailed findings facilitate appellate review by allowing the reviewing court to determine whether an "intensely local appraisal" of the voting system or structure demonstrates a sufficient denial of consent, when compared to the principle of respecting majority rule, to warrant a judicial intrusion into the political arena. *Thornburg v. Gingles* held that appellate courts were to apply the clearly erroneous standard when engaging in this inquiry. See *Thornburg v. Gingles*, 478 U.S. 30, 77-79 (1986) (citing *White v. Regester*, 412 U.S. 755, 769-70 (1973)).

before the will of the majority can be set aside, a remedy must be available to ameliorate the denial of consent.²⁶⁰ Nevertheless, even with these constraints, many cases will not lend themselves to a ready solution between the opposing principles of protecting minority consent and respect for majority rule. Under such circumstances, a judicial referee must weigh the value of sustaining one principle against the damage it will do to the political system or structure in question by ruling against the other.²⁶¹ There is no escaping substantive decision-making.²⁶² The fact that the decisions to be made are difficult and might have sweeping implications is no reason for the judicial referee to avoid his constitutional duty.²⁶³ If a court fails

²⁶⁰ At the same time, however, a judicial referee must avoid giving so much deference to the state or local government's interest in the electoral scheme that he or she appears unwilling to allow any changes to that scheme. Reaching a different conclusion leads to the extreme interpretations taken by the Supreme Court in *Holder v. Hall*, 512 U.S. 874 (1994), and the Fifth and Eleventh Circuits, which essentially have held that a vote dilution claim can be defeated by showing the absence of a remedy within the confines of the *existing* electoral structure. See *infra* notes 649-59, 811-35 and accompanying text.

²⁶¹ Cf. *Houston Lawyers' Ass'n v. Texas Attorney Gen.*, 501 U.S. 419, 426-27 (1991) ("[T]he State's interest in maintaining an electoral system . . . is a legitimate factor to be considered by courts among the 'totality of the circumstances' in determining whether a § 2 violation has occurred."). But see Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 376 ("Balancing the state's interest in the challenged practice against evidence of racial vote dilution is at odds with the express language of the [Voting Rights] Act, with the legislative history of the 1982 amendment to [s]ection 2, and with prior judicial decisions."). As the majority in *LULAC II* observed, weighing a state's interest in a particular voting structure or mechanism in a vote dilution inquiry "is analogous to weighing the asserted state interest in constitutional law contexts." *League of Latin Am. Citizens, Council No. 4434 v. Clements* ("LULAC II"), 999 F.2d 831, 871 (5th Cir. 1993) (en banc). Nevertheless, an important caveat on consideration of the state's interest is that it "does not automatically, and in every case, outweigh proof of racial vote dilution," *Houston Lawyers' Ass'n*, 501 U.S. at 427, a point apparently lost on the Fifth and Eleventh Circuits. See *infra* notes 811-834 and accompanying text.

²⁶² See *infra* note 333; cf. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 143-44 (1993) ("[D]emocracy is far from a self-defining idea . . . Courts need a quite particular conception of democracy in order to decide cases."); LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 66 (1991) ("Constitutional value choices cannot be made . . . without recourse to a system of values that is at least partly external to the constitutional text."); Carter, *supra* note 237, at 82 ("Like it or not, meaning is created, not simply found, when a judge interprets the Constitution; the interpreting judge engages in an act of creation.").

²⁶³ The Court has held in the context of political gerrymanders that the difficulty of those cases does not prevent their adjudication:

It is true that the type of claim that was presented in *Baker v. Carr* was subsequently resolved in this Court by the formulation of the "one person, one vote" rule. The mere fact, however, that we may not now similarly perceive a likely arithmetic presumption in the instant context does not compel a conclusion that the claims presented here are nonjusticiable. The one person, one vote

to fulfill its responsibilities simply to avoid engaging in questions of democratic theory, it undermines, rather than enhances, one the most basic principles of Madisonian democracy—that the judiciary is to be the guardian of consent by ALL THE GOVERNED.

Moreover, when a court declines to act at all in a particular instance, it also has made a substantive decision.²⁶⁴ Ronald Dworkin refers to this decision as the “majoritarian default” position in constitutional law, upon which judges rely “when the going gets too tough.”²⁶⁵ Dworkin argues that it is erroneous to say that a reviewing court avoids adopting a particular democratic theory by respecting the majoritarian position of the legislature. In fact, such a court *is* adopting a democratic theory, one which says that the decision of the majority wins.²⁶⁶ For many years, the Court applied the majoritarian default to voting rights claims through its reliance on the political question doctrine outlined in *Colegrove v. Green*.²⁶⁷ It soon became evident, however, that the default position resulted in some extraordinarily unfair

principle had not yet been developed when *Baker* was decided. At that time, the Court did not rely on the potential for such a rule in finding justiciability. Instead . . . the Court contemplated simply that legislative line drawing in the districting context would be susceptible of adjudication under the applicable constitutional criteria.

Davis v. Bandemer, 478 U.S. 109, 123 (1986) (citations omitted).

²⁶⁴ See generally Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 963 (1988) (“Failure to decide is itself a decision, and one that often can have undesirable future impact.”). A rather stark example of how such a nondecision is itself a decision recently occurred when the Supreme Court denied certiorari in *United States v. Hatter*, 117 S. Ct. 39 (1996). In *Hatter*, the Federal Circuit held that withholding social security taxes from the salaries of federal judges who took office before those taxes were imposed in 1983 diminished judicial salaries in violation of the Compensation Clause of the United States Constitution. See *Hatter v. United States*, 64 F.3d 647 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 39 (1996). To the extent that their salaries had been diminished by the taxes, the judges were entitled to reimbursement and interest on the amount of diminution they had suffered. See *Hatter v. United States*, 38 Fed. Cl. 166 (1997) (holding on remand). When the Supreme Court was presented with the issue in a petition for certiorari, four justices who believed they might have a financial interest in the case disqualified themselves. See Richard Carelli, *Some U.S. Judges Won't be Required to Pay Routine Taxes—Supreme Court Sees Conflict for Members*, BOSTON GLOBE, Oct. 8, 1996, at A3. The result was that the Court lacked the quorum of six justices required to decide the case, mandating summary affirmance pursuant to Title 28 of the United States Code, 28 U.S.C. §§ 1, 2109 (1994). See *Hatter*, 117 S. Ct. at 39. Consequently, this “non-decision” effectively enhanced the financial interests of the justices who recused themselves, even though that was purportedly the very reason that they had disqualified themselves from considering the petition in the first place.

²⁶⁵ See Ronald M. Dworkin, *Must Judges Really Be Philosophers?* (Nov. 10, 1997) (Owen J. Roberts Memorial Lecture presented at the University of Pennsylvania) (transcript on file with the *University of Pennsylvania Law Review*).

²⁶⁶ See *id.*

²⁶⁷ 328 U.S. 549 (1946).

outcomes, leading to the Court's repudiation, in *Baker v. Carr*,²⁶⁸ of the political question doctrine in legislative reapportionment cases.²⁶⁹

Consequently, there are at least some occasions when the majority's position should not prevail.²⁷⁰ It is in these particular cases that it is preferable to adopt what Dworkin calls the "constitutional conception of democracy":²⁷¹

Democracy means government subject to conditions—we might call these the "democratic" conditions—of equal status for all citizens. When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to other procedures that protect and respect them better. . . . Of course, it may be controversial what the democratic conditions, in detail, really are, and whether a particular law does offend them. But, according to the constitutional conception, it would beg the question to object to a practice assigning those controversial questions for final decision to a court, on the ground that that practice is undemocratic, because that objection assumes that the laws in question respect the democratic conditions, and that is the very issue in controversy.²⁷²

Nonetheless, there are limits on a court's use of constitutional review.²⁷³ It is possible to agree with Dworkin that judicial review requires us to "accept that the Supreme Court [and other courts] must make important political decisions"²⁷⁴ without

²⁶⁸ 369 U.S. 186, 208-37 (1962).

²⁶⁹ See *supra* notes 293-325 and accompanying text.

²⁷⁰ For an interesting argument to the contrary, see RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 104, 112-15 (1994) (suggesting that a "reinvigorated" majority of common people should establish rules governing the political process, not an anti-populist judiciary). See also Book Note, *A Constitution for the People*, 108 HARV. L. REV. 1196 (1995) (reviewing Parker's book).

²⁷¹ RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION* 17 (1996).

²⁷² *Id.* at 17-18; cf. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 628 (1969).

The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Id. For an additional discussion of constitutional democracy, see generally GUTMAN & THOMPSON, *supra* note 56, at 33-39.

²⁷³ See *supra* notes 220-25 and accompanying text.

²⁷⁴ Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 516 (1981). As Justice Jackson observed, "all constitutional interpretations have political consequences." ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 56

going a step further, as Dworkin does, to conclude that a judge's task is to interpret constitutional law in a manner that makes it the best law possible.²⁷⁵ Taken to that extreme, the judicial branch easily could destroy the republican principle of consent at the same time it interprets the law in an attempt to preserve the voice of the people.²⁷⁶ Instead, judicial referees must abide by the constitutional and practical constraints on their power to regulate the political arena.²⁷⁷

Robert Bork has argued that the will of the majority should be respected unless it "clearly runs contrary to a choice made in the framing of the Constitution."²⁷⁸ Bork is correct, except as to his cramped interpretation of what the Constitution protects.²⁷⁹ As discussed in the first two sections of this Part,²⁸⁰ the Framers of the Constitution and the Reconstruction Amendments chose to give the judiciary broad powers to protect minority consent from the tyranny of majority factionalism. At the same time, this section has shown that judicial referees are forced to make difficult substantive decisions about when to stop the play in the political arena and call a foul on one or more of the players. Bright-line interpretations of constitutional principles are not possible, and the judicial referee therefore gives content to these principles each time she applies them. In this sense, the rules of the game require a judicially active referee to translate the Madisonian compromise into political reality.

The next Part describes in detail how the Court has fared in its role as a referee in the political arena. It is apparent that the Court has evinced a great deal of confusion on how it is supposed to protect consent. On the one hand, the Court has made the sweeping substantive decision that consent—as well as its corollary of representation—requires equipopulous districts. The Court has seemed comfortable with this conclusion because, once the initial substantive choice is made, it limits judicial discretion to deciding simply whether a particular district complies with its rigid, formulaic rule of decision. On the other hand, after such a rule is in place, the Court has opted for a constrained approach: to protect consent only to the extent that it can do so through application of a rule which, like the "one person, one vote" standard, limits the ability of judges to make substantive choices. The resulting "process democracy" continuum of consent protection, which operates between the poles of access and outcome, marks a fundamental distortion of the constitutional

(1955) (emphasis added).

²⁷⁵ See RONALD DWORKIN, *LAW'S EMPIRE* 410-413 (1986) (summarizing Dworkin's conception of what "law" is, and how Hercules, "[a] judge of superhuman intellectual power and patience who accepts law as integrity," *id.* at 239, discovers it).

²⁷⁶ See Clifford Orwin & James R. Stoner, Jr., *Neoconstitutionalism? Rawls, Dworkin, and Nozick*, in *CONFRONTING THE CONSTITUTION*, *supra* note 71, at 456. For an additional critique of Dworkin's theory of judicial review, see, for example, JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 213-30 (William Rehg trans., 1996); SUNSTEIN, *supra* note 262, at 111-13, 145-46; TRIBE & DORF, *supra* note 262, at 17.

²⁷⁷ See *supra* notes 220-25 and accompanying text.

²⁷⁸ Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 11 (1971).

²⁷⁹ See *id.*

²⁸⁰ See *supra* notes 61-207 and accompanying text.

responsibilities of the judicial referee. Moreover, the discussion demonstrates how judges still must make value selections, even when they say they are not doing so.

II. IMPLEMENTING THE GUARANTEE OF CONSENT

As demonstrated in Part I, the Framers believed "the right of suffrage" is "a fundamental article of republican government,"²⁸¹ that must be protected by active judicial referees. The Supreme Court has been hesitant to view its role this broadly, however, and has, at times, questioned whether voting even is protected under the Constitution.²⁸² The right to vote is not mentioned explicitly in the Constitution.²⁸³

²⁸¹ THE FEDERALIST NO. 52, *supra* note 46, at 326 (James Madison).

²⁸² The Supreme Court has wrestled with this issue, often reaching contradictory conclusions. *Compare* Reynolds v. Sims, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."), and *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884) ("The exercise of the right [to vote] . . . is guaranteed by the Constitution, and should be kept free and pure by Congressional enactments whenever that is necessary."), with San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973) ("[T]he right to vote, *per se*, is not a constitutionally protected right."), and Harper v. State Bd. of Elections, 383 U.S. 663, 665 (1966) ("[T]he right to vote in state elections is nowhere expressly mentioned.")

²⁸³ The closest the Constitution comes to recognizing a right to vote is in Article I, section 2. *See generally* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."). Other constitutional provisions indirectly refer to the right to vote. *See generally* U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ."), amended by U.S. CONST. amend. XVII, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, elected *by the people* thereof." (emphasis added)); U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ."), amended by U.S. CONST. amend. XII (discussing the procedures used by the Electoral College to select the President and Vice President), and by U.S. CONST. amend. XX, § 1 (identifying the terms of the President and Vice President). Many commentators have said the source of the right to vote should rest in Article IV, section 4 of the Constitution, which guarantees the States a "republican form of government." *See, e.g.,* ELY, *supra* note 95; Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994); *infra* note 307; *see also* Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276, 298-99 (1985) (discussing Judge Wisdom's position in *Kohler v. Tugwell*, 292 F. Supp. 978 (E.D. La. 1968) (three judge panel) (Wisdom, J., concurring), *aff'd mem.*, 393 U.S. 531 (1969) (*per curiam*)); *Baker v. Carr*, 369 U.S. at 241-44 (Douglas, J., concurring) ("[T]he right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 . . ."). The Supreme Court thus far has rejected any reliance on the Guarantee Clause as a justiciable source for the right to vote. *See, e.g.,* *Colegrove v. Green*, 328 U.S. at 556; *Luther v. Borden*,

This ambiguity often has caused the Supreme Court's refusal to enter the "political thicket" of voting on the ground that to do so would require judicial determination of essentially "political questions."²⁸⁴ The Court, however, has since recognized that fundamental rights include those that are "explicitly or implicitly guaranteed by the Constitution."²⁸⁵ As a result of its unique status in being "preservative of other basic civil and political rights,"²⁸⁶ the right to vote, if not an explicit right, necessarily is an implicit constitutional right. It has been accorded this "extraordinary treatment because it is, in equal protection terms, an extraordinary right: A citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right to participate in the political process."²⁸⁷

If the right to vote is itself an implicit constitutional right, then that status would seem to require the courts to strike down any infringements depriving voters of the ability to enjoy full and equal participation in the political arena. Nevertheless, the Supreme Court has been reticent to exercise its enforcement powers even when the majority wrongfully has denied the consent of a minority. Instead, the Court has engaged in stringent regulation of the judicial referees themselves. To accomplish this end, the Court has designed to establish rigid, formulaic guidelines whenever possible. What has resulted is a hierarchy of voting rights, with the degree of protection for particular claims frequently turning on whether the violation of consent can be viewed as a deprivation of individual access to the political process. The closer a claim comes to the outright denial of the ballot, the more likely it will be protected.

This Part will illustrate how the Court has viewed voting rights under a process theory of democracy on a continuum between access and outcome. The first section highlights how the Court analytically has treated the idea of "one person, one vote" as akin to the most protected type of process democracy claim: a pure process or structural process right of individual access to the political system. However, the discussion of this line of cases also demonstrates that, notwithstanding the Court's characterization of the type of consent claim at stake, it really includes elements of every type of process and outcome democracy right.²⁸⁸ The second section evaluates the Court's protection for process democracy claims, which are based upon the principle that a voter cannot be said to have a voice in government if the process is unfair. It shows how the Court has accorded full protection for pure process democracy claims,²⁸⁹ less protection for quasi-structural and geography process

48 U.S. (7 How.) 1, 42 (1849). *But see* *New York v. United States*, 505 U.S. 144, 184-86 (1992) (suggesting the possibility of a justiciable claim under the Guarantee Clause).

²⁸⁴ *Colegrove*, 328 U.S. at 556; *see infra* notes 295-300 and accompanying text (discussing *Colegrove*).

²⁸⁵ *Rodriguez*, 411 U.S. at 33-34.

²⁸⁶ *Reynolds*, 377 U.S. at 562.

²⁸⁷ *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring).

²⁸⁸ *See infra* notes 312-14 and accompanying text.

²⁸⁹ *See infra* notes 347-84 and accompanying text.

claims,²⁹⁰ and little protection for perverted process claims.²⁹¹ At the other end of the continuum, parliamentary process rights are grounded in the view that a voter cannot have a meaningful voice in government if her representative actually cannot influence government decisions. Because parliamentary process democracy claims inherently are group-oriented and come into direct conflict with the principle of majority rule, the Court has left them unprotected except to the extent that legislative outcomes generated by that process implicate a constitutional right independent of the right to vote.²⁹²

A. Consent and "One Person, One Vote"

The Supreme Court has been most amenable to exercising its powers as judicial referee by regulating reapportionment.²⁹³ In doing so, the Court has reasoned that consent is at the heart of this representative government, and judicial intervention is necessary when consent of individual voters is weighted differently. In fact, the Court's conclusions are neither dictated expressly by language in the Constitution nor supported by the history of apportionment in this country. For almost 180 years of this nation's existence, the exclusive domain of reapportionment remained largely in the hands of the state legislatures.²⁹⁴ As a result, the Court's intrusion into this part of the political arena was dictated primarily by substantive decisions that the Court itself made: value choices to give some content to what "consent" means in this democratic system.

The Court initially refrained from making such content-laden judgments. In *Colegrove v. Green*, the plaintiffs sought to invalidate an Illinois congressional reapportionment plan because it lacked compactness of territory and equality of population.²⁹⁵ The Supreme Court affirmed the district court's order dismissing the suit for lack of jurisdiction.²⁹⁶ Justice Frankfurter, in a plurality opinion, found that

²⁹⁰ See *infra* notes 385-446 and accompanying text.

²⁹¹ See *infra* notes 447-56 and accompanying text.

²⁹² See *infra* notes 457-506 and accompanying text.

²⁹³ Reapportionment includes two separate elements: "apportionment," which "concerns how many seats each state should have," and "redistricting," which "concerns how the boundaries within each state should be drawn." DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 17 (1992); see also discussion *infra* note 464 (providing an alternative definition of "redistricting").

²⁹⁴ See U.S. CONST. art. I, § 4. The most notable exception to exclusive state control over reapportionment came in 1842, when Congress first enacted a law requiring that representatives be "elected by districts of contiguous territory equal in number . . . [to the state's entitlement], no district electing more than one representative." BUTLER & CAIN, *supra* note 293, at 24 (quoting Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491). The present law is codified at 2 U.S.C. § 2c (1967).

²⁹⁵ See *Colegrove v. Green*, 328 U.S. 549, 550-51 (1946). The population disparity between the most populous and least populous congressional districts in Illinois was approximately nine to one. See *id.* at 557, app. I.

²⁹⁶ See *id.* at 556.

the Court lacked competence over the issue, which was “of a peculiarly political nature and therefore not meet for judicial determination.”²⁹⁷ The plurality based its conclusion, in part, upon the reasoning of four justices in an earlier case,²⁹⁸ as well as history demonstrating that “glaring disparities have prevailed as to the contours and the population of districts.”²⁹⁹ Justice Frankfurter reasoned that “[c]ourts ought not to enter this political thicket,” and noted the proper forum for the plaintiffs to seek relief was through either their state legislature or Congress.³⁰⁰ By endorsing the so-called “political question” doctrine, the Court in *Colegrove*, in fact, adopted the majoritarian default position in order to “avoid” making a substantive choice.

The repudiation of the political question doctrine in *Baker v. Carr*³⁰¹ marked a significant recognition by the Court of its broad powers as a referee in the political arena. In *Baker*, the plaintiffs challenged a Tennessee state apportionment statute that had remained unchanged for over sixty years, effectively allowing a vote in one county to be worth as many as twenty-three votes in another county.³⁰² The Court acknowledged that simply because a “suit seeks protection of a political right does not mean it presents a political question.”³⁰³ Instead, the question turned on whether the Court’s exercise of judicial power would violate the separation of powers. Finding that it would not, the Court reasoned that the plaintiffs did not

ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy but simply arbitrary and capricious action.³⁰⁴

As a result, the Court held that reapportionment was a matter “amenable to judicial correction,” concluding that the alleged violation of the Fourteenth Amendment allowed the case to be “lifted . . . ‘into the conventional sphere of constitutional litigation.’”³⁰⁵

Once the Court recognized it could entertain a reapportionment challenge, what was its basis to sustain such a challenge? In *Reynolds v. Sims*,³⁰⁶ the Court grounded

²⁹⁷ *Id.* at 552.

²⁹⁸ *See id.* at 551-52. In *Wood v. Broom*, 287 U.S. 1 (1932), the Court declined to overturn a Mississippi reapportionment plan that created districts of unequal population. In a separate opinion, four justices opined that the case should be “dismissed for want of equity.” *Id.* at 8.

²⁹⁹ *Colegrove*, 328 U.S. at 555.

³⁰⁰ *Id.* at 556.

³⁰¹ 369 U.S. 186 (1962).

³⁰² *See* BUTLER & CAIN, *supra* note 293, at 29. While such population disparities are shocking, at least four states included some districts with up to *one hundred times* the population of other districts. *See id.* at 25.

³⁰³ *Baker*, 369 U.S. at 209.

³⁰⁴ *Id.* at 226.

³⁰⁵ *Id.* at 229-30 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

³⁰⁶ *See Reynolds v. Sims*, 377 U.S. 533 (1964).

judicial intervention on a broad-based need to protect consent. Preliminarily, the Court recognized the fundamental value of consent to the Madisonian model:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.³⁰⁷

Because consent is a cornerstone of government, the Court described the need to ensure all voters have an equal voice in the selection of their representatives:

There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted It also includes the right to have the vote counted at full value without dilution or discount.³⁰⁸

. . . .

[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . . Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen.³⁰⁹

Consequently, a state violated the consent of the governed when it provided that "the votes of citizens in one part of the State should be given two times, or five times, or [ten] times the weight of votes of citizens in another part of the State," thereby "effectively dilut[ing]" the vote of those in the "disfavored areas."³¹⁰ The fact that the Court had to protect the right of all to give equal consent—particularly the minority of voters whose votes had been diluted at the expense of majority rule—did not preclude judicial intrusion into the political arena.³¹¹ Under such circumstances, the judicial referees had no choice but to call a constitutional foul.

Nevertheless, the rhetoric of the Court's reasoning in *Reynolds* does not match up with what it was actually doing. The Court's language suggests that it was

³⁰⁷ *Id.* at 562.

³⁰⁸ *Id.* at 555 n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

³⁰⁹ *Id.* at 565, 567.

³¹⁰ *Id.* at 563.

³¹¹ See *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 736 (1964). The court held: "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate." *Id.* (emphasis added). This statement highlights the Court's construction of "one person, one vote" as an individual right of access to the political process—a pure process democracy right.

treating reapportionment purely as a violation of an individual right: access to the political process (a “pure process” right).³¹² As Justice Stewart aptly pointed out in his dissent, however, no pure process claim could be stated under the facts: “[T]hese cases . . . have nothing to do with the denial or impairment of any person’s right to vote. Nobody’s right to vote has been denied. Nobody’s right to vote has been restricted. Nobody has been deprived of the right to have his vote counted.”³¹³ Rather, the case was one in which consent was denied to voters in a “disfavored area,” when compared to voters in a “favored area,” because they would have less ability to influence their representative, diminished opportunity to have their voices heard in the legislative decision-making process, and would have to compete with more people to attain the services of their representative. These results all suggest that the denial of consent would not occur at the entry point to participation in the political process, but rather at every other point beyond that—including outcomes generated through the parliamentary process. The Court’s reference to “dilution,” an inherently group-oriented political right, supports this conclusion. Consequently, if the *Reynolds* rhetoric is taken at face value, it is nothing less than a guarantee of equal voting power,³¹⁴ something that the Framers arguably intended the judicial referees to secure, even if the Court did not.

Instead, the Court sought to limit the judicial discretion of the referees on the field by seizing upon what it believed to be a principled approach to political reapportionment: the concept of “one person, one vote.”³¹⁵ The Court held that its authority to mandate equipopulous districts was grounded in two constitutional

³¹² See *infra* notes 347-55 and accompanying text.

³¹³ *Lucas*, 377 U.S. at 744 (1964) (Stewart, J., dissenting).

³¹⁴ Intuitively, most people probably would take the concept of “one person, one vote” quite literally and view it as a promise of equal voting power. Judge Kozinski has adopted such a view. See *Garza v. County of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part) (“[W]hat lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation.”), *cert. denied*, 498 U.S. 1028 (1991). Cf. *Shaw v. Reno*, 509 U.S. at 640-41 (“Drawing on the ‘one person, one vote’ principle, this Court recognized that ‘[t]he right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot.” (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969))). Participants in the civil rights movement similarly believed that “one person, one vote” guaranteed equal voting power. See Tucker, *supra* note 7, at Part II (describing how the Student Nonviolent Coordinating Committee (“SNCC”) and other civil rights groups interpreted “one person, one vote” to mean equal voting power). The Supreme Court, however, generally has used the phrase “one person, one vote” solely in terms of equal representation—i.e., equipopulous districts.

³¹⁵ See *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“The concept of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”).

sources. The *Baker* holding established,³¹⁶ and the *Reynolds* holding confirmed,³¹⁷ that the Court possessed power under the Equal Protection Clause of the Fourteenth Amendment to adjudicate claims of malapportionment in state legislatures. In *Reynolds*, the Court also laid down the rule that equal protection demands “no less than *substantially equal* state legislative representation for all citizens.”³¹⁸ Conversely, in *Wesberry v. Sanders*, the Court ruled that it had power under Article I, section 2 of the Constitution to adjudicate claims of congressional malapportionment, relying on a more stringent mathematical standard.³¹⁹ According to the Court, that constitutional provision “means that *as nearly as is practicable* one man’s vote in a congressional election is to be worth as much as another’s.”³²⁰ Similar standards have been imposed upon other governmental bodies.³²¹ Without question, the Court made a significant substantive decision to adopt a fixed, mechanical standard for

³¹⁶ See *supra* notes 301-05 and accompanying text.

³¹⁷ See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”).

³¹⁸ *Id.* (emphasis added). In *Mahan v. Howell*, 410 U.S. 315 (1973), the Court confirmed that this language gave states broader latitude in state legislative reapportionment than in congressional reapportionment. Specifically, the states were given broader discretion when necessary to further other rational state policies. See *id.* at 320-25. In *Mahan*, the Court sustained a state legislative districting plan in which the most overrepresented district deviated from the ideal population district by 6.8%, while the most underrepresented deviated by 9.6%. See *id.* at 318-19, 327. In *White v. Regester*, 412 U.S. 755, 763 (1973), the Court held that states could make *de minimis* variations from the equal population principle without providing any justification. The Court has struck down deviations of 16.5% or more in state legislative districts. See *Connor v. Finch*, 431 U.S. 407 (1977).

³¹⁹ See *Wesberry v. Sanders*, 376 U.S. 1 (1964).

³²⁰ *Id.* at 7-8 (emphasis added). In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court held that there are “no *de minimis* population variations, which could practicably be avoided, but which would nonetheless meet the standard of Art. I, § 2 without justification.” *Id.* at 731. In *Karcher*, the Court rejected a congressional reapportionment plan with a maximum deviation of only 0.6984%. *Id.* at 728.

³²¹ See *Board of Estimate of New York v. Morris*, 489 U.S. 688 (1989) (applying “one person, one vote” to New York City’s Board of Estimate, comprised of elected presidents from the city’s five boroughs, which had disparate populations, and three city officials elected at-large); *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970) (applying “one person, one vote” to local government apportionment of administrative body); *Avery v. Midland County*, 390 U.S. 474 (1968) (applying “one person, one vote” to local government apportionment of legislative body).

reapportionment cases—a standard which itself has been subject to widespread, and sometimes caustic, criticism by some justices³²² and many commentators.³²³

³²² Justices have criticized the “one person, one vote” cases because they reflect value choices in matters of political theory. *See generally* *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting)

([I]t is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process.);

Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 748 (1964) (Stewart, J., dissenting) (But even if it were thought that the rule announced today by the Court [adoption of the “one person, one vote” standard in *Reynolds*] is, as a matter of political theory, the most desirable general rule which can be devised as a basis for the make-up of the representative assembly of a typical State, I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution . . .);

Reynolds, 377 U.S. at 590 (Harlan, J., dissenting) (“Whatever may be thought of this holding as a piece of political ideology . . . I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so.”); *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting)

(Disregard of inherent limits in the effective exercise of the Court’s ‘judicial power’ not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. . . . The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such a feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.).

Other justices have criticized the standard of equipopulous districts itself. *See generally* *Karcher v. Daggett*, 462 U.S. 725, 750 (1983) (Stevens, J., concurring) (“I am convinced that judicial preoccupation with the goal of perfect population equality is an inadequate method of judging the constitutionality of an apportionment plan Mere numerical equality is not a sufficient guarantee of equal representation.”); *Wells v. Rockefeller*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting) (“[T]he rule of absolute equality is perfectly compatible with ‘gerrymandering’ of the worst sort.”).

³²³ BERNARD GROFMAN, *VOTING RIGHTS, VOTING WRONGS: THE LEGACY OF BAKER V. CARR* 33-34 (1990) [hereinafter GROFMAN, *LEGACY*]; *see also* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 403-04 (1993) (examining effect of Court’s “rigid adherence” to population equality in the context of local government); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 83 (1985) (referring to Court’s “rigid insistence on absolute population equality in congressional districting”); Paul L. Mckaskle, *The Voting Rights Act and the “Conscientious Redistricter”*, 30 U.S.F. L. REV. 1, 94 (1995) (evaluating “the extremely rigid population equality standard embraced by the Court in *Karcher v. Daggett*”); Mark Packman, *Reapportionment: The Supreme Court Searches for Standards*, 21 URB. LAW. 925, 937 (1989) (“The Court has been too rigid in its demand for precise

In summary, the Court's intervention into reapportionment clearly is justifiable under the consent theory of democracy. Malapportionment of districts can lead to two antithetical results, both of which violate the equal right of consent of a particular group of voters. In one case, it can result in majority tyranny, whereby a majority group gives itself disproportionate voting power in both the general election and the legislative body at the expense of a minority group. In the other case, a perverse result occurs which even Madison had not contemplated: minority tyranny, whereby a minority group has disproportionate voting power—sometimes as high as one hundred times the voting power of other voters—allowing the minority group to elect a majority of representatives in the general election and to control the legislature.³²⁴ Although the two extremes of majority and minority tyranny provide a reason for the Court to enter the political arena, they do not necessarily dictate the mechanical “one person, one vote” standard. In fact, “one person, one vote” highlights the danger of the courts adopting inflexible standards. It actually can *exaggerate* majority factionalism, leading to majority tyranny in another form: the equipopulous gerrymander.³²⁵ As the next section illustrates, such tyranny can result in violations of process democracy rights.

B. *Consent and Process Democracy*

As discussed in Part I(A), the Founding Fathers adopted a republican form of government as an answer to a British political process that denied the Colonials a right to actual representation in Parliament.³²⁶ Not only had Britain violated the republican principle of consent, but it had directed adverse legislative outcomes at the American Colonies as a result of this violation.³²⁷ Consequently, the Madisonian

mathematical equality among congressional districts.”); Stephen J. Thomas, Note, *The Lack of Judicial Direction in Political Gerrymandering: An Invitation to Chaos Following the 1990 Census*, 40 HASTINGS L.J. 1067, 1077 (1989) (discussing Court's “inflexible insistence” on population equality”); cf. Samuel Issacharoff, *Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle*, 45 CATH. U. L. REV. 1257, 1264 (1996) (noting that “once districts are of equal population, there is no clear individual component to districting decisions,” leaving the courts without a standard).

³²⁴ In this manner, Madison's “republican principle” of allowing the majority to defeat minority factionalism would be circumvented. See *supra* note 82 and accompanying text.

³²⁵ See generally Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 67 (arguing that it was “the conjunction of the ‘one person, one vote’ rule with the requirement to create black majority districts wherever possible that demanded the abandonment of traditional redistricting criteria,” leading to pursuit of other goals such as “partisan advantage and incumbent protection”).

³²⁶ See *supra* notes 61-70 and accompanying text.

³²⁷ See *supra* note 66 and accompanying text. In addition to the Stamp Act, Britain had imposed on the Colonists other revenue and coercive acts, including the Townshend Duties, the Sugar Act of 1764, the Tea Act of 1773, the Boston Port Act, the Massachusetts Government Act, the Quebec Act, the Quartering Act, rigorous enforcement of the

solution aimed toward broadening the franchise and toward being vigilant for factions seeking to exclude a minority of citizens from the political process.³²⁸ Without question, this approach requires judicial referees policing the political process itself, as well as scrutinizing substantive outcomes that might reveal a lack of protection of minority interests.³²⁹ This section will focus on "process democracy": the extent to which the Court, consistent with republican principles, should ensure the political process is operating fairly, and should protect the rights of individuals or groups of individuals to have a voice in government and receive fair outcomes.

John Hart Ely is the current leading proponent of a process approach to representation.³³⁰ According to Ely, judicial review under open-ended provisions of

Navigation Laws, and a number of other measures. *See* BAILYN, *supra* note 65, at 94-143.

³²⁸ *See supra* notes 71-118 and accompanying text.

³²⁹ *See* ELY, *supra* note 95, at 73-104; *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 60-128 (1980) (discussing the judicial role in protecting individual rights).

³³⁰ *See* ELY, *supra* note 95, at 73-104; *cf.* HABERMAS, *supra* note 276 (proposing a process approach to democracy, arguing that it is the government's responsibility to ensure that avenues of communication are left open so that citizens can have a voice in governmental decision-making). *See also* GUTMAN & THOMPSON, *supra* note 56, at 28 (discussing "procedural democracy" in which "the results of majority rule are legitimate because the procedure is fair, not because the results are right"). Ely was not the first to discuss a political process approach. *See generally* Richard A. Givens, *The Impartial Constitutional Principles Supporting Brown v. Board of Education*, 6 HOW. L.J. 179, 181 (1960) (emphasizing the importance of judicial restraint, and observing that such restraint was unnecessary "where the 'processes of democratic government' themselves were threatened"); Louis Lusk, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 12 (1942) ("[P]olitical activity should not be interfered with *unless* it seeks to by-pass, or threatens the existence of, the regular corrective processes."). A political process approach also was alluded to in Justice Stone's famous *Carolene Products* footnote 4:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). Ely interprets the themes of the *Carolene Products* footnote 4 as

ask[ing] us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and

the Constitution, such as the right to vote,³³¹ can be accomplished "by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack."³³² Ely has been subjected to widespread criticism on this point.³³³ This criticism is validly taken because the nature of voting "rights" dictate that reviewing courts will have to make certain substantive choices about how much access groups of voters are entitled to.³³⁴ If

accommodated, or in the accommodation those processes have reached, has been unduly constricted.

ELY, *supra* note 95, at 77.

³³¹ Ely argues that the Court's decision in *Reynolds v. Sims* rests on both the Equal Protection Clause of the Fourteenth Amendment and the open texture of the Guarantee Clause of Article IV of the Constitution. *See id.* at 122-25. The Guarantee Clause provides, in pertinent part: "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4. According to Ely, the Court was willing to address the problem of malapportionment notwithstanding the open texture of the Guarantee Clause because "one person, one vote" (equipopulous districts) provided a workable standard for reviewing courts. *See* ELY, *supra* note 95, at 124.

³³² *Id.* at 181.

³³³ *See, e.g.,* HABERMAS, *supra* note 276, at 265-66; SUNSTEIN, *supra* note 262, at 104-05; Larry A. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 44-51 (1981); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Dworkin, *supra* note 274, at 500-16; Samuel Estreicher, Review Essay, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. REV. 547, 563-67 (1981); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065-72 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045-48 (1980). Edwin Baker interprets Ely's theory on representation as process-based because judicial intervention corrects defects in how the legislature counts preferences of citizens. *See* C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1039-49 (1980). For a further discussion of Baker's interpretation of Ely's process theory, *see* Alexander, *supra*, at 48-50.

³³⁴ *See generally* ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 35 (2d ed. 1978) (explaining that the issue of voting rights is "the distribution of access and power among various groups, and the answer requires normative choices and prophetic judgments"); Ortiz, *supra* note 333, at 728

(The proper degree of influence to give an individual or group relative to others, however, does not fall from the heavens. It varies according to how one thinks society should be organized, whether citizens do or should fall into classes, and whether communities of various sorts deserve a special status. All of these questions are substantive through and through.).

See also Tribe, *supra* note 333, at 1069

(Deciding what *kind* of participation the Constitution demands requires analysis not only of the efficacy of alternative processes but also of the character and importance of the interest at stake That analysis, in turn, requires a theory of values and rights as plainly substantive as, and seemingly of a piece with, the

these substantive choices are left out of an analysis of what voting means, the risk is that the values being represented will be limited to those of an interest-driven majority, the very group that Madison said had to be regulated in order to protect the vulnerable minority.³³⁵ Such a result should be unsurprising under a process approach supposedly blinded to substantive outcomes. For a "process theorist must . . . be concerned with the decision[-]making process for its own sake, not because of the reactions people might have to it."³³⁶

The allure of strictly process-based approaches is that they allow courts to function under the principle of judicial restraint.³³⁷ With regard to representation, judicial restraint also permits courts to respect majority rule, while at the same time avoiding the "*reductio ad absurdum*: 'whichever group happens to lose the political struggle or fails to command the attention of the legislature . . . is—by that fact alone—a discrete and insular minority'" subject to protection.³³⁸ The seductiveness of judicial restraint under a process theory and the negative aspects of its alternative—judicial decision-making on matters of democratic theory—goes far to explain why the Supreme Court has resisted regulating representation and its attendant outcomes.³³⁹

However, the courts' failure to address questions of representation not easily resolved under either a pure process approach³⁴⁰ or an approach protecting substantive values through "uncritical, simplistic, and heavy-handed application of

theories of values and rights that underlie the Constitution's provisions addressing religion, slavery, and property.).

