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Conceptual Dispute over Political Equality: From Voting Rights to Equal Representation

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INTRODUCTION

Equality is a fundamental principle in American society. Even though equality has been denied to certain individuals in practice from time to time, the general idea of equality has been solidly supported by Americans as an ideal. When it comes to the question of what constitutes equality, though, solid support starts to unravel.

In the American tradition, equality had long been interpreted as "equality of opportunity." What was impôrtant was to provide the opportunity equally, and the outcome would be the responsibility of individuals, not of society. The serious disparity in the conditions between African Americans and whites caused by accumulated discrimination, from slavery to subsequent segregation, challenged the efficacy of this concept of "equality of opportunity." Given the magnitude of the racial gap, no personal effort seemed possible to achieve equality without some external help to compensate for it. The concept of "equality of result" was therefore introduced to help improve the

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conditions of minorities so that equality might be achieved more realistically.

"Equality of result" conceptually collides with the tradition of "equality of opportunity," but the former was accepted by American society as a temporary compensational means rather than a permanent principle. Still, as this concept came to be practiced through policies such as affirmative action, controversy over the concept of equality—whether providing an equal opportunity is sufficient or equalizing the result is necessary—emerged in several areas such as education and employment.

Political equality, however, seems to have been free from such controversy because an objective, quite straightforward standard for political equality was supposed to exist in the idea of "one person, one vote." When African Americans were deprived of the opportunity of voting, gaining it was supposed to provide a level playing field, and thus the goal in itself. Once it was provided, however, minority groups gradually noticed that their "one vote" might not always weigh the same as the "one vote" of others. Whether "result" rather than "opportunity" should be the criterion for political equality, and if so, how to determine the "equal result" of an individual's political rights that are meaningful only if exercised collectively in a representative democracy are quite complex questions.

In this article, I have focused on the political participation of African Americans, who have experienced a distinctive and long history of discrimination, and discussed how we can conceptualize political equality in American society today.

I. IS "ONE PERSON, ONE VOTE" ENOUGH?

Conditions behind the Voting Rights Act of 1965

In the history of American democracy, universal suffrage does not have a long record. Until the mid 19th century, property could be a factor used to deny voting rights among the male population, and gender could also be such a factor until women's suffrage was constitutionally guaranteed in 1920. Even after the obstacles for voting disappeared institutionally, not everyone has exercised his/her voting rights to the same extent. For example, socio-economic status is said to be correlated with the ratio of turnout at polling. The lower a person's level of education and/or income, the less likely that person will exercise the

right to vote.[1] Also, culture and tradition might discourage women aspiring to run for elected positions.[2] Less-than-full exercise of one's political rights cannot be dismissed simply as a personal preference, but rather should be viewed in the context of social conditions.

Such difficulty in fully exercising political rights is nonetheless clearly distinct from the institutional discrimination targeted at African Americans preceding the Voting Rights Act of 1965. Race itself had not been a factor in denying voting rights among African Americans in the early days of the Republic, and a small number of free African American men of property did exercise their voting rights. By the time the Civil War broke out, however, race had replaced the condition of servitude as a factor used to deny African Americans the right to vote in all states except five in the northeast.[3] When the Thirteenth Amendment to the Constitution abolished slavery, and the Fourteenth and the Fifteenth Amendments respectively provided equal protection to and enfranchisement of African Americans through banning political discrimination based on race, color, or previous condition of servitude, the question of political equality should have been settled.

During the period of Reconstruction, African Americans expanded their political participation, and some African American politicians were elected to national office from the southern states. They included two U.S. senators from Mississippi and twenty U.S. representatives in the House from eight southern states.[4] The return to Home Rule, however, allowed the reemergence of racial discrimination in the south. Despite the constitutional ban, states denied African Americans their right to vote through various means such as literacy tests, poll tax payments, and grandfather clauses. Cheating and even the use of violence also occurred.[5] The Democratic Party, which virtually dominated southern politics during this period, excluded African Americans from their primaries and thus made African American votes meaningless even if they cast them for the losing Republican candidates.

Such disfranchisement of African Americans in the south contrasted with their emerging political power in northern cities, especially Chicago, as they migrated northward in great numbers from the 1910s. The votes of African Americans were courted by white politicians and even though their relationship of patron-client was not on an equal level, African Americans in Chicago succeeded in electing the first African American from the north to the House of Representatives.[6] As the New Deal realigned African Americans to the Democratic Party, their con-

tinuing migration to and residential concentration in urban areas made African Americans an indispensable source of votes for the Democratic Party. Besides Chicago, such cities as New York, Detroit, and Philadelphia elected African American members to the House in the 1940s and 1950s. Promoting African American political visibility in the north through their voting power illustrated that it was not racial discrimination *per se*, but rather disfranchisement, that deprived African Americans in the south of their political representation.