³³⁵ For a discussion of how a simple political process approach benefits those in the majority, see generally Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935 (1994) (arguing that process theory is "transparently white," perpetuating the substantive values of those in the white majority).

³³⁶ Alexander, *supra* note 333, at 42-43.

³³⁷ James B. Thayer was an early proponent of judicial restraint. Thayer observed: The ultimate arbiter of what is rational and permissible is indeed always the courts, so far as litigated cases bring the question before them. This leaves to our courts a great and stately jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the law-maker, or be unmindful of the hint that is found in the sagacious remark of an English bishop nearly two centuries ago, quoted lately from Mr. Justice Holmes:—"Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them."

James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 152 (1893) (citation omitted).

³³⁸ Tribe, *supra* note 333, at 1073 (quoting Owen M. Fiss, *The Supreme Court, 1978 Term—Foreward: The Forms of Justice*, 93 HARV. L. REV. 1, 8 (1979)).

³³⁹ See *infra* notes 591-712 and accompanying text.

³⁴⁰ See *infra* notes 719-60 and accompanying text.

sixth-grade arithmetic,³⁴¹ is contrary to Madisonian democracy. Judicial inaction in addressing majority violations of consent—premised on the reasoning that to do so involves making substantive choices and adopting a particular democratic theory—imposes a democratic theory which is inconsistent with republican principles: respecting the tyrannical choices of majority factionalism.³⁴² American democratic theory explicitly requires judicial intervention when the republican principle of consent is violated by the exclusion of a minority of voters from the political process.³⁴³ Undoubtedly, such intervention requires some substantive line-drawing by the courts to determine how much representation is required.³⁴⁴ In this sense, Madison envisioned courts would be judicially active in vigorously protecting the right of all citizens to have a voice in government.³⁴⁵ Courts, however, can make substantive decisions using a process-based approach to secure one core republican principle—protection of consent from majority factionalism—without destroying the other core republican principle of majority rule.³⁴⁶

The remainder of this section will examine how the Court has addressed different types of process democracy claims. The discussion will show that the Court is willing to protect minorities from majority factionalism when principled methods of examining claims involving representation and voting are present. Conversely, the more these claims depart from principled methods and require the Court to make substantive decisions on how much access to the political system is appropriate, the less amenable the Court will be to providing a remedy. Nevertheless, it will become apparent that even in the stages of the political process that lend themselves to the creation of straightforward rules to guide the judicial referee in protecting consent, the Court by necessity still must engage in substantive decision-making on matters of democratic theory.

³⁴¹ *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting) (referring to the equipopulous “one person, one vote” standard).

³⁴² See *supra* notes 264-69 and accompanying text.

³⁴³ See BICKEL, *supra* note 243, at 192-97.

³⁴⁴ Cf. Barber, *supra* note 103, at 874 (“A court cannot address questions of power . . . without forming judgments about ends.”).

³⁴⁵ See *supra* notes 105-18 and accompanying text.

³⁴⁶ See generally Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 782 (1991)

(A political process theory of judicial review is grounded on a reasonably uncontroversial vision of democracy by which majorities rule through elected representatives, though they are free to precommit themselves not to oppress minorities. Judicial review can, consonant with this paradigm, enforce such precommitments, but only upon the same generation that undertook them, and only when the phraseology is sufficiently determinate that judicial enforcement will not amount simply to uncabined second guessing of legislative policy decisions.).

1. "Structural Process" or "Pure Process" Claims

"Structural process" or "pure process"³⁴⁷ claims contend that a state-created mechanism or structure such as a voter registration law,³⁴⁸ literacy test, poll tax, or use of multiple ballot boxes actually denies a voter any voice in the political process.³⁴⁹ Although pure process claims might affect a group of voters, they inherently focus on individual voting rights because they only look at election access (an individual right), and not election outcome (a group right).³⁵⁰ Moreover, the baseline for examining what the right to vote means under a pure process approach analytically is very simple: Is the voter prevented from casting a ballot? No judicial inquiry is required into how much weight a particular ballot should be given.

³⁴⁷ The term "pure process" is used here to recognize claims in which elections laws regulating the voting process itself prevent certain voters from having a voice in the political process.

³⁴⁸ Voter registration laws have been criticized as one of the primary barriers to those who otherwise might be eligible and want to exercise their voice in the political process. *See, e.g.,* BARRIERS TO REGISTRATION AND VOTING, *supra* note 62; F. PIVEN & R. CLOWARD, WHY AMERICANS DON'T VOTE (1988). Most registration laws, however, have been upheld. *See* BARRIERS TO REGISTRATION AND VOTING, *supra* note 62, at 115-35; *see also* Association of Community Orgs. for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995) (upholding the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq.*, popularly known as the "motor voter" law). Registration laws generally only have been constitutionally suspect when they have been applied in a discriminatory fashion. *See generally* Williams v. Wallace, 240 F. Supp. 100 (N.D. Ala. 1965) (discussing the impediments black voters faced in registering to vote in Alabama). A further discussion of the discriminatory purpose and effects of registration laws is beyond the scope of this Article.

³⁴⁹ For a discussion of the use of these types of structural devices to deny minorities the right to vote, see J. Morgan Kousser, *The Undermining of the First Reconstruction—Lessons for the Second*, in MINORITY VOTE DILUTION, *supra* note 19, at 27-46; J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 9, at 135-64.

³⁵⁰ *Cf.* Davis v. Bandemer, 478 U.S. 109, 149 (1986) (O'Connor, J., concurring) ("Reynolds makes plain that the one person one vote principle safeguards the *individual's* right to vote, not the interests of political groups." (emphasis added)); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (holding that an election law, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the *individual's* right to vote and his right to associate with others for political ends." (emphasis added)); City of Mobile v. Bolden, 446 U.S. 55, 78 (1980) (plurality opinion) (stating that the Equal Protection Clause protects "the right of *each voter* to 'have his vote weighted equally with those of all other citizens'" (quoting Reynolds v. Sims, 377 U.S. 533, 576 (1964) (emphasis added))). Jonathan Still labels this type of claim for political equality as "Universal Equal Suffrage," requiring that "[e]veryone is allowed to vote, and everyone gets the same number of votes—'one person, one vote' in a literal sense." Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375, 378 (1981) (highlighting the individual nature of a pure process claim (emphasis added)).

Because of the ease of evaluating pure process claims without apparently having to make attendant substantive choices,³⁵¹ pure process claims traditionally have been protected the most by the Court. Even dogmatic skeptics of judicial intrusions into the political arena, such as Abigail Thernstrom,³⁵² Justices Thomas and Scalia,³⁵³ and Senators Orrin Hatch³⁵⁴ and John East,³⁵⁵ would protect pure process claims.

Before describing cases found by the Court to state a pure process claim, it is worth noting those cases that in fact have not done so. The Founding Fathers acknowledged that some discrimination in voter qualifications was not only acceptable, but desirable.³⁵⁶ Consonant with the Framers' deference to the states on

³⁵¹ Except, of course, that this is a situation in which appearances can be deceiving. Courts must make substantive decisions in determining which types of restrictions on the right to vote are permissible. See Estreicher, *supra* note 333, at 565-66.

³⁵² See THERNSTROM, *supra* note 240, at 3-5 (referring to the right to vote, as protected under the Voting Rights Act, as "simply the right to enter a polling booth and pull the lever" and asserting that the sole purpose of the Act was to enfranchise blacks); Abigail Thernstrom, *More Notes from a Political Thicket*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 117 (criticizing the idea that "[f]rom the outset the Voting Rights did clearly promise more than simple access to the polling booth; the architects of the statute believed black ballots would mean black power").

³⁵³ See generally *Holder v. Hall*, 512 U.S. 874, 945 (1994) (Thomas, J., concurring); discussion of *Holder* *infra* notes 591-629 and accompanying text; see also *Johnson v. DeGrandy*, 512 U.S. 997, 1031-32 (1994) (Thomas, J., dissenting) (reiterating his view in *Holder* that the "standard, practice, or procedure" referred to in section 2 only extends to state enactments that regulate ballot access or the right to have a ballot counted).

³⁵⁴ See generally S. REP. NO. 417, at 94-105 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 267-78 (additional views of Sen. Hatch) (arguing that the Voting Rights Act only protects a right to individual access and not a group right to equal outcomes and adopting the views stated in the Report of the Senate Subcommittee on the Constitution); *id.* at 185, *reprinted in* 1982 U.S.C.C.A.N. at 356 (Report of the S. Subcomm. on the Constitution) (stating that the objective of the Voting Rights Act is "equal access to the ballot-box" and not "equal results in the electoral process").

³⁵⁵ In his minority views on the 1982 amendments to the Voting Rights Act, Senator East opined that only individual voter access was protected under the Act:

[T]he right to vote means that every citizen has a right to come forward and engage in the physical act of voting—that is, marking a ballot and having it counted. It means that no one shall be denied access to the polling booth merely because of race or color, and that all citizens shall have an *equal opportunity* to participate in the electoral process [Section 2] addresses the problem of voter access to the polling booth *prior to* and including the final act of voting Neither the [Fifteenth Amendment] nor [s]ection 2 of the Act explicitly or impliedly asserts that the voter has any additional rights or privileges *after* his vote has been taken, or that the outcome or result of the election with respect to the success or failure of minority candidates bears any relation to an individual's right to vote.

Id. at 221-22, *reprinted in* 1982 U.S.C.C.A.N. at 391-92 (minority views of Sen. East).

³⁵⁶ See *supra* notes 73-76 and accompanying text.

the issue of who could exercise the franchise, the Court similarly has acknowledged the right of states to impose legitimate voter restrictions. Early on, the Court recognized that a state or local government could take into consideration factors such as residence, age, and prior criminal records in determining who could exercise the right to vote.³⁵⁷ Since then, the Court repeatedly has allowed imposition of voter qualifications discriminating against non-citizens,³⁵⁸ minors,³⁵⁹ insane persons,³⁶⁰ non-residents,³⁶¹ and convicted felons.³⁶² Literacy requirements posed a much closer question for the Court. In *Lassiter v. Northampton County Board of Elections*,³⁶³ the Court upheld a state literacy test, finding that "[t]he ability to read and write has some relation to standards designed to promote the intelligent use of the ballot."³⁶⁴ The Court did not rule out the possibility that literacy tests could be used as racially discriminatory devices, but found insufficient evidence to support such a claim in the facts before it.³⁶⁵ In light of all of the foregoing restrictions on the right to vote, it is evident that, even under a pure process approach, there are acceptable reasons to exclude certain groups of voters.³⁶⁶

The most obvious examples of unacceptable voter qualifications are race³⁶⁷ and gender.³⁶⁸ Other illegitimate qualifications include those based upon duration of

³⁵⁷ See *Davis v. Beason*, 133 U.S. 333, 345-47 (1890) (declaring that the state of Idaho could withhold the right to vote from a known polygamist), *overruled on other grounds*, *Romer v. Evans*, 517 U.S. 620 (1996).

³⁵⁸ See *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 n.10 (1952).

³⁵⁹ See *Oregon v. Mitchell*, 400 U.S. 112 (1970).

³⁶⁰ See *id.* at 214 (Harlan, J., concurring in part and dissenting in part).

³⁶¹ See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

³⁶² See *Richardson v. Ramirez*, 418 U.S. 24 (1974), *cert. denied sub nom. Class of County Clerks and Registrars of Voters of Ca. v. Ramirez*, 418 U.S. 904 (1974). *But see* *Hunter v. Underwood*, 471 U.S. 222, 222 (1985) (striking down state law denying voting rights to individuals convicted of crimes "involving moral turpitude" because it had the purpose and effect of disproportionately disenfranchising black voters).

³⁶³ 360 U.S. 45 (1959).

³⁶⁴ *Id.* at 51; see also *supra* note 199 (noting that the framers of the Fifteenth Amendment specifically refused to include a ban on literacy tests in order to secure its passage). Frank Michelman has argued that enfranchisement based upon competence can be reconciled with a "deliberative-politics premise," in which "one's franchise is one's badge of inclusion in a constitutive political dialogue" extolling "the interest of all in the 'intelligent' participation of each." Michelman, *supra* note 53, at 480-85. For a response to Michelman, see C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491, 504-07 (1989).

³⁶⁵ See *Lassiter*, 360 U.S. at 53-54. Section 4(a) of the Voting Rights Act suspended the use of literacy tests in covered jurisdictions, and was extended to all states in the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314-15 (1970).

³⁶⁶ Cf. Still, *supra* note 350, at 378 ("Universal suffrage has never been truly universal, and no one has ever seriously suggested that it ought to be.").

³⁶⁷ See U.S. CONST. amend. XV, § 2.

³⁶⁸ See U.S. CONST. amend. XIX, cl. 1.

residency,³⁶⁹ primary interest,³⁷⁰ property ownership,³⁷¹ military service,³⁷² literacy tests with either a discriminatory purpose or effect,³⁷³ and poll taxes.³⁷⁴ In addition, the Court has struck down procedural barriers to registration,³⁷⁵ improper challenges to voters who have registered,³⁷⁶ racial barriers to candidate qualification for office,³⁷⁷ and grandfather clauses³⁷⁸ as pure process barriers to voting.

The line separating permissible pure process restrictions on voting from impermissible restrictions is based upon the Court's substantive determination that the illegitimate restrictions do not bear a sufficiently supportable relationship to the purpose of the franchise. In other words, improper structural restrictions have no rightful connection to the republican principle of consent. It is easy to see why citizens do not want to have minors or insane persons voting—these are the very people the law recognizes as being incapable of giving consent, quite literally as “the lowest and most ignorant of mankind.”³⁷⁹ Similarly, convicted felons, presumably including those released from prison who have not yet had their civil rights restored, have taken themselves out of society by their own actions and made their consent

³⁶⁹ See *Dunn v. Blumstein*, 405 U.S. 330 (1972). *But see* *Marston v. Lewis*, 410 U.S. 679 (1973) (per curiam) (upholding Arizona's durational residency requirements under the specific facts of the case).

³⁷⁰ See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969). *But see* *Ball v. James*, 451 U.S. 355 (1981) (upholding primary interest qualification for electors in water reclamation district); *Salzer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (upholding primary interest qualification for electors in water storage district). In *Hill v. Stone*, 421 U.S. 289 (1975), the Court reconciled the *Kramer* and *Salzer* decisions by finding that primary interest was a legitimate voting qualification only so long as the functions of the elected body in question were highly specialized. Because the school district election in *Kramer* was not highly specialized like the water storage district election in *Salzer*, the Court concluded the former's limitation on primary interest was improper. See *Hill*, 421 U.S. at 297.

³⁷¹ See *Turner v. Fouche*, 396 U.S. 346 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

³⁷² See *Carrington v. Rash*, 380 U.S. 89 (1965).

³⁷³ See *Alabama v. United States*, 371 U.S. 37 (1962); *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949).

³⁷⁴ See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

³⁷⁵ See *Lane v. Wilson*, 307 U.S. 268 (1939); *see also* *United States v. Raines*, 362 U.S. 17 (1960) (holding that a complaint alleging use of racially discriminatory devices as barriers to registration stated a claim under the Civil Rights Act of 1957, which the Court determined to be constitutional under Fifteenth Amendment).

³⁷⁶ See *United States v. McElveen*, 180 F. Supp. 10 (E.D. La. 1960), *aff'd in part sub nom.* *United States v. Thomas*, 362 U.S. 58 (1960).

³⁷⁷ See *Hadnott v. Amos*, 394 U.S. 358 (1969).

³⁷⁸ See *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915).

³⁷⁹ See *supra* note 75.

unnecessary.³⁸⁰ Additionally, non-citizens and non-residents can be excluded from the franchise because they have not yet become a part of the community with sufficient ties to warrant having the government obtain their consent.³⁸¹ On the other hand, it is a completely different matter to say that pure process restrictions based upon race, gender, property ownership, ability or willingness to pay a poll tax, and so forth, sufficiently justify denying the ability to consent to members of the community who might otherwise possess the same (or possibly more) intelligence and interest in governmental affairs as those individuals outside of their group who are allowed to cast a ballot.³⁸²

³⁸⁰ For a different view on disenfranchisement of felons and ex-felons, see, for example, Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300 (1989).

³⁸¹ For a different view on disenfranchisement of non-citizens, see Gerald L. Neuman, *"We are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259 (1992); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993); Paul Tiao, *Non-Citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 23 COLUM. HUM. RTS. L. REV. 171 (1993); see also Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1523 (1993) ("[W]e advocate a limited form of noncitizenship voting. This noncitizen voting, though, is a means to an end—to promote the transition from immigrant to citizen.").

³⁸² See generally ANNE PHILLIPS, *THE POLITICS OF PRESENCE* 29 (1995) ("[Political equality] has become particularly definitive in the development of modern democracy, for, while the roughly equal capacity for reason is more a matter of faith than of empirical confirmation, it translates into what Dahl calls a 'roughly equal qualification' for government."). It is not impossible, however, for many of these illegitimate pure process restrictions to be tied sufficiently to consent. In *Lassiter*, a compelling argument was made based upon consent: Literacy bore a relation to the intelligent exercise of the ballot in a "society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues." *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959). If a person was incapable of being informed fully about a particular issue or candidate, it is unlikely that the person could give any meaningful consent. See also discussion *supra* note 364. Similarly, a colorable (though losing) argument could be made in *Dunn* that a durational residency requirement would enhance the ability of a voter to give his consent by giving the voter a reasonable time to become a member of the community, develop common interests with other voters, and become better apprised of local issues. See *Dunn v. Blumstein*, 405 U.S. 330, 354-60 (1972). Conversely, in each of the cases in which pure process restrictions were struck down, it likewise was true that, even if a person is incapable of reading and writing, is new to town, does not own property, or lacks the funds to pay a poll tax, it does not necessarily follow that such a person cannot otherwise become informed about candidates or issues and intelligently give (or withhold) her consent.

This discussion has shown that the Court substantively must decide who gets to consent to government actions, even in the “easiest” case of evaluating pure process claims. In this sense, then, the Court is defining the scope of the right to vote. Nevertheless, the Court is not creating a democratic theory when it makes this definition. Instead, the Court is acting in its role as a referee of the political process to protect the republican principle of consent from majority factionalism. If the Court were not allowed to make substantive decisions concerning pure process claims, one of two results would occur. First, all people could have the right to vote because majorities in the states would be prohibited from fencing anyone out of the political process. Alternatively, the states could have unfettered discretion (subject, of course, to certain constitutional restrictions such as the Fifteenth, Nineteenth, and Twenty-sixth Amendments)³⁸³ to define the right to vote according to whom the majority wanted to be allowed to give their consent. Neither result is particularly desirable. Consequently, the judiciary makes substantive decisions on the scope of consent—i.e., who gets to vote—in a pure process environment in fulfillment of its republican role of protecting the right to suffrage.³⁸⁴ The Court thereby promotes, rather than undermines, Madisonian democracy.

2. “Quasi-Structural Process” Claims

“Quasi-structural process” claims assert that state-created mechanisms, such as majority vote requirements³⁸⁵ and anti-single shot provisions,³⁸⁶ or state-sanctioned mechanisms, such as primary elections for candidates of political parties³⁸⁷ and candidate slating,³⁸⁸ do not bar a voter from casting her ballot but, instead, ensure she cannot have a meaningful voice in the political process. As a result, this type of claim differs from a pure process claim because the voter is allowed to cast a ballot. A quasi-structural impediment, however, has the same effect as a pure process barrier—the voter is denied the ability to have a voice at the stage of the elections process at which the representative is actually selected.

Quasi-structural process claims have both an individual and group rights focus to voting. State-sanctioned quasi-structural mechanisms, like pure process claims, are individual-oriented because they prevent voters from participating in a particular stage of the election. In other words, they directly affect election access. On the other hand, most state-created quasi-structural mechanisms are group-oriented

³⁸³ If the Court, however, was precluded from making *any* substantive decisions in protecting the right to vote, the protections offered by these Constitutional Amendments would be minimal, at best. Only limited statutory protection would preclude the passage of a literacy test, residency requirement, or even a standard that a person be of good moral character in order to qualify to vote.

³⁸⁴ See *supra* notes 106-08 and accompanying text.

³⁸⁵ See *infra* notes 407, 409-13 and accompanying text.

³⁸⁶ See *infra* notes 408, 414 and accompanying text.

³⁸⁷ See *infra* notes 389-98 and accompanying text.

³⁸⁸ See *infra* notes 399-405 and accompanying text.

because they allow individual participation at all stages, but nevertheless prevent members of a group from having the ability to cast a decisive ballot. These impediments more clearly are seen through election outcomes, which must be examined to determine the impediment's effect on the ability of groups of voters to cast meaningful ballots. Consequently, the analytical method of examining quasi-structural process claims is slightly more difficult than for pure process claims: A reviewing court must ask whether the voter is prevented from casting a ballot at the stage of the election process at which the decision is made, and frequently needs to inquire into the motivations of voters or local elections officials. Because state-sanctioned quasi-structural claims closely resemble pure process claims in that they focus on election access (an individual right), the Court has been more willing to protect them.³⁸⁹ Conversely, in evaluating state-created quasi-structural claims, which focus on election outcome (a group right), the Court generally has required more direct evidence of how the challenged impediment has interacted with other features of the voting system to deny voters a meaningful voice in the political process.

The *White Primary Cases* are paradigm examples of how access to primary elections can be protected as quasi-structural process claims.³⁹⁰ This series of cases

³⁸⁹ There are limits, however, to how far certain justices are willing to go to protect even these easier cases. In *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), the Court stated that the rationale of the *White Primary Cases*, discussed *infra* notes 390-401 and accompanying text, "does not reach to all forms of private political activity, but encompasses only state regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials.'" *Flagg Bros.*, 436 U.S. at 158 (quoting *Terry v. Adams*, 345 U.S. 461, 484 (1953) (Clark, J., concurring)). Relying on this language, Justices Thomas, Rehnquist, and Scalia refused to extend constitutional protection to deprivations of the right to vote by private individuals when no state actors made such political choices—even when the public elections system itself endorses the private discrimination. See generally *Morse v. Republican Party of Va.*, 517 U.S. 186, 272, 274 (1996) (Thomas, J., dissenting)

([C]onvening the members of a political association in order to select the person who can best represent and advance the group's goals is not, and historically never has been, the province of the State—much less its exclusive province

. . . .

Even if, as might be said here, "the government erects the platform" upon which a private group acts, the government "does not thereby become responsible for all that occurs upon it."

(quoting *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting))). Cf. *Terry v. Adams*, 345 U.S. 461, 493, 494 (1953) (Minton, J., dissenting) ("I do not understand that concerted action of individuals which is successful somehow becomes state action Far from the activities of these groups being properly labeled as state action, under either the Fourteenth or the Fifteenth Amendment, they are to be considered as attempts to influence or obtain state action.").

³⁹⁰ For a more detailed accounting of the factual underpinnings and history of the *White Primary Cases*, see CONRAD BRYSON, DR. LAWRENCE A. NIXON AND THE WHITE PRIMARY (1974); DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE

began with a black voter's challenge to a Texas statute that denied blacks the right to vote in Democratic Party primary elections, a state-created quasi-structural claim.³⁹¹ The Court unanimously struck down the law as a violation of equal protection under the Fourteenth Amendment.³⁹² In *Nixon v. Condon*, the Court invalidated voter qualifications established by the State Executive Committee of the Democratic Party that denied blacks the right to vote in party primaries.³⁹³ The Court reasoned that the State had sanctioned the private group's actions by delegating to it, by statute, the power to set voter qualifications.³⁹⁴ The Court reached a similar conclusion in *Smith v. Allwright*, in which the Democratic Party itself prevented blacks from voting in party primaries.³⁹⁵ In striking down the party's action,³⁹⁶ the Court articulated how state-sanctioned quasi-structural process claims can be repugnant to the Constitution:

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.³⁹⁷

Finally, in *Terry v. Adams*, the Court recognized that private political organizations (separate from political parties whose candidates are selected through state-run elections) also can unconstitutionally deny voters the ability to cast a vote at the decision-making stage of the election process.³⁹⁸ *Terry* presents a good bridge to

PRIMARY IN TEXAS (1979).

³⁹¹ See *Nixon v. Herndon*, 273 U.S. 536, 539-40 (1927). The challenge also could be viewed as a pure process claim in the sense that the Texas statute absolutely barred black participation in the Democratic primaries. This Article, however, refers to it as a state-created quasi-structural claim because individual black voters still could participate in the general election, even though the actual selection of the elected official already had been made in the Democratic primary.

³⁹² See *id.* at 540-41.

³⁹³ 286 U.S. 73, 82 (1932).

³⁹⁴ See *id.* at 85-89. The case contained elements of both state-created and state-sanctioned quasi-structural process claims. It was state-created in the sense that the state enacted a statute giving power to the party executive committees to set voter qualifications. It was state-sanctioned in the sense that the party placed a restriction on black voters that was endorsed by the State.

³⁹⁵ 321 U.S. 649, 656-57 (1944).

³⁹⁶ See *id.* at 665-66.

³⁹⁷ *Id.* at 664.

³⁹⁸ *Terry v. Adams*, 345 U.S. 461, 469-70 (1953) (plurality opinion). The Court explained why the state-sanctioned quasi-structural process claim was unlawful:

The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The

another type of state-sanctioned quasi-procedural process claim: The Jaybird primaries that excluded black voters also may be viewed as a form of candidate-slatting.³⁹⁹ The challenged primaries in *Terry* were used as a mechanism to create a slate of candidates that would be endorsed by the organization. A majority of white voters then generally would support the candidates on the slate when they voted in Democratic Party primaries.⁴⁰⁰ As already discussed, the Court found this type of candidate-slatting to be unconstitutional because the election decision was made when the slate was put together, and blacks were excluded from participating in this decision.⁴⁰¹

Another example of candidate-slatting is found in *Graves v. Barnes*,⁴⁰² a challenge to legislative reapportionment in two Texas counties. In *Graves*, the court found that the Dallas Committee for Responsible Government, a private organization like the Jaybirds, virtually could ensure election of its slate.⁴⁰³ The organization allowed blacks to participate in the recruitment process for candidates who would be included on the slate, but made its decisions without the participation of black voters.⁴⁰⁴ The Court concluded:

[T]he plaintiffs have shown that Negroes in Dallas County are permitted to enter the political process in any meaningful manner only through the benevolence of the dominant white majority. If participation is to be labeled "effective" then it certainly must be a matter of right, and not a function of grace.⁴⁰⁵

The lesson of *Terry* and *Graves* is instructive. When a state-sanctioned quasi-structural process impedes the ability of individual voters to participate at the

Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. . . . The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting matters that intimately touch the daily lives of citizens.

Id.

³⁹⁹ See Chandler Davidson & Luis Ricardo Fraga, *Nonpartisan Slating Groups in an At-Large Setting*, in *MINORITY VOTE DILUTION*, *supra* note 19, at 119 ("A nonpartisan slating group is defined as an organization whose purpose is to recruit candidates, nominate them, and campaign for their election to office in a nonpartisan election system."). Candidate-slatting allows local citizen groups to combine their support for a "slate" of candidates for various offices, effectively making a nonpartisan slating group the "gatekeeper to public office." *Id.* at 120. For additional examples of candidate-slatting, see *id.* at 119-43.

⁴⁰⁰ See *Terry*, 345 U.S. at 463-65.

⁴⁰¹ See *id.* at 467.

⁴⁰² 343 F. Supp. 704 (W.D. Tex. 1972) (three judge panel), *aff'd in part, rev'd in part sub nom.* *White v. Regester*, 421 U.S. 755 (1973).

⁴⁰³ See *Graves*, 343 F. Supp. at 726.

⁴⁰⁴ See *id.*

⁴⁰⁵ *Id.*

decision-making stage of the election process, then their right to vote has been taken away in just as effective a manner as if a pure process restriction barring all access to the political process had been implemented.

Quasi-structural process claims that are state-created may be contrasted with those that are state-sanctioned because their very nature typically makes them less protected.⁴⁰⁶ For example, majority vote requirements⁴⁰⁷ or anti-single shot provisions,⁴⁰⁸ by themselves, are not necessarily discriminatory either in their purpose or their effect.⁴⁰⁹ As a plurality of the Court observed in *Bolden*, a majority vote

⁴⁰⁶ Obviously, there are exceptions to this more limited protection. See *supra* notes 391-92 and accompanying text.

⁴⁰⁷ A majority vote requirement mandates that a candidate receive a majority of the vote in order to be elected. If no candidate receives a majority of the vote, then a runoff election is held. A majority vote requirement can work against minority candidates who might be able to muster a plurality of the vote, only to lose in the runoff election to a candidate supported by the group in the majority. See Chandler Davidson, *Minority Vote Dilution—An Overview*, in MINORITY VOTE DILUTION, *supra* note 19, at 6; accord *Beer v. United States*, 425 U.S. 130, 160 n.22 (1976) (Marshall, J., dissenting). As a result, majority vote requirements can preclude minority voters from having a voice in the political process at the stage of the election at which the candidate is selected.

⁴⁰⁸ The Court has described bullet (single-shot) voting as follows:

Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.

City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980) (quoting U.S. COMM'N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: TEN YEARS AFTER 206-07* (1975)). A number of anti-single shot devices exist. Full-slate laws do not count ballots in which the voter has not selected choices for every open office. Numbered-place laws require candidates to select a particular place on the ballot (such as "Commissioner 1" or "Commissioner 2") and then limit voters to casting one vote for each place on the ballot. Staggered terms limit the number of offices in any given election, frustrating single-shot voting by either eliminating (when there is only one position) or decreasing a voter's ability to withhold votes for other positions. See Chandler Davidson, *Minority Vote Dilution—An Overview*, in MINORITY VOTE DILUTION, *supra* note 19, at 6-7; Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 9, at 25 n.63; U.S. COMM'N ON CIVIL RIGHTS, *supra*, at 207-08.

⁴⁰⁹ In fact, a majority vote requirement actually is consistent with the republican principle of majority rule. See *supra* note 72 and accompanying text. Moreover, the Court has held that under a winner-take-all system, the mere fact that one party loses year after year does not mean that members of that party have been denied a right to vote. See *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971); see also *Davis v. Bandemer*, 478 U.S. 109, 132 (1986)

requirement “is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation.”⁴¹⁰ Some other feature of the election system in question must interact with the majority-vote requirement or anti-single shot provision to state a cognizable quasi-structural process claim. Furthermore, a reviewing court must examine election outcomes (a group right) in assessing such claims. For example, in *City of Port Arthur v. United States*,⁴¹¹ the Court upheld the lower court’s decision to condition preclearance under section 5 of the Voting Rights Act on the requirement that the majority-vote requirement be eliminated for at-large non-mayoral candidates for municipal office.⁴¹² The Court reached its decision, not on the basis that there was anything inherently wrong with a majority-vote requirement, but because of the impact the requirement had on black voters when combined with an at-large election system and widespread racially polarized voting by white voters.⁴¹³ Similarly, in *City of Rome v. United States*, the Court upheld the lower court’s conclusion that the mere presence of certain anti-single shot provisions alone did not allow the black plaintiffs to state a quasi-structural process claim, because the provisions “would not have the effect of forcing head-to-head contests between Negroes and whites and depriving Negroes of the opportunity to elect a candidate by single-shot voting.”⁴¹⁴

It should now be evident that when the Court evaluates quasi-structural process claims, it also must make certain substantive choices. These choices are less problematic for the Court the closer the facts of the case approximate those raised in a pure process claim. In other words, the Court prefers a case in which there is a denial of electoral access (an individual right) which the Court believes can be protected in a principled fashion. As a result, when a state-created feature (such as

([T]he power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.).

⁴¹⁰ *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980) (plurality opinion) (discussing the use of majority vote requirements in conjunction with at-large elections).

⁴¹¹ 459 U.S. 159 (1982).

⁴¹² *See id.* at 166-68.

⁴¹³ *See id.* at 167-68. The Court also reasoned that eliminating the majority-vote requirement was a “reasonable hedge” against the possibility that the new election plan was designed with a discriminatory purpose, in light of two previous plans that had such a purpose. *Id.* at 168.

⁴¹⁴ *City of Rome*, 446 U.S. at 185. For additional consideration of anti-single shot voting provisions as the basis for quasi-structural process claims, see *City of Lockhart v. United States*, 460 U.S. 125, 134-36 (1983) (holding that continued use of numbered-post and staggered terms in an election system did not violate section 5 of the Voting Rights Act because, although the anti-single shot provisions could “have a discriminatory effect under some circumstances,” there was no retrogressive effect). *Cf. Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479-80 (1997) (implying that a different result is possible under section 2 of the Voting Rights Act, which looks at discriminatory effects of voting features).

the state law in *Nixon v. Herndon*⁴¹⁵) or a state-sanctioned practice (such as the candidate-slating in *Terry v. Adams* and *Graves v. Barnes*⁴¹⁶) actually precludes voter access in a critical stage of the election process, the Court can treat the challenged feature or practice like an illegitimate restraint on the republican principle of consent.⁴¹⁷ Conversely, state-created mechanisms that do not deny voter access completely raise harder questions, because the Court must determine how much of an effect those mechanisms have on the weight of ballots measured under election outcomes (a group right) and balance those effects with the right of majority rule. Nevertheless, when the challenged mechanisms interact with other features of the voting system to allow majority factionalism to deny a group of voters of their ability to consent at a key stage of the electoral process, Madisonian democracy similarly requires the Court to invalidate those mechanisms.⁴¹⁸ Like all types of voting rights claims, substantive decisions are an inevitable part of evaluating quasi-structural claims. The key is for the Court, as judicial referee, to strike an appropriate balance between protecting the consent of the minority and the principle of majority rule.

3. "Geography Process" Claims

"Geography process" claims allege that election districts have been devised in a manner which prevents a group⁴¹⁹ of voters from voting or having a meaningful say in the selection of those representatives who would be amenable to representing those voters' interests.⁴²⁰ These claims encompass annexations,⁴²¹ deannexations that

⁴¹⁵ See *supra* notes 390-92 and accompanying text.

⁴¹⁶ See *supra* notes 398-405 and accompanying text.

⁴¹⁷ See *supra* notes 367-82 and accompanying text.

⁴¹⁸ See *supra* notes 116-18 and accompanying text. To hold otherwise would allow a cohesive majority faction to circumvent pure process limitations simply by adopting a quasi-structural process impediment to a minority group's participation. Such impediments can disenfranchise minority voters just as effectively as the outright denial of the ballot. See Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 9, at 21-24.

⁴¹⁹ Cf. *Miller v. Johnson*, 515 U.S. at 947 (Ginsburg, J., dissenting)

(In adopting districting plans . . . States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in *groups*. States do not assign voters to districts based on merit or achievement, standards States might use in hiring employees or engaging contractors [i.e., individuals]. Rather, legislators classify voters in *groups*—by economic, geographical, political, or social characteristics—and then "reconcile the competing claims of [these] groups." (emphasis added) (citation omitted));

Shaw v. Reno, 509 U.S. at 681-82 (Souter, J., dissenting) ("In districting . . . the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others 'Dilution' . . . refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of the *group*." (emphasis added)). But see sources cited *supra* note 240.

⁴²⁰ Geographical process claims, as discussed in this context, are distinguishable from a

exclude voters from the political process,⁴²² assertions that the size of a political subdivision has the effect of excluding a voter from the political process regardless of whether or not it was intended to do so,⁴²³ and gerrymandering.⁴²⁴ A geography

“one person, one vote” claim in which “absolute population equality [is] the paramount objective.” *Karcher v. Daggett*, 462 U.S. 725, 732 (1983); *see also* Still, *supra* note 350, at 378-80 (labeling the “one person, one vote” mandate as “equal shares,” which states that “[e]ach voter has the same ‘share’ in the election, defined as what that voter voted on divided by the number of voters who voted on it”); *see generally* BUTLER & CAIN, *supra* note 293, at 26-33 (describing the legal development of “one person, one vote”); GROFMAN, LEGACY, *supra* note 323, at 1-4, 7-8. Unlike equal population challenges, these claims require an examination of how the votes cast relate to election outcomes. In this sense, they can implicate two additional criteria for fair election systems described by Jonathon Still: “[e]qual [p]robabilities,” the idea that “[e]ach voter has the same statistical probability of casting a vote which decides the election (under certain assumptions),” and “[a]nonymity,” which holds that “[t]he result of the election is the same under all possible distributions of voters among the positions in the structure of the election system.” Still, *supra* note 350, at 380-83; GROFMAN, LEGACY, *supra* note 323, at 40 n.65 (“[G]errymandering exists when votes are not accorded the same weight”); *cf.* DAHL, *supra* note 71, at 65 (“The condition of political equality evidently requires ‘interchangeability,’ i.e., the interchange of an equal number of individuals from one side to another would not affect the outcome of the decision.”). Consequently, geographical process claims move

beyond the equal right to the franchise [a pure process claim] and the right to an equally weighted vote [one person, one vote] to a third political right—the right to a meaningful or undiluted vote. This line of reasoning holds that, even if an individual has the right to vote, and even if that vote is equally weighted, the districting arrangement [whether single or multi-member] can still be unequal and hence unfair.

BUTLER & CAIN, *supra* note 293, at 33-34.

⁴²¹ *See generally* *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975) (holding that annexations driven by the purpose of depriving blacks of the right to vote “have no credentials whatsoever”).

⁴²² *See* discussion of *Gomillion v. Lightfoot* *infra* notes 425-31 and accompanying text.

⁴²³ For a more detailed discussion of geographical process claims based upon size through the use of at-large districts, *see generally* Chandler Davidson & George Korb, *At-Large Elections and Minority Group Representation—A Reexamination of Historical and Contemporary Evidence*, in MINORITY VOTE DILUTION, *supra* note 19, at 65-81 (describing the “effects of at-large or multimember-district elections on the opportunities of ethnic minority groups to participate effectively in the political process”).

⁴²⁴ “Gerrymandering covers any redistricting practice which maximizes the political advantage or votes of one group, and minimizes the political advantage or votes of another.” Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in MINORITY VOTE DILUTION, *supra* note 19, at 85; *see also* Michael McDonald & Richard L. Engstrom, *Detecting Gerrymandering*, in GERRYMANDERING, *supra* note 240, at 178 (“Gerrymandering is the drawing of electoral district lines so as to assign unequal voting weights to cognizable political groups.”). In another sense, gerrymandering represents the ultimate perversion of the political process, when it is used to protect incumbents and candidates of the dominant political party: “[T]he final result seems not one in which the people select their

process claim resembles most state-created quasi-structural process claims because it is group-oriented, allows individual participation at all stages of the election process (although not necessarily within a particular political division), but still denies members of the group the ability to decide elections. Reviewing courts usually must engage in a complex inquiry of examining election outcomes, motivations of the officials who drew the district, as well as other features of the voting system, with the particular evidence required to state a claim depending on the specific facts of the case. The difficulty in devising a principled method for engaging in this type of factual inquiry and its tension with second-guessing the inherently political choices embodied in the election system explains why the Court has accorded less protection for geographical process claims than pure process and quasi-structural process claims.

On the other hand, it is evident that the closer such a claim approximates complete exclusion of a particular group of voters, the more likely the Court will find that claim cognizable. *Gomillion v. Lightfoot*⁴²⁵ is perhaps the best example of a geography process claim in which a districting scheme had been designed to exclude a group of voters completely.⁴²⁶ The city limits of Tuskegee, Alabama initially formed the shape of a square. In 1957, the Alabama legislature passed a local act that altered the city limits to form "an uncouth twenty-eight-sided figure," removing from the city all but four or five black voters and no white voters or residents.⁴²⁷ The black plaintiffs challenged the act under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and as a denial of the right to vote in violation of the Fifteenth Amendment.⁴²⁸ The Court concluded the plaintiffs' claim was justiciable, because if their allegations were proven, it would be "tantamount . . . to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."⁴²⁹ Basing its decision solely on the Fifteenth Amendment, the Court reasoned that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the

representatives, but in which the representatives have selected the people." *Bush v. Vera*, 517 U.S. 952, 963 (1996) (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1334 (S.D. Tex. 1994)); accord Samuel Issacharoff, *The Redistricting Morass*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7, at 201 ("In a democratic society, the purpose of voting is to allow the electors to select their governors. Once a decade, however, that process is inverted and the governors and their political agents are permitted to select their electors."). For a more detailed discussion of geographical process claims based upon gerrymandering, see generally Parker, *supra*, at 85-117 (describing the history and techniques of gerrymandering, as well as judicial enforcement of racial gerrymandering protections).

⁴²⁵ 364 U.S. 339 (1960).

⁴²⁶ Other cases which the Court has treated like *Gomillion* include *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, and *Wright v. Rockefeller*, 376 U.S. 52 (1964). See *infra* notes 660-94 and accompanying text.

⁴²⁷ *Gomillion*, 364 U.S. at 341.

⁴²⁸ See *id.* at 340.

⁴²⁹ *Id.* at 341.

United States Constitution."⁴³⁰ Consequently, the Court recognized that, when a majority deliberately removes a minority group from a political division in order to reduce or take away the group's ability to consent to government in that division, the majority has deprived the members of that group of their right to vote.⁴³¹

A somewhat more difficult situation arises when a plaintiff alleges a geographical process claim based upon the size of a political division where a group of voters is not excluded entirely, as in *Gomillion*. As the Supreme Court recently noted, the size and location of counties and voting districts do not necessarily have anything to do with their impact on particular groups of voters.⁴³² Nonetheless, an unusually large election district can be used as effectively as state-created quasi-structural mechanisms such as majority vote requirements and anti-single shot provisions to "enhance the opportunity for discrimination against [a] minority group."⁴³³ Typically,

⁴³⁰ *Id.* at 344-45; *see also id.* at 347 ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."). Justice Whittaker concurred in the judgment, but found that the decision should have been based upon the Equal Protection Clause of the Fourteenth Amendment:

It seems to me that the "right . . . to vote" that is guaranteed by the Fifteenth Amendment is but the same right to vote as is enjoyed by all others within the same election precinct, ward, or other political division. . . . But it does seem clear to me that accomplishment of a State's purpose . . . of "fencing Negro citizens out of" Division A and into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment

Id. at 349 (Whittaker, J., concurring).

⁴³¹ *But see* Mark E. Rush, *The Price of Unclear Precedents: Shaw v. Reno and the Evolution of Voting Rights Jurisprudence*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7, at 37 (discussing how the Court in *Shaw v. Reno* recast the issue in *Gomillion* as an individual right to equal protection from discriminatory gerrymandering); MARK RUSH, *DOES REDISTRICTING MAKE A DIFFERENCE?: PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR* 22 (1993) [hereinafter RUSH, REDISTRICTING] (observing that in post-*Gomillion* cases, "the Court came to interpret the Fourteenth and Fifteenth Amendments together as creating an implicit group right to representation as a function of the explicit individual right to vote").

⁴³² *See generally* *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2195 (1997) ("Since districting can be difficult, after all, just because racial composition varies from place to place, and counties and voting districts do not depend on common principles of size and location, facts about the one do not as such necessarily entail conclusions about the other.").

⁴³³ S. REP. NO. 417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206; *see also* *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc) (noting that vote dilution can be demonstrated, in part, "by a showing of the existence of large districts"), *aff'd on other grounds sub nom.* *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). The size of an election district can have a discriminatory effect on minority voters in a number of ways. First, inaccessible voter registration and polling sites—for example, where there is only one such site located in a town far removed from rural voters—can preclude or discourage those voters from taking part in the electoral process. In addition, a large district

this type of geographical process claim is raised in challenges to at-large districts, which the Court has concluded are "not unconstitutional *per se*."⁴³⁴ Instead, like state-created quasi-structural process claims,⁴³⁵ a reviewing court must examine the manner in which the at-large district interacts with other features of the voting system to deny voters a meaningful voice in the selection of representatives.⁴³⁶ The judicial referee may not avoid the issue merely because it is a difficult one.

Gerrymandering presents the most difficult, and correspondingly the least protected, type of geographical process claim. Unlike redistricting,⁴³⁷ gerrymandering is problematic "because definitions are frequently unclear regarding (1) who the injured parties are, (2) what it means to be represented, and (3) what it means to be denied a fair opportunity to be represented."⁴³⁸ Quite simply, "nothing comparable to the mathematical yardstick used in apportionment ["one person, one vote"] cases is available to identify the difference between permissible and impermissible adverse impacts on the voting strength of political groups."⁴³⁹ Nevertheless, a majority of the Court has concluded that "[t]he mere fact . . . that we may not now similarly perceive a likely arithmetic presumption in the [gerrymandering] context does not compel a conclusion that [such] claims . . . are nonjusticiable."⁴⁴⁰ Rather, some members of the Court have focused on whether a gerrymander violates basic principles of electoral fairness: "[A] finding of unconstitutionality must be supported by evidence

often restricts the ability of less well-financed minority candidates to run effective campaigns because they lack the resources to get their message out to widely dispersed pockets of potential voters. *See* BARRIERS TO REGISTRATION AND VOTING, *supra* note 62, at 53-114.

⁴³⁴ *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion).

⁴³⁵ *See supra* notes 406-14 and accompanying text.

⁴³⁶ *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 622-27 (1982); *White v. Regester*, 412 U.S. 755, 765-70 (1973).

⁴³⁷ "Redistricting" is "a benign form of altering constituency boundary lines . . . whereby legislative districts are redrawn, usually to equalize the population of each district." RUSH, REDISTRICTING, *supra* note 431, at 2.

⁴³⁸ *Id.* *See also* RUSH, REDISTRICTING, *supra* note 431, at 37-38 (discussing the problems the Court and political scientists have had in trying to bridge the gap between individual and group voting behavior to come up with "a manageable and usable standard of fair group representation").

⁴³⁹ *Bolden*, 446 U.S. at 90 (Stevens, J., concurring).

⁴⁴⁰ *Davis v. Bandemer*, 478 U.S. 109, 123 (1986) (holding that partisan gerrymanders were justiciable). Justice O'Connor, joined by Justices Burger and Rehnquist, concluded that political gerrymandering claims were nonjusticiable because "[v]ote dilution analysis is far less manageable when extended to political parties than if confined to racial minority groups." *Id.* at 156 (O'Connor, J., concurring). In an extensive study of political gerrymandering in Connecticut and Massachusetts, Mark Rush concluded that Justice O'Connor's concerns "about the mutability of partisanship" were supported by his analysis. RUSH, REDISTRICTING, *supra* note 431, at 134. For an additional discussion of *Davis v. Bandemer* and its import for voting rights claims, see, for example, GERRYMANDERING, *supra* note 240; GROFMAN, LEGACY, *supra* note 323, at 11-15, 18-19, 29-34; RUSH, REDISTRICTING, *supra* note 406, at 10-39; RICHARD K. SCHER ET AL., VOTING RIGHTS AND DEMOCRACY: THE LAW AND POLITICS OF DISTRICTING 29-49 (1997).

of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."⁴⁴¹

With the exception of cases in which there is nearly complete exclusion of a group, geography process claims require reviewing courts to make a number of difficult substantive choices in one of the most highly politicized areas of representation. The judiciary thereby faces a double dilemma. On the one hand, history has shown that the courts cannot ignore the harder geographical process claims because of the intentional use and manipulation of at-large elections, gerrymandering, and boundary changes to discriminate against cohesive groups of minority voters.⁴⁴² On the other hand, courts are forced to determine in such cases how much representation for a group is enough to make it "fair," without the benefit of any principled standards to guide them in drawing that baseline—and in direct contravention to the will of the people as expressed through the political body responsible for districting. As illustrated in the discussion of *Shaw v. Reno* in Part III,⁴⁴³ the Court has complicated this problem further by holding that race may be considered in districting, but cannot predominate over traditional districting

⁴⁴¹ *Davis*, 478 U.S. at 133 (plurality decision of four justices). Justice Stevens, who wrote the majority opinion in *Davis*, previously had outlined the essential elements he believed were necessary to state a political gerrymandering claim:

As a threshold matter, plaintiffs must show that they are members of an identifiable political group whose voting strength has been diluted. They must first prove that they belong to a politically salient class, one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries. Second, they must prove that in the relevant district or districts or in the State as a whole, their proportionate voting influence has been adversely affected by the challenged scheme. Third, plaintiffs must make a *prima facie* showing that raises a rebuttable presumption of discrimination.

Karcher v. Doggett, 462 U.S. 725, 754-55 (1983) (Stevens, J., concurring) (citations and footnotes omitted); *cf.* *Thornburg v. Gingles*, 478 U.S. 30 (1986) (requiring proof of geographical compactness, political cohesiveness, and racially polarized voting to state a racial gerrymandering claim under section 2 of the Voting Rights Act). For additional discussion of current theories and methods of analyzing gerrymanders, see RUSH, REDISTRICTING, *supra* note 431, at 57-72.

⁴⁴² See generally *Perkins v. Matthews*, 400 U.S. 379, 389 (1971) (discussing findings of the United States Civil Rights Commission on the use of discriminatory geographical process mechanisms to circumvent the Voting Rights Act); Chandler Davidson, *Minority Vote Dilution—An Overview*, in MINORITY VOTE DILUTION, *supra* note 19, at 5, 8-9; Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in MINORITY VOTE DILUTION, *supra* note 19, at 85-117; J. Morgan Kousser, *The Undermining of the First Reconstruction—Lessons for the Second*, in MINORITY VOTE DILUTION, *supra* note 19, at 31-37.

⁴⁴³ See *infra* notes 581-848 and accompanying text.

factors.⁴⁴⁴ These restrictions make it difficult, if not impossible, to reconcile political fairness with fairness to racial or ethnic groups.⁴⁴⁵

It would seem that if the majority is prevented from denying the consent of a minority directly, through either a pure process or quasi-structural process impediment, then under a Madisonian model, it also would be prevented from denying the consent of a minority indirectly through manipulation of geographical boundaries. That is not the case, however, when a court is forced to make substantive decisions with little or no guidance in assessing a geographical process claim. Many members of the Court have expressed misgivings about making decisions in what they view as political theory, not adjudication, and would leave most geographical claims unprotected.⁴⁴⁶ But in this sense, geographical process claims really are no different from pure process or quasi-structural process claims: The Court is not compelled to create a political theory in these cases, but to enforce one (protection of minority consent from the tyranny of majority factionalism), albeit with more difficult substantive decisions to make in evaluating the fairness of political districting systems. If the courts fail to maintain their role as referees over geographical process claims, history has shown that it is but a simple matter for the majority to render meaningless the formal right of any minority group to vote.

4. "Submersion Process" or "Perverted Process" Claims

"Submersion process" or "perverted process" claims aver that a voter's voice is drowned out or diluted by sustained bloc voting of another group or groups of voters. In other words, this category identifies those claims in which there is no identifiable pure process impediment—that is, there is no state-created or state-used electoral device which bars a voter from actually casting his ballot (no denial of election access)—but the process nevertheless is perverted by precluding the voter and his group from having a meaningful voice in the political process.⁴⁴⁷ Vote dilution

⁴⁴⁴ See generally *Miller v. Johnson*, 515 U.S. 900, 903-05, 920 (1995) (holding that strict scrutiny applies when race predominates over traditional districting criteria). Traditional districting criteria include compactness, contiguity, preservation of communities of interest, respect for political boundaries and topographical features, and protection of incumbents. See *BUTLER & CAIN*, *supra* note 293, at 66-90; *SCHER ET AL.*, *supra* note 440, at 149-65; Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7.

⁴⁴⁵ See *SCHER ET AL.*, *supra* note 440, at 144-47; Samuel Issacharoff, *The Redistricting Morass*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7, at 201-20.

⁴⁴⁶ See *supra* note 322; *infra* notes 595-98, 617.

⁴⁴⁷ As Judge Tjoflat observed in his plurality opinion in *Nipper v. Smith*, "[c]ases alleging a distortion of group voting power of this type have been termed 'qualitative' (as opposed to quantitative) reapportionment cases because they focus 'not on population-based apportionment but on the quality of representation.'" *Nipper v. Smith*, 39 F.3d 1494, 1510 (11th Cir. 1994) (en banc) (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971) (footnote omitted)), *cert. denied*, 514 U.S. 1083 (1995).

claims brought under section 2 of the Voting Rights Act fall squarely within this category. Proof of perverted process claims typically requires showing evidence of quasi-structural process or geography process barriers,⁴⁴⁸ and how the presence of those impediments has interacted with majority bloc voting to give members of a minority group "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."⁴⁴⁹ Consequently, perverted process claims have all of the attendant difficulties of the other process democracy claims, in addition to some of their own and, hence, are less protected.

Although perverted process claims can include both individual and group characteristics (particularly when there is evidence of state-sanctioned quasi-structural impediments⁴⁵⁰), their focus on election outcomes makes them inherently group-based.⁴⁵¹ The central place of electoral outcomes in proving perverted process claims⁴⁵² creates what detractors of section 2 find to be the principal reason to deny them any protection at all: Like geography process claims, there is no baseline for a court to determine how much voting strength a group must receive in order to have fair and equal access to the political process.⁴⁵³ Also weighing very heavily against judicial intrusion into this area is the fact that it requires the courts to engage in the seemingly antidemocratic action of second-guessing the will of the majority, one of the foundations of republican government.⁴⁵⁴ Notwithstanding these difficulties, the Court has been willing to provide limited protection for some perverted process claims. The Court has denied protection to cases, however, in which it has determined that it has been unable to discern a benchmark to which it may compare the challenged structure or mechanism.⁴⁵⁵

⁴⁴⁸ See S. REP. NO. 417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07.

⁴⁴⁹ 42 U.S.C. § 1973(b) (1994).

⁴⁵⁰ See *supra* notes 389-413 and accompanying text.

⁴⁵¹ See generally *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part) ("The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."); cf. sources cited *supra* note 221 (summarizing commentary on whether the right to vote is an individual or a group right).

⁴⁵² The results test of section 2 mandates an examination of election outcomes as part of the analysis in determining whether a group of voters has been denied equal access to the political process. See 42 U.S.C. § 1973(b) (1994); see also *infra* notes 507-80 and accompanying text.

⁴⁵³ For Justice Thomas's discussion of this problem in *Holder v. Hall*, 512 U.S. 874 (1994), see *infra* text accompanying note 617; see also Abigail Thernstrom, *More Notes from a Political Thicket*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 112 ("Unequal electoral opportunity was inevitably an elusive concept As Justice Frankfurter observed (dissenting in *Baker v. Carr*), we can only know if voters are improperly represented if we know what it means to be properly represented. And yet we lack a theoretical framework to decide." (footnote omitted)).

⁴⁵⁴ See *supra* note 25.

⁴⁵⁵ See *infra* notes 649-59 and accompanying text.

The last two Parts of this Article will discuss in greater detail the problems of judicial regulation of perverted process claims.⁴⁵⁶ This Article will show how it is possible to place principled limits on the courts to protect the consent of minorities from perversions in the political process. At the same time, the courts will not have to sacrifice the basic axiom of majority rule or impose their own democratic theory on other branches of government. Indeed, it will become evident that, unless the judiciary is willing to fulfill its constitutional role of overseeing the political process, there is little preventing majority factionalism from rendering the Madisonian equation of consent of the governed to nothing more than an empty plebiscite to endorse the majority's predetermined choices.

5. "Parliamentary Process" Claims and Legislative Outcomes

"Parliamentary process"⁴⁵⁷ claims lie on the opposite end of the continuum from pure process claims. This type of claim maintains that a voter cannot have a meaningful voice in government unless her representative actually is able to influence government decisions—thereby securing "*fair and effective*" representation for the voter.⁴⁵⁸ In this sense, parliamentary process democracy adopts a submersion process or perverted process claim and applies it to the legislative body in question. Thus, if a representative's voice is drowned out or diluted by sustained bloc voting of other legislators, then it is said that the voter lacks a voice in the political process.⁴⁵⁹ In addition, parliamentary process democracy also encompasses specific instances in which a voter's voice in government either is not present or not loud enough to prevent the legislative body in question from passing a law which discriminates

⁴⁵⁶ See *infra* notes 581-851 and accompanying text.

⁴⁵⁷ The term "parliamentary process" is used here to refer to claims based upon parliamentary law and its outcomes. "Parliamentary law" is defined as "[t]he general body of enacted rules (*e.g.*, Roberts Rules of Order) and recognized usages which governs the procedure of legislative assemblies and other deliberative bodies" BLACK'S LAW DICTIONARY 1116 (6th ed. 1990).

⁴⁵⁸ *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). On the other hand, it is absurd to suggest that the voter herself must be allowed to participate directly in government decisions in order for outcomes to be legitimate. The Court has rejected such an argument expressly. See *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 284-85 (1984).

⁴⁵⁹ Cf. GUINIER, *supra* note 16, at 8 (describing bloc voting as a "third generation" voting rights problem requiring the policing of "the legislative voting rules whereby a majority consistently rigs the process to exclude a minority").

[I]nterest representation does not end with electoral reforms. Rather, it looks into the legislative body itself to make sure the discrete and insular minority problem is not replicated there through seemingly neutral rules that have disparate effects on minority representatives. It is important to bear in mind that in its evaluation of the internal legislative processes, interest representation focuses not on guaranteeing that minorities achieve the substantive results desired, but on adopting voting procedures that enhance the quality of the deliberative process.

Id. at 117-18.

against that voter and her group. The Court has treated outcomes resulting from the parliamentary process like other process democracy claims: The closer legislative outcomes approximate harm to individuals by classifying benefits or burdens in a discriminatory manner, the more likely they will be protected.

The Founding Fathers were sympathetic to parliamentary process claims and protection from some of the attendant outcomes. Hamilton described how the "firmness of the judicial magistracy . . . not only serves to moderate the immediate mischiefs of those [unjust laws] which may have been passed, but it operates as a check upon the legislative body passing them."⁴⁶⁰ In the same vein, Jefferson spoke of the "sacred principle, that although the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect and to violate which would be oppression."⁴⁶¹ Madison similarly recognized that the causes of majority factionalism which denied the consent of a particular segment of the governed could be controlled only through the "effects" of that factionalism.⁴⁶² In other words, consent itself would become an empty, formalized exercise if a majority was allowed consistently and systematically to deny fair outcomes to a minority, even where that minority had some members in the elected body.⁴⁶³ Moreover, to the extent the majority denies others the opportunity to have any voice at the stage of the process when government decisions are actually made, the outcomes themselves would be rendered illegitimate.⁴⁶⁴

Nevertheless, the Court has rejected parliamentary process claims, even when a legislative body has adopted measures that indirectly affect the value of the right to vote. In *Presley v. Etowah County Commission*,⁴⁶⁵ Etowah County, Alabama had been governed by a five member county commission, elected at-large and comprised of four members elected from districts in which the member had to reside and a chairman who was not subject to the residency requirement. The commissioners

⁴⁶⁰ THE FEDERALIST NO. 78, *supra* note 46, at 470 (Alexander Hamilton); *see also supra* notes 105-08 and accompanying text.

⁴⁶¹ Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in THE POLITICAL WRITINGS OF THOMAS JEFFERSON 42 (Edward Dumbauld ed., 1985).

⁴⁶² THE FEDERALIST NO. 10, *supra* note 46, at 80 (James Madison).

⁴⁶³ *Cf. ELY, supra* note 95, at 84 ("[C]ertain groups that are technically enfranchised *have* found themselves for long stretches in a state of persistent inability to protect themselves from pervasive forms of discriminatory treatment. Such groups might just as well be disenfranchised.").

⁴⁶⁴ *See supra* notes 111-18 and accompanying text. In his dissent in *Bolden*, Justice Marshall anticipated the danger of permitting unfettered majority discrimination against a particular group: in the absence of legal redress, the victims of that discrimination would have no incentive "to respect political channels." *City of Mobile v. Bolden*, 446 U.S. 55, 141 (1980) (Marshall, J., dissenting).

⁴⁶⁵ 502 U.S. 491 (1992). The Court also considered a claim against Russell County, Alabama. *See id.* at 498-99, 506-08. For purposes of clarity and because of the similarities between the effect of the changes made in the two county commissions, however, this discussion will be limited to Etowah County.

from each of the four residency districts controlled the use of funds allocated to their own district by the commission for a road shop, crew, and equipment used in road construction and repairs.⁴⁶⁶ In 1986, a consent decree restructured the commission and established six residency districts. One of the two new residency districts elected a black commissioner.⁴⁶⁷ In 1987, the commission passed a resolution that allowed the four holdover commissioners to continue individual management of the road shop in each of their districts and to oversee jointly the construction and maintenance of all the roads in the county. The two new commissioners, who voted against the resolution, were given other responsibilities.⁴⁶⁸ In addition, the commission passed a "common fund" resolution that took away the power of individual commissioners to determine how road funds were spent in his or her district and transferred that power to the commission as a whole.⁴⁶⁹

When confronted with a challenge to the common fund resolution under section 5 of the Voting Rights Act, the Court held that no parliamentary process claim could be stated.⁴⁷⁰ The majority applied a narrow reading of section 5, and found that the resolution had "no connection to voting *procedures*," but instead only concerned "the internal operations of an elected body" and the "power of elected officials."⁴⁷¹ The majority especially was troubled by the inability to draw "lines between those governmental decisions that involve voting and those that do not," and found the absence of a "workable standard" to be a compelling basis to reject the plaintiffs' claim.⁴⁷² The majority seemed unconcerned with the fact that the reallocation of

⁴⁶⁶ See *id.* at 495-96.

⁴⁶⁷ See *id.*

⁴⁶⁸ See *id.* at 496-97. Presley, the black commissioner and plaintiff in the case, was assigned oversight for maintenance of the county courthouse, while Williams, a white commissioner, was assigned oversight of the county engineering department. See *id.* at 497.

⁴⁶⁹ See *id.*

⁴⁷⁰ See *id.* at 503. Prior to *Presley*, other lower courts permitted outcome democracy claims to be stated when there was a reallocation of the power of elected officials. See, e.g., *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) (three judge panel); *Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978) (three judge panel). But see *Rojas v. Victoria Indep. Sch. Dist.*, No. CIV.A.V-87-16, 1988 WL 92053 (S.D. Tex. Mar. 29, 1988) (rejecting outcome democracy claim when school board policy changed to require approval of two board members to place an item on the school board's meeting agenda), *aff'd*, 490 U.S. 1001 (1989).

⁴⁷¹ *Etowah*, 502 U.S. at 503-04 (emphasis added).

⁴⁷² *Id.* at 504; cf. *Holder v. Hall*, 512 U.S. 874, 881 (1994) (rejecting a challenge to the size of an elected body because "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2" of the Voting Rights Act). Justice Stevens, joined by Justices White and Blackmun in dissent, contended a workable standard was possible:

At the very least, I would hold that the reallocation of decision-making authority of an elective office that is taken (1) after the victory of a black candidate, and (2) after the entry of a consent decree designed to give black voters an opportunity to have representation on an elective body, is covered by § 5.

power in the commission (a parliamentary process claim) could be an indirect means of undermining a minority group's equal opportunity to elect a candidate of their choice (a perverted process claim).⁴⁷³ Instead, in *Etowah*, the Court rejected the parliamentary process claim to avoid the slippery slope of determining a stopping point for the "all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every . . . State" covered under section 5 of the Voting Rights Act.⁴⁷⁴ Thus, when the only process democracy violation is in the parliamentary process, courts generally will reject that claim.

Conversely, the Court actually has afforded greater protection to claims based upon unequal outcomes than to the discriminatory parliamentary process which generated them. The accepted contemporary view of outcomes holds that, under the Equal Protection Clause of the Fourteenth Amendment, "individuals [must] be treated in a manner similar to others . . . in all governmental actions which classify individuals for different benefits or burdens under the law."⁴⁷⁵ Intuitively, this type of judicial protection makes sense. If courts were precluded from intervening in such

Etowah, 502 U.S. at 523 (Stevens, J., dissenting).

⁴⁷³ The right to cast a ballot has more than just symbolic value—it also is a means to have a voice in the allocation of government outcomes. See *infra* note 491. If a majority simply can abrogate the newly acquired political power of a minority group by ensuring the minority's representatives have no say in government outcomes, then process democracy rights are rendered nothing more than a symbolic act. The minority group might just as well not elect any representatives because the result is the same. Majority factionalism has denied the minority group of their ability to have any say—i.e., consent—at the critical decision-making stage of government. Cf. *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 367, 372 (1992)

(The counties' actions . . . did something more than redistribute power: they transferred the decision-making authority of a black official elected from a predominately black district to a body or individual controlled by the majority of voters, rendering a vote for county commissioner by a resident of that district virtually meaningless. Under the Court's prior interpretations, this is the very result section 5 was meant to eliminate.).

The *Etowah* decision has been criticized widely on this point. See, e.g., GUINIER, *supra* note 16, at 179-81; Grofman & Handley, *supra* note 20, at 235-37; Karlan, *supra* note 51, at 1723-26.

⁴⁷⁴ *Etowah*, 502 U.S. at 506. To avoid the slippery slope, in *Etowah*, the Court went on to hold that section 5 typically only applies to four types of voting changes: (1) "the manner of voting"; (2) "candidacy requirements and qualifications"; (3) "the composition of the electorate that may vote for candidates" of a particular office; and (4) "affecting the creation or abolition of an elective office." *Id.* at 502-03. On remand, the *Etowah* plaintiffs argued the challenged resolution fit within the third and fourth categories of cases. See *Mack v. Russell County Comm'n*, 840 F. Supp. 869, 873-74 (M.D. Ala. 1993) (three judge panel) (*per curiam*). The lower court disagreed, finding the plaintiffs' arguments rested upon the assumption that "a shift in authority among elected officials is a change in voting that requires preclearance," a view which the Supreme Court expressly had rejected. *Id.* at 874.

⁴⁷⁵ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 568 (4th ed. 1991).

cases, there would be little to prevent a well-disciplined majority faction from trampling on the rights of those in the minority. These legislative outcome cases invoke well-established constitutional standards that seem to require little in the way of substantive judicial decisions.⁴⁷⁶

As a result, in easier cases appearing to fit neatly within standard equal protection doctrine, the courts are willing to protect minorities from adverse legislative outcomes. In *Hawkins v. Town of Shaw, Mississippi*,⁴⁷⁷ for example, evidence showed extensive disparities between municipal services provided to whites and blacks. Nearly ninety-eight percent of all homes that fronted on unpaved streets were owned by blacks.⁴⁷⁸ Similarly, ninety-seven percent of all homes not served by municipal sanitary sewers were owned by blacks.⁴⁷⁹ Black residential areas also had less powerful street lights, less adequate surface water drains, and fewer water mains, fire hydrants, and traffic control signs than white residential areas.⁴⁸⁰ The Fifth Circuit in *Hawkins* recognized that it was adjudicating a legislative outcome claim with a simple solution. It had a "most reliable yardstick—namely, the quality and quantity of municipal services provided in the white area of town" which made comparing the black and white areas "hardly an insuperable judicial task."⁴⁸¹ In addition, the court stated its opinion squarely in Madisonian terms. Citing *The Federalist No. 48*, the Fifth Circuit reasoned its judicial intervention was acceptable under the system of checks and balances to preserve the integrity of the local government in question.⁴⁸² Other courts have reached similar conclusions under comparable circumstances.⁴⁸³

⁴⁷⁶ Of course, such cases *do* require reviewing courts to make substantive decisions about what types of classifications are constitutional. Discussion of judicial decision-making in these types of outcome democracy cases is beyond the scope of this Article.

⁴⁷⁷ 437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g en banc*, 461 F.2d 1171 (5th Cir. 1972) (per curiam).

⁴⁷⁸ See *Hawkins*, 437 F.2d at 1288.

⁴⁷⁹ See *id.*

⁴⁸⁰ See *id.*

⁴⁸¹ *Id.* at 1292.

⁴⁸² See *id.* On rehearing, the en banc panel held that it was unnecessary for the plaintiffs to prove that the municipal officials had discriminatory motive, intent, or purpose. See *Hawkins*, 461 F.2d at 1172. The Supreme Court subsequently disagreed with that conclusion. See *Washington v. Davis*, 426 U.S. 229, 244 & n.12 (1976).

⁴⁸³ See, e.g., *Ammons v. Dade City, Florida*, 783 F.2d 982 (11th Cir. 1986); *Johnson v. City of Arcadia*, 450 F. Supp. 1363 (M.D. Fla. 1978); see also *Florida Rogers v. Lodge*, 458 U.S. 613, 631-32 (1982) (Stevens, J., dissenting) (citing cases of unpaved roads, denial of government employment, and segregated schools as examples of outcome democracy claims that "[n]o one could legitimately question"); *Greene v. City of Memphis*, 535 F.2d 976 (6th Cir. 1976) (holding that an outcome democracy claim stated against the mayor and city council chairman, where benefit of street closings to create greater privacy and quiet, was conferred on white but not black residential areas), *appeal after remand*, 610 F.2d 395 (6th Cir. 1979), *rev'd*, 451 U.S. 100 (1981).

When there is no impediment to ballot access, and without these simpler types of equal protection problems, however, courts rarely are sympathetic to claims focusing on disparate legislative outcomes. The judiciary has been unequivocal in its stand that "the right to an 'effective' vote refers to the citizen's right to make his voice heard in the electoral process, and not to the ability to command results in the public office."⁴⁸⁴ Similarly, no process democracy claim can be stated for a failure to achieve proportional representation.⁴⁸⁵ In addition, there certainly is no basic constitutional entitlement of an individual or group to allocations of government benefits⁴⁸⁶ so long as those benefits are not distributed "on an unconstitutional basis."⁴⁸⁷ The Court's discomfort with examining legislative outcomes arises from its general rejection of a substantive due process approach to constitutional analysis.⁴⁸⁸ From a more fundamental standpoint, protection of substantive outcomes

⁴⁸⁴ *Smith v. Winter*, 717 F.2d 191, 198 (5th Cir. 1983); *accord Kardules v. City of Columbus*, 95 F.3d 1335, 1358 (6th Cir. 1996) (Batchelder, J., concurring).

⁴⁸⁵ See generally 42 U.S.C. § 1973(b) (1994) (stating that nothing in section 2 of the Voting Rights Act "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."); *Thornburg v. Gingles*, 478 U.S. 30, 84-86, 94 (1986) (O'Connor, J., concurring) ("[U]nder § 2 . . . we . . . know that Congress did not intend to create a right to proportional representation for minority voters." *Id.* at 84.); *City of Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization."); *id.* at 122 (Marshall, J., dissenting); see also *White v. Regester*, 412 U.S. 755, 765-66 (1973) (holding that the Constitution does not protect any group from defeat at the polls). While there is no right to "descriptive" proportional representation exists, nothing can prevent a governmental body from attempting to achieve "functional" proportional representation so long as it acts within tolerable constitutional limits. See *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973); see also *supra* notes 250-51, 255 and accompanying text; *infra* notes 554, 639-40 and accompanying text (describing descriptive representation and and proportionate descriptive representation).

⁴⁸⁶ See, e.g., *Danbridge v. Williams*, 397 U.S. 471 (1970).

⁴⁸⁷ ELY, *supra* note 95, at 145.

⁴⁸⁸ Early on, the Court summarily rejected the idea of substantive due process in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). However, substantive due process later was revived by and enjoyed its clearest expression in *Lochner v. New York*, 198 U.S. 45 (1905), overruled by *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963). The Court abandoned the doctrine in 1937, see *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and, except for Justice Stone's famous footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), substantive due process largely has remained discredited. The Court's present position is "only to actively guard fundamental constitutional values and . . . should allow other branches of government great latitude in dealing with issues of 'economics and social welfare' which do not touch upon these values." NOWAK & ROTUNDA, *supra* note 475, at 379. For an additional discussion of substantive due process, see, for example, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997); G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. 87, 107-28 (1997).

is much less principled than ensuring purely procedural access. A focus on outcomes quickly can become a slippery slope, on which the Court is forced to engage in the type of substantive decision-making for which it is certainly less qualified than a duly elected legislative body. Besides, such judicial interference would seem to be the quintessential violation of basic democratic standards.

As a result, when there is no ready application of equal protection standards to discriminatory classifications, few scholars would support an outcome-oriented claim seeking equal distribution of government benefits. Professor Kenneth Karst suggests that there is an illusory distinction "between equalizing opportunity and equalizing result."⁴⁸⁹ Similarly, Professor Cass Sunstein has argued that "[j]udicial scrutiny of the legislative process might take the form of a more serious inquiry into both process and outcome . . . to ensure that what emerges is genuinely public rather than a reflection of existing relations of private power."⁴⁹⁰ In the context of voting, what good is it to have an "equal opportunity" to vote if that right merely shifts the place of exclusion from the ballot box to the legislature? The result is the same.⁴⁹¹ Out of fairness to Karst and Sunstein, however, their comments should not be viewed as mandating formal equality to be taken so far as to require equal outcomes under all circumstances. Rather, it is perhaps more accurate to say that they would examine legislative outcomes as a means of determining whether the consent of a particular group of citizens has been denied in the parliamentary process. In this sense, their statements implying equality of outcomes are consistent with what others have said on the subject.⁴⁹²

⁴⁸⁹ KARST, *supra* note 51, at 39; *see also id.* at 135 ("To speak of equal citizenship as a status goal . . . is to identify an objective that includes a measure of substantive equality along with formal equality before the law."); *id.* at 213 ("The concerns of full citizenship go beyond formal equality and encompass a measure of substantive justice.").

⁴⁹⁰ Sunstein, *supra* note 56, at 86.

⁴⁹¹ It is fair to say that most people expect that the exercise of the franchise is more than just a symbolic act, but should be tied to having some voice in the distribution of government benefits and burdens. *See generally* Karen I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 901 (1982) ("Although the right to vote may have inherent symbolic value, for the individual the practical value comes from the ability to join a vote with those of others to influence election outcomes and ultimately the legislative process."); Frickey, *supra* note 283, at 308 (observing that the "realistic focus [of Judge Wisdom's voting rights decisions] upon actual political outcomes is more of a pragmatic recognition that the true goal is fair representation, not the vote in and of itself"); Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 434 (1989) ("To keep the faith, blacks expect political fairness. At this moment in history, political fairness for blacks means a fair opportunity to choose their representatives, a fair shake in administrative enforcement that protects minority voting rights, and a fair share of substantive, legislative policy outcomes.").

⁴⁹² Cf. DAHL, *supra* note 71, at 145

([Being heard] at some crucial stage in the process of decision . . . does not mean that every group has equal control over the outcome . . . [but that] it makes a noise . . . [and] that one or more officials are not only ready to listen

Other commentators have refrained from drawing any connection between the right to vote and substantive outcomes. Professor John Hart Ely, who built his entire constitutional construct for protecting minority rights as a purely procedural model,⁴⁹³ emphasized that “[o]ur government cannot fairly be said to be ‘malfunctioning’ simply because it sometimes generates outcomes with which we disagree.”⁴⁹⁴ Abigail Thernstrom is even more direct in her conclusion that “[d]emocracies guarantee a fair political process, but no particular results. Opportunity, not outcome.”⁴⁹⁵ Thernstrom’s pure process approach, in which only individual access to the political process is protected, is shared by other critics of minority voting rights:

Most critics of minority rights’ litigation insist on a strictly procedural interpretation of political equality, arguing that equality should be tested against input (are all individuals equally enfranchised?) and not against output as well. Political equality is then conceived only as a matter of establishing equality between individuals, and any additional preoccupation with balancing the relative power of different groups is viewed as an illegitimate intrusion on the democratic agenda.⁴⁹⁶

The judiciary often has expressed the same skepticism as these commentators. Outside of the context of easy equal protection cases, courts generally are less receptive to voting rights claims that are framed in terms of legislative outcomes.⁴⁹⁷

to the noise, but to suffer in some significant way if they do not placate the group, its leaders, or its most vociferous members);

GUINIER, *supra* note 16, at 14

(Outcomes are indeed relevant, but *not* because I seek to advance particular ends . . . Rather, I look to outcomes as *evidence* of whether all the [members of the community] . . . feel that their choice is represented and considered. The purpose is not to guarantee ‘equal legislative outcomes’; equal opportunity to *influence* legislative outcomes regardless of race is more like it.);

id. at 249 n.64 (“Outcomes are considered, but only in a procedural justice sense to measure degrees of participation by eligible voters in the decision-making process.”); Abrams, *supra* note 56, at 475, 489 (noting that enhancing minority participation is “a dialogue about goals,” which requires “apply[ing] a wider lens to the political process . . . [by] describ[ing] the activity that legitimized governmental power not as a single electoral event, but as a process that began with reflection on, and discussion of, preferences and concluded with the enactment of substantive policies.”).