There were two paths to change this situation in the south: through Congressional legislation and through litigation. A legislative remedy by Congress, though, was not expected to be obtained because many southern senators and representatives enjoyed reelection in safe districts and thus occupied senior positions in congressional committees, exercising enough influence to block the passage of remedial legislation. There was also a question about the unconstitutionality of congressional intervention based on the Civil Rights Act of 1875 in cases of private discrimination.[7] In the judicial arena, the Supreme Court had also been reluctant to take positive steps to abolish voting discrimination, and rather had permitted the southern states to rewrite their state constitutions to disfranchise African Americans. It was only in 1944 that the Supreme Court finally ruled that the white primaries, even though they were private political activities, were subject to the constitutional ban on voting discrimination.[8]

Faced with the probable expansion of African American political power, white resilience became even stronger. For example, the Alabama constitution was amended to give local registrars discretion to disqualify prospective voters, and when this procedure was found unconstitutional, a new amendment was made to require applicants to fill in complex, legalistic forms and to read portions of the Constitution. Louisiana also utilized an "interpretation" test, asking the applicants to make a "reasonable" interpretation of the federal/state constitution in order to find a way to disqualify African Americans. Mississippi adopted a "good moral character" qualification to discourage indirectly African American registration, and South Carolina strengthened its state regulations against African American registration with measures such as literacy tests at the primaries.[9] Such resistance among whites against African American voting rights could only be overcome by a fundamental change in the election system enforced by national authority.

Achievements and Limitations of the Voting Rights Act

The passage of the Voting Rights Act of 1965 (PL 89–110, Aug. 6, 1965) marked the turning point for unrestricted exercise of African American voting rights. Section 2 of the Act stipulates what is prohibited:

> 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.

Sections 4 and 5 are the main parts of the Act that guarantee what Section 2 prohibits. Section 4 abolishes the practice of using tests or other devices to deny voting rights and identifies states and political subdivisions which used such tests or devices on November 1, 1964, or had a registration ratio of the voting population on November 1, 1964 or a voting ratio in the Presidential election of 1964 that was less than 50%. Section 5 forbids changing election rules in such areas covered in Section 4 unless the D.C. District Court gives preclearance by finding that such a change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Seven southern states—Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia—had literacy tests as late as 1964, and altogether 22 states or parts of states, including areas outside the south, were covered by this clause.[10] In order to "bail out" from this coverage, a state (or a part of it) should demonstrate that it has not conducted any discriminatory measures for 17 years. What Section 5 failed to cover was the existing discriminatory election rules, which are not subject to preclearance as long as they remain the same. Sections 4 and 5 were not permanent parts of the Act and needed to be extended by subsequent congressional action.[11] The Act also provides that federal examiners can be sent to places where voting discrimination exists to enforce the Act.

The immediate effects of the Voting Rights Act encouraged optimism with regard to achieving political equality. The registration ratio and consequent voting ratio among African Americans greatly increased. In 1964 the average registration ratio of African Americans in 11 southern states was 43.1%, which increased to 62% in 1968. Notable increases included Mississippi (6.7% to 59.4%), Alabama (23% to

Table 1
Number of African Americans elected to officials[13]

	federal	state	county	municipal	education	others	total
1970	10	169	92	623	362	213	1,469
1975	18	281	305	1,573	937	389	3,503
1980	17	323	451	2,356	1,214	551	4,912
1985	20	396	611	2,898	1,438	693	6,056
1990	24	423	810	3,671	1,655	787	7,370

56.7%) and Louisiana (32% to 59.3%).[12] Electoral success of African Americans, as shown in Table 1, also increased.

If we look closer at these political opportunities for African Americans, complex problems emerge. It is true that the number of elected officials increased constantly. More than a decade after the Voting Rights Act was passed, however, the percentage of elected African Americans in office was considerably less than that for voting-age African Americans in the entire population. Most of the elected officials were from small political units such as cities or counties, which tend to be rather homogeneous with the majority voters comprised of African Americans along with other minority populations.

For example, on the federal level, about 6% of the House was African American as late as 1990, and the Senate has never had more than one African American at any given time. Reverend Jesse Jackson has had a large influence in mobilizing African American voters, but neither he nor any other African American has come close to winning the Democratic nomination for the presidency or vice-presidency. Prominent mayors such as David Dinkins of New York, John Daniels of New Haven, and Norman Rice of Seattle, and Governor Douglas Wilder of Virginia were African Americans elected to represent predominantly white jurisdictions, but on average, African American political executives tend to come from smaller, predominantly African American areas.[14] Even in the legislatures of states with a substantial minority population, the ratios of African American officials to the voting-age population fall short of parity (see Table 2).