⁴⁹³ See *supra* notes 330-36 and accompanying text.

⁴⁹⁴ ELY, *supra* note 95, at 103.

⁴⁹⁵ Abigail Thernstrom, *More Notes from a Political Thicket*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 99.

⁴⁹⁶ PHILLIPS, *supra* note 382, at 92; cf. S. REP. NO. 417, at 94 (1982), *reprinted* in 1982 U.S.C.A.A.N. 177, 267 (additional views of Senator Hatch) (expressing concern that the 1982 amendment to section 2 of the Voting Rights Act, adopting a results test, “would substitute a totally alien principle of equal results”).

⁴⁹⁷ Cf. Issacharoff, *Polarized Voting*, *supra* note 240, at 1869 (“The lesson of the past decade is that voting rights claims gather force to the extent that process-based claims can relieve a conservative judiciary of any obligation to police the substantive distributional

Consequently, it is not surprising that the judicial referees are reticent to recognize parliamentary process claims, which rely on outcomes as circumstantial evidence that the consent of a particular group of voters has been denied at the legislative decision-making stage of the political process.

In sharp contrast, courts have made it clear that the inability to point to unfair outcomes, because the aggrieved party is receiving fair and effective representation, is an insufficient basis on which to defeat a claim based upon a denial of access to the political process. One of the reasons for this distinction comes from the incorporation of a results test in section 2 of the Voting Rights Act. Outcomes, measured by the responsiveness of elected officials, are evidence of discriminatory intent that has little relevance to assessing discriminatory impact of an election system on a group of voters.⁴⁹⁸ Consequently, "evidence that officials meet the functional needs of minority citizens does not overcome evidence that the minorities are excluded from political participation."⁴⁹⁹

This disparate weight given to process claims, based upon access over those based upon outcome, is very evident in *Johnson v. Mortham*,⁵⁰⁰ an equal protection challenge to Florida's Third Congressional District (a geography process claim). The evidence showed that black Congresswoman Corrine Brown provided all of her constituents, including the white plaintiffs, with fair and equal representation.⁵⁰¹ The majority found the district was drawn for predominately race-based reasons,⁵⁰² and stated a process democracy claim had been proven because the redistricting plan was not narrowly tailored to further a compelling state interest.⁵⁰³ In a strongly worded dissent, Circuit Judge Hatchett disagreed with the majority's conclusion that a process democracy claim had been proven, making his point in unequivocal terms of legislative outcome:

[I]t is important to assess the representation that constituents living in District 3 have received as a result of the development of this district. Although I do not suggest that the successful representation obtained in this district predominates over constitutional considerations, it is important to recognize that this district has accomplished what the *De Grandy* court [the court which originally drew the challenged district] set out to achieve: remedying the past exclusion that African-American voters endured in Florida's political process and *creating a district that works for all of its constituents*. Moreover, this discussion exposes the absurdity of the majority's finding that District 3 will inevitably be overburdensome to "innocent" white residents in District 3. District 3 not

outcomes of the policy decisions of elected political bodies.").

⁴⁹⁸ See *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 978, 983 (11th Cir. 1982).

⁴⁹⁹ *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1572 (11th Cir.), *appeal dismissed and cert. denied*, 469 U.S. 976 (1984).

⁵⁰⁰ 926 F. Supp. 1460 (N.D. Fla. 1996) (three judge panel) (per curiam).

⁵⁰¹ See *id.* at 1492; see *id.* at 1498-502 (Hatchett, J., dissenting).

⁵⁰² *Johnson v. Mortham*, 915 F. Supp. 1529, 1552-53 (N.D. Fla. 1995).

⁵⁰³ See *Johnson*, 926 F. Supp. at 1481, 1492-93.

only complies with constitutional and statutory mandates, *it works*. . . . The evidence in this case shows that *District 3 works, and it works for everyone*.⁵⁰⁴

Nonetheless, the other two judges gave the evidence of fair outcomes short shrift in the face of what they concluded was a cognizable geographical process democracy claim. The *Johnson* majority reasoned that “[t]he fact that innocent third parties receive a fair result cannot ameliorate the deprivation of those parties’ *fundamental right to equally participate in the political process*.”⁵⁰⁵ Hence, it is apparent that fair outcomes alone cannot defeat process democracy claims.

This section has demonstrated how the courts have failed to give protection to parliamentary process claims except to the extent that outcomes resulting from that process implicate a constitutional right independent of the right to vote. When there is a clear-cut equal protection violation, discriminatory outcomes will be viewed akin to a pure process (individual access) claim: The reviewing court might have to make substantive decisions, but it can do so in a principled manner by pointing to the unacceptable correlation between the benefit or burden and legitimate government purposes.⁵⁰⁶ On the other hand, when all voters have been given an equal opportunity to elect the representatives of their choice, but an unfair outcome has resulted—either because of defects in the legislative decision-making process (such as the majority refusing to give minority representatives any voice in the decision) or reallocations of power of the elected officials (as in *Etowah*)—the judiciary will be unwilling to enforce the parliamentary process democracy claim. In this sense, the parliamentary process claim is treated like an unprotected perverted process (group access) claim: The absence of a clear baseline or benchmark for a court precludes a determination of how many benefits or burdens a group should receive, in the face of the seemingly easy decision of sustaining the legislative decision out of respect for majority rule in a democratically elected body. The reluctance of courts to afford protection against such impediments to the democratic process, seriously undermines the ability of a minority group to consent to the actions of the government. In this sense, there is little doubt that fair and effective representation has not been provided.

C. *Redefining the Boundaries for Judicial Protection of Consent*

The foregoing discussion has illustrated how the courts have protected consent along a continuum of process democracy rights, between the two poles of access and outcome. Viewing this continuum in the context of the constitutional role that judicial referees are supposed to play in ensuring fair and equal consent of all voters and to preserve “democratic legitimacy,”⁵⁰⁷ this Article suggests that the courts have

⁵⁰⁴ *Id.* at 1498, 1502 (Hatchett, J., dissenting) (emphasis added).

⁵⁰⁵ *Id.* at 1492 (emphasis added).

⁵⁰⁶ In this sense, a court is engaging in the same type of substantive decision-making that has allowed the Supreme Court to separate acceptable limitations on the right to vote from unacceptable ones. See *supra* notes 379-82 and accompanying text.

⁵⁰⁷ See *infra* note 579 and accompanying text.

not gone far enough. Protection for consent should not be limited to the entry point of individual access to the political process, but instead is extended better to every stage of the process in which cognizable discrimination deprives any individual or group of voters of the equal opportunity to consent.

Congress recognized as much in the Voting Rights Act of 1965,⁵⁰⁸ and adopted the Act pursuant to its enforcement powers under the Fifteenth Amendment.⁵⁰⁹ As originally enacted, the purpose of the Act was to "banish the blight of racial discrimination in voting"⁵¹⁰ by focusing primarily on pure process claims—barriers such as poll taxes, voter registration procedures, and literacy tests that precluded individual access to the polls and the right to have a ballot counted.⁵¹¹ The "heart of the Voting Rights Act,"⁵¹² sections 4 through 9, were temporary measures mainly limited to seven southern states that had engaged in extensive discrimination against blacks attempting to register to vote or cast a ballot.⁵¹³ Among other things, these provisions suspended the use of literacy tests in certain states, required federal supervision over changes in voting laws and practices, and provided for federal voting examiners and poll watchers to oversee voter registration and voting.⁵¹⁴ Sections 11 and 12 of the Act also were intended to guarantee pure process rights to vote by prohibiting voter intimidation and electoral fraud.⁵¹⁵ The legislative history of the original Act leaves no question that Congress had the principal goal of

⁵⁰⁸ Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973 to 1973aa-6 (1994)).

⁵⁰⁹ The Act was "designed primarily to enforce the 15th [A]mendment," and, secondarily, "to enforce the 14th [A]mendment and [A]rticle I, section 4." H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2437. Congress rested the sweeping scope of the Act on the broad powers it possessed under section 2 of the Fifteenth Amendment. *See id.*, *reprinted in* 1965 U.S.C.C.A.N. at 2448-49; S. REP. NO. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2554-55 (outlining the joint views of 12 members of the Senate Judiciary Committee relating to the Voting Rights Act of 1965).

⁵¹⁰ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). In 1975, Congress expanded the Act's coverage to include language minorities under sections 2 and 5. *See* Pub. L. No. 94-73, § 203, 89 Stat. 400, 401-02 (1975) (codified as amended at 42 U.S.C. § 1973b (1994)). Congress made this change after determining that "voting discrimination against citizens of language minorities is pervasive and national in scope." 42 U.S.C. § 1973b(f)(1) (1994).

⁵¹¹ For a summary of the provisions of the original Act, see Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 8, at 17-21.

⁵¹² U.S. COMM'N ON CIVIL RIGHTS, *supra* note 408, at 5.

⁵¹³ *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 9, at 18-20. Congress intended these temporary provisions initially were to be in effect for five years. *See* Pub. L. No. 89-110, 79 Stat. 437 (1965). In 1970, Congress extended them for an additional five years. *See* Pub. L. No. 91-285, 84 Stat. 314 (1970). In 1975, Congress extended them for an additional seven years. *See* Pub. L. No. 94-73, 89 Stat. 400 (1975). In 1982, Congress extended the provisions for an additional twenty-five years—they will expire in 2007. *See* Pub. L. No. 97-205, 96 Stat. 131 (1982).

⁵¹⁴ *See* 42 U.S.C. §§ 1973b-g (1994).

⁵¹⁵ *See id.* §§ 1973i-j.

removing barriers preventing individual exercise of the right to vote.⁵¹⁶ Indeed, in what many scholars have described as “first generation” voting rights claims under the Constitution and the Voting Rights Act, minorities mainly focused on ballot access.⁵¹⁷

Yet, Congress did not intend to limit the scope of the Voting Rights Act solely to protecting pure process voting claims. Preliminarily, Congress broadly defined the terms “vote” and “voting” as including “all action necessary to make a vote *effective* in any primary, special, or general election, *including, but not limited to*, registration, . . . casting a ballot, and having such ballot counted properly”⁵¹⁸ Therefore, as a number of Republican sponsors of the legislation made clear, the right to vote protected under the Act went beyond individual access:

The right to vote is of particular importance and value to *minority groups in general* but to our Negro citizens in particular who suffer deprivations of rights *other than access to the ballot*. If these other deprivations are to be rectified and the present imbalance cured at the level of government contemplated by the Constitution as custodian of the welfare of individual citizens, that level of government must be maintained *responsive to the needs of all its people*. Federal authority lies to correct the gross imbalance of today, to bring back to a constitutional standard the responsive character of State and local governments where lies the final assurance and vindication of these rights. Neither in the streets nor in the courts, nor in the Federal Congress but *in the political process of free and responsive operation of local government lies the final goal of equality*

⁵¹⁶ See H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-44, 2451-54 (discussing discrimination against blacks in voter qualifications, voter registration, and the voting process); S. REP. NO. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2541-54 (providing the joint views of 12 members of the Senate Judiciary Committee relating to the Voting Rights Act of 1965); *id.*, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2570-73 (additional views of 10 Senators in support of S. 1564) (discussing the discriminatory purpose and impact of poll taxes on blacks); *see also* S. REP. NO. 417, at 5-6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182-83 (“The initial effort to implement the Voting Rights Act focused on registration [through the elimination of] violence, . . . harassment, and . . . the use of literacy tests or other screening methods.”).

⁵¹⁷ See, e.g., GUINIER, *supra* note 16, at 7; Issacharoff, *Polarized Voting*, *supra* note 240, at 1839; Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 138-50 (1992). This focus is unsurprising because the widespread use of barriers to registration and voting made any contemplation by minority groups of electing candidates of their choice and having effective representation in legislative bodies premature at best. *See generally* 1982 S. REP., *supra* note 6, at 5, *reprinted in* 1982 U.S.C.C.A.N. 177, 182 (“Traditionally, black Americans were denied the franchise throughout the South. After statutory bars to voting by blacks were lifted, the main device was denial of voter registration—by violence, by harassment, and by the use of literacy tests or other screening methods.”).

⁵¹⁸ 42 U.S.C. § 19731(c)(1) (1994) (emphasis added).

in all civil rights. The vote is indispensable—it cannot longer be denied.⁵¹⁹

Republican Representative John Lindsay further elaborated on the “voting right problem” by pointing out that “it still must be viewed as part of the broad problem of achieving equality of opportunity, not only in the political process but also in such areas as jobs, schools, and housing.”⁵²⁰ Senator Jacob Javits expressed a similar view, stating that the purpose of the Act was “not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs.”⁵²¹ Thus, protection of individual access to the ballot box could not be viewed in isolation from the underlying purpose of safeguarding the right to vote. As Attorney General Nicholas Katzenbach testified, the Act was intended “to enlarge representative government. It is to solicit the consent of *all the governed*.”⁵²²

To do so, Congress recognized it would have to be flexible in dealing with changes in “methods” of discrimination,⁵²³ by “legislat[ing] not only for the immediacy of today’s problems but for the requirements of the future as well.”⁵²⁴ The legislative history of the Act documents the extensive and persistent ability of many jurisdictions to exploit the limitations of the judicial process in seeking “new ways and means of discriminating” against blacks and other racial and ethnic minorities.⁵²⁵ Hence, the “new, strong legislation to protect voting rights”⁵²⁶ had to

⁵¹⁹ H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2465-66 (providing the Republican views of Rep. McCulloch and others) (emphasis added).

⁵²⁰ *Id.*, *reprinted in* 1965 U.S.C.C.A.N. at 2484 (providing additional views of Rep. Lindsay).

⁵²¹ 111 CONG. REC. 8295 (1965); *see also* S. REP. NO. 417, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182 (quoting Sen. Javits as well).

⁵²² *Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 21 (1965) (emphasis added); *see also* H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2482 (providing the Republican views of Rep. McCulloch and others) (“The injustices and deprivations this legislation must be designed to alleviate are clear. It requires no recapitulation of the evidence to emphasize the urgency of this task, to free those of our citizens who now endure the near-tyranny of nonrepresentation.”).

⁵²³ H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441.

⁵²⁴ *Id.*, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2468 (Republican views of Rep. McCulloch et al.); *see also id.* at 2484 (providing additional views of Rep. Lindsay discussing civil rights legislation). Representative Lindsay observed that “[t]ogether with the redress of voting rights grievances, they should do much to give all of our citizens the fair break to which they are entitled. However, if more is needed, then more will be done.” *Id.*

⁵²⁵ H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441; *see also* sources cited *supra* note 206 (discussing the continued prevalence of discrimination following passage of the Reconstruction Amendments and continuing after the enactment of the Voting Rights Act of 1965).

⁵²⁶ S. REP. NO. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2540 (providing the joint views of 12 members of the Senate Judiciary Committee relating to the Voting Rights

anticipate the use of means other than pure process barriers to deny the consent of those in the minority. While section 2 of the Act received little attention in the legislative history,⁵²⁷ Congress undoubtedly meant it to play a role in protecting denial of consent extending past barriers to individuals registering to vote and casting a ballot.⁵²⁸ Attorney General Katzenbach stated that section 2 would prohibit “*any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color.*”⁵²⁹ Consequently, the Voting Rights Act was designed to provide broad protection across the spectrum of the political process “to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but *comprehensively and finally.*”⁵³⁰

Act of 1965).

⁵²⁷ As originally enacted, section 2 provided:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 42 U.S.C. § 1973(a) (1994)). The few times that section 2 is mentioned in the Senate and House reports accompanying the Voting Rights Act are little more than a restatement of the statutory language. *See* H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2454; S. REP. NO. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2557 (providing the joint views of 12 members of the Senate Judiciary Committee relating to the Voting Rights Act of 1965).

⁵²⁸ The legislative history of the Act does not address specifically vote dilution claims under section 2. In its discussion of the use of poll taxes as barriers to voter registration, however, the House Report alludes to vote dilution claims encompassed by the Act:

If the Supreme Court’s rule of “one man, one vote” as enunciated in *Reynolds v. Sims* is to be meaningful, Congress must act to protect the right of those with the lowest incomes to cast their votes. As the Supreme Court has stated: “Diluting the weight of votes because of place of residence impairs basic constitutional rights under the 14th amendment just as much as invidious discrimination based on factors such as race . . . or economic status”

H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2453 (quoting *Reynolds v. Sims*, 377 U.S. 533, 566 (1964)). In one important sense, section 2 was broader in scope than section 5 and the other temporary provisions of the Act: unlike those sections, “Section 2—the Act’s general prohibition against voting discrimination—applies to every state and county” and “could be used effectively to challenge voting discrimination anywhere that it might be proved to occur.” S. REP. NO. 417, at 15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 192.

⁵²⁹ *Hearings on S. 1564 Before Sen. Comm. on the Judiciary*, 89th Cong. 191 (1965) (emphasis added); *see also* S. REP. NO. 417, at 17 & n.50 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 194-95 & n.50 (quoting Katzenbach).

⁵³⁰ S. REP. NO. 417, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182 (emphasis added).

In *Allen v. State Board of Elections*,⁵³¹ the Court recognized the Voting Rights Act's sweeping protection of minority consent. The Court confronted the issue of whether a number of voting changes, including a switch from single-member to at-large districts, were subject to administrative preclearance under section 5 of the Act.⁵³² The defendant-appellees contended that section 5 only pertained to voter registration and the casting of a ballot.⁵³³ Rejecting the appellees' "narrow construction," the Court described the expansive protection available under the Voting Rights Act:

The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes "*all action necessary to make a vote effective.*" . . . The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way.⁵³⁴

The Court went on to find that all of the proposed voting changes were subject to section 5 preclearance.⁵³⁵ The Court observed that a change to a countywide at-large voting system might lead to a perverted process claim whereby the consent of a minority group was denied just as effectively as it would be if a pure process impediment was present.⁵³⁶

The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.⁵³⁷

⁵³¹ 393 U.S. 544 (1969).

⁵³² See *id.* at 550. The other voting changes addressed by the Court included a shift from an elected to an appointed office, imposition of new restrictions on independent candidacies, and modifications of a provision for write-in ballots. See *id.* at 550-51.

⁵³³ See *id.* at 564.

⁵³⁴ *Id.* at 565-66 (quoting 42 U.S.C. § 1973l(c)(1) (1994)) (citations omitted) (emphasis added).

⁵³⁵ See *id.* at 569-70, 572.

⁵³⁶ The Court anticipated its discussion of vote dilution in *Allen* in a number of its earlier decisions. See generally notes 306-14 and accompanying text (discussing *Burns v. Richardson*, 384 U.S. 73, 87 (1966) (suggesting the possibility of a vote dilution claim); *Fortson v. Dorsey*, 379 U.S. 433, 438-39 (1965) (noting that a multimember scheme would minimize or cancel out minority voting strength); *Reynolds v. Sims*, 377 U.S. 533 (1964)).

⁵³⁷ *Allen*, 393 U.S. at 569. In *Perkins v. Matthews*, the Court reached a similar conclusion as to changes in municipal boundaries. See *Perkins v. Matthews*, 400 U.S. 379, 388-89 (1971). In addition to boundary changes, the Court in *Perkins* held that changes in locations

Allen's significance lies in the Court's acknowledgement that even seemingly innocent features of the political process can interact in a manner which denies the consent of racial and ethnic minority groups.⁵³⁸ Moreover, the case also demonstrates the Court's early respect for congressional attempts to use the Voting Rights Act to effectuate the consent of all voters at every stage of the political process.⁵³⁹

Elaborating on the holding in *Allen*, the Court outlined, in two Fourteenth Amendment vote dilution cases, the standards to be used by judicial referees in determining whether minority consent has been denied wrongfully by a perversion of the political process. The Court first held in *Whitcomb v. Chavis* that "political

of polling places and changes from ward to at-large election of city aldermen were subject to preclearance under section 5 of the Voting Rights Act. *See id.* at 394-95.

⁵³⁸ *See generally* Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 9, at 27-30 (discussing the impact of the *Allen* holding on section 5 and vote dilution cases). The *Allen* decision marks one of the beginning points of what have been termed "second" and "third" generation voting rights claims, which have focused on bringing minorities into the body politic and policing legislative rules to protect minority representatives, respectively. *See, e.g.,* GUINIER, *supra* note 16, at 7-8; Issacharoff, *Polarized Voting*, *supra* note 240, at 1839-42; Pamela S. Karlan, *Democracy and Dis-Appointment*, 93 MICH. L. REV. 1273, 1276 (1995) (reviewing GUINIER, *supra* note 16). These later generation voting rights claims necessarily focus on group rights because "groups of voters elect representatives, individual voters do not." *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part).

⁵³⁹ Some commentators have criticized *Allen* as expanding section 5 beyond its intended purpose. *See generally* THERNSTROM, *supra* note 240, at 22-27 (arguing that in *Allen* the Court "began the process by which the Voting Rights Act was reshaped into an instrument for affirmative action in the electoral sphere"); Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 9, at 90 ("*Allen* substantially enlarged the scope of section 5, shifting the focus of the act beyond suffrage to include representation."). Their criticism is belied, however, by the fact that "Congress was fully aware of the broad sweep which the Supreme Court had given the Act's prohibitions in *Allen v. State Board of Elections*." Matthew M. Farley, Comment, *Crashing the Party—The Supreme Court Subjects Political Parties to Preclearance Under Section 5 of the Voting Rights Act of 1965* in *Morse v. Republican Party of Virginia*, 31 U. RICH. L. REV. 191, 219 (1997); *accord* *Holder v. Hall*, 512 U.S. 874, 959-60 (Stevens, J., dissenting); Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 363-71 (1996) (discussing the legislative history of the 1970 extension of section 5); Laughlin McDonald, *Holder v. Hall: Blinking at Minority Voting Rights*, 3 D.C. L. REV. 61, 78-79 (1995); Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1471 (1996). For a more direct reply to the critics of an expanded definition of section 5, see Drew S. Days III, *Section 5 and the Role of the Justice Department*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 9, at 54-61; Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 J.L. & POL. 751, 752-54, 758-59, 774 (1988) (reviewing THERNSTROM, *supra* note 240); J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 9, at 165-73.

defeat at the polls” was insufficient by itself to prove a violation of consent by dilution.⁵⁴⁰ On the contrary, such an outcome was an unsurprising product of majority rule and the “winner-take-all” system.⁵⁴¹ As a result, when the evidence merely showed that the candidate chosen by members of one political party was defeated by supporters of another political party, no consent claim could be stated.⁵⁴² Similarly, lack of proportional representation also was not enough.⁵⁴³ Instead, the proper focus of the judicial inquiry was whether an individual or group of voters was denied consent through evidence such as the inability to register or vote, participate in a political party, or take part in an informal candidate slating process.⁵⁴⁴

In *White v. Regester*,⁵⁴⁵ the Court reaffirmed the *Whitcomb* holding, couched in language that supported not only a right to individual access, but also to group participation extending beyond the ballot box:

The plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the *group* in question—that its members had *less opportunity* than did other residents in the district *to participate in the political processes and to elect legislators of their choice*.⁵⁴⁶

At the same time, the Court in *White* recognized the absence of a simple formula for evaluating deprivations of consent by vote dilution. Rather, judicial referees needed to base their examination on “the totality of the circumstances,”⁵⁴⁷ looking at evidence showing a “blend of history and an intensely local appraisal of the design and impact [of the challenged structure or mechanism] in the light of past and present reality, political and otherwise.”⁵⁴⁸ In *White*, the Court outlined several factors that it considered relevant under this “results” test, focusing on whether any individual or group of voters was wrongfully denied access to any stage of the political process, without requiring a showing of intentional discrimination.⁵⁴⁹ Thus, under the *White*

⁵⁴⁰ 403 U.S. 124, 153 (1971).

⁵⁴¹ *Id.* at 149; *cf. supra* note 245 and accompanying text (describing the need for voters who fail to elect a winning candidate under a “winner-take-all” system).

⁵⁴² *See Whitcomb*, 403 U.S. at 150-55.

⁵⁴³ *See id.* at 149, 153.

⁵⁴⁴ *See id.* at 149-50.

⁵⁴⁵ 412 U.S. 755 (1973).

⁵⁴⁶ *Id.* at 766 (emphasis added).

⁵⁴⁷ *Id.* at 769.

⁵⁴⁸ *Id.* at 769-70.

⁵⁴⁹ These factors included: the history of official racial discrimination in the state and local community; the use of majority vote requirements and numbered place systems in primaries; the use of candidate slating; past electoral success of minority groups; lack of responsiveness by elected officials to minority groups; the use of overt racial tactics to defeat a minority group’s candidate of choice; the presence of socio-economic or other barriers leading to depressed political participation by members of minority groups; and the use of pure process barriers such as poll taxes and restrictive voter registration procedures. *See id.* at 766-69; *see also Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc) (elaborating on

standard, a particular voting feature such as at-large elections might be perfectly permissible in one jurisdiction but impermissible in another. According to *White*, the *sine qua non* of a violation of consent must be weighed under a flexible totality of the circumstances inquiry because no single standard would allow a judicial referee to account for all the combinations of historical, political, sociological, and structural elements that can prevent fair and effective minority participation in the political process.

In 1982, Congress further clarified the scope of the Voting Rights Act's protection of minority consent from majority tyranny. Congress acted in part because the Act's temporary provisions were scheduled to expire,⁵⁵⁰ but largely because it was driven to respond to the Supreme Court's narrow interpretation of the scope of section 2 protection in *City of Mobile v. Bolden*.⁵⁵¹ The change in the statutory language of section 2 was one of the key elements of the 1982 amendments to the Act.⁵⁵² Congress retained the basic language of section 2,⁵⁵³ but added a new

additional objective factors to be considered), *aff'd on other grounds sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

⁵⁵⁰ See *supra* note 513.

⁵⁵¹ 446 U.S. 55 (1980). Without expressly overruling *Allen*, *Whitcomb*, or *White*, a plurality of the Court in *Bolden* held that section 2 was to be interpreted in the same manner as the Fifteenth Amendment. See *id.* at 60-61. The plurality therefore adopted the "intent test" which applied to constitutional vote dilution claims, finding "racially discriminatory motivation . . . a necessary ingredient" of a section 2 claim. *Id.* at 60-62. In addition, the Court found that voting was only an individual right, stating:

It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.

And the Court's decisions hold squarely that they do not.

Id. at 78-79. Finally, the *Bolden* plurality concluded that the Fifteenth Amendment itself only encompassed the right to ballot access, and did not extend to group vote dilution. See *id.* at 77-79. According to the Senate Report, a "fair reading" of the plurality opinion revealed "a marked departure from earlier Supreme Court and lower court vote dilution cases." S. REP. NO. 417, at 26 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 203. In the aftermath of the *Bolden* decision, "litigators virtually stopped filing new voting dilution cases." *Id.*

⁵⁵² In addition, the amendments extended the temporary coverage of sections 4 through 8 for an additional 25 years, amended section 4(a) to broaden the ability of certain covered jurisdictions to bailout from coverage under sections 4 through 8, extended language-assistance provisions of the Act until 1992, and added a new section providing for voting assistance to voters who are blind, disabled, or illiterate. See S. REP. NO. 417, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 178.

⁵⁵³ Compare the language of section 2 as originally enacted, see *supra* note 527, with the language of section 2(a), as amended:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, in contravention of the

subsection (b) which codified the *White* “results” test and the Court’s disclaimer, in *Whitcomb*, of a right to proportional representation:⁵⁵⁴

A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.⁵⁵⁵

In the Senate Report accompanying the amendments, Congress emphasized that “the issue to be decided under the results test is *whether the political processes are equally open to minority voters*.”⁵⁵⁶ The key inquiry for vote dilution claims was on the discriminatory effects of electoral structures and mechanisms, without any required showing of discriminatory intent or “invidious discrimination.”⁵⁵⁷

guarantees set forth in section 1373b(f)(2) of this title, as provided in subsection (b) of this section.

Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982) (codified as 42 U.S.C. § 1973(a) (1994)).

⁵⁵⁴ For a discussion of proportionate descriptive representation, see *supra* notes 250-51, 255 and accompanying text. As Justice Souter observed in his majority opinion in *Johnson v. De Grandy*:

“Proportionality” as the term is used [in discussing the facts of *De Grandy*] links the number of majority-minority voting districts to minority members’ share of the relevant population. *This concept is distinct from the subject of the proportional representation clause of § 2 . . . [The § 2] proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. . . .* And the proviso also confirms what is otherwise clear from the text of the statute, namely that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.

Johnson v. DeGrandy, 512 U.S. 997, 1014 n.11 (1994) (emphasis added) (citations omitted).

⁵⁵⁵ 42 U.S.C. § 1973(b) (1994).

⁵⁵⁶ S. REP. NO. 417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179 (emphasis added).

⁵⁵⁷ Senator Dole made this perfectly clear in his discussion of the 1982 amendments to section 2:

It should be reemphasized that the “results” test contained in the substitute amendment in no way includes an element of discriminatory purpose. I am aware that some have sought to characterize the *White* holding as including an ultimate purpose requirement or a so-called “objective design” element. The implication of this characterization is that because the substitute amendment codifies the

Consequently, the amended section 2 was a critical part of congressional efforts undertaken through a proper exercise of its enforcement powers⁵⁵⁸ "to achieve *full participation* for all Americans in our democracy."⁵⁵⁹

Congress recognized that individual access was only a starting point for full participation in the political process, just as the Court had held in *Allen*.⁵⁶⁰ Drawing

White standard, the amendment also includes some requirement of discriminatory purpose. But in presenting my compromise before the Committee, I explicitly stated that "the supporters of this compromise believe that a voting practice or procedure which is discriminatory in result, should not be allowed to stand, regardless of whether there exists a discriminatory purpose. . . . Section 2 should only require plaintiffs to establish discriminatory "results" and [I reject] the notion that any element of purpose should be incorporated into the standard.

Id. at 194-95, *reprinted in* 1982 U.S.C.C.A.N. at 365 (additional views of Sen. Dole).

⁵⁵⁸ Congress indicated it was not overturning the Court's *Bolden* decision—an action which would have violated the separation of powers—but instead was engaging in "a proper statutory exercise of [its] enforcement power" under section 2 of the Fifteenth Amendment. *Id.* at 41, *reprinted in* 1982 U.S.C.C.A.N. at 219. *But see id.* at 101, *reprinted in* 1982 U.S.C.C.A.N. at 274 (additional views of Sen. Hatch) (stating that Congress was attempting to engage in the unconstitutional action of statutorily overturning *Bolden*); *id.* at 124, 169-70, 182-83, 184, *reprinted in* 1982 U.S.C.C.A.N. at 295, 342, 354, 356 (Report of the Senate Subcommittee on the Constitution); *id.* at 188, *reprinted in* 1982 U.S.C.C.A.N. at 358-59 (additional views of Sen. Laxalt); *id.* at 224, 239, *reprinted in* 1982 U.S.C.C.A.N. at 394, 410 (minority views of Sen. East). Drawing from the Court's decision in *South Carolina v. Katzenbach*, discussed *supra* note 230, Congress observed that it had the power to set the ceiling on the scope of voting rights under the Fifteenth Amendment pursuant to its enforcement powers:

[T]he Court has long held that Congres[s] need not limit itself to legislation coextensive with the Fifteenth Amendment, if there is a basis for the Congressional determination that the legislation furthers enforcement of the amendment. The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself

....

Congress may enact measures going beyond the direct requirements of the Fifteenth Amendment, if such measures are appropriate and reasonably adapted to protect citizens against the risk that the right to vote will be denied in violation of the Fifteenth Amendment. That point, clearly established in *South Carolina*, has not been seriously challenged in subsequent years.

1982 S. REP., *supra* note 6, at 39-40, *reprinted in* 1982 U.S.C.C.A.N. 177, 217-18; *see also id.* at 61-62, *reprinted in* 1982 U.S.C.C.A.N. at 239-40 (discussing the use of enforcement powers in enactment of bailout provisions). For different interpretations of congressional enforcement powers under the Reconstruction Amendments, *see id.* at 101, *reprinted in* 1982 U.S.C.C.A.N. at 274 (providing additional views of Sen. Hatch); *id.* at 169-73, *reprinted in* 1982 U.S.C.C.A.N. at 342-46 (Report of the Senate Subcommittee on the Constitution).

⁵⁵⁹ *Id.* at 4, *reprinted in* 1982 U.S.C.C.A.N. at 181 (emphasis added).

⁵⁶⁰ *See generally id.* at 6, *reprinted in* 1982 U.S.C.C.A.N. at 183 ("But registration is only

language from *White* and a number of other cases,⁵⁶¹ Congress concluded that the right to vote could be both an individual and a group right, with the proper focus on whether consent was wrongfully denied:

As the Supreme Court has repeatedly noted, discriminatory election systems or practices which operate, designedly or otherwise,⁵⁶² to minimize or cancel out the voting strength and political effectiveness of *minority groups*, are an impermissible denial of the right to have one's vote fully counted, just as much as outright denial of [individual] access to the ballot box.⁵⁶³

Therefore, Congress evinced a desire to afford sweeping protection for individual and group participation in the political process not only under section 2, but under section 5 as well.⁵⁶⁴ Recognition of the individual and group nature of the right to vote led Congress to provide an expansive definition of consent which protected "equal

the first hurdle to *full effective participation* in the political process." (emphasis added)). The Senate Report goes on to note that, although many electoral practices are "tactics used traditionally by the 'ins' against the 'outs,'" such tactics "are clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination and to undermine the gains won under other sections of the Voting Rights Act." *Id.* at 12, *reprinted in* 1982 U.S.C.C.A.N. at 189.

⁵⁶¹ *See id.* at 19-24, *reprinted in* 1982 U.S.C.C.A.N. at 196-201.

⁵⁶² This "designedly or otherwise" language reaffirms the conclusion of Congress that consent can be denied either intentionally or unintentionally. In addition, Congress made it explicit that the "on account of" language contained in section 2 was not to be read as requiring a showing of purpose or intent, but merely as requiring that the violation of consent correlate with the minority group's race or language. *See id.* at 27-28 n.109, *reprinted in* 1982 U.S.C.C.A.N. at 205-06 n.109. Similarly, Congress pointed out that it was improper for courts to rely upon a Title VII-like framework when discriminatory results were used to create an inference of discrimination. *See id.* at 28 n.112, *reprinted in* 1982 U.S.C.C.A.N. at 206 n.112. Rather than "ask[ing] the wrong question" about *why* a particular electoral structure or feature was adopted (the *Bolden* intent test), under the test codified in the amended section 2, the proper focus is on whether the structure or feature *results* in a deprivation of consent—no purpose or inference of purpose is necessary. *See id.* at 36, *reprinted in* 1982 U.S.C.C.A.N. at 214. The Committee Report also indicates that Congress rejected the *Bolden* intent test as "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," and it made it too difficult to prove a section 2 violation resulting from evidentiary problems such as legislative immunity and false trails of evidence used by legislators to disguise their true motives. *Id.* at 36-37, *reprinted in* 1982 U.S.C.C.A.N. at 214-15.

⁵⁶³ *Id.* at 28, *reprinted in* 1982 U.S.C.C.A.N. at 205 (emphasis added) (discussing section 2 of the Act).

⁵⁶⁴ As Congress observed in its discussion of the continuing need for the temporary preclearance mechanisms under section 5, consent had to be protected beyond the ballot box because many "covered jurisdictions . . . substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength." *Id.* at 10, *reprinted in* 1982 U.S.C.C.A.N. at 187.

access to *any phase of the electoral process* for minority group members.”⁵⁶⁵ There is no question that this protection would encompass not only pure process claims, but quasi-structural process, geography process, and perverted process claims as well, whenever minority consent has been denied wrongfully.⁵⁶⁶

As the plain language of the amended section 2 demonstrates, Congress determined whether consent was “wrongfully denied” by relying upon the flexible approach adopted by the Supreme Court in *White*⁵⁶⁷ and the Fifth Circuit in *Zimmer*.⁵⁶⁸ “To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.”⁵⁶⁹ The

⁵⁶⁵ *Id.* at 30, *reprinted in* 1982 U.S.C.C.A.N. at 207 (emphasis added). The Senate Report indicates that this broad definition of consent also applies to section 5 preclearance. In order for covered jurisdictions to bail out of section 5 coverage, they would have to show not only the absence of pure process barriers, but also would have to “expand opportunities for minority participation,” eliminate impediments “which inhibit or dilute equal access to the electoral process,” and would even have to “make constructive efforts to eliminate the continued effects of many years of discrimination”—suggesting a need for ameliorative outcomes, and not just fair process. *Id.* at 53, *reprinted in* 1982 U.S.C.C.A.N. at 231-32; *see also id.* at 54, *reprinted in* 1982 U.S.C.C.A.N. at 233 (“It is an essential aspect of any jurisdiction’s firm commitment to ensure the *full opportunity* for minority participation in the political process.” (emphasis added)); *id.* at 72-73, *reprinted in* 1982 U.S.C.C.A.N. at 251-52 (explaining that under section 4 of the Act, covered methods of election “include *all aspects* of the electoral process,” with evidence of outcomes relevant to the inquiry (emphasis added)).

⁵⁶⁶ *See generally id.* at 30 n.120, *reprinted in* 1982 U.S.C.C.A.N. at 208 n.120 (“[W]ithout question [section 2] is aimed at discrimination which takes the form of dilution, as well as outright denial of the right to register or to vote.”). It would not be inconsistent with the Senate Report’s language to interpret “dilution” as extending to parliamentary process claims, particularly where the parliamentary process is altered in the wake of minority electoral success. *See generally* notes 465-74 and accompanying text (discussing *Presley v. Etowah County Comm’n*, 502 U.S. 491 (1992)). Indeed, Congress intended the Act to be forward looking and adaptive to subtle violations of consent, *see supra* notes 523-24 and accompanying text, particularly in light of the congressional admonition that jurisdictions frequently use “more sophisticated devices that dilute minority voting strength,” S. REP. NO. 417, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 187, to deprive minority voters of any meaningful access they might have obtained. *See supra* note 525 and accompanying text. If parliamentary process claims are not protected, then it is but a simple matter to shift the location of exclusion to the legislative body, rendering the right to “full and effective participation in the political process” to nothing more than a symbolic facade. *See supra* notes 457-506 and accompanying text.

⁵⁶⁷ *White v. Regester*, 412 U.S. 755 (1973).

⁵⁶⁸ *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc).

⁵⁶⁹ S. REP. NO. 417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206. The “Senate factors” largely mirror those described in *White* and *Zimmer*. Compare the factors listed in note 549, *supra*, with factors described in S. REP. NO. 417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. In addition to the factors outlined in note 549, the Senate Report also suggests consideration of the extent to which voting in elections is racially polarized, and whether the policy underlying the challenged electoral structure or mechanism

“functional view of ‘political process’”⁵⁷⁰ adopted by the Voting Rights Act requires judicial referees to engage in a “searching practical evaluation of the ‘past and present reality’” of minority participation.⁵⁷¹ As a result, in evaluating liability under section 2, courts must “not use a mechanical ‘factor counting’ approach,” rather, “the factors [must be] considered as part of the total circumstances and in light of the ultimate issue to be decided, i.e., whether the political processes [are] equally open.”⁵⁷² Similarly, in fashioning relief for a section 2 violation, a judicial referee should avoid “mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances.”⁵⁷³ Instead, relief should be fashioned that “completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority voters to participate and to elect candidates of their choice.”⁵⁷⁴ Many detractors have criticized Congress’ failure to adopt a more mechanical, formulaic standard in section 2.⁵⁷⁵ Nevertheless, the 1982 amendments evince recognition by Congress that there simply is no escaping substantive decision-making by the courts in order to afford full protection for the consent of all Americans.

Obviously, there are some “easy” voting cases in which the exercise of judicial discretion can be kept to a minimum. Denial of pure process or even quasi-structural process democracy rights present clear baselines for judicial review: the need for inclusion of the subject voters in a system in which they are completely excluded. Similarly, malapportioned districts provide courts with a simplistic numerical standard—one person, one vote—with the degree of acceptable variation depending on whether congressional or legislative districts are at stake.⁵⁷⁶ Legislative outcomes

is tenuous. *See supra* notes 525-39 and accompanying text. For a discussion of the type of evidence which may be used for each of the Senate factors, see generally Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 9, at 200-08.

⁵⁷⁰ S. REP. NO. 417, at 30 n.120 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208 n.119.

⁵⁷¹ *Id.* at 30, *reprinted in* 1982 U.S.C.C.A.N. at 208 (quoting *White v. Regester*, 412 U.S. 755, 769-70 (1973)).

⁵⁷² *Id.* at 34-35, *reprinted in* 1982 U.S.C.C.A.N. at 212-13. The Senate further observes in its Report:

The courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a mechanical “point counting” device. The failure of plaintiff to establish any particular factor is not rebuttal evidence of non-dilution. Rather, the provision requires the court’s overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* and *Burns*, “minimized or canceled out.”

Id. at 20 n.118, *reprinted in* 1982 U.S.C.C.A.N. at 207 n.118.

⁵⁷³ *Id.* at 31, *reprinted in* 1982 U.S.C.C.A.N. at 208.

⁵⁷⁴ *Id.*

⁵⁷⁵ *See infra* notes 614-22 and accompanying text (summarizing Justice Thomas’s criticism).

⁵⁷⁶ *See supra* notes 315-23 and accompanying text.

that deprive a person of a constitutional right independent of the right to vote typically can be analyzed under accepted equal protection analysis.⁵⁷⁷ But what about those process democracy claims that do not fit neatly within these prescribed formulae? Should they be denied on the basis that a court has to make substantive decisions on how effective a minority group's votes must be? Surely that cannot be an acceptable reason to reject these "harder" cases, for as already witnessed, even the "easier" cases require making certain substantive decisions or theoretical presuppositions. Indeed, the difficult cases are the very ones that demand more, not less, judicial decision-making.⁵⁷⁸

Therefore, this Article suggests that, in its enactment of the Voting Rights Act, Congress recognized the need for judicial referees who would be flexible in applying a functional analysis to each case to ensure there is an appropriate balance between majority rule and protection of minority groups from any tyranny of that majority rule which might be present. None of the process democracy claims should be eliminated from the scope of this judicial protection, regardless of where they fall on the present continuum, because the touchstone should remain whether the consent of a particular group of voters has been denied wrongfully by those in the minority (in the case of certain one person, one vote cases) or those in the majority. As Justice Marshall explained in his *Bolden* dissent:

The American approach to government is premised on the theory that, when citizens have the unfettered right to vote, public officials will make decisions by the democratic accommodation of competing beliefs, not by deference to the mandates of the powerful. The American approach to civil rights is premised on the complementary theory that the unfettered right to vote is preservative of all other rights. The theoretical foundations for these approaches are shattered where . . . the right to vote is granted in form but denied in substance.⁵⁷⁹

Thus, in the case of perverted process claims, the absence of a specific benchmark of comparison for a challenged electoral feature might make it more difficult to prove a violation of consent, but it is not a sufficient basis, by itself, to deny protection. A similar conclusion applies to parliamentary process claims, in which legislative processes can be used to undermine the value of consent at the very stage of the political process in which substantive outcomes are generated. Of course, the totality of the circumstances approach adopted by Congress in section 2 requires that judicial referees still engage in a balancing process to evaluate whether they should provide relief to the aggrieved group of voters.⁵⁸⁰

When the judicial referees protect the rights of all qualified voters to have a voice in government, they are abiding faithfully by the core republican principle of consent

⁵⁷⁷ See *supra* notes 475-83 and accompanying text.

⁵⁷⁸ See *supra* notes 256-63 and accompanying text.

⁵⁷⁹ *City of Mobile v. Bolden*, 446 U.S. 55, 140 (1980) (Marshall, J., dissenting).

⁵⁸⁰ See *supra* notes 241-42, 569-75 and accompanying text.

that underlies the democratic system in the United States. Political discourse is more meaningful. The government is more legitimate. Everyone is enriched as a result.

III. CONSENT DENIED: THE END OF THE "SECOND RECONSTRUCTION"

The end of the First Reconstruction rested, in large part, on the Supreme Court's refusal to recognize broad congressional powers under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments, as well as the Court's narrow definition of the right to vote under the self-executing sections of those two amendments.⁵⁸¹ The end of the "Second Reconstruction"⁵⁸² has resulted from similar judicial intransigence. In a series of decisions, the Court has chiseled away at protection for minority rights,⁵⁸³ while at the same time it has redefined its constitutional role as judicial referee over the political process.

As Part II illustrated, the Court has deigned to establish rigid regulations for the judicial referees themselves, instead of abiding by a more flexible approach which would provide the greatest protection for consent of all the governed.⁵⁸⁴ In doing so, the Court willfully has disregarded the Framers' idea of what voting means in the United States government. Instead, the Court has advanced its own democratic

⁵⁸¹ See sources cited *supra* note 206.

⁵⁸² Historian C. Vann Woodward is credited with coining this term in 1965. See C. Vann Woodward, *From the First Reconstruction to the Second*, HARPER'S MAG., Apr. 1965, at 127. The "Second Reconstruction" is used to describe the civil rights reforms which began with *Brown v. Board of Education*, and later included passage of the Civil Rights Acts of 1957 and 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974). The first phase of the Second Reconstruction was marked by reforms initiated by the federal judicial and executive branches, while the second phase was defined by southern resistance which "aroused popular support and stirred Congress into unprecedented and effective action." *Id.* at 135.

⁵⁸³ The Court has not limited itself to narrowing protection for minority voting rights, but also has embraced restrictions on the scope of affirmative action, employment discrimination, and set-asides. See *generally* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that all racial classifications imposed by any governmental actor, including set asides for disadvantaged minority business enterprises, are subject to strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that race-conscious relief is only lawful when it is narrowly tailored to remedy the present effects of identifiable past discrimination); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that 42 U.S.C. § 1981 applies only to the formation of employment contracts, and not to discriminatory conduct which occurs after the parties have entered into such contracts), *overruled by* The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that layoffs of nonminority teachers solely on the basis of their race in order to maintain a racially integrated faculty violated the Equal Protection Clause). Each of these cases has distanced the Court further from the benign use of racial classifications allowed under *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁵⁸⁴ See *supra* notes 281-580 and accompanying text.

theory protecting the right to vote to the extent it requires regular elections open to all qualified voters (a pure process right), districts of equal population (one person, one vote), and the absence of race as a primary governmental consideration (an equal protection right to "color-blind" elections). The end result of the Court's misguided activism is just as devastating as the majoritarian default position advanced in *Colegrove*:⁵⁸⁵ the sacrifice of "fair and effective representation"⁵⁸⁶ and the "equal access" to the political process secured by Congress in section 2 of the Voting Rights Act pursuant to its enforcement powers under the Fifteenth Amendment.⁵⁸⁷

This Part examines the devastating effects that the Court's theory has had on perverted process (vote dilution) claims brought under section 2. The first section will explore the theoretical underpinnings of the Court's misguided approach, and contrast it with the democratic theory that Congress adopted when it passed and subsequently amended section 2.⁵⁸⁸ That discussion will lead to the second section, which focuses on the application of this judicial approach by the federal courts.⁵⁸⁹ A review of some illustrative lower court opinions will show how the willingness of the federal courts to "explain away" violations of section 2 has resulted in the dilution of consent and rendered the Madisonian Compromise an empty shell of majority rule. Through this analysis, it will become evident that the Court's "refusal" to enter into the political arena out of respect for democratic principles, itself has violated the most fundamental democratic principle of all: that government must derive its "just powers from the consent of the governed,"⁵⁹⁰ not just from those in the majority.

A. *Supreme Blunder: Legislating Democratic Theory from the Judicial Thicket*

In the last two decades, a number of justices on the Supreme Court have questioned the Court's role in enforcing voting rights legislation, particularly section 2 of the Voting Rights Act. None of these justices, however, has been a more outspoken critic of broad judicial protection for fair and equal access to the political arena than Justice Clarence Thomas. In *Holder v. Hall*,⁵⁹¹ Justice Thomas purported to eschew matters of democratic theory and substantive decision-making by the courts in favor of a pure process approach to protection of voting rights. He advanced a constrained definition of what the right to "consent" means, and a correspondingly limited view of the courts in securing fair and equal consent. In doing so, Thomas articulated a democratic theory—one that is antithetical to the constitutional foundations of consent that would, if adopted, destroy the very basis

⁵⁸⁵ *Colegrove v. Green*, 328 U.S. 549 (1946).

⁵⁸⁶ *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

⁵⁸⁷ S. REP. NO. 417, at 36 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 214.

⁵⁸⁸ See *supra* notes 591-712 and accompanying text.

⁵⁸⁹ See *supra* notes 713-848 and accompanying text.

⁵⁹⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁵⁹¹ 512 U.S. 874, 891 (1994) (Thomas, J., concurring). Justice Scalia joined Justice Thomas in his opinion. See *id.*

of the Madisonian Compromise. Because Justice Thomas's opinion contained many of the same miscues that have caused the Court to misinterpret the scope of section 2 and the constitutional role of judicial referees in protecting consent, it is fitting to begin this discussion with his *Holder* concurrence.

Preliminarily, Justice Thomas planted the seeds for dismantling Madisonian democracy by his limited vision of what "consent" means. In a word, he found that "consent" only refers to participation, nothing more.⁵⁹² If a qualified voter is allowed to register to vote and has the formal opportunity to cast a ballot that is tabulated, then, according to Justice Thomas, that voter has had full participation in the political process. It is irrelevant whether any voters actually have cast ballots, as long as there are no structural barriers to their ability to do so. Thomas explained:

[S]ince the ballot provides the formal mechanism for obtaining access to the political process and for electing representatives, it would seem that one who has had the same chance as others to register and to cast his ballot has had an equal opportunity to participate and to elect, whether or not any of the candidates he chooses is ultimately successful.⁵⁹³

He refused to sanction judicial protection for consent based upon notions of political power.⁵⁹⁴ As a result, Thomas reasoned that consent only protects pure process claims of individual access and, to a very limited extent, quasi-structural impediments to political participation.⁵⁹⁵ Most quasi-structural process and all geography process,⁵⁹⁶ perverted process, and parliamentary process claims would be

⁵⁹² See generally *id.* at 900-01 (describing the "formal value of the vote as a *mechanism for participation* in the electoral process") (emphasis added). Other commentators have shared Justice Thomas's limited definition of consent. See *supra* notes 352-55 and accompanying text.

⁵⁹³ *Holder*, 512 U.S. at 925.

⁵⁹⁴ See generally *id.* at 924 ("[Section 2] does not extend by its terms to electoral mechanisms that might have a dilutive effect on group voting power.").

⁵⁹⁵ Thomas's dissenting opinion in *Morse v. Republican Party of Virginia*, 517 U.S. 186, 252-53 (1996) (Thomas, J., dissenting), however, makes it evident that Thomas would not permit such claims to extend to private actions endorsed by state mechanisms. See discussion *supra* note 389.

⁵⁹⁶ According to Justice Thomas, "a given set of district lines has nothing to do with the basic process of allowing a citizen to vote—that is, the process of registering, casting a ballot, and having it counted." *Holder*, 512 U.S. at 915-16 (Thomas, J., concurring). *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the quintessential geography process claim, see *supra* notes 425-31 and accompanying text, appears to be inapposite to Thomas's reasoning. Nevertheless, Thomas characterized *Gomillion* as involving not a geography process claim, but a pure process claim. Thomas opined that "[t]he *Gomillion* plaintiffs' claims centered precisely on access: Their complaint was not that the weight of their votes had been diminished in some way, but that the boundaries of a city had been drawn to prevent blacks from voting in municipal elections altogether." *Holder*, 512 U.S. at 920 n.20. Thomas reached a similar conclusion in the *Shaw v. Reno* line of decisions pertaining to racial gerrymanders. See *infra* notes 670-94 and accompanying text. Consequently, it is fair to conclude that Justice Thomas would not protect geography process claims as violations of

unprotected.⁵⁹⁷ Taken to its logical conclusion, Thomas's pure process approach also would abrogate the one person, one vote cases because pure process claims do not protect a right to equal representation.⁵⁹⁸ After all, protection of only the right to cast a ballot says nothing about a right for that ballot to have the same weight as ballots cast in other districts. Also, its exclusive focus on access and not outcome ignores both equal legislative policies as well as the right to have the same access to elected officials that voters in other districts enjoy. To summarize, Justice Thomas found that "[d]istricting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted are simply beyond the purview of the [Voting Rights] Act"⁵⁹⁹ and, presumably, the Constitution as well.⁶⁰⁰

As discussed in Part II(B),⁶⁰¹ process democracy claims view voting as an individual right to the extent that ballot access is affected, and as a group right to the extent that electoral and parliamentary outcomes are affected. Therefore, in light of Justice Thomas's myopic vision that consent is limited to individual ballot access, it is not surprising that he viewed voting as strictly an individual right: "Giving the terms 'standard, practice, or procedure' an expansive interpretation to reach potentially dilutive practices, however, would distort that focus on the *individual*, for a vote dilution claim necessarily depends on the assertion of a group right."⁶⁰²

consent.

⁵⁹⁷ See generally *Holder*, 512 U.S. at 922-23 (Thomas, J., concurring)

([Section 2] does not cover . . . the choice of a multimember over a single-member districting system or the selection of one set of districting lines over another, or any other such electoral mechanism or method of election that might reduce the weight or influence a ballot may have in controlling the outcome of an election.).

See also *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (Thomas, J., joining the majority opinion) (holding that the parliamentary process claim was not cognizable); discussion *supra* notes 463-74 and accompanying text.

⁵⁹⁸ See *supra* notes 312-14 and accompanying text.

⁵⁹⁹ *Holder*, 512 U.S. at 914 (Thomas, J., concurring).

⁶⁰⁰ Justice Thomas made it clear that he would reaffirm *Bolden* to the extent that the Court's opinions in that case can be read as a rejection of protection for vote dilution under the self-executing section 1 of the Fifteenth Amendment. See *id.* at 920-22. Moreover, to the extent that any constitutional vote dilution claim could be stated, there is little question that Thomas effectively would render it a nullity by requiring imposition of the rigorous "intent" test elaborated by the Court in *Washington v. Davis*, 426 U.S. 229 (1976), even when a voting structure or mechanism actually deprives a group of voters of their right to consent.

⁶⁰¹ See *supra* notes 326-506 and accompanying text.

⁶⁰² *Holder*, 512 U.S. at 918 (Thomas, J., concurring) (emphasis added). Thomas reached a similar conclusion by comparing section 2 with section 5:

As in § 2, the specific terms in the list of regulated state actions describe only laws that would limit access to the ballot. Moreover, § 5 makes the focus on the *individual voter* and access to the voting booth even more apparent as the section goes on to state that 'no person shall be denied the right to vote for failure to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure As is the case with § 2, § 5's description of the terms

Indeed, he went to great lengths to criticize the notion “that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well.”⁶⁰³ According to Thomas, the absence of political interests means that, when courts use racial groups to create political districts, they destroy “any need for voters or candidates to build bridges between racial groups or to form voting coalitions.”⁶⁰⁴ Of course, he rested his conclusion on the assumption that voters and candidates of majority groups are willing to build such bridges, which is a view that frequently does not square with the political realities of widespread, sustained, racially polarized voting.⁶⁰⁵ Moreover, building bridges itself is inconsistent with Thomas’s notion that voting is nothing more than a formal, symbolic right because it anticipates unobstructed efforts by voters to secure fair and equal legislative outcomes. Thomas, however, found such efforts to be outside the legitimate scope of electoral participation. Consequently, Justice Thomas’s narrow theory of “consent” as an individual, symbolic right,⁶⁰⁶ marked a significant departure from the broad protection of minority consent from majority tyranny envisioned by the Framers of the Constitution and Reconstruction Amendments.⁶⁰⁷

Moreover, Justice Thomas’s reasoning is flawed materially by his failure to recognize that determining the textual source for protecting consent (i.e., the Constitution or the Voting Rights Act) has critical implications for the scope of that protection.⁶⁰⁸ Instead, he has conflated both sources.⁶⁰⁹ Justice Thomas equated the language of section 2 of the Voting Rights Act, passed by Congress pursuant to its enforcement powers, to the language of the self-executing section of the Fifteenth Amendment:

The use of language taken from the [Fifteenth] Amendment suggests that the section was intended to protect a “right to vote” *with the same scope as the right secured by the Amendment itself*; certainly, no reason appears

‘standard, practice, or procedure’ thus suggests a focus on rules that regulate the *individual voter’s* ability to register and cast a ballot, not a more abstract concern with the effect that various electoral systems might have on the ‘weight’ of the votes cast by a group that constitutes a numerical minority in the electorate.

Id. at 929-30 (first and third emphases added).

⁶⁰³ *Id.* at 903.

⁶⁰⁴ *Id.* at 907.

⁶⁰⁵ See generally QUIET REVOLUTION IN THE SOUTH, *supra* note 7 (documenting widespread racially polarized voting in state, county, and municipal elections in the southern states); cf. *infra* text accompanying notes 737-45 (describing the court’s rejection, in *LULAC II*, of evidence of racially polarized voting in light of reasoning similar to that of Justice Thomas).

⁶⁰⁶ See *supra* notes 592-600 and accompanying text.

⁶⁰⁷ See *supra* notes 61-207 and accompanying text.

⁶⁰⁸ See *supra* notes 220-34 and accompanying text.

⁶⁰⁹ See generally *Holder*, 512 U.S. at 893 n.1 (1994) (“Of course, many of the basic principles I will discuss are *equally applicable* to constitutional vote dilution cases.” (emphasis added)).

from the text of the Act for giving the language a broader construction in the statute than we have given it in the Constitution. The Court has never decided, however, whether the Fifteenth Amendment should be understood to protect against vote "dilution."⁶¹⁰

Thomas's reasoning suggested that Congress cannot exercise its enforcement powers to provide greater protection than the Court to voting rights under the Reconstruction Amendments. If that is the case, he essentially would reverse well established jurisprudence to the contrary, which originated in *McCulloch v. Maryland*,⁶¹¹ and has its clearest statement in *Katzenbach v. Morgan*.⁶¹² In doing so, he would render the Enforcement Clauses superfluous restatements of the Self-Executing Clauses. Such a result, however, plainly runs contrary to the legislative intent of the Framers of the Reconstruction Amendments, who devised the Enforcement and Self-Executing Clauses as means by which Congress and the courts, respectively, could check and balance the extent of protection for voting rights provided by the other branch.⁶¹³

Justice Thomas's failure to identify and accord proper deference to the textual source of the voting right in question paled in comparison to "the damage wrought"

⁶¹⁰ *Id.* at 919-20 (emphasis added). Thomas then explained that *Bolden* remained "the last word" on the Court's interpretation of section 2 prior to the 1982 amendments, in which a plurality of justices found that "the Fifteenth Amendment did not extend to reach vote dilution claims." *Id.* at 921. Because the amended section 2 contained "virtually identical language" as the original version protecting against "denial or abridgement of the right . . . to vote," Thomas concluded that Congress did not intend section 2 to encompass vote dilution. *Id.* Of course, Thomas failed to reconcile this conclusion with his recognition that prior to the 1982 amendments, "dilution claims typically were brought under the Equal Protection Clause," *id.* at 893-94 n.1, and that the 1982 amendments were intended to restore analysis of dilution cases to the pre-*Bolden* test devised in *White v. Regester*. See *id.* at 923-24. These two facts show that Congress intended section 2 to cover vote dilution cases.

⁶¹¹ 17 U.S. (4 Wheat.) 316 (1819).

⁶¹² 384 U.S. 641 (1966). See also *supra* note 230. Surely, that could not have been Thomas's intent because he joined with a majority of the Court in *City of Boerne v. Flores*, in which the Court reaffirmed the scope of congressional powers under *Morgan*:

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, as a measure to combat racial discrimination in voting, despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections*. We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States.

City of Boerne v. Flores, 117 S. Ct. 2157, 2163 (1997) (citations omitted) (emphasis added).

⁶¹³ See *supra* notes 220-34 and accompanying text.

by another feature of “the system [he has] created.”⁶¹⁴ Justice Thomas has stated repeatedly that the role of judges in protecting consent must be limited as much as possible.⁶¹⁵ He opined, therefore, that perverted process claims must be left unprotected because “vote dilution cases have required the federal courts *to make decisions* based on highly political judgments—judgments that courts are inherently ill-equipped to make.”⁶¹⁶ Specifically, Thomas decried the fact that the judiciary necessarily must engage in line-drawing in determining whether a perverted process has diluted the consent of a particular group of voters. In doing so, he observed:

[T]alk of ‘debasement’ or ‘dilution’ is circular talk. One cannot speak of ‘debasement’ or ‘dilution’ of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.” But in setting the benchmark of what “undiluted” or fully “effective” voting strength should be, a court must necessarily make some judgments based purely on an assessment of principles of political theory.

....

Our interpretation of § 2 . . . has mired the federal courts in an inherently political task—one that requires answers to questions that are ill-suited to principled judicial resolution. Under § 2, we have assigned the federal judiciary a project that involves, not the application of legal standards to the facts of various cases or even the elaboration of legal principles on a case-by-case basis, but rather the creation of standards from an abstract evaluation of political philosophy.⁶¹⁷

⁶¹⁴ *Holder*, 512 U.S. at 905 (Thomas, J., concurring).

⁶¹⁵ *See, e.g., id.* at 893-94, 896-97, 901-02, 936.

⁶¹⁶ *Id.* at 894 (emphasis added); *see also id.* at 901-02

(I do not pretend to have provided the most sophisticated account of the various possibilities; but such matters of political theory are beyond the ordinary sphere of federal judges. And that is precisely the point. The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law.);

id. at 926 (“[I]t would be contrary to common sense to read [Voting Rights Act] § 2(b)’s reference to political opportunity as a charter of federal courts to embark on the ambitious project of developing a theory of political equality to be imposed on the Nation.”).

⁶¹⁷ *Id.* at 936 (quoting *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting)); *cf.* S. REP. NO. 417, at 96, 99 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 269, 272 (additional views of Sen. Hatch) (arguing that there is “no core value under the results test other than election results,” with the remaining “totality of the circumstances” questions asked under the test serving as “straight proportional representation analysis or in terms that totally substitute for the rule of law an arbitrary case-by-case rule of individual judges”); *id.* at 137-38, *reprinted in* 1982 U.S.C.C.A.N. at 309-10 (report of the Senate Subcommittee on the Constitution) (“There is no ‘core value’ under the results test except for . . . proportional representation” and “it affords no guidance to courts in deciding suits,” thereby substituting “the arbitrary discretion of judges”); *id.* at 236, *reprinted in* 1982 U.S.C.C.A.N. at 406 (minority views of Sen. East) (maintaining that “[i]t will be the whims of countless federal

Justice Thomas went so far as to suggest that, in adjudicating constitutional and statutory matters, judges are precluded from engaging in *any* substantive decision-making,⁶¹⁸ a conclusion that is unsupportable both in terms of the nation's democratic theory⁶¹⁹ and practical reality.⁶²⁰ Yet, if Thomas's reasoning is taken to its logical conclusion, the judiciary is powerless to intervene in any case in which a simple, formulaic method of adjudication is not present in the constitutional or statutory text. Furthermore, even when a principled method exists, such as in the one person, one vote cases, the Court nevertheless would be precluded from adopting it because of the significant substantive choice it would require the Court to make.⁶²¹ In short, Justice Thomas's democratic theory decimates the Framers' intent to have vigorous, flexible judicial referees protecting the consent of all the governed.⁶²²

All that remained under Justice Thomas's approach is one half of Madison's republican equation: the simple mantra that the judiciary must respect majority rule.

judges that will have to supplement" the "glaring deficiency" created by the "totality of the circumstances" test and the proportional representation disclaimer of section 2).

⁶¹⁸ See *Holder*, 512 U.S. at 901-02. As support for this proposition, Justice Thomas cited Professor Laurence Tribe: "[N]o strategy [in vote dilution cases] can avoid the necessity for at least some hard substantive decisions of political theory by the federal judiciary." *Id.* at 901 n.11 (quoting LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-7, at 1076 n.7 (2d ed. 1988)). As previously illustrated, however, Tribe reaches the same conclusion about *all* matters of constitutional law. See generally TRIBE & DORF, *supra* note 262, at 66 ("Constitutional value choices cannot be made . . . without recourse to a system of values that is at least partly external to the constitutional text . . .").

⁶¹⁹ See *supra* notes 48-280 and accompanying text.

⁶²⁰ See generally *supra* notes 281-580 and accompanying text (describing how every type of process democracy claims, even the pure process view of voting to which Thomas subscribes, requires that judicial referees make substantive decisions).

⁶²¹ See generally *supra* notes 293-325 and accompanying text (describing the value choices made by the Court in adopting the one person, one vote standard).

⁶²² The following is perhaps the clearest statement of Justice Thomas's rejection of the Court's role as a judicial referee in the political process:

That our reading of the [Voting Rights] Act has assigned the judiciary the task of making the decisions I have described . . . should suggest . . . that *something in our jurisprudence has gone awry*. We might be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America. But under our constitutional system, this Court is not a centralized politburo appointed for life to dictate to the provinces the "correct" theories of democratic representation, the "best" electoral systems for securing truly "representative" government, the "fairest" proportions of minority political influence, or . . . the "proper" sizes for local governing bodies. *We should be cautious in interpreting any Act of Congress to grant us power to make such determinations.*

Holder, 512 U.S. at 912-13 (emphasis added). It was not Congress, but the Constitution that granted the Court "power to make such determinations." See *supra* notes 48-280 and accompanying text.

Thomas discussed his abiding deference to majority rule in explaining his "participation" theory of democracy:

Some conceptions of representative government may primarily emphasize the formal value of the vote as a mechanism for participation in the electoral process, whether it results in a seat or not. Under such a theory, minorities unable to control elected posts would not be considered essentially without a vote; rather, a vote duly cast and counted would be deemed just as "effective" as any other. If a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, *in a majoritarian system, numerical minorities lose elections*.⁶²³

He buttressed this conclusion with the constraints he would impose upon judicial decision-making. Thomas used the Court's selection of single-member districts as a benchmark for vote dilution cases to illustrate his criticism of judicial interference with majority rule:

[D]istricting is merely another political choice made by the citizenry in the drafting of their state constitutions. Like other political choices concerning electoral systems and models of representation, it too is presumably subject to a judicial override if it comes into conflict with the theories of representation and effective voting that we may develop under the Voting Rights Act.⁶²⁴

Justice Thomas missed the point. The "constitutional conception of democracy" requires the Court to monitor majority rule when that rule comes at the expense of denying a minority of voters their basic right to fair and equal access to the full political process,⁶²⁵ a fundamental premise underlying the Madisonian Compromise.⁶²⁶ Nevertheless, Thomas found that "the Voting Rights Act supplies no rule for court to rely upon in deciding"⁶²⁷ what "objective standard" to "seize upon . . . for deciding cases"⁶²⁸ is a sufficient basis for the Court to refuse to act at all. In purporting to avoid matters of democratic theory, Justice Thomas, in fact, adopted the "majoritarian default" position of constitutional law.⁶²⁹ Of course, in doing so, Thomas himself has taken the anti-majoritarian action of thwarting congressional intent to afford broad protection for all process democracy claims brought under the Voting Rights Act.

⁶²³ *Id.* at 900-01 (emphasis added).

⁶²⁴ *Id.* at 911. Thomas also pointed out that the Court had exceeded its constitutional power in the "political decision" to use single-member districts as a benchmark for vote dilution cases. *Id.* at 897-902.

⁶²⁵ See *supra* notes 270-77 and accompanying text.

⁶²⁶ See *supra* notes 103-18 and accompanying text.

⁶²⁷ *Holder*, 521 U.S. at 896 (Thomas, J., concurring).

⁶²⁸ *Id.* at 899 n.6.

⁶²⁹ See *supra* notes 264-69 and accompanying text.

While Justice Thomas believes that consent only should be protected to the extent that it is denied by pure process impediments, a majority of the Court has declined formally to adopt such a narrow view. In *Thornburg v. Gingles*,⁶³⁰ the Court reaffirmed its conclusion in *Allen* that the Voting Rights Act included within its scope perverted process claims in which consent was denied by vote dilution.⁶³¹ Furthermore, all of the justices in *Gingles* seemed to find that by their very nature, vote dilution claims implicate group rights and not individual rights. Writing for the majority, Justice Brennan laid out the three factors of geographical compactness,⁶³² political cohesiveness,⁶³³ and majority bloc voting,⁶³⁴ which “the minority *group* must be able to demonstrate” to prove a violation of section 2.⁶³⁵ Justice O’Connor, joined by the remaining three justices, stated that she would abide by the “approach outlined in *Whitcomb* and *White*,” under which “a court should consider all relevant factors bearing on whether the minority *group* has ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of its choice.’”⁶³⁶ It would seem at first glance, then, that in *Gingles*, the Court endorsed strong protection for consent regardless of the particular stage of the political process in which it is denied.

Nevertheless, appearances can be deceiving. The Court in *Gingles* laid the foundation for negating the very protection it purported to convey. As an initial matter, Justice Brennan’s departure from the *White* “totality of the circumstances” test in favor of his three factor test placed undue emphasis on the electoral success of the minority group as the key to a section 2 claim.⁶³⁷ It is unsurprising that Justice

⁶³⁰ 478 U.S. 30 (1986).

⁶³¹ See generally *id.* at 45 n.10 (“Section 2 prohibits *all forms of voting discrimination*, not just vote dilution.” (emphasis added)); *id.* at 87 (O’Connor, J., concurring) (“Although § 2 does not speak in terms of ‘vote dilution,’ I agree with the Court that proof of vote dilution can establish a violation of § 2 as amended.”).

⁶³² Geographical compactness requires that “the minority group . . . demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.” *Id.* at 50.

⁶³³ According to the Court, “[i]f the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.” *Id.* at 51.

⁶³⁴ Majority bloc voting requires proof “that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, usually to defeat the minority’s preferred candidate.” *Id.* (citations omitted).

⁶³⁵ *Gingles*, 478 U.S. at 50 (emphasis added). The Court held that if members of the minority group are unable to prove “the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.” *Id.* at 50 n.17. The Court’s reasoning, therefore, implies that section 2 plaintiffs must demonstrate the existence of a remedy as part of their *prima facie* case of vote dilution.

⁶³⁶ *Id.* at 99 (O’Connor, J., concurring) (emphasis added).

⁶³⁷ See *id.* at 48-51, 74-77. The Court subsequently held, in *Johnson v. De Grandy*, that courts examining section 2 claims must consider other evidence (including the *White/Zimmer* factors described in the Senate Report) in the totality of the circumstances in addition to the

Brennan emphasized electoral success because it seemed to provide an objective, readily quantifiable judicial standard for assessing perverted process claims, in much the same manner as equal population could be used for the one person, one vote cases. Of course, the danger in focusing on electoral success is that it neglects violations of consent at other stages of the political process.⁶³⁸ For example, when the evidence in *Gingles* purported to show black electoral success in one of the challenged districts—through “descriptive representation,”⁶³⁹ or the election of black candidates—the Court held that such electoral success was inconsistent with the plaintiffs’ ability to state a claim under section 2.⁶⁴⁰ Undoubtedly, parliamentary process claims and many types of perverted process claims not readily discernable by electoral success or failure also are left out of the *Gingles* formula for analyzing claims under section 2. “Consent” thereby is narrowed to mean little more than “electoral success” under this judicial redefinition of the scope of the right to vote protected under section 2 of the Voting Rights Act.

three *Gingles* factors. See *Johnson v. De Grandy*, 512 U.S. 997, 1011-13 (1994). Nevertheless, the Court in *De Grandy* also made it clear that proportionality—a key indicator of electoral success—is an important fact “to be analyzed when determining whether members of a minority group have ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” *Id.* at 1000 (quoting 42 U.S.C. § 1973 (1994)). As a result, even after *De Grandy*, electoral success remains the touchstone of section 2 vote dilution claims.

⁶³⁸ See generally *De Grandy*, 512 U.S. at 1000 (observing that the Court’s focus on electoral success has led to “[i]ssues of voter participation, effective representation, and policy responsiveness . . . [being] omitted from the calculus”); Abrams, *supra* note 56, at 452 (“In *Gingles*, the Court focused exclusively on the electoral portion of . . . [the section 2] guarantee, ignoring the statute’s apparent protection of participation in other facets of the political process.”); Dana R. Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 YALE L. & POL’Y REV. 405, 412 (1991) (“Although the Supreme Court may have intended its decision to apply only to the facts presented in the case, *Gingles* threatens to narrow the concept of ‘political participation’ to electoral success.”); Sharon N. Humble, Case Note, 24 ST. MARY’S L.J. 569, 586 n.66 (“The Court’s exclusive focus on the statutory language guaranteeing the opportunity of minorities to elect representatives results in the Court’s ignoring already existing statutory language requiring equal participation in the political process.”).

⁶³⁹ See *supra* notes 250-51, 255 and accompanying text.

⁶⁴⁰ See *Gingles*, 478 U.S. at 77; *id.* at 104-05 (O’Connor, J., concurring); cf. *De Grandy*, 512 U.S. at 1000 (“[N]o violation of § 2 can be found . . . where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of voting districts roughly proportional to the minority voters’ respective shares in the voting-age population.”). According to Lani Guinier, the Court’s holding in *Gingles* shows that the Court “clearly established ‘descriptive’ proportional representation as the ceiling” in section 2 cases. Guinier, *supra* note 240, at 1636. The Court’s rejection of parliamentary process claims in *Etoah* shows the Court is disinclined to afford any protection for substantive representation to the extent it cannot discern a readily identifiable equal protection violation. See *supra* notes 457-506 and accompanying text.

Justice O'Connor seized on the majority's reasoning to attack the apparent results of its conclusion: "[E]lectoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and . . . the elements of a vote dilution claim create an entitlement to roughly proportional representation."⁶⁴¹ Such reliance on electoral success thereby forces courts to confront directly and to overturn majority rule primarily on the basis of election results. Many lower courts have used Justice O'Connor's criticism of the Court's electoral success standard in *Gingles* as a basis to reject perverted process claims, even in the face of extensive sociological and narrative data showing the systematic exclusion of minority voters from the political process. By making it appear that vote dilution is grounded upon a claim of lack of proportional representation, it becomes far easier for the reviewing court to reject the claim on the basis of the proportional representation disclaimer contained in section 2.⁶⁴² What frequently results, of course, is the adoption by lower courts of the majoritarian default, sustaining a denial of consent in favor of majority rule.

Moreover, in its attempts to provide a judicially manageable standard for actionable vote dilution, the Court in *Gingles* divided on the key issue of what evidence could be used to prove a violation of section 2. On the one hand, a majority of the Court approved the use of bivariate ecological regression analysis,⁶⁴³ which is used to determine if there is political cohesiveness and majority bloc voting by showing whether members of the majority and minority groups vote differently from one another.⁶⁴⁴ On the other hand, the justices were unable to secure a majority on whether the cause of racially polarized voting is relevant. Justice Brennan, joined by three other justices, believed causation was not relevant. According to Justice Brennan, a vote dilution claim could be stated under section 2 as long as "the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."⁶⁴⁵

⁶⁴¹ *Gingles*, 478 U.S. at 93 (O'Connor, J., concurring). Many commentators have agreed with Justice O'Connor's conclusion that electoral success has become the central inquiry under *Gingles*. See, e.g., Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991); Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 663 n.60 (1993).

⁶⁴² See *supra* notes 554-55 and accompanying text.

⁶⁴³ Bivariate ecological regression analysis "determine[s] the degree of relationship between two variables—here the relationship between the racial [or ethnic] composition in each political unit (the independent variable) and the support provided a particular candidate within that political unit (the dependent variable)." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1119 n.10 (3d Cir. 1993), *cert. denied*, 512 U.S. 1252 (1994).

⁶⁴⁴ See *Gingles*, 478 U.S. at 53 n.21.

⁶⁴⁵ *Id.* at 63 (Brennan, J., plurality opinion). Justice White, who joined with Justice Brennan in most of his opinion, disagreed with this portion of the opinion because of Justice Brennan's distinction between the race of the voter and of the candidate in the identification of racially polarized voting. See *id.* at 82 (White, J., concurring).

Justice O'Connor, joined by three other justices, disagreed with Justice Brennan's assessment. Justice O'Connor stated:

Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account.⁶⁴⁶

Justice O'Connor's error in focusing upon the cause of racially polarized voting is twofold. First, it diverts the inquiry from one of determining whether consent has been denied by a particular voting structure or mechanism to an examination of the reasons for the violation of consent, something Congress expressly disclaimed in the 1982 amendments to section 2.⁶⁴⁷ As a corollary to the first error, an examination of causation also creates a proxy for inquiring into the intent of the governmental and private persons who have deprived a minority group of its ability to consent, thereby opening the door for resurrecting the *Bolden* intent test. In the absence of such "racial animus" or "discriminatory intent," it becomes much easier for defendants to "explain away" even egregious denials of consent through non-racial factors such as different partisan affiliations and socioeconomic backgrounds. Justice Thomas apparently has recognized the difficulty that section 2 claimants will have in establishing causation because he has seized upon that onerous evidentiary burden as yet another reason to leave perverted process claims unprotected.⁶⁴⁸

Like *Gingles*, *Holder v. Hall* also laid the foundation for implicitly limiting protection of racial or ethnic consent under section 2. In *Holder*, black voters challenged the use of a single-commissioner form of county government under section 2,⁶⁴⁹ claiming that the county "must have a county commission of sufficient

⁶⁴⁶ *Id.* at 100 (O'Connor, J., concurring).

⁶⁴⁷ See *supra* note 562 and accompanying text.

⁶⁴⁸ See *Holder v. Hall*, 512 U.S. 874, 904 (1994) (Thomas, J., concurring).

⁶⁴⁹ They also brought claims under the Fourteenth and Fifteenth Amendments, which the

size that, with single-member election districts, the county's black citizens would constitute a majority in one of the single-member districts".⁶⁵⁰ The Court rejected the plaintiffs' claim.⁶⁵¹ In reaching this result, Justice Kennedy drew on Justice O'Connor's language in *Gingles* that "in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system."⁶⁵² Justice Kennedy therefore found that "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2."⁶⁵³ As a result, Justice Kennedy concluded the black voters' claim had to fail because "[t]here is no principled reason why one size [of a government body] should be picked over another as a benchmark for comparison."⁶⁵⁴

The *Holder* plurality's reasoning harbors dangerous implications for the protection of minority consent. As Justice Blackmun observed in his dissent, the Court's holding substantially cut back on the "broad construction" of the Voting Rights Act given by the Court in cases such as *Allen* and endorsed by Congress.⁶⁵⁵ In addition, *Holder* effectively can be used to bar an otherwise successful vote dilution claim by preventing imposition of a remedy that alters certain features of the challenged voting system or structure. Such a result is contrary to the "general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."⁶⁵⁶ In its attempt to get around this problem, the *Holder* plurality engaged in the circular reasoning that the absence of a remedy—i.e., a benchmark within the government's voting system to evaluate the challenged practice—meant that no legal right had been invaded. Moreover, the plurality's logic is particularly troubling because there is little to distinguish the lack of a "principled reason why one size [of a government body] should be picked over

district court rejected. See *Holder*, 512 U.S. at 877-78. The constitutional claims were not before the Supreme Court on appeal. See *id.* at 880.

⁶⁵⁰ *Id.* at 878.

⁶⁵¹ See *id.* at 885 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J.); *id.* at 891 (O'Connor, J., concurring in part); *id.* at 946 (Thomas, J., joined by Scalia, J., concurring).

⁶⁵² *Holder*, 512 U.S. at 880 (Kennedy, J., plurality opinion) (quoting *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring)).

⁶⁵³ *Id.* at 881 (Kennedy, J., plurality opinion). Although Justice Kennedy's opinion on this point was written for only a plurality of three justices, Justices Thomas and Scalia indicated that Justice Kennedy had "persuasively demonstrate[d] that there is no principled method for determining a benchmark against which the size of a governing body might be compared to determine whether it dilutes a group's voting power." *Id.* at 891 (Thomas and Scalia, JJ., concurring).

⁶⁵⁴ *Id.* at 881 (plurality opinion) (Kennedy, J.).

⁶⁵⁵ *Id.* at 949 (Blackmun, J., dissenting).

⁶⁵⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

another as the benchmark for comparison,"⁶⁵⁷ from the Court's selection in *Gingles* of single-member districts as a benchmark for challenges to multimember districts.⁶⁵⁸ *Holder*'s narrow construction of the judicial role in protecting consent has caused some lower courts to give unrelenting deference to the state's interest in maintaining challenged voting structures at the expense of fair and effective representation for all voters.⁶⁵⁹

While, in *Gingles* and *Holder*, the Court laid the foundation for implicitly limiting protection of racial or ethnic minority consent under section 2, the Court took a more direct approach in *Shaw v. Reno*.⁶⁶⁰ *Shaw v. Reno* involved a Fourteenth Amendment challenge to North Carolina's congressional redistricting plan by white voters who alleged that the plan constituted an unconstitutional racial gerrymander.⁶⁶¹ The North Carolina legislature had created two "unusually shaped"⁶⁶² majority-minority black districts after the Department of Justice refused to grant section 5 preclearance to an earlier plan which only created one majority-minority district.⁶⁶³ Under the plan, white voters, who comprised seventy-eight percent of the state's population, would still control eighty-three percent of the congressional seats (ten out of the twelve seats).⁶⁶⁴ The plaintiffs alleged the legislature deliberately sacrificed traditional districting criteria "to create Congressional Districts along racial lines" and to assure the election of two black representatives to Congress.⁶⁶⁵ It would seem that the legislature's desire to ensure black electoral success was consistent with a desire to avoid section 2 liability because in *Gingles* the Court had made electoral success the gravamen of a vote dilution claim. The question before the Court was whether the plaintiffs had stated a cognizable claim.⁶⁶⁶

In addressing this issue, the Court faced two obstacles. First, the Court began by reaffirming its view that the group right to a vote free of dilution was protected under section 2.⁶⁶⁷ Second, the Court was confronted by its earlier opinion in *United Jewish Organizations of Williamsburgh, Inc. v. Carey* ("UJO"), in which it denied a challenge by Hasidic Jews in suburban New York who alleged that the creation of nonwhite majority-minority districts violated the Fourteenth Amendment when white voters as a group were provided with fair representation.⁶⁶⁸ Both of these obstacles seemed to preclude any constitutional claim the *Shaw v. Reno* plaintiffs might have

⁶⁵⁷ *Holder*, 512 U.S. at 881 (plurality opinion) (Kennedy, J.).

⁶⁵⁸ Justice Thomas made the same point in his *Holder* concurrence. See *supra* note 624.

⁶⁵⁹ See *infra* notes 815-34 and accompanying text.

⁶⁶⁰ 509 U.S. 630 (1993).

⁶⁶¹ See *id.* at 633-39.

⁶⁶² *Id.* at 635.

⁶⁶³ See *id.* at 634-35.

⁶⁶⁴ See *id.* at 634; *id.* at 666-67 (White, J., dissenting).

⁶⁶⁵ *Id.* at 637.

⁶⁶⁶ See *id.* at 633-34.

⁶⁶⁷ See *id.* at 640-41. As the Court noted, the 1982 amendments to section 2 were designed to "prohibit legislation that results in the dilution of a minority group's voting strength, regardless of the legislature's intent." *Id.* at 641 (second emphasis added).

⁶⁶⁸ 430 U.S. 144 (1977).

had: white voters in North Carolina as a group enjoyed better than proportional representation, making it impossible to state claims for either vote dilution or discriminatory effects.⁶⁶⁹

Despite these problems, the Court held that the *Shaw v. Reno* plaintiffs could state an “analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification”⁶⁷⁰—in other words, a “constitutional right to participate in a ‘color-blind’ electoral process.”⁶⁷¹ The majority reached this conclusion by engaging in what Justice White called a decision “not to overrule, but rather to sidestep, *UJO*” and the Court’s section 2 jurisprudence.⁶⁷² Writing for the Court, Justice O’Connor distinguished *UJO* by reasoning that it “set forth a standard under which white voters can establish unconstitutional vote dilution” which “simply does not apply where . . . a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality.”⁶⁷³ Instead, Justice O’Connor found *Gomillion*⁶⁷⁴ and *Wright v. Rockefeller*⁶⁷⁵ to be on point—an opinion which the *Shaw v. Reno* dissenters⁶⁷⁶ and many commentators do not share.⁶⁷⁷

⁶⁶⁹ See discussion *infra* note 684.

⁶⁷⁰ *Shaw v. Reno*, 509 U.S. at 652.

⁶⁷¹ *Id.* at 641-42. Much of the language of Justice O’Connor’s majority opinion in *Shaw v. Reno* mirrors similar views stated in the Senate Subcommittee on the Constitution’s views of the constitutionality of the amendments to section 2 of the Voting Rights Act. Compare discussion of *Shaw v. Reno*, *supra* notes 660-70 and *infra* notes 672-94, with S. REP. NO. 417, at 110-11, 147-51, 172-73, 180 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 281-82, 320-23, 345-46, 352 (report of the Senate Subcommittee on the Constitution).

⁶⁷² *Shaw v. Reno*, 509 U.S. at 659 (White, J., dissenting).

⁶⁷³ *Id.* at 652.

⁶⁷⁴ See *supra* notes 425-31 and accompanying text.

⁶⁷⁵ 376 U.S. 52 (1964) (assuming that the allegation that the statute segregated voters on the basis of race in drawing congressional districts stated a constitutional claim, but holding that the plaintiffs had not met their burden of proving discriminatory intent).

⁶⁷⁶ See *Shaw v. Reno*, 509 U.S. at 664-70 (White, J., dissenting); *id.* at 677-79 (Stevens, J., dissenting); *id.* at 685-87 (Souter, J., dissenting).

⁶⁷⁷ See generally Karlan, *supra* note 221, at 278 (“[D]espite the Court’s invocations of *Gomillion v. Lightfoot* and *Wright v. Rockefeller*, in reality, *Shaw v. Reno* represents a dramatic departure from the prior case law.”); Parker, *supra* note 17, at 30

(The *Shaw v. Reno* Court also thought that the Court’s voting rights precedents, *Guinn*, *Gomillion*, and *Wright v. Rockefeller*—involving mostly Fifteenth Amendment, not Fourteenth Amendment claims—were racial classification cases in which the Court applied strict scrutiny without proof of discriminatory intent. However, this constitutional revisionism runs up against the Court’s description of these very same cases as discriminatory purpose cases in *City of Mobile v. Bolden*.);

Anthony A. Peacock, *Shaw v. Reno and the Voting Rights Conundrum: Equality, The Public Interest, and the Politics of Representation*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 136-40 (concluding the “distinction between *UJO* as a vote dilution claim

According to Justice O'Connor and the *Shaw v. Reno* majority, *Gomillion* and *Wright* held that a constitutional claim could be stated when reapportionment statutes that were race-neutral on their face⁶⁷⁸ had the effect of leaving minority voters "fenced out" of the political process.⁶⁷⁹ Under such circumstances, the majority found that a pure process claim denying individual access had been stated.

[The central purpose of the Equal Protection Clause] is to prevent the States from purposefully discriminating between *individuals* on the basis of race. Laws that explicitly distinguish between *individuals* on racial grounds fall within the core of that prohibition.

....

Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." They threaten to stigmatize *individuals* by reason of their membership in a racial group and to incite racial hostility.

....

[R]eapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district *individuals* who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perceptions that members of the same racial group—regardless of their age, education, economic status,

and *Shaw* as an 'analytically distinct' claim" was "less tenable" in light of the *UJO* plaintiffs' explicit allegations of unconstitutional racial gerrymandering). But see Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7, at 51 n.32 (maintaining that Justice O'Connor properly distinguished *UJO* in her *Shaw v. Reno* opinion); Mark E. Rush, *The Price of Unclear Precedents: Shaw v. Reno and the Evolution of Voting Rights Jurisprudence*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7, at 33-36 (asserting that *Shaw v. Reno* marked a break from *UJO*, but only to the extent that it "represents a reconsideration of a cause of action that failed to win the sympathy of a majority of the Justices" in *UJO*); David B. Sentelle, *Speech: Racial Gerrymandering*, 45 CATH. U. L. REV. 1249, 1251 (1996) ("The Supreme Court in *Gomillion v. Lightfoot* recognized and roundly condemned that act of the Alabama legislature in walling out voters because of their race. Justice O'Connor for the majority in *Shaw v. Reno* does the same thing."); cf. Issacharoff, *supra* note 323, at 1268 (agreeing with Judge Sentelle that *Shaw v. Reno* merely reiterated the Court's conclusion in *Gomillion* that racial gerrymandering is subject to constitutional review, but implying strict scrutiny is not necessarily appropriate as in *Gomillion* because "racial demands for representation [do not] constitute anything more than a more cartographically imaginative version of what has always gone on in back-room redistricting").

⁶⁷⁸ See generally *Shaw v. Reno*, 509 U.S. at 646 (stating that reapportionment and redistricting plans typically are facially race-neutral because they usually do not "classify persons at all," but instead classify "tracts of land, or addresses").

⁶⁷⁹ *Id.* at 644-47.

or the community in which they live—think alike, share the same interests, and will prefer the same candidates at the polls.⁶⁸⁰

Justice O'Connor went on to cite with approval Justice Douglas's dissent in *Wright* that suggested a color-blind society when "the *individual* is important, not his race, his creed, or his color."⁶⁸¹ Because the *Shaw v. Reno* majority drew a parallel between the "fencing out" in *Gomillion* and the stigma that individual voters faced in racial gerrymandering and the "balkanization" or representational harm it purportedly fostered,⁶⁸² the five justices ruled that the plaintiffs stated a cognizable pure process claim under the Fourteenth Amendment.⁶⁸³ Of course, the four dissenting justices strongly disagreed with the Court's holding, reasoning that no individual pure process claim was alleged in the plaintiffs' complaint.⁶⁸⁴

⁶⁸⁰ *Id.* at 642-43, 647 (emphasis added) (citations omitted).

⁶⁸¹ *Id.* at 648 (emphasis added) (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)).

⁶⁸² *Shaw v. Reno*, 509 U.S. at 657.

⁶⁸³ *See id.* at 658.

⁶⁸⁴ Justice White explained the majority's error:

To date, we have held that only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote [a pure process claim], for example by means of a poll tax or literacy test. Plainly, this variety is not implicated by [plaintiffs'] allegations and need not detain us further. The second type of unconstitutional practice is that which "affects the political strength of various *groups*" [the remaining process democracy claims], in violation of the Equal Protection Clause. As for this latter category, we have insisted that members of *the political or racial group* demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process.

Id. at 659-60 (White, J., dissenting) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 83 (1980) (Stevens, J., concurring)) (emphasis added). *Cf. id.* at 681-82 (Souter, J., dissenting) (In districting . . . the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others . . . 'Dilution' thus refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a *group*.

(emphasis added)). Justice White went on to find that the goal of "improving the minority group's prospects of electing a candidate of its choice" did not implicate discriminatory intent and, even if it did, there was no discriminatory effect because white voters still enjoyed better than proportional representation. *See id.* at 666-67 (White, J., dissenting). Thus, there was no unconstitutional deprivation of a group right free of dilution. *See id.* at 673-75 (White, J., dissenting). The dissenting opinions are replete with additional references to the treatment of geographical process claims—such as the one alleged in *Shaw v. Reno*—as a group right. *See generally id.* at 661 (White, J., dissenting) ("[W]e have asked that an identifiable *group* demonstrate more than mere lack of success at the polls to make out a successful gerrymandering claim." (emphasis added)); *id.* at 663 (White, J., dissenting) ("[T]he group must exhibit 'strong indicia of lack of political power and the demand of fair representation'" (quoting *Davis v. Bandemer*, 478 U.S. 109, 139 (1986))); *id.* at 676 (Blackmun, J., dissenting) ("[T]he conscious use of race in redistricting does not violate the

While *Shaw v. Reno* simply stood for the proposition that allegations that a district is racially gerrymandered states a claim under the Fourteenth Amendment, other language contained in Justice O'Connor's majority opinion did not bode well for continued protection of vote dilution claims under section 2. First, Justice O'Connor made it clear that even when a legislature engaged in efforts to afford minorities equal access to the political process, if the plaintiffs proved the legislature did so by racial gerrymandering then strict scrutiny would apply to the challenged districts.⁶⁸⁵ In reaching this conclusion, the majority's opinion contained extensive citations to *Croson*⁶⁸⁶ and *Wygant*,⁶⁸⁷ two opinions which interpreted the Equal Protection Clause in a manner that marked a significant retreat from affirmative action measures designed to level the playing field for minorities.⁶⁸⁸ The threat that these decisions posed to remedial measures for minorities in legislative and congressional reapportionment could not be overstated, as Justice O'Connor wrote: "We have made clear, however, that equal protection analysis is 'not dependent on the race of those burdened or benefited by a particular classification.'"⁶⁸⁹ Rather, she emphasized that the Fourteenth Amendment protected "'personal rights' guaranteed to the individual and not to groups."⁶⁹⁰

Equal Protection Clause unless the effect of the redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly." (emphasis added)); *id.* at 678 (Blackmun, J., dissenting) ("The difference between constitutional and unconstitutional gerrymanders [is] whether their purpose is to enhance the power of the group in control of the districting process at the expense of any minority group . . ." (emphasis added)). In the same vein, much of the criticism that commentators have leveled at *Shaw v. Reno* is that, at least with respect to districting claims (deemed geographical process claims in this Article), the Court made a dramatic shift from the group-rights focus which had been the norm, see *United Jewish Org. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166-68 (1977); *Whitcomb v. Chavis*, 403 U.S. 124, 153-55 (1971), to an individual-rights focus that simply is incompatible with claims that are not based merely on lack of ballot access. See, e.g., Aleinikoff & Issacharoff, *supra* note 240; Jennifer L. Gilg, Note, *Back to the Drawing Board: Equal Protection Clashes with the Voting Rights Act in Shaw v. Reno*, NEB. L. REV. 383, 399-400 (1994); Mark E. Rush, *The Price of Unclear Precedents: Shaw v. Reno and the Evolution of Voting Rights Jurisprudence*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 30-42.

⁶⁸⁵ See *Shaw v. Reno*, 509 U.S. at 658; see also *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (holding that strict scrutiny applies when a "legislature subordinated traditional race-neutral districting principles . . . to racial considerations").

⁶⁸⁶ *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

⁶⁸⁷ *Wygant v. Jackson Bd. of Elections*, 476 U.S. 267 (1986).

⁶⁸⁸ See *Shaw v. Reno*, 509 U.S. at 642-43, 650-51, 656; see also *supra* note 583 (summarizing the holdings of these decisions). Some commentators, however, correctly have found that section 2 is not an affirmative action statute. See *supra* note 7.

⁶⁸⁹ *Id.* at 650-51 (quoting *Croson*, 488 U.S. at 494 (plurality opinion)).

⁶⁹⁰ Anthony A. Peacock, *Shaw v. Reno and the Voting Rights Conundrum: Equality, The Public Interest, and the Politics of Representation*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 132 (quoting *Croson*, 488 U.S. at 493).

Second, the *Shaw v. Reno* Court suggested that while the “States certainly have a very strong interest in complying with federal anti-discrimination laws that are constitutionally valid as interpreted and as applied,” such compliance does not insulate the States from a Fourteenth Amendment challenge.⁶⁹¹ Justice White disagreed, stating that he had “no doubt that a State’s compliance with the Voting Rights Act clearly constitutes a compelling interest.”⁶⁹² He distinguished *Croson* and *Wygant* by reasoning that “state efforts to remedy vote dilution are wholly unlike what typically has been labeled ‘affirmative action’” because “[t]o the extent that no other racial group is injured, remedying a Voting Rights Act violation does not involve preferential treatment.”⁶⁹³ Justice White concluded that the “Equal Protection Clause . . . surely, does not stand in the way” of using the Voting Rights Act “to equalize treatment, and to provide minority voters with an effective voice in the political process.”⁶⁹⁴ Nevertheless, the “analytically distinct” claim created in *Shaw v. Reno* bore an ill wind for broad protection of the consent of minority groups.

The Court’s clarifications of the contours of the *Shaw v. Reno* Fourteenth Amendment challenge in subsequent decisions proved just how narrow the protection for statutory perverted process claims would be. After the North Carolina case came back before the Court in *Shaw v. Hunt*,⁶⁹⁵ Chief Justice Rehnquist, writing for a majority which included Justice O’Connor, retreated from Justice O’Connor’s conclusion in *Shaw v. Reno* that a vote dilution claim under section 2 was a group right:

To accept that [a] district [designed to remedy a voting rights violation] may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. *It does not.*⁶⁹⁶

In addition, the Court continued to engage in a fundamental shift away from the basic premise that the Voting Rights Act “was not limited to remedying past harms.”⁶⁹⁷

⁶⁹¹ *Shaw v. Reno*, 509 U.S. at 653-54.

⁶⁹² *Id.* at 674 (White, J., dissenting). Justice O’Connor subsequently agreed with this point in her concurrence in *Bush v. Vera*, 517 U.S. 952, 990-95 (1996). *See infra* notes 705-06 and accompanying text.

⁶⁹³ *Shaw v. Reno*, 509 U.S. at 675 (White, J., dissenting).

⁶⁹⁴ *Id.* (White, J., dissenting); *see also id.* at 680-81 (Souter, J., dissenting) (discussing the need “to take race into account in order to avoid dilution of minority voting strength in the districting plans they adopt”).

⁶⁹⁵ *Shaw v. Hunt*, 517 U.S. 899 (1996).

⁶⁹⁶ *Id.* at 917 (emphasis added) (citing the reference in the Voting Rights Act to “the right of any citizen”).

⁶⁹⁷ Anthony A. Peacock, *Shaw v. Reno and the Voting Rights Conundrum: Equality, The Public Interest, and the Politics of Representation*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7, at 138 & n.46; *see also* Mark E. Rush, *The Price of Unclear Precedents: Shaw v. Reno and the Evolution of Voting Rights Jurisprudence*, in *AFFIRMATIVE ACTION AND REPRESENTATION*, *supra* note 7, at 25 (noting the leeway which

Instead, applying the reasoning of *Croson* and *Wygant* just as *Shaw v. Reno* had foreshadowed, the Court held that a state must have a “‘strong basis in evidence’ for believing it is violating the Act” before it can take steps to assure that all voters have equal access to the political process.⁶⁹⁸

Perhaps the most troubling conclusion the Court reached came in *Bush v. Vera*,⁶⁹⁹ in which Justice O’Connor wrote in her plurality opinion that a state remained free to rely upon political data to draw districts—even when that data resulted in political gerrymandering that benefited majority groups at the expense of those in the minority—but a state could not use similar data to engage in racial gerrymandering that created equal participational opportunities for minority voters.⁷⁰⁰

This final point creates the ominous presence of conflict between the group rights protected under the Voting Rights Act and the individual right protected under a *Shaw v. Reno*-like Fourteenth Amendment claim.⁷⁰¹ Echoing the words of Justice Blackmun’s dissent in *Shaw v. Reno*,⁷⁰² Justice Stevens noted in his *Vera* dissent:

After *Miller* and today’s decisions, States may find it extremely difficult to avoid litigation flowing from decennial redistricting. On one hand, States will risk violating the Voting Rights Act if they fail to create

the Court previously had given to states in their attempts to comply with the Voting Rights Act).

⁶⁹⁸ *Shaw v. Hunt*, 517 U.S. at 908-09 n.4; see also *Miller v. Johnson*, 515 U.S. 900, 922 (1995).

⁶⁹⁹ 507 U.S. 952 (1996).

⁷⁰⁰ *Id.* at 969-70. Justice Thomas’s concurring opinion, in which Justice Scalia joined, leaves no question that a majority of the justices agreed with the plurality opinion on this point. See *id.* at 999-1003 (Thomas, J., concurring).

⁷⁰¹ Many commentators have reached the same conclusion. See, e.g., Bernard Grofman, *The Supreme Court, The Voting Rights Act, and Minority Representation*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 187-89; Samuel Issacharoff, *The Redistricting Morass*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 209; Anthony A. Peacock, *Shaw v. Reno and the Voting Rights Conundrum: Equality, The Public Interest, and the Politics of Representation*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 131, 141, 149-52; Mark E. Rush, *The Price of Unclear Precedents: Shaw v. Reno and the Evolution of Voting Rights Jurisprudence*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 29, 42.

⁷⁰² Justice Stevens noted that the majority opinion in *Shaw v. Reno* “suggests that African-Americans may now be the only group to which it is unconstitutional to offer specific benefits from redistricting.” *Shaw v. Reno*, 509 U.S. at 679 n.4. Justice Stevens observed:

If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for the members of the very minority group whose history in the United States gave birth to the Equal Protection Clause. A contrary conclusion could only be described as perverse.

Id. at 679 (Stevens, J., dissenting).

majority-minority districts. If they create those districts, however, they may open themselves to liability under *Shaw* and its progeny.⁷⁰³

When racial minorities have their consent denied, most remedial measures adopted under the Voting Rights Act necessarily must be race-based.⁷⁰⁴ Consequently, when new districts are created to avoid or correct a section 2 violation, they undoubtedly would be considered the product of "racial gerrymandering" and trigger strict scrutiny under *Shaw v. Reno*. Nevertheless, Justice O'Connor tried to reconcile the Voting Rights Act with the Fourteenth Amendment, asserting that the results test under section 2 "can co-exist in principle and in practice with *Shaw*" under a principled judicial framework.⁷⁰⁵ O'Connor reasoned that a state's interest in avoiding section 2 liability was compelling, and there would be no equal protection violation "if a State pursues that compelling interest by creating a district that 'substantially addresses' the potential liability and does not deviate substantially from a hypothetical court-drawn § 2 district for predominately racial reasons."⁷⁰⁶ Yet,

⁷⁰³ *Bush v. Vera*, 517 U.S. 952, 1037 (1996) (Stevens, J., dissenting).

⁷⁰⁴ See Anthony A. Peacock, *Shaw v. Reno and the Voting Rights Conundrum: Equality, The Public Interest, and the Politics of Representation*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 145-46; see also *infra* note 835 and accompanying text.

⁷⁰⁵ *Bush v. Vera*, 517 U.S. at 990 (O'Connor, J., concurring); cf. *Davis v. Chiles*, 139 F.3d 1414, 1424-26 (11th Cir. 1998) (distinguishing the *Shaw v. Reno* and *Miller* standards for racial gerrymandering from the *Gingles* standards for racially polarized voting).

⁷⁰⁶ *Bush v. Vera*, 517 U.S. at 994 (O'Connor, J., concurring) (quoting *Shaw v. Hunt*, 517 U.S. 899, 918 (1996)). In fact, in a recent ruling, the Court summarily affirmed a three judge panel's conclusion that the Fourth Congressional District in Illinois, a racially gerrymandered Hispanic majority-minority district in Chicago designed to remedy a section 2 violation, survived strict scrutiny analysis. See *King v. Illinois Bd. of Elections*, 979 F. Supp. 582 (N.D. Ill. 1996) (three judge panel), *aff'd*, 118 S. Ct. 877 (1998). The Court's lack of any explanation for its decision in *King*, however, leaves lower courts without guidance as to how they are to reconcile section 2 remedies with the Fourteenth Amendment *Shaw v. Reno* claim. In addition, the Court summarily has affirmed at least two cases in which separate three judge courts upheld majority-minority districts in California and Ohio by concluding that they did not constitute "racial gerrymanders." See *Quilter v. Voinovich*, 981 F. Supp. 1032 (N.D. Ohio 1997) (three judge panel), *aff'd*, 118 S. Ct. 1358 (1998); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (three judge panel), *aff'd in part, appeal dismissed in part*, 515 U.S. 1170 (1995). Again, the summary affirmances provide no guidance as to what differentiates these particular cases from those in which the courts found that the particular districting plan was adopted for primarily race-based reasons. In his concurring opinion in *Bush v. Vera*, Justice Scalia made it clear that the lower courts should not read too much into *DeWitt*, which "cannot justify exempting intentional race-based redistricting from [the Court's] well-established Fourteenth Amendment [*Shaw v. Reno*] standard," and did not "eviscerate the explicit holding of *Adarand* or [] undermine the force of our discussion of Georgia's concessions [of racial gerrymandering] in *Miller*." *Bush v. Vera*, 517 U.S. at 1001-02 (Scalia, J., concurring). In fact, Justice Scalia expressly noted probable jurisdiction in both *King* and *Quilter*, giving some indication as to his disagreement with the conclusions reached in those cases. See *Quilter*, 118 S. Ct. 1358; *King*, 118 S. Ct. at 877.

it is hard to agree with Justice O'Connor that such a framework will allow states to play a "primary role," with courts relegated to "their secondary role."⁷⁰⁷

In fact, the opposite is true. The irony of the *Shaw v. Reno* line of cases is that the Court has intervened in its role as judicial referee over the political process to stop the states from *enhancing* minority access to the political process. This result was not lost on Justice Ginsburg. In her *Miller* dissent, Justice Ginsburg pointed out that under Madisonian democracy, it generally is unnecessary for the judiciary to provide protection for those in the majority:

Special circumstances justify vigilant judicial inspection to protect minority voters—circumstances that do not apply to majority voters. A history of exclusion from state politics left minorities without clout to extract provisions for fair representation in the lawmaking forum. The equal protection rights of minority voters thus could have remained unrealized absent the Judiciary's close surveillance. The majority, by definition, encounters no such blockage. White voters in Georgia do not lack means to exert strong pressure on their state legislators. The force of their numbers is itself a powerful determiner of what the legislature will do that does not coincide with perceived majority interests.⁷⁰⁸

Once districts of equal population are in place, the republican principle of majority rule will secure the rights of those in the majority.⁷⁰⁹ Therefore, when the courts overturn legislative measures designed to ensure the equal opportunity of minority groups to consent, they engage in anti-majoritarian action which is unjustifiable because it enhances the exclusion of those minority groups from the political process. Judicial tyranny has replaced majority tyranny.

Thus, while a majority of the Court has declined to go as far as Justice Thomas did in *Holder* in the scope of protection it gives to minority consent, the result of its

⁷⁰⁷ *Bush v. Vera*, 517 U.S. at 995 (O'Connor, J., concurring). In light of the lack of guidance provided by the Court's *Shaw v. Reno* jurisprudence, *see supra* note 706, it seems likely that the federal courts will litigate more cases to determine if either a Fourteenth Amendment or section 2 violation has occurred.

⁷⁰⁸ *Miller v. Johnson*, 515 U.S. 900, 948 (1995) (Ginsburg, J., dissenting) (citing to the exhortation in the *Carolene Products* footnote to engage in a "more searching judicial inquiry" for classifications adversely affecting "discrete and insular minorities"); *see supra* note 330 (discussing the *Carolene Products* footnote).

⁷⁰⁹ *See supra* notes 82, 324 and accompanying text. In some of the *Shaw v. Reno* challenges, the Justice Department refused to give section 5 preclearance to redistricting plans that did not provide greater opportunities for minority representation. *See, e.g., Shaw v. Hunt*, 517 U.S. at 911-13; *Miller*, 515 U.S. at 906-07. Under such circumstances, it might be argued that the redistricting plans adopted in these states were not the product of majority rule. Such an argument would be mistaken. States always retain the right to challenge the Justice Department's refusal to give section 5 preclearance, by filing an action in federal court. *See* 42 U.S.C. § 1973c (1994). The failure of the states to do so in *Shaw v. Reno* and *Miller* explicitly endorses their redistricting plans as the products of majority rule in the appropriate legislative bodies.

decisions in *Gingles* and *Shaw v. Reno* is largely the same. Voting is seen as an individual and not a group right, without any distinctions between the different types of process democracy claims. Flexible judicial referees, who determine whether minority consent has been denied through application of a functional approach to the "totality of the circumstances" of the electoral system or mechanism, are replaced with inflexible judges who apply rigid formulaic criteria to "avoid" making substantive decisions or engaging in matters of democratic theory. These criteria, which were set forth in *Gingles* and further elaborated on in *De Grandy*,⁷¹⁰ redefine consent to mean electoral success, thereby leaving minorities unprotected at many stages in the political process. Even when a claimant apparently succeeds in demonstrating vote dilution under the Court's theory of democracy, it is often a hollow victory, with the use of mechanisms such as proportionality or causation to explain away the electoral injury.

Moreover, the elevation of the "color blind" equal protection claim created in *Shaw v. Reno* makes it extremely difficult, if not impossible, to devise a group-based remedy for dilution that the courts will not strike down under the Fourteenth Amendment. This paradoxical result has a number of significant consequences. Preliminarily, the Court effectively has reversed the role of the judicial referee from one of protecting the minority from majority tyranny to one of protecting the majority from equal access to the political process by minorities in all but individual access cases. As a corollary to the first point, the Court now sustains majority rule at the expense of "fair and effective representation" for those in the minority. The Founding Fathers surely would reel in disbelief at this distortion of the Madisonian Compromise. Moreover, the Court has used its interpretative powers under the self-executing sections of the Fourteenth and Fifteenth Amendments to set the floor and the ceiling for congressional protection under the enforcement sections of those Amendments. In doing so, the Court has all but conflated the protection of consent under the Voting Rights Act with the limits of the Equal Protection Clause. In addition, the Court has upset the delicate checks and balances scheme that the Framers of the Reconstruction Amendments devised, negating the Framers' intention that Congress could provide more expansive protection for the right to vote under its enforcement powers when the Court failed to do so. The injury done to separation of powers is almost as great as the damage done to the right to vote.

In sum, the Court's actions evince a democratic theory whereby "the right to vote is granted in form but denied in substance."⁷¹¹ In the Court's attempts to "avoid" engaging in substantive decisions on matters of democratic theory it has done just the opposite, destroying the democratic theory that Congress codified in section 2 of the Voting Rights Act. Specifically, a majority of this activist Court indirectly has accomplished what Justice Thomas proposed to do by direct means in his *Holder* concurrence: judicially abrogate the use of section 2 to protect minority consent beyond individual ballot access. In the process, the Court has made it more likely

⁷¹⁰ See *supra* note 637.

⁷¹¹ *City of Mobile v. Bolden*, 446 U.S. 55, 141 (1980) (Marshall, J., dissenting).

that "the right to vote provides the politically powerless with nothing more than the right to cast meaningless ballots."⁷¹²

B. *Perverted Process: Judicial Referees and the Reinforcement of Majority Tyranny*

In the face of a line of Supreme Court decisions which are increasingly hostile to the rights of all voters to have fair and effective participation in the political process, it is unsurprising that the lower federal courts also have become tacit accomplices to wrongful violations of consent. A growing number of district and appellate decisions have relied upon the Court's jurisprudence to find ways to "explain away" even the most egregious cases of majority tyranny. In doing so, these courts have redefined what "consent" means. They have shifted away from section 2's protection of the rights of individuals and groups to fair and equal opportunities to participate in government, towards an inconsistent view that restricts such "participation" to unobstructed individual access to the ballot box. At the same time, these courts have limited their roles as referees over the political process, respecting majority rule at the expense of protecting minority groups from the tyranny of that rule. What has resulted is a perversion of the political process and of the role of the judiciary in protecting fair and equal opportunities to participate in it.

This section will outline three principle bases that lower courts have used to refrain from remedying wrongful deprivations of consent. First, several courts have relied upon partisan politics as a means to nullify a factual showing that widespread, systematic, majority bloc voting denies minority consent.⁷¹³ *LULAC II*⁷¹⁴ is the most representative example of this line of cases. Second, other courts have interpreted section 2 as including a requirement of proof that racial bias or animus has driven the voting community to reject consistently a racial or ethnic minority group's candidates of choice.⁷¹⁵ Judge Tjoflat's opinions in *Solomon*⁷¹⁶ and *Nipper*⁷¹⁷ are characteristic of this school of thought. Third, some courts either have rested their rejection of a section 2 claim on the absence of a viable remedy under *Holder*, or have refused to impose a remedy for a section 2 violation in the face of the Court's admonition in *Shaw v. Reno* that race-conscious relief is presumptively unconstitutional under the Fourteenth Amendment.⁷¹⁸ During the course of this discussion, this section will outline the implications of this judicial activism by the lower courts.

⁷¹² *Id.* at 104 (Marshall, J., dissenting).

⁷¹³ See *supra* notes 719-60 and accompanying text.

⁷¹⁴ League of United Latin Am. Citizens, Council No. 4434 v. Clements ("LULAC II"), 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994).

⁷¹⁵ See *supra* notes 761-810 and accompanying text.

⁷¹⁶ *Solomon v. Liberty County, Florida*, 899 F.2d 1012 (11th Cir. 1990) (en banc).

⁷¹⁷ *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc).

⁷¹⁸ See *supra* notes 811-48 and accompanying text.

1. Judge Higginbotham's *LULAC II* Opinion: Partisan Politics

A growing number of federal courts are rejecting section 2 claims on the basis that partisan politics and not race causes majority bloc voting.⁷¹⁹ Judge Higginbotham's majority opinion in *LULAC II*⁷²⁰ is representative of this line of decisions. In *LULAC II*, black and Hispanic voters alleged that the use of at-large districts in the election of state court judges in nine Texas counties diluted their votes in violation of section 2.⁷²¹ The district court found a violation in each of the counties by holding that plaintiffs only need show that minorities and non-Hispanic white voters generally supported different candidates—and not the reasons for those differences—in establishing the third *Gingles* factor of majority bloc voting.⁷²² On appeal, the defendants argued that the lower court erred by failing to consider non-racial causes of voting preferences, such as partisan affiliation, in its analysis of racially polarized voting.⁷²³ The Fifth Circuit agreed, holding that “[e]lectoral losses that are attributable to partisan politics do not implicate the protections of § 2.”⁷²⁴

⁷¹⁹ See generally *Southern Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1293-94 (11th Cir. 1995) (en banc) (affirming lower court's holding that factors other than race, including party politics and the lack of qualified minority candidates, were responsible for the results of at-large elections of Alabama trial judges), *cert. denied*, 516 U.S. 1045 (1996); *Houston v. Lafayette County*, 56 F.3d 606 (5th Cir. 1995) (holding that evidence of divergent voting patterns attributable to partisan affiliation or interests other than race is probative in a vote dilution action on the issue of a minority group's future success at the polls, but evidence that fails to evaluate voters' possible motivations is still relevant); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (“The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.”), *cert. denied*, 508 U.S. 907 (1993); *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1412 (N.D. Ill. 1997) (“The results test of VRA § 2 protects racial minorities against a stacked deck but it does not guarantee that they will enjoy a winning hand—i.e., an electoral structure is not illegal if defeat represents nothing more than the routine operation of political factors.”), *aff'd in part, vacated in part*, 141 F.3d 699 (7th Cir. 1998); *Reed v. Town of Babylon*, 914 F. Supp. 843 (E.D.N.Y. 1996) (holding that evidence that partisan politics caused majority bloc voting precluded section 2 claim); *Armstrong v. Allain*, 893 F. Supp. 1320, 1329 (S.D. Miss. 1994) (noting that the *LULAC II* holding requires a court to look “not only at the results but also at probable explanations for election results, e.g., race, interest-group politics, etc.”); *Harper v. City of Chicago Heights*, 824 F. Supp. 786, 790-92 (N.D. Ill. 1993) (discussing role of partisan affiliation in assessing majority bloc voting); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684 (D. Ariz. 1992) (three judge panel) (finding that majority bloc voting resulted from partisan affiliation, and not race or ethnicity), *aff'd sub nom.* *Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993).

⁷²⁰ See *League of United Latin Am. Citizens, Council No. 4434 v. Clements* (“*LULAC II*”), 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994).

⁷²¹ See *id.* at 837.

⁷²² See *id.* at 850.

⁷²³ See *id.*

⁷²⁴ *Id.* at 863.

According to Judge Higginbotham, “[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens . . . the district court’s judgment [in favor of the plaintiffs] must be reversed.”⁷²⁵

In reaching the conclusion that the vote dilution inquiry must consider causation (and party affiliation in particular), Judge Higginbotham relied upon two primary sources: *Whitcomb v. Chavis*⁷²⁶ and Justice O’Connor’s *Gingles* concurrence.⁷²⁷ The *LULAC II* majority found that *Whitcomb*’s rejection of dilution based upon “political defeat at the polls”⁷²⁸ required courts to “undertake the additional inquiry into the reasons for, or causes of, . . . electoral losses in order to determine whether they were the product of ‘partisan politics’ or ‘racial vote dilution,’ ‘political defeat’ or ‘built-in bias.’”⁷²⁹ Similarly, the majority endorsed Justice O’Connor’s approach in *Gingles* which rejected limiting proof of majority bloc voting to whether the majority and minority citizens usually supported different candidates “in favor of an inquiry into the possible explanations of these divergent voting patterns.”⁷³⁰ Therefore, the

⁷²⁵ *Id.* at 850. Commentators widely have criticized Judge Higginbotham’s conclusion. See, e.g., Grofman & Handley, *supra* note 20, at 222-33; Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 991-92 (1996) (describing *LULAC II* as an “outlier in § 2 caselaw”); Karlan & Levinson, *supra* note 7, at 1223 (noting that “[t]he many difficulties attending the disaggregation of race and politics . . . all result from the fact that race and political affiliation are, in fact, substantially correlated”); Glenn P. Smith, Note, *Interest Exceptions to One-Resident, One-Vote: Better Results from the Voting Rights Act?*, 74 TEX. L. REV. 1153, 1178-79 (1996) (rejecting *LULAC II*’s “resurrection of an intent requirement for vote dilution”). For an additional discussion of the problems of permitting proof of the causes of majority bloc voting, see *infra* note 775.

⁷²⁶ See *supra* notes 540-44 and accompanying text.

⁷²⁷ See *supra* notes 646-47 and accompanying text.

⁷²⁸ *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

⁷²⁹ *LULAC II*, 999 F.2d at 853-54. On the other hand, Judge King asserted in her dissent that *Whitcomb* does not support the majority’s conclusion. Rather, she contended that *Whitcomb* stands for the proposition that where there is evidence of partisan voting or interest group politics *and no evidence* that members of the minority group have an unequal opportunity to participate in the political process on account of race or color, the minority group’s vote dilution claim will fail.

Id. at 907 (King, J., joined by Politz, C.J., and Johnson, J., dissenting).

⁷³⁰ *Id.* at 857. Judge Higginbotham stated that a majority of the justices in *Gingles* endorsed Justice O’Connor’s acceptance of causal evidence. See *id.* at 851, 855-58. As Judge King properly pointed out in her dissent, however, Justice White only agreed with Justice O’Connor’s conclusion “that the race of the candidate is relevant to the racial bloc voting inquiry,” and not “that minority plaintiffs must negate partisan politics . . . in order to demonstrate polarized voting.” *Id.* at 906-07 (King, J., joined by Politz, C.J., and Johnson, J., dissenting); see also *supra* note 645 (discussing why Justice White did not join in this portion of Justice Brennan’s opinion).

LULAC II majority held that “§ 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats.”⁷³¹

The assumptions underlying Judge Higginbotham’s reasoning are instructive in the dramatic implications they hold for protection of minority consent from majority tyranny. As an initial matter, Judge King is correct in her conclusion that Judge Higginbotham and the *LULAC II* majority erroneously treated “a racial or language minority group as a mere ‘interest group’ rather than as a politically cohesive minority group striving to make its voice heard.”⁷³² The *LULAC II* majority recognized that race and politics typically intersect, and noted “that even partisan affiliation may serve as a proxy for illegitimate racial considerations.”⁷³³ Under the facts of the case before it, however, the majority found that no such wrongful proxy was present:

Minority voters . . . have tended uniformly to support the Democratic Party [W]hite voters constitute the majority of not only the Republican Party, but also the Democratic Party The suggestion that Republican voters are galvanized by a “white” or “anti-minority” agenda is plausible only to the extent that the Democratic Party can be viewed as a vehicle for advancing distinctively minority interests, which clearly is not the case. At the same time, white Democrats in recent years experienced the same electoral defeats as minority voters. If we are to hold that these losses at the polls, without more, give rise to a racial vote dilution claim warranting special relief for minority voters, a principle by which we might justify withholding similar relief from white Democrats is not readily apparent.⁷³⁴

Yet, Judge Higginbotham failed to enunciate any occasion when racial or ethnic minorities who support a party containing members of the majority race would be able to state a cognizable claim of vote dilution under section 2.⁷³⁵ The result is that

⁷³¹ *LULAC II*, 999 F.2d at 854.

⁷³² *Id.* at 910 (King, J., joined by Politz, C.J., and Johnson, J., dissenting). Compare Judge Higginbotham’s dissenting opinion in the initial panel decision in *LULAC I*. League of United Latin Am. Citizens, Council No. 4434 v. Clements (“*LULAC I*”), 986 F.2d 728, 847 (5th Cir. 1993) (Higginbotham, J., dissenting) (“‘Racial politics’ implies racially conscious politics. It does not include politics in which minority voters only fail to achieve maximum feasible success because they were outvoted by *other interest groups*.” (emphasis added)), *vacated on reh’g en banc*, *LULAC II*, 999 F.2d 831.

⁷³³ *LULAC II*, 999 F.2d at 860; *cf.* Karlan & Levinson, *supra* note 7, at 1223 (“The many difficulties attending the disaggregation of race and politics . . . all result from the fact that race and political affiliation are, in fact, substantially correlated.”).

⁷³⁴ *LULAC II*, 999 F.2d at 860-61.

⁷³⁵ In each of the nine counties that were the subject of plaintiffs’ challenge, the *LULAC II* majority found that the majority bloc voting was the product of partisan affiliations and not racial polarization. *See id.* at 877-93; *id.* at 903-04 (King, J., joined by Politz, C.J., and Johnson, J., dissenting) (summarizing the majority’s findings).

the *LULAC II* “majority has effectively eviscerated section 2 of the Voting Rights Act in communities where there is any measurable crossover voting by whites.”⁷³⁶

In addition, the *LULAC II* majority assumed that minority voters “can wield influence over elections even when those votes are cast for losing candidates.”⁷³⁷ Judge Higginbotham’s supposition rests upon reasoning similar to that which supported Justice Thomas’s view in *Holder*, that the use of race to remedy violations of consent dissolves any motivations that minority voters have to build bridges with those in the majority.⁷³⁸ Higginbotham opined that “[t]his ability to form coalitions and influence the elections of *all* judges in Harris County would be lost in the system of single-member districts proposed by the plaintiffs.”⁷³⁹ In tying race to partisan politics, Judge Higginbotham further asserted that “the open channels of communication facilitate a recognition of points of common ground that might otherwise go undetected.”⁷⁴⁰ Yet, the *LULAC II* majority’s assumption simply is not in accord with its own recognition of the inability of minority voters to find common ground with the majority in the face of sustained racially polarized voting:

Both parties’ analyses show that the majority of Anglo voters *always opposed* the candidate preferred by the geographically compact and cohesive combined minority population in the general elections. The minority-preferred candidate was *always defeated* by this Anglo majority.⁷⁴¹

The *LULAC II* court undoubtedly was correct in rejecting the proposition that “all measures of success be found in the win-loss column.”⁷⁴² By the same token, that does not mean that *no* measures of success should be based upon electoral victories because consent is protected to the extent that voters are entitled to “fair and effective representation,”⁷⁴³ including (but not limited to) an equal opportunity to elect candidates of their choice.⁷⁴⁴ Moreover, it is disingenuous to say that there can be no violation of minority consent when members of the minority group have the opportunity to change their “substantive political positions” to the majority’s political view.⁷⁴⁵ Such a conclusion would nullify the Madisonian Compromise by giving blind, unyielding deference to the will of the majority, regardless of any adverse

⁷³⁶ *Id.* at 910 (King, J., joined by Politz, C.J., and Johnson, J., dissenting).

⁷³⁷ *Id.* at 873 (citing *Thornburg v. Gingles*, 478 U.S. 30, 98-99 (1986) (O’Connor, J., concurring)).

⁷³⁸ See *supra* notes 604-07 and accompanying text.

⁷³⁹ *LULAC II*, 999 F.2d at 884.

⁷⁴⁰ *Id.* at 858.

⁷⁴¹ *Id.* at 891 (emphasis added).

⁷⁴² *Id.* at 873. As argued in the previous Section, section 2 itself is intended to protect more than just electoral success, notwithstanding the *Gingles* majority’s conclusion to the contrary. See *supra* notes 507-80 and accompanying text.

⁷⁴³ *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

⁷⁴⁴ See 42 U.S.C. § 1973(b) (1994).

⁷⁴⁵ *LULAC II*, 999 F.2d at 879.

consequences to those in the minority (whether in the political process itself, or in its attendant outcomes).

Furthermore, Judge Higginbotham's assumption about the nature of what "representation" entails is equally devastating to the ability of minority groups to have fair and equal opportunities to participate in the political process. In marshaling factual evidence to support his conclusion "that the defeat of black-preferred candidates was the result of the voters' partisan affiliation,"⁷⁴⁶ it is evident that Judge Higginbotham and the *LULAC II* majority believed that consent is not denied when minority voters have descriptive representation.⁷⁴⁷

The race of the candidate did not affect the pattern [of majority bloc voting]. White voters' support for black Republican candidates was equal to or greater than their support for white Republicans. Likewise, black and white Democratic candidates received equal percentages of the white vote. Given these facts, we cannot see how minority-preferred judicial candidates were defeated "on account of race or color." Rather, the minority-preferred candidates were consistently defeated because they ran as members of the weaker of two partisan organizations. We are not persuaded that this is racial bloc voting as required by *Gingles*.⁷⁴⁸

Under the consent model of democracy, however, it is not a right to descriptive representation, but "actual" or "substantive" representation that is protected.⁷⁴⁹ Section 2 likewise adopts a right to actual representation by according protection to racial or language minorities when their "members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."⁷⁵⁰ At the same time, the section's proportional representation clause explicitly rejects a right to descriptive representation.⁷⁵¹ The *LULAC II* majority apparently abandoned the congressional intent codified in section 2, by finding that the presence of descriptive representation was sufficient to defeat the minority groups' claims that their consent had been denied.⁷⁵²

⁷⁴⁶ *Id.*

⁷⁴⁷ *But see supra* note 255 and accompanying text.

⁷⁴⁸ *LULAC II*, 999 F.2d at 879; *see also id.* at 889 ("Anglo voters gave a majority of their votes to Republicans, and Hispanic voters gave a majority of their votes to Democrats, even when Hispanic Republican candidates faced Anglo Democratic opponents."); *id.* at 893 ("The undisputed facts indicate that partisan affiliation controlled the outcomes of the general elections. . . . [W]hile Hispanic Democratic candidates lost the Anglo vote, Barrera, a Hispanic Republican, won a majority of the Anglo vote running against his white Democratic opponent . . .").

⁷⁴⁹ *See supra* notes 253-55 and accompanying text.

⁷⁵⁰ 42 U.S.C. § 1973(b) (1994).

⁷⁵¹ *See id.*

⁷⁵² *Cf. LULAC II*, 999 F.2d at 913 n.14 (King, J., joined by Politz, C.J., and Johnson, J., dissenting) ("[I]t is interesting to note that the majority, in proclaiming that minorities are *overrepresented* on the district court bench, frequently considers minority judges who were not minority-preferred candidates.").

Judge Higginbotham's opinion of the role effects of past discrimination play in the section 2 calculus likewise assumes a narrow view of what "participation in the political process" means. Among the Senate factors that the courts should consider in the totality of the circumstances inquiry is "the extent to which members of the minority group . . . bear the effects of discrimination in areas such as education, employment, and health, *which hinder their ability to participate in the political process.*"⁷⁵³ Judge Higginbotham and the *LULAC II* majority interpreted this evidence as "pertain[ing] solely to the '*political access*' prong of a § 2 claim."⁷⁵⁴ Conversely, as Judge King elucidated in her dissent, "the question of whether the lingering socioeconomic effects of discrimination hinder the ability of minorities to participate in the political process is much broader than asking whether they register and vote at rates equal to whites."⁷⁵⁵ To hold otherwise leads to the *LULAC II* majority's perverse conclusion that the lack of eligible minority candidates for judicial office in Texas, arising from the present effects of past discrimination, weighs against a finding of actionable vote dilution.⁷⁵⁶ When the *LULAC II* majority's limited perspective of present effects of past discrimination is joined with its view of racial and language minorities as political interest groups it becomes evident that *LULAC II* only affords section 2 protection to individual ballot access. This judicial sleight-of-hand has devastating consequences for the ability of minority groups to have a meaningful opportunity to participate in the political process.

⁷⁵³ *Id.* at 863 (quoting S. REP. NO. 417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206).

⁷⁵⁴ *LULAC II*, 999 F.2d at 863 (emphasis added).

⁷⁵⁵ *Id.* at 915 (King, J., joined by Politz, C.J., and Johnson, J., dissenting); *see also supra* notes 507-80 and accompanying text (describing the broad view of the political process adopted by Congress in the Voting Rights Act).

⁷⁵⁶ *LULAC II*, 999 F.2d at 865-66. Judge Higginbotham acknowledged that the "[u]ndisputed evidence shows that in all of the counties, the percentage of minority lawyers was much smaller than the percentage of minority voters." *Id.* at 865. Nevertheless, he concluded that "minority lawyers *disproportionately* serve as judges, when their percentage among all eligible lawyers is considered." *Id.* (emphasis added). The dissent reached the opposite conclusion:

Unlike the majority, however, this indisputable fact would not argue *against* a finding of dilution; it would be compelling evidence of the extent to which blacks and Hispanics continue to "bear the effects of discrimination in such areas as education [and] employment, . . . which hinder their ability to participate effectively in the political process."

Id. at 915 (King, J., joined by Politz, C.J., and Johnson, J., dissenting) (quoting S. REP. NO. 417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206).

In summary, Judge Higginbotham's opinion in *LULAC II* is judicial activism of the worst kind.⁷⁵⁷ At the beginning of his opinion, Judge Higginbotham recognized the difficulties inherent in a section 2 vote dilution case:

Over the past fifty years, the steady march of civil rights has been to New Orleans and this court. It continues but the demands have changed. Relatively clear lines of legality and morality have become more difficult to locate as demands for outcomes have followed the cutting away of obstacles to full participation. With our diverse ethnic makeup, this demand for results in voting has surfaced profound questions of a democratic political order such as the limits on rearranging state structures to alter election outcomes, and majority rule at the ballot box and even in legislative halls, *questions Congress has provoked but not answered*.⁷⁵⁸

Reaching this conclusion allowed Judge Higginbotham and the *LULAC II* majority to accomplish "what it set out to do in this case: . . . overhaul the Voting Rights Act."⁷⁵⁹ In this manner, Judge Higginbotham followed the letter of the Act by leaving its language in place, but violated its spirit by interpreting it in a manner that foreclosed any reasonable chance of minority groups to show that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."⁷⁶⁰ By disregarding the broad protections afforded by section 2, he engaged in the anti-majoritarian action of rejecting the will of the people, as expressed by their representatives in Congress. In the process, all that Judge Higginbotham and the *LULAC II* majority left was a narrow definition of consent that sparingly protects the individual's right to ballot access.

2. Judge Tjoflat and the "Racial Bias" Straw Man

In *LULAC II*, Judge Higginbotham "implie[d]—without deciding the issue—that minority plaintiffs may have to affirmatively prove racial animus in the electorate to meet their burden with respect to legally significant white bloc voting and racially polarized voting."⁷⁶¹ On the other hand, Judge Tjoflat of the Eleventh Circuit has

⁷⁵⁷ As previously discussed, all constitutional matters involve some substantive line-drawing, which critics frequently have labeled "judicial activism." See *supra* notes 208-13 and accompanying text. In engaging in such "activism," nevertheless, it is of paramount importance that the judicial referee maintain an abiding respect for the intent and purpose codified in the particular constitutional or statutory provision under review. This Article argues that Judge Higginbotham simply failed to do so.

⁷⁵⁸ *LULAC II*, 999 F.2d at 837 (emphasis added).

⁷⁵⁹ *Id.* at 900 (King, J., joined by Politz, C.J., and Johnson, J., dissenting).

⁷⁶⁰ 42 U.S.C. § 1973(b) (1994).

⁷⁶¹ *LULAC II*, 999 F.2d at 902 (King, J., joined by Politz, C.J., and Johnson, J., dissenting). The *LULAC II* majority did not adopt expressly the racial bias test because it concluded that partisan affiliation was a sufficient basis to reverse the lower court's finding of actionable vote dilution. See *id.* at 859-60 (summarizing Judge Higginbotham's views on the racial bias test). In two earlier opinions, however, Judge Higginbotham made it clear that

been more resolute in his adoption of the "racial bias" or "racial animus" test, by elaborating on this approach in two divisive opinions. In *Solomon v. Liberty County, Florida*,⁷⁶² four other judges joined Judge Tjoflat on an evenly divided en banc court in holding that racial bias is the touchstone of a section 2 vote dilution claim.⁷⁶³ In *Nipper v. Smith*,⁷⁶⁴ only one other judge joined Judge Tjoflat in reaching the same conclusion.⁷⁶⁵ Although the widely criticized⁷⁶⁶ racial bias test is not the law in the

he believed racial bloc voting necessitated proof of racial animus or bias in the relevant voting community. See *LULAC I*, 986 F.2d 728, 846 (5th Cir. 1993) (Higginbotham, J., dissenting); *Jones v. City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) (Higginbotham, J., specially concurring from denial of rehearing). In order to make such a showing, he maintained that the reviewing court would have to rely upon multivariate regression analysis to eliminate non-racial causes of voting behavior. See *id.* at 234-35.

⁷⁶² 899 F.2d 1012 (11th Cir. 1990) (en banc).

⁷⁶³ *Id.* at 1021-37 (Tjoflat, C.J., specially concurring). *Solomon* represents an unusual appellate decision. Because the en banc panel was evenly "divided on the legal effect" of proving the *Gingles* factors, it remanded the case to the district court with instructions to "proceed in accordance with *Gingles*, giving due consideration to the views expressed in Chief Judge Tjoflat's and Judge Kravitch's specially concurring opinions." *Id.* at 1013 (per curiam). On remand, the lower court rejected Judge Tjoflat's assertion that racial bias was determinative of a section 2 claim. See *Solomon v. Liberty County, Florida*, 957 F. Supp. 1522 (N.D. Fla. 1997). Instead, the court concluded "[r]acial bias may be considered in assessing a vote dilution claim, as one factor among many under the totality of the circumstances." *Id.* at 1551. Recently, the Eleventh Circuit reversed and remanded *Solomon*, finding that the district court's finding of no vote dilution was clearly erroneous. *Solomon v. Liberty County Comm'r*, No. 97-2540, 1999 WL 46839, at *15 (11th Cir. Feb. 3, 1999). One judge dissented in this holding. See *id.* at *16 (Black, J., dissenting). However, all the judges agreed that the district court had formatted properly the legal standard for vote dilution claims under section 2. See *id.* at *6 ("The parties do not dispute the legal accuracy of [the district court's section 2] framework."); *id.* at *16 (Black, J., dissenting) ("The parties, the Court, and I all agree as to the applicable law in this case.").

⁷⁶⁴ 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1083 (1995).

⁷⁶⁵ See *id.* at 1547 (four judges concurring, with one judge joining Chief Judge Tjoflat in adopting the racial bias test).

⁷⁶⁶ See *Goosby v. Town Bd. of Hempstead*, 956 F. Supp. 326, 353-55 (E.D.N.Y. 1997); *Solomon v. Liberty County, Florida*, 957 F. Supp. at 1543-50, *rev'd on other grounds*, *Solomon v. Liberty County Comm'r*, 1999 WL 46839; Richard R. Hesp, Comment, *Electoral Data in Racial-Bloc Analysis: A Solution for Staleness and Special Circumstances Problems*, 1995 U. CHI. LEGAL F. 409, 431-34 (1995); Randall Thomas Kim, "Special Circumstances" and Section 2 of the Voting Rights Act: Defining a Standard, 28 COLUM. HUM. RTS. L. REV. 605, 623-25 (1997). But see THERNSTROM, *supra* note 240, at 205 ("Voting patterns must be analyzed to determine not only the level of support for competing candidates, but the reasons why voters have cast their ballots as they have."); David D. O'Donnell, *Wading into the "Serbonian Bog" of Vote Dilution Claims Under Amended Section 2 of the Voting Rights Act: Making the Way Towards a Principled Approach to "Racially Polarized Voting,"* 65 MISS. L.J. 345, 383 (1995) ("[C]ourts have now come to the realization that the section 2 plaintiff's burden remains to show that the community is driven by racial animus and the electoral scheme allows that animus to dilute the minority population[']s voting power.");

Eleventh Circuit,⁷⁶⁷ both of Judge Tjoflat's opinions are important because they illuminate significant judicial departures from the right to vote that Congress protected in section 2 of the Voting Rights Act. Quite simply, Judge Tjoflat has raised the racial bias "straw man" as a means "to accomplish [a] purpose otherwise not allowed"⁷⁶⁸—the reintroduction of the intent test into the section 2 analysis.⁷⁶⁹

The racial bias test marks a radical judicial redefinition of section 2. Judge Tjoflat summarized the test as follows:

I submit that section 2 prohibits those voting systems that have the effect of allowing a community *motivated by racial bias* to exclude a minority group from participation in the political process. Therefore, if a section 2 defendant can affirmatively show, under the totality of the circumstances, that the community is not *motivated by racial bias* in its voting, a case of vote dilution has not been made out.⁷⁷⁰

Paula W. Render, Comment, *Straight Party Tickets and Redistricting Thickets: Nonracial Motivations for Voter Preferences*, 1995 U. CHI. LEGAL F. 505, 506 (1995) ("Courts should consider voter motivations" because such evidence can show "the degree to which racial bias interacts with the challenged electoral practice to dilute a minority group's vote.").

⁷⁶⁷ On the other hand, the First and Fifth Circuits and a district court in the Second Circuit have adopted the racial bias test. *See generally* *Teague v. Attala County*, 92 F.3d 283, 290 (5th Cir. 1996) ("Plaintiffs are to present evidence of racial bias operating in the electoral system by proving up the *Gingles* factors. Defendants may then rebut the plaintiffs' evidence by showing that no such bias exists in the relevant voting community." (citing Judge Tjoflat's plurality opinion in *Nipper*)); *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) ("We believe it follows that, after *De Grandy*, plaintiffs cannot prevail on a VRA § 2 claim if there is significantly probative evidence that whites voted as a bloc for reasons wholly unrelated to racial animus. We so hold."); *Reed v. Town of Babylon*, 914 F. Supp. 843, 877 (E.D.N.Y. 1996) ("The Court adopts the holding in [*LULAC II*] that losses by minority-preferred candidates attributable to partisan voting rather than racial bias would not constitute legally significant bloc voting under the third *Gingles* prong."); *see also* *Bradford County NAACP v. City of Starke*, 712 F. Supp. 1523, 1541 (M.D. Fla. 1989) (applying the racial bias test that Judge Tjoflat announced in the initial hearing of *Solomon* which was subsequently vacated).

⁷⁶⁸ BLACK'S LAW DICTIONARY 1421 (6th ed. 1990). Specifically, a "straw man" refers to a "'front' . . . [A] [p]erson who purchases property for another to conceal identity of real purchaser, or to accomplish some purpose otherwise not allowed." *Id.*

⁷⁶⁹ Interestingly enough, both Richard Engstrom and Peyton McCrary pointed out, in 1985 (before *Gingles*), that some lower federal courts already were beginning to look to non-racial causes of racially polarized voting as a backdoor mechanism to reestablish the intent test. *See* Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 HOW. L.J. 495 (1985); Peyton McCrary, *Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits*, 28 HOW. L.J. 463 (1985). The following discussion in the text illustrates how Judge Tjoflat (like many other judges) has relied on the Supreme Court's voting rights jurisprudence to fashion a reincarnated intent standard that no longer requires bringing in intent evidence through the back door.

⁷⁷⁰ *Solomon v. Liberty County, Florida*, 899 F.2d 1012, 1022 (11th Cir. 1990) (en banc) (Tjoflat, C.J., specially concurring) (emphasis added); *accord Nipper*, 39 F.3d at 1497, 1514-

Judge Tjoflat reasoned that when a defendant shows that "racial bias does not play a major role in the political community . . . then obviously [Congress] did not intend the plaintiff to win, *even if the plaintiff has proven bloc voting*."⁷⁷¹ In reaching that conclusion, he disclaimed any implication that proof of the absence of racial bias somehow rebuts the plaintiff's showing of racially polarized voting.⁷⁷² Instead, he apparently would find that the plaintiff's showing was meaningless under the circumstances because it was an unintended consequence of majority rule. According to Judge Tjoflat, his approach is necessary to strike an appropriate balance between "equal access to the political processes" without creating "a right to proportional representation."⁷⁷³ In his struggle to create a new standard that imposes on section 2 plaintiffs a burden that is neither "too heavy" nor "too light,"⁷⁷⁴ however, Judge Tjoflat erred in favor of reimposing the weighty burden of intent which Congress expressly repudiated in the 1982 amendments to section 2.⁷⁷⁵

15 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.). Judge Tjoflat's use of the phrase "motivated by racial bias" makes it clear that "racial bias" is equivalent to discriminatory purpose or intent. *See Solomon*, 899 F.2d at 1012.

⁷⁷¹ *Solomon*, 899 F.2d at 1034 (Tjoflat, C.J., specially concurring). Judge Tjoflat contended that "[n]ot to allow a defendant to rebut a plaintiff's proof" in this manner would allow a section 2 plaintiff to "establish an irrebuttable case with proof of only one objective factor." *Id.* at 1033 (Tjoflat, C.J., specially concurring). Judge Tjoflat's argument is similar to one made by some of the dissenting Senators in the Senate Report. *See S. REP. NO. 417*, at 97-98 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 270-71 (additional views of Sen. Hatch); *id.* at 143, *reprinted in* 1982 U.S.C.C.A.N. at 315 (Report of the Senate Subcommittee on the Constitution). As the Senate Report articulates, however, this is a spurious argument because applying the results test under the totality of the circumstances necessarily dictates that no single factor is sufficient by itself to state a vote dilution claim under section 2. *See id.* at 33-34, *reprinted in* 1982 U.S.C.C.A.N. at 211-12.

⁷⁷² *See Nipper*, 39 F.3d at 1524 n.60 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.); *Solomon*, 899 F.2d at 1035 n.12 (Tjoflat, C.J., specially concurring).

⁷⁷³ *Id.* at 1037 (Tjoflat, C.J., specially concurring); *see also Nipper*, 39 F.3d at 1515 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (holding, among other things, that the results test in section 2(b) "can only be understood in light of . . . the final clause of subsection (b), which makes it clear that the 1982 amendment was not designed to create a right of proportional representation.").

⁷⁷⁴ *Solomon*, 899 F.2d at 1036 (Tjoflat, C.J., specially concurring).

⁷⁷⁵ *See supra* notes 550-66 and accompanying text. The racial bias test revives intent merely by requiring a defendant to offer some evidence of other factors suggesting "that the voting community is not driven by racial bias," in order to shift the burden to the plaintiff to prove the existence of racial bias. *Solomon*, 899 F.2d at 1035 (Tjoflat, C.J., specially concurring). In this manner, section 2 plaintiffs can take little solace from Judge Tjoflat's conclusion that his racial bias test is not "[a] rule conditioning relief under § 2 upon proof of the existence of racial animus in the electorate would require plaintiffs to establish the absence of not only partisan voting, but also all other potentially innocent explanations for white voters' rejection of minority-preferred candidates." *Nipper*, 39 F.3d at 1525 n.64 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements* ("LULAC II"), 999 F.2d 831, 859 (5th Cir.

1993)).

Moreover, there are a number of problems with requiring proof of racial bias in the voting community. First, such a requirement involves the fundamental error of “ask[ing] the wrong question,” dictating that a court focus on the motivations of the voting community instead of “whether minorities have equal access to the process of electing their representatives.” S. REP. NO. 417, at 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214. Second, when courts which review section 2 claims avoid inquiring into the motivations for adopting or maintaining an electoral scheme because of the “divisiveness” of inquiring into the motivations of “individual . . . citizens,” then they contravene congressional intent. *Id.* at 27, *reprinted in* 1982 U.S.C.C.A.N. at 205. Third, because the racial bias test requires an examination of individual voter motivations for casting secret ballots, it raises a number of practical concerns, not the least of which is the specter of violating the voters’ First Amendment right not to reveal their thought processes in voting for particular candidates. *See, e.g., LULAC II*, 999 F.2d at 909-10 (King, J., joined by Politz, C.J., and Johnson, J., dissenting); *Arthur v. City of Toledo*, 785 F.2d 565, 573-74 (6th Cir. 1986); *Johnson v. Mortham*, 926 F. Supp. 1460, 1511 (N.D. Fla. 1996) (Hatchett, J., dissenting); *Solomon v. Liberty County, Florida*, 957 F. Supp. 1545 (N.D. Fla. 1997), *rev’d on other grounds*, *Solomon v. Liberty County Comm’r*, No. 97-2540, 1999 WL 46839 (11th Cir. Feb. 3, 1999). Fourth, proof of racial bias necessarily would entail multivariate regression analysis (that is, consideration of at least two independent variables—presumably the race of voters and whether they cast their ballots for racially motivated reasons—compared to the dependent variable of candidate support). *See, e.g., LULAC II*, 999 F.2d at 907-08 (King, J., joined by Politz, C.J., and Johnson, J., dissenting); *Solomon v. Liberty County, Florida*, 957 F. Supp. at 1546-48. A majority of justices in *Gingles* held that bivariate regression analysis (consideration of one independent variable—the race of voters—compared to the dependent variable of candidate support) was the proper methodological framework for assessing racial bloc voting. *See supra* note 643 and accompanying text. In fact, multivariate regression analysis is the very type of “junk science” that federal judges, as the “gatekeepers” of expert evidence, must keep out of the courtroom. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (discussing the role of federal judges in assessing expert evidence not generally accepted within the expert’s field). Federal courts presently are divided on the use of multivariate regression analysis. For opinions refusing to admit evidence of causation by using a multivariate approach, see, for example, *Roberts v. Wamser*, 883 F.2d 617, 628 (8th Cir. 1989) (dissenting opinion of Judge Heaney); *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1501 n.14 (5th Cir.), *vacated on reh’g*, 829 F.2d 546 (5th Cir. 1987) (en banc); *Jackson v. Edgefield County, South Carolina Sch. Dist.*, 650 F. Supp. 1176, 1194 n.1 (D.S.C. 1986). *But see, e.g., Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205 (5th Cir. 1996); *Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995); *McCord v. City of Ft. Lauderdale*, 787 F.2d 1528 (11th Cir.), *vacated*, 804 F.2d 611 (11th Cir. 1986); *Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1482 (11th Cir. 1984); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 1996 WL 172327, at *10 (D. Del. Apr. 10, 1996), *aff’d sub nom. Jenkins v. Manning*, 116 F.3d 685 (3d Cir. 1997). For competing views of social scientists on the propriety of using multivariate regression analysis, see generally David A. Freeman et al., *Ecological Regression and Voting Rights*, 15 EVAL. REV. 673 (1991) (supporting use of multivariate regression analysis); Grofman, *supra* note 323, at 141 n.272 (criticizing use of multivariate regression analysis).

Nevertheless, Judge Tjoflat rejected the assertion that his racial bias test entailed a return to the *Bolden* intent test.⁷⁷⁶ Rather, he found that such an assertion “ignores the very important distinction between racial bias *in general* and *racially discriminatory intent on the part of legislators in particular*.”⁷⁷⁷ This splitting of legal hairs becomes readily apparent in an examination of Judge Tjoflat’s patent misconstruction of the meaning of *Whitcomb v. Chavis*⁷⁷⁸ and *White v. Regester*.⁷⁷⁹ He read these cases as incorporating explicitly a requirement of proof of “invidious discrimination,”⁷⁸⁰ by one of two methods:

First, the plaintiff could prove invidious discrimination with proof of the legislators’ intent—the intent either of those who designed the scheme or those who maintained it. Second, the plaintiff could prove invidious discrimination with circumstantial evidence of racial bias in all levels of the voting community.⁷⁸¹

In other words, the objective factors discussed in *Whitcomb* and *White* were not just relevant to what Judge Tjoflat calls “‘official’ discrimination,” but also to “racial bias in the political organizations and all levels of the voting community.”⁷⁸² He

As the foregoing discussion demonstrates, proof of racial bias is contrary to congressional intent and imposes a virtually insurmountable burden on section 2 plaintiffs. As one commentator has observed, one “cannot even begin to envision a way for vote dilution plaintiffs to suggest, much less prove, the thought processes of thousands of individual voters. Requiring a showing of such intent would necessitate plaintiffs finding a ‘smoking gun’ under circumstances where none would likely be found.” Kim, *supra* note 766, at 624-25.

⁷⁷⁶ See *Nipper v. Smith*, 39 F.3d 1494, 1520-23 (11th Cir. 1994) (en banc) (plurality opinion of Tjoflat, C.J., joined by Anderson, J.), *cert. denied*, 514 U.S. 1083 (1995); *Solomon*, 899 F.2d at 1036 (Tjoflat, C.J., specially concurring).

⁷⁷⁷ *Nipper*, 39 F.3d at 1520-21 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (emphasis added).

⁷⁷⁸ 403 U.S. 124 (1971).

⁷⁷⁹ 412 U.S. 755 (1973). See *supra* notes 540-49 and accompanying text; *supra* note 729 (discussing *Whitcomb* and *White*).

⁷⁸⁰ *Nipper*, 39 F.3d at 1517-20 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.); *Solomon*, 899 F.2d at 1023-26 (Tjoflat, C.J., specially concurring).

⁷⁸¹ *Solomon*, 899 F.2d at 1024 (Tjoflat, C.J., specially concurring).

⁷⁸² *Id.* at 1024-25. (Tjoflat, C.J., specially concurring); *Nipper*, 39 F.3d at 1517-20 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.). Judge Tjoflat further explained what he believed the Court’s objective factors actually prove:

I submit that the Court was concerned about the interaction between the voting scheme and racial bias in all levels of the voting community. Why else would a private organization’s racial campaign tactics be relevant? Why would the Court consider neutral rules that enhance the opportunity to discriminate? If the Court was concerned only with public officials’ bias, then it would have looked only to the motive behind enacting and maintaining those rules, not to the opportunity for discrimination that those neutral rules created.

Solomon, 899 F.2d at 1025 (Tjoflat, C.J., concurring).

characterized the holding in *Bolden* as saying that these objective factors were not sufficient to support a finding of official "purpose," indicating "that the Court was requiring proof of the *other* form of invidious discrimination—i.e., racial bias on the part of legislators or other responsible officials."⁷⁸³ Therefore, Judge Tjoflat maintained that the 1982 amendments marked Congress' desire to overturn *Bolden*'s mandate that vote dilution under section 2 be proven exclusively by "legislative or official intent" in favor of an approach that allowed a plaintiff to prove racial bias by *either* officials or the relevant voting community.⁷⁸⁴

Judge Tjoflat further attempted to support his erroneous conclusion by a selective parsing of the language contained in the Senate Report accompanying the 1982 amendments to section 2. As an initial matter, he contended that the section 2 language "'result[s] in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*,' explicitly retains racial bias as the gravamen of a vote dilution claim,"⁷⁸⁵ even though Congress made it clear that the language merely was a requirement to show there was a correlation between the majority bloc voting and the race or ethnicities of the groups of voters.⁷⁸⁶ Like Judge Higginbotham in *LULAC II*, Judge Tjoflat believed that this reading was necessary to ensure that vote dilution was "not on account of some other racially neutral cause."⁷⁸⁷

He also attempted to circumvent the congressional mandate "that the plaintiffs may choose to establish discriminatory results without proving *any kind of discriminatory purpose*,"⁷⁸⁸ by making three separate arguments. First, just as he had

Solomon, 899 F.2d at 1025 (Tjoflat, C.J., concurring).

⁷⁸³ *Solomon*, 899 F.2d at 1026-27 (Tjoflat, C.J., specially concurring); *accord Nipper*, 39 F.3d at 1522-23 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.).

⁷⁸⁴ *See Solomon*, 899 F.2d at 1027-32 (Tjoflat, C.J., specially concurring); *Nipper*, 39 F.3d at 1520 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.).

⁷⁸⁵ *Nipper*, 39 F.3d at 1515 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (quoting 42 U.S.C. § 1973(a) (1994)).

⁷⁸⁶ *See Nipper*, 39 F.3d at 1552-53 (Hatchett, J., joined by Kravitch, J., dissenting); *supra* note 562.

⁷⁸⁷ *Nipper*, 39 F.3d at 1515 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (emphasis added); *see* analogous discussion *id.* at 1525-26 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.); *cf. supra* notes 726-31 and accompanying text. In other words, like the *LULAC II* majority, Judge Tjoflat implicitly relied upon Justice O'Connor's opinion in *Gingles* that causation is relevant to the section 2 inquiry; *see also Nipper*, 39 F.3d at 1514 n.43 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (quoting with approval Justice O'Connor's opinion that causal evidence is relevant to the section 2 inquiry). As discussed *supra* note 562, however, the Senate Report expressly disclaims the need for an inquiry into causation. *See generally Solomon*, 899 F.2d at 1017 n.3 (Kravitch, J., specially concurring) ("Chief Judge Tjoflat's analysis takes a tack similar to that of Justice O'Connor's concurring opinion in *Gingles*," which "failed to obtain the support of a majority of the Court").

⁷⁸⁸ *Nipper*, 39 F.3d at 1521 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (emphasis added) (quoting S. REP. NO. 417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06).

asserted when describing the holding in *Bolden*, he opined that the Senate Report's language referred only to official discrimination and not to discrimination in the voting community.⁷⁸⁹ Second, he maintained that the *LULAC II* majority's own misreading of the Senate Report supported his strained interpretation.⁷⁹⁰ His last argument, however, was perhaps the most revealing of all: he declared that "nothing in the [Senate] report indicates that the Judiciary Committee's interpretation of *White* differs from my interpretation of that case."⁷⁹¹ By saying nothing about an unreasonable interpretation of the results test, Congress presumably had endorsed Judge Tjoflat's redefinition of section 2.⁷⁹² No clearer example of rampant judicial activism could strike at the very heart of this representative government.⁷⁹³

Judge Tjoflat rested his racial bias test on many of the same faulty assumptions that Justice Thomas used to eviscerate the democratic theory embodied in section 2. Like Justice Thomas, Judge Tjoflat apparently conflated the protections under section 2 with those under the self-executing section of the Fifteenth Amendment. Judge Tjoflat purported to recognize that Congress possesses "broad power to enforce" the Reconstruction Amendments "by appropriate legislation," under the expansive test that the Court adopted in *Katzenbach v. Morgan*.⁷⁹⁴ He also acknowledged that

"the Act's ban on electoral changes that are *discriminatory in effect* is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting."⁷⁹⁵

Yet, at the same time, Judge Tjoflat rendered the distinction between discriminatory effect and intentional discrimination meaningless by concluding that "'discriminatory result,' or 'effect,' implies the existence of two things: a suspect scheme and racial bias in the voting community."⁷⁹⁶ He claimed that any other reading of the amended

⁷⁸⁹ *Nipper*, 39 F.3d at 1521-22 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.). Judge Hatchett strongly disagreed with this conclusion, noting that "the two judges simply desecrate the legislative history surrounding [the] amendment" to section 2. *Id.* at 1555 (Hatchett, J., joined by Kravitch, J., dissenting).

⁷⁹⁰ *See id.* at 1521 n.53, 1523 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.).

⁷⁹¹ *Solomon v. Liberty County, Florida*, 899 F.2d 1012, 1029 (11th Cir. 1990) (en banc) (Tjoflat, C.J., specially concurring).

⁷⁹² *Cf. Solomon*, 899 F.2d at 1024 (Tjoflat, C.J., specially concurring) (arguing that "[a]lthough the Court did not expressly recognize that it was talking about racial bias in two different groups," the Court nevertheless meant to impose a requirement of proving invidious discrimination by not only public officials, but people in the voting community as well (emphasis added)).

⁷⁹³ *Cf. Nipper*, 39 F.3d at 1547 (Hatchett, J., joined by Kravitch, J., dissenting) (noting that Judges Tjoflat and Anderson "would have us hold, for the first time in American law . . . a plaintiff class must also show the existence of racial bias motivating the voting community").

⁷⁹⁴ *Id.* at 1516 & n.44 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.).

⁷⁹⁵ *Id.* at 1516 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (quoting *City of Rome v. United States*, 446 U.S. 156, 177 (1980)) (emphasis added).

⁷⁹⁶ *Solomon*, 899 F.2d at 1032 (Tjoflat, C.J., specially concurring).

section 2 would render it “outside the limits of Congress’ legislative powers and therefore unconstitutional.”⁷⁹⁷ In light of this narrow interpretation, it becomes evident that Judge Tjoflat believes Congress can do nothing more in enforcement legislation passed under the Reconstruction Amendments than simply restate the protections that the Court provided under the self-executing sections.⁷⁹⁸ Such a result directly contravenes the intent of the Framers of the Fifteenth Amendment.⁷⁹⁹

In addition, Judge Tjoflat evinced a strong disdain for substantive decision-making by judges. His *Solomon* opinion would seem to suggest a different result; at one point, he criticized Judge Kravitch for departing from the flexible “totality-of-the-circumstances test” in favor of a “completely mechanical test.”⁸⁰⁰ Tjoflat himself, however, departed from having flexible judicial referees examine the subtle nuances of particular voting systems in favor of a rigid, mechanical test. Under his reasoning, “invidious discrimination”⁸⁰¹—his code words for official or private “intent”—must be shown as a part of the totality of the circumstances. In this manner, he arrived at the very “core value” Justice Thomas said must be present to constrain judges evaluating section 2 claims:

If, however, the results test was given a “core value,” that is, if Congress admitted that the test was intended to prevent invidious discrimination in voting systems, then the defendant could overcome the plaintiff’s evidence with evidence that invidious discrimination was not present.⁸⁰²

Therefore, Judge Tjoflat would use the presence or absence of official or private intent to constrain judges evaluating vote dilution claims from making any substantive decisions. If intent is present and the *Gingles* factors are otherwise met, reviewing judges would be compelled to find a section 2 violation. Conversely, if no intent was present, they would have no choice but to enter judgment in favor of the defendants. This construction denigrates judges from their roles as vigorous guardians of the consent of the governed, to little more than legal automatons. It also cuts against Judge Tjoflat’s own recognition that “[n]o single statistic provides courts with a short-cut to determine whether a set of [electoral structures] unlawfully dilutes minority voting strength.”⁸⁰³

⁷⁹⁷ *Nipper*, 39 F.3d at 1515 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.).

⁷⁹⁸ Imposition of either official or private discriminatory intent mirrors the requirements for constitutional vote dilution challenges brought under the Fourteenth and Fifteenth Amendments. See *supra* note 232.

⁷⁹⁹ See *supra* note 230 and accompanying text.

⁸⁰⁰ *Solomon*, 899 F.2d at 1033 (Tjoflat, C.J., specially concurring); see also *id.* at 1034-35 (Tjoflat, C.J., specially concurring) (“Indeed, Judge Kravitch’s occasionally rigid interpretation of *Gingles* . . . flies in the face of the [Senate] Committee’s mandate.”).

⁸⁰¹ *Id.* at 1028 (Tjoflat, C.J., specially concurring).

⁸⁰² *Id.*; see also *Nipper*, 39 F.3d at 1517 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (“[R]acial bias in the voting community remains the keystone of section 2 vote dilution claims.” (emphasis added)).

⁸⁰³ *Nipper*, 39 F.3d at 1527 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020-21 (1994)).

Judge Tjoflat apparently was willing to concede that “[t]he right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot.”⁸⁰⁴ Similarly, he acknowledged that districting plans or other practices can “provide the opportunity for subtle discrimination” and thereby impair the ability of a minority group “to elect its candidate of choice on an equal basis with other voters.”⁸⁰⁵ Nevertheless, his imposition of proving the presence or negating the absence of racial bias in the voting community itself marked a significant impairment of the ability of minority voters “to participate in the political process and to elect representatives of their choice.”⁸⁰⁶ He concluded his discussion of his racial bias test by stating:

[A] court gradually draws together a picture of the challenged electoral scheme and the political process in which it operates by accumulating pieces of circumstantial evidence. Like a Seurat painting, a portrait of the challenged scheme emerges against the background of the voting community. Only by looking at all of the dots on the canvas is a district court able to determine whether vote dilution has occurred. A court should not exclude certain types of relevant evidence—certain colors on the canvas—from its examination if doing so would leave an incomplete view of the circumstantial evidence picture.⁸⁰⁷

Judge Tjoflat painted a bleak picture of what it means to secure for minorities their right to exercise unimpaired consent within the political process.⁸⁰⁸ The color on his painting was virtually the same throughout; by allowing racial bias to be the dominant (if not sole) inquiry under section 2, he made it a distinctly white picture, with racial and ethnic minority groups relegated to the recesses and shadows of majority tyranny. Under the circumstances, there would be little difference in the results of Judge Tjoflat’s narrow vision of the right to vote if he left the white canvas blank and denied the ability of minority voters to put their “dots on the canvas” altogether. The bitter irony in the fate of this judicial artisan is that he has fallen victim to exactly what he chided Judge Kravitch for doing in *Solomon*: “significantly depart[ing] from the intent of Congress in enacting amended section 2.”⁸⁰⁹ Apparently Judge Tjoflat no longer believes the truth of his earlier statement that “the

⁸⁰⁴ *Id.* at 1510 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)).

⁸⁰⁵ *Id.* (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (quoting *Voinovich v. Quilter*, 507 U.S. 146, 153 (1996)).

⁸⁰⁶ 42 U.S.C. § 1973(b) (1994) (amended 1982) (regarding enforcement of voting rights).

⁸⁰⁷ *Nipper*, 39 F.3d at 1527 (plurality opinion of Tjoflat, C.J., joined by Anderson, J.).

⁸⁰⁸ *Cf. id.* at 1556 (Hatchett, J., joined by Kravitch, J., dissenting) (“If this court ever adopts the rejected racial bias/intent test, the court will ensure that a politically cohesive and geographically compact racial minority will rarely be permitted to elect representatives of their choice when serious racially polarized voting exists.”).

⁸⁰⁹ *Solomon v. Liberty County, Florida*, 899 F.2d 1012, 1033 (11th Cir. 1990) (en banc) (Tjoflat, C.J., specially concurring).

policy choice [embodied in section 2] belongs to Congress," and not to federal judges.⁸¹⁰

3. *Holder, Shaw*, and Section 2: Even When There's a "Wrong," There's No Remedy

The final analytical method that courts use to deny relief for perverted process claims rests on their purported inability to fashion a remedy for the alleged violation. There are two theoretical strains to this methodology. First, in the context of judicial elections in particular, some courts have refused to impose remedial plans that would require alteration of features of the challenged electoral structure. The rationales of these decisions are based upon *Holder*'s proscription for imposing remedies in the absence of an existing "benchmark," as well as a need to accord strong deference to the state governments' policy choices in selecting the challenged voting structures or mechanisms. Second, courts more generally have declined to adopt ameliorative plans for section 2 violations by relying upon *Shaw v. Reno*'s warning about the presumptively unconstitutional nature of race-conscious remedies. These courts typically conclude that group-based relief is inherently contrary to the constitutional mandate to treat all voters as individuals without regard to their race or ethnicity. The refusal of federal judges to correct deprivations of minority consent under these circumstances defies the well accepted rule that for every wrong, there must be a remedy.⁸¹¹ This Article recommends that these courts must remedy the wrong they have inflicted upon the ability of all voters to have a fair and equal opportunity to give or withhold their consent.

Judicial elections present a special challenge to courts reviewing vote dilution claims brought under section 2. On the one hand, the use of electoral methods to select state and local judges necessarily implies that voters should receive a fair and equal opportunity to cast ballots for their chosen candidates—including the right to cast undiluted votes. On the other hand, judges are not required to be (nor should they be) responsive to the needs of their constituents in the same manner as representatives in a legislative body. As a result, eliciting the "consent of the governed" does not have the same meaning in judicial elections. However, the Court properly has recognized that when popular elections select judicial officers, then these officers are "representatives" for the purpose of section 2 of the Voting Rights Act.⁸¹² Similarly, the Court is correct in finding that the "[s]tate's interest in maintaining an electoral system . . . is a legitimate factor to be considered," although that interest "does not automatically, and in every case, outweigh proof of racial vote dilution."⁸¹³ Nevertheless, certain lower courts have disregarded the latter mandate.

⁸¹⁰ *Solomon v. Liberty County, Florida*, 865 F.2d 1566, 1583 (11th Cir. 1988), *vacated on reh'g*, 873 F.2d 248 (1989) (en banc).

⁸¹¹ See *supra* note 656.

⁸¹² See *Houston Lawyers' Ass'n v. Texas Attorney Gen.*, 501 U.S. 419, 423-24 (1991); *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

⁸¹³ *Houston Lawyers' Ass'n*, 501 U.S. at 426-27.

Under the approach these courts have taken, the absence of a benchmark within the state's judicial scheme precludes imposition of *any* section 2 remedy, even where there is widespread and severe majority bloc voting that repeatedly dilutes the voting power of minority groups.⁸¹⁴

Judge Higginbotham's *LULAC II* opinion is one example of this troubling approach.⁸¹⁵ In *LULAC II*, Texas's asserted interest in keeping elections for trial judges countywide was to maintain the linkage between "the jurisdictional and electoral bases of the district courts."⁸¹⁶ The majority found that this linkage "is a key component of the effort to define the office of a district judge."⁸¹⁷ As a result, the majority ruled that "proof of dilution, considering the totality of the circumstances, must be *substantial* in order to overcome the state's interest in linkage established here."⁸¹⁸ In view of its holding that partisan affiliation caused majority bloc voting, the *LULAC II* majority's conclusion that the state's interest outweighed the plaintiffs' proof of dilution in each and every county at issue was to be expected.⁸¹⁹ Nevertheless, the extraordinary lengths to which Judge Higginbotham was prepared to go in order to validate the state's interest would seem to preclude a section 2 claim under any circumstances, tilting the scales of justice against racial and language minority groups in favor of maintaining the majoritarian status quo.⁸²⁰

⁸¹⁴ See *infra* note 779.

⁸¹⁵ League of United Latin Am. Citizens, Council No. 4434 v. Clements ("LULAC II"), 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994).

⁸¹⁶ *Id.* at 868.

⁸¹⁷ *Id.* at 872.

⁸¹⁸ *Id.* at 876 (emphasis added).

⁸¹⁹ See generally *id.* at 877 (finding that even if the district court was correct in finding racial vote dilution in some counties, "the evidence would be outweighed by the State's substantial interest in linkage," and observing that "partisan voting at the least so weakens the proof of dilution that it loses in the weighing of the totality of the circumstances").

⁸²⁰ See generally Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, in AFFIRMATIVE ACTION AND REPRESENTATION, *supra* note 7, at 344-45 (observing that *LULAC II* "advanced a new 'balancing test' that would, in some instances, allow the state's interest in the challenged election scheme to defeat Voting Rights Act liability even if the challenged scheme would have violated the Act under the totality of the circumstances test"). A close reading of *LULAC II* reveals that Judge Higginbotham's "balancing" of the state interest—which should be a part of any section 2 analysis, see *supra* note 261 and accompanying text—is really nothing of the sort. Instead, Judge Higginbotham ensured that section 2 plaintiffs only will be able to state a claim in the judicial context in the rarest and most unusual cases (i.e., when a mechanism or structure is not deemed to be "integral" to the State's electoral scheme). Cf. Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194, 1200 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 853 (1998) (describing the State's interest as "powerful, indeed dispositive, unless the plaintiffs show gross racial vote dilution" (emphasis added)).

Judge Tjoflat and a majority of judges took a similar tack in *Nipper*.⁸²¹ In that case, black voters and black attorneys alleged vote dilution in the at-large election of circuit and county court judges and sought a remedy such as sub-districts that would provide them with an equal opportunity to elect judges of their choice.⁸²² The *Nipper* court rejected the plaintiffs' claim—even though they had proven “that racial bloc voting exists . . . in such a way that the white majority usually defeats the minority's candidate of choice”⁸²³—because the relief they sought “would undermine the administration of justice” in the courts at issue.⁸²⁴ The majority accurately pointed out that the three *Gingles* factors require an examination into whether a remedy was feasible in the challenged system. The court then took this a step further and concluded:

Implicit in the first *Gingles* requirement [geographical compactness] is a limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system. Nothing in the Voting Rights Act suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government; moreover, from a pragmatic standpoint, federal courts simply lack legal standards for choosing among alternatives. Accordingly, we read the first threshold factor . . . to *require* that there must be *a remedy within the confines of the state's judicial model that does not undermine the administration of justice*.⁸²⁵

Judge Tjoflat found further support for his conclusion in *Holder*, which he interpreted as saying “the existence of a workable remedy *within the confines of the state's system of government* is critical to the success of a vote dilution claim.”⁸²⁶

There are a number of flaws in Judge Tjoflat's reasoning. First, he assumed that federal judges cannot and should not engage in substantive decision-making in devising a remedial plan. That assumption cuts against the fundamental nature of guaranteeing consent, which makes substantive judicial decision-making an indispensable part of protecting the right to vote.⁸²⁷ Second, he disregarded the broad

⁸²¹ A majority of six judges joined this portion of Judge Tjoflat's opinion. See *Nipper v. Smith*, 39 F.3d 1494, 1547 (11th Cir. 1994) (en banc) (Edmondson, J., joined by three judges concurring in the opinion in part and in the result), *cert. denied*, 514 U.S. 1083 (1995).

⁸²² See *id.* at 1496-97.

⁸²³ *Id.* at 1542 (plurality opinion of Tjoflat, C.J., and Anderson, J.).

⁸²⁴ *Id.* at 1498. The *Nipper* majority concluded that no remedy was possible even though the district court never had reached the issue of a remedy and there was no record evidence pertaining to proposed remedies. See *id.* at 1509; see also *id.* at 1556-57 (Hatchett, J., joined by Kravitch, J., dissenting) (criticizing the majority for relying upon a barren record to reject plaintiffs' section 2 claim and engaging in “speculation and conjecture to support its holding that Florida's interest in conserving its current at-large voting system precludes any possible remedy”).

⁸²⁵ *Nipper*, 39 F.3d at 1531 (emphasis added).

⁸²⁶ *Id.* at 1533 (emphasis added) (interpreting *Holder v. Hall*, 512 U.S. 874 (1994)).

⁸²⁷ See *supra* notes 281-580 and accompanying text.

remedial purposes of the Voting Rights Act, which the Court acknowledged most clearly in *Allen*.⁸²⁸ Third, he failed to recognize that there can be no better example of “undermin[ing] the administration of justice”⁸²⁹ than allowing the majority effectively to fence minority voters out of the process of selecting judicial officers. Fourth, he repeated the *Holder* plurality’s circular reasoning by stating that the absence of a remedy precludes the existence of a wrong to be remedied.⁸³⁰ In fact, Judge Tjoflat’s outright rejection of single-member districts as a remedy for demonstrated vote dilution in at-large judicial elections⁸³¹ flies in the face of *Gingles*’ express recognition of single-member districts (whether called “sub-districts” or otherwise) as an acceptable benchmark.⁸³² Finally, he apparently could not identify the truism that if the existing electoral system wrongfully denies a particular group of voters their right to cast an undiluted ballot, then there exists no other recourse to remedying that violation of consent except altering one or more features of that system. In short, Judge Tjoflat’s analysis does little more than place a judicial seal of approval on the majoritarian default, at the expense of minority consent.

But even Judge Tjoflat’s approach pales in comparison to Judge Edmondson’s unflagging deference to the asserted state interest in perpetuating the existing electoral scheme. While Judge Tjoflat was at least willing to go through an analytical exercise before rejecting the plaintiffs’ section 2 claim, Judge Edmondson did not even bother to engage in such false pretenses. In *Nipper*, Judge Edmondson reasoned that

[t]he State of Florida’s legitimate interest in maintaining linkage between jurisdiction and the electoral bases of its trial judges is, as a matter of law, great and outweighs (either at the vote-dilution-finding stage or at the remedy stage) *whatever minority vote dilution that may possibly have been shown here*.⁸³³

Similarly, in a vote dilution challenge to the system of electing trial judges in Alabama, he wrote:

⁸²⁸ See *supra* notes 531-44 and accompanying text.

⁸²⁹ *Nipper*, 39 F.3d at 1498. The *Nipper* majority concluded no remedy was possible even though the district court never had reached the issue of a remedy and there was no record evidence pertaining to proposed remedies. See *id.* at 1509; see also *id.* at 1556-57 (Hatchett, J., joined by Kravitch, J., dissenting) (criticizing the majority for relying upon a barren record to reject plaintiffs’ section 2 claim, and engaging in “speculation and conjecture to support its holding that Florida’s interest in conserving its current at-large voting system precludes any possible remedy”).

⁸³⁰ See *supra* notes 648-59 and accompanying text.

⁸³¹ See *Nipper*, 39 F.3d at 1543-45 (plurality opinion of Tjoflat, C.J., and Anderson, J.).

⁸³² See *supra* note 632 and accompanying text. There simply is no evidence that the Court intended to preclude the use of single-member districts to remedy proven vote dilution in judicial elections.

⁸³³ *Nipper*, 39 F.3d at 1547 (Edmondson, J., joined by three judges, concurring in part) (emphasis added).

Most important, no need (and I think no rightful, federal judicial power) exists to compare the strength and weaknesses—as a matter of political science—of Alabama's current system of electing trial judges with the system for which plaintiffs contend. Even if in a head-to-head comparison plaintiffs' proposed system were "better" (that is, the wiser choice—in terms of good government or political science practice and theory) than Alabama's present system, federal courts could not properly compel Alabama to change, given the circumstances of this case.

The basic structure of Alabama's judicial branch of government, including the shape of its judicial jurisdictions and the manner of selecting trial judges, is in the hands of Alabama's people.⁸³⁴

The extent to which such a position endangers full and effective participation by minority groups cannot be overemphasized.⁸³⁵ In virtually every vote dilution case, the challenged electoral feature will be a part of the state's constitutional or statutory scheme. The fact that a section 2 remedy cannot be imposed without altering the state's scheme should not be a bar to an otherwise successful vote dilution claim.⁸³⁶

⁸³⁴ *Southern Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1298 (11th Cir. 1995) (en banc) (Edmondson, J., concurring), *cert. denied*, 516 U.S. 1045 (1996).

⁸³⁵ In *Davis v. Chiles*, a panel of judges in the Eleventh Circuit discussed the problem with the approach taken by Judge Tjoflat and Judge Edmondson:

[W]e are troubled by the analysis and the conclusion that our precedents appear to require in cases such as the one at bar. The Supreme Court has clearly and repeatedly held that Section Two applies to state judicial elections. Moreover, the Court has explicitly stated that . . . the State's interest . . . does not automatically, and in every case, outweigh proof of racial vote dilution. In interpreting *Chisom* and *Houston Lawyers'*, our circuit in *Nipper* and *SCLC* has placed what now seems, in hindsight, to be an insurmountable weight on a state's interest in preserving its constitution's judicial selection system and in maintaining linkage between its judges' jurisdictions and electoral bases. Together with *Nipper*, *SCLC*, and the additional case of *White v. Alabama*, we will with this decision have disallowed redistricting, subdistricting, modified subdistricting, cumulative voting, limited voting, special nomination, and any conceivable variant thereof as remedies for racially polarized voting in at-large judicial elections. Given such rulings, neither we, nor [the parties] have been able to envision any remedy that a court might adopt in a Section Two vote dilution challenge to a multi-member judicial election district. Thus, *in this circuit, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections.*

Davis v. Chiles, 139 F.3d 1414, 1423-24 (11th Cir. 1998) (emphasis added) (citations omitted).

⁸³⁶ Cf. Kirsten Lundgaard Izatt, Note, *The Voting Rights Act and Judicial Elections: Accommodating the Interests of States Without Compromising the Goals of the Act*, 1996 U. ILL. L. REV. 229, 264 (1996) ("The balancing tests of the Fifth and Eleventh Circuits illegitimately elevate the role of the state's interest above the other enumerated factors in the

The same holds true with the need to have race-conscious remedies for wrongful deprivations of minority consent. It is apparent that any remedy to "found violations of § 2 of the Voting Rights Act by definition employs race."⁸³⁷ The reason is quite simple. If a particular electoral feature operates in a way that wrongfully inhibits minority consent, then section 2 requires the reviewing court to identify the particular feature and ensure that any remedy it adopts does not replicate that harm to minority voters. Consequently, the court at all times must be conscious of the race of the voters in assessing the known or potential impact on their ability to consent in order to give any meaning to section 2 protection. Nevertheless, the *Shaw v. Reno* holding treated such awareness as anathema to a "color-blind" society.⁸³⁸ As a result, the *Shaw v. Reno* line of cases creates the likelihood that in remedying a section 2 violation, a federal court will violate the Fourteenth Amendment rights of individual members of the majority group.⁸³⁹ Not surprisingly, a growing number of federal courts have relied upon such an impending constitutional violation as yet another reason to deny successful section 2 litigants any relief.⁸⁴⁰

Many of the reasons these courts have articulated for rejecting otherwise cognizable section 2 claims echo the language that the Court used in *Shaw v. Reno* and its progeny. One example will illustrate this point. In *Lewis v. Alamance County, North Carolina*, Judge Wilkinson vigorously criticized the dissent's "intensely race-conscious approach" to the *Gingles* vote dilution inquiry.⁸⁴¹ According to Judge Wilkinson, although *Gingles* required such an inquiry, "it cannot be read to require us to adopt rules that unconstitutionally tie American politics to racial identity" thereby leading to "racially separate electorates and a racially separate

Senate Report, implicitly diminishing the role that Congress intended the other factors to play.").

⁸³⁷ *Clark v. Calhoun County, Mississippi*, 88 F.3d 1393, 1408 (5th Cir.), *petition for reh'g and reh'g en banc denied*, 95 F.3d 1151 (5th Cir. 1996); *accord Sanchez v. Colorado*, 97 F.3d 1303, 1327 (10th Cir. 1996) ("[A]dherence to *Gingles* to remedy violations of § 2 necessarily implicates race."), *cert. denied*, 117 S. Ct. 1820 (1997); *Houston v. Haley*, 859 F.2d 341, 342 (5th Cir. 1988) (holding that, in analyzing a section 2 claim, the court "must evaluate the use of race-conscious remedies to create a more fluid political process without countenancing any move toward installing a structure of proportional representation not in keeping with our theory of government"), *vacated on reh'g*, 869 F.2d 807 (5th Cir. 1989); *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1408 n.13 (N.D. Ill. 1997) ("It would approach theater of the absurd to impose a rule stating that a remedy intended to correct race-based discrimination in districting could not be race-conscious."); *see supra* note 704 and accompanying text.

⁸³⁸ *See supra* notes 679-84 and accompanying text.

⁸³⁹ *See supra* notes 701-07 and accompanying text.

⁸⁴⁰ *See, e.g., Cannon v. North Carolina Bd. of Educ.*, 917 F. Supp. 387, 389-91 (E.D.N.C. 1996); *Reed v. Town of Babylon*, 914 F. Supp. 843, 870-74 (E.D.N.Y. 1996); *Jeffers v. Tucker*, 847 F. Supp. 655, 661-62 (E.D. Ark. 1994) (three judge panel).

⁸⁴¹ *Lewis v. Alamance County, North Carolina*, 99 F.3d 600, 618 (4th Cir. 1996) (Wilkinson, C.J., concurring), *cert. denied*, 117 S. Ct. 1820 (1997).

society.”⁸⁴² As a result, he faulted the dissent for seeking to remedy a section 2 violation by restructuring the county’s electoral districts “along racial lines.”⁸⁴³

Judge Wilkinson attacked such remedies as viewing “voters as members of racial blocs rather than as individuals.”⁸⁴⁴ In addition, he questioned the very feasibility of section 2 remedies in a changing multicultural society:

Where will this road of race-consciousness end? . . . [T]he *Gingles* inquiry is complicated enough in a biracial community. Is the inquiry to become ever more refined and ever more complex as America becomes more multicultural? At some point, this race-based calculus will demonstrate only how far the law has set us in the path to disunion.

Entering this maze of racially laden inquiries reflects a view of American political life as a competition between highly segregated racial forces. Indeed, this is precisely the mistake of the dissent. The dissent’s interpretation of *Gingles* will not allow courts to accept the votes of minority individuals as expressing their personal preferences.

. . . .

It will be said that racial bloc voting is already ensconced in American political life and that courts must learn to embody in law what is established in fact. A Constitution, however, has its aspirational as well as descriptive aspect. It is informed by the way things ought to be. Were the Fourteenth Amendment no more than a concession to the racial realities of the day, *Brown v. Board of Commissioners* would have remained an untaken step. Separation of the races is no better for America now than it was in 1954.⁸⁴⁵

Judge Wilkinson is wrong. Surely section 2’s guarantee of an equal opportunity to participate in the political process must mean more than protecting the right of individuals to express their preferences. Such an interpretation nullifies anything extending much beyond the pure process right to cast a ballot and have it counted. It also ignores the lengthy legislative and judicial history of the Voting Rights Act.⁸⁴⁶ There is no way to avoid the use of race-conscious remedial measures to eradicate race discrimination, unless one does what Judge Wilkinson suggests and turns one’s back on the protection of a right to fair and effective participation in government. Moreover, while everyone would like to believe that they live in a society in which race no longer matters, the harsh reality is that race *does* matter,⁸⁴⁷ leaving large

⁸⁴² *Id.* (Wilkinson, C.J., concurring).

⁸⁴³ *Id.*

⁸⁴⁴ *Id.*

⁸⁴⁵ *Id.* at 618-20 (Wilkinson, C.J., concurring).

⁸⁴⁶ See *supra* notes 507-80 and accompanying text.

⁸⁴⁷ See generally CITIZENS’ COMM’N ON CIVIL RIGHTS, THE CONTINUING STRUGGLE: CIVIL RIGHTS AND THE CLINTON ADMINISTRATION (Connie M. Yu & William L. Taylor eds., 1997) (describing Justice Department announcements of racial discrimination that “believe the notion, so popular with previous [presidential] Administrations, that the nation has arrived at a

racial and ethnic segments of the population are submerged into de facto disenfranchisement. "Color-blindness" should not require courts to be blind to discrimination against minority groups. The courts must not heed Judge Wilkinson's call to "rebuild the walls [of discrimination against minorities] they once brought down."⁸⁴⁸

IV. A RETURN TO CONSENT: RESTORING MEANING TO SECTION 2 OF THE VOTING RIGHTS ACT AND THE ROLE OF JUDICIAL REFEREES IN ENFORCING IT

Certain members of the present Supreme Court have shown disdain for what they call "judicial activism" in defining the right to vote. They have resisted their unique constitutional role in promoting the rights of minority voters to have a full and meaningful voice in the political process. Instead, the justices have adopted mechanical rules to limit the ability of judges to engage in substantive decision-making in voting rights cases. In cases in which use of formulaic rules is unavailing, such as vote dilution challenges, the Court has marked a steady retreat by acknowledging the right to a ballot cast free of dilution, but denying the substance of that right. Moreover, these same justices have embraced an individual view of the right to vote, which is inconsistent with the broad group protection codified in section 2 of the Voting Rights Act. In the process, a majority of the present Court has "declined" to engage in matters of democratic theory. However, the Court's inability to recognize the illegitimacy of its own misbegotten democratic theory has thrust it into the very position it has sought to avoid: squarely in the middle of the political thicket, where judges make (not interpret) law, and create (not enforce) democratic views.

This Article has urged the Court to pull itself out of the political thicket by using the consent theory of democracy as a basis for reviewing voting rights claims. Consent of the governed is a cornerstone of government in the United States. The Constitution itself is a product of attempts by the Founding Fathers to reconcile the democratic element of majority rule with the accompanying and competing need to protect minorities—whether individuals or groups—from the tyranny of that rule. The Reconstruction Amendments, especially the Fifteenth Amendment, gave

blissful state of 'color blindness' making obsolete the affirmative remedies and enforcement machinery that had brought progress in earlier times"). The report further notes "that this notion has yet to reach the point where the great bulk of citizens are 'color blind,' where race has ceased to matter, and where children do not suffer disadvantage because of their race or national origin." *Id.* at 2. A fifteen month study of race in America by the Advisory Board of the President's Initiative on Race recently reached a similar conclusion. *See generally* ADVISORY BD. OF THE PRESIDENT'S INITIATIVE ON RACE, ONE AMERICA IN THE 21ST CENTURY: FORGING A NEW FUTURE 33 (1998) ("Does race matter in America? . . . 'Yes, race matters.' It became increasingly clear that America is still struggling with the impact of past policies, practices, and attitudes based on racial differences—what we are calling the legacy of race and color.").

⁸⁴⁸ *Lewis*, 99 F.3d at 620 (Wilkinson, C.J., concurring).

Congress extensive power to pass legislation protecting the right to equal consent. The Voting Rights Act is the culmination of congressional efforts under its enforcement powers to eradicate voting discrimination once and for all. The Act encompasses both the individual right to cast a ballot that is counted, as well as the right of members of all racial and ethnic groups to have fair and effective participation in every stage of the political process. Section 2 of the Act elaborates on these protections by providing that all voters shall have the same opportunity "to participate in the political process and to elect representatives of their choice."⁸⁴⁹ A violation of section 2 turns on whether minority consent has been denied wrongfully, and not whether that result was intended. In addition, vote dilution challenges brought under that provision necessarily imply a group right.

But every election system is different. No two voting communities have the same level of minority participation, electoral features, past (or even present) legacies of discrimination, or history of majority bloc voting at the polls. Consequently, the Court recognized in its early interpretations of vote dilution claims, the need for flexible judicial referees who carefully could engage in a comprehensive analysis of voting conditions under the totality of the circumstances. Rigid, mechanical rules are not possible, nor even desirable, if consent is to be protected to the extent that the Framers (in constitutional claims) and Congress (in section 2 claims) intended. Use of inflexible criteria precludes the courts from differentiating between the unique fact-specific nature of voting rights claims at the risk of sustaining majority tyranny. Substantive decision-making by judges is unavoidable, even in the "simple" cases, if consent is to have any meaning at all.

Therefore, it is up to the Court to lift itself "out of the so-called 'political' arena and into the conventional sphere of constitutional litigation"⁸⁵⁰ in assessing vote dilution claims brought under section 2 of the Voting Rights Act. To do so, this Article suggests that it is time for the Court to return to first principles: interpreting and applying duly enacted statutory protections under section 2, without rewriting those protections in a manner that distorts congressional intent. In addition, the Court must undo the damage created by its ill-conceived emphasis on such things as electoral success and "benchmarks," and its discomfort in adopting race-conscious remedies to racial electoral harms. In short, the Court must accept the fact that it cannot avoid making difficult choices in giving content to the right to vote, and must not directly or indirectly adopt the "neutral position" of the majority default that essentially nullifies minority consent. This Article proposes that the Court examine allegations of vote dilution by determining whether the electoral system has operated to deprive minority consent in a manner that is inconsistent with constitutional and statutory remedial measures.

To do so does not amount to the creation of a democratic theory or improper "judicial activism," as Justice Thomas asserted in his *Holder* concurrence. Rather, Justice Stevens aptly described it as a necessary by-product of advancing the democratic theories embodied in the Constitution and the Voting Rights Act:

⁸⁴⁹ 42 U.S.C. § 1973(b) (1994).

⁸⁵⁰ *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

There is no question that the Voting Rights Act has required the courts to resolve difficult questions, but that is no reason to deviate from an interpretation that Congress has thrice approved. Statutes frequently require courts to make policy judgments. The Sherman Act, for example, requires courts to delve deeply into the theory of economic organization. Similarly, Title VII of the Civil Rights Act has required the courts to formulate a theory of equal opportunity. Our work would certainly be much easier if every case could be resolved by consulting a dictionary, but when Congress has legislated in general terms, judges may not invoke judicial modesty to avoid difficult questions.⁸⁵¹

The Court must accept the force of Justice Stevens's argument. It cannot escape substantive decision-making. The only question is whether the substantive decisions the Court makes are consistent with the textual source of the voting right they are considering. A return to consent, enforced by vigorous and flexible judicial referees, would fulfill the promise of the Voting Rights Act. It would ensure that minority voters no longer will have to raise their voices against judicial tyranny.

⁸⁵¹ Holder v. Hall, 512 U.S. 874, 966 (1994) (Stevens, J., dissenting).