There are many reasons for this racial underrepresentation among elected officials, and it is neither necessarily nor singularly explained by racial discrimination. Conditions for electoral success include competitive candidates, identification with parties capable of win-

Table 2
Ratio of African American Legislators to
African American Voting Age Population (VAP) (1992)[15]

	legislators (%)	VAP (%)	ratio
Mississippi	24.1	32	.753
Louisiana	22.9	28.5	.804
South Carolina	15.3	27.1	.565
Georgia	16.1	24.9	.647
Alabama	17.1	22.9	.747

ning and sufficient financial resources to support campaigns. Sufficient turnout of voters from particular groups to reflect their population ratio is also required. Despite the complexity of these factors, some cases may support the hypothesis that racial discrimination constitutes another, important factor.

One is the attitude of white voters toward African American political power. Right after the passage of the Voting Rights Act, a sudden increase in the registration ratio among southern whites was observed, which suggests that whites tried to offset the increase in African American political power.[16] More direct resistance is seen in their attitude toward representation by African American officials. According to the data compiled by the D.C. District Court regarding the contested elections of 1978, 1980 and 1982 in the areas where claims of voting discrimination had been made, 81.7% of white voters did not vote for any African American candidates in the primaries, and two thirds did not do so in the general elections even if it meant crossing their party line.[17] Another study indicates that 55% of whites regard race as more important than the qualifications of a candidate when casting votes.[18] Even in cases where African American candidates won, there was a significant percentage of whites who voted for white candidates of the opposite party, rather than for African American candidates of their own.[19] There is also a factor known as racial block voting, in which the majority racial group votes as one block in order to defeat the candidate supported by the minority racial group, thus constantly making it impossible for the minority to elect candidates of their choice.

Another reason for racial underrepresentation among elected officials is to be found in some voting procedures which function to reduce the chances of African American electoral success. The most notorious

example is the at-large system adopted in many local elections. Statistically, when there is a geographically concentrated minority population in sufficient number, they have a good chance to elect their choice in a single-member district, but in a multimember at-large district, their influence can be submerged due to the surrounding majority population. As more African Americans started to be elected, an increasing number of districts with majority African American populations were combined with neighboring, mostly white districts into at-large districts so that the influence of African American voters was reduced. Other than race, there is no persuasive reason to explain the significant increase in at-large districts from nine during 1965–75 to 234 during 1975–88.[20] In cases where single-member districts have been kept, boundaries have been drawn so that the district either has too many African Americans (packing) or too few (dividing up), which reduces the chances for electing African American choices—likely to be African American—to less than their population ratio. A similar purpose is seen to exist in such rules as the ban on one-shot voting (refusing to use the rest of the multiple votes so that the candidate being supported can enjoy a relative advantage) or the majority requirement in primaries.

Such practices raise the question of racial vote dilution. Just before the passage of the Voting Rights Act, the Supreme Court examined a case of vote dilution caused by malapportionment in *Reynolds v. Sims* (1964). The court ruled that "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[21] Section 2 of the Voting Rights Act, thu, was widely believed to have included vote dilution cases in "denial and abridgement" of voting rights. Questions about defining and proving vote dilution are difficult to answer. When we look at the statistics, African Americans certainly have had a smaller share than whites in political offices, but whether such circumstantial evidence is sufficient to demonstrate that racial discrimination exists in the voting system was left for the judicial branch to decide.

II. *MOBILE* AND THE VOTING RIGHTS ACT AMENDMENT OF 1982

The Significance of *City of Mobile v. Bolden* (1980)

In the decade after the Voting Rights Act went into effect, the Supreme Court was asked to express its position on whether the reduced chance for African Americans to elect whom they wanted was

enough to constitute racial discrimination.[22] In *Forston v. Dorsey* (1965), it ruled that multimember districts as opposed to single-member districts can be unconstitutional depending on the circumstances, and thus it touched upon the question of racial vote dilution. In *Allen v. State Board of Election* (1969), the court expanded the concept of "voting" covered by the Voting Rights Act and ruled that even changes in the election rules that potentially reduce the voting influence of minorities should come under the clause of preclearance. In *White v. Regester* (1973), "the totality of the circumstances" was adopted as the new criterion for determining vote dilution, and *Zimmer v. McKeithen* (1973) specified "primary factors" and "enhancing factors" constituting such totality.[23] In *Beer v. United States* (1976), the court banned "retrogressive" changes in election rules that would reduce the voting power of a certain minority group.

When the court was actively promoting the concept of and protection against vote dilution, an unexpected ruling was made in the *Mobile* case, which questioned the constitutionality of the at-large election system the city of Mobile adopted around the turn of the century. Ruling against the claim of the plaintiffs that Mobile's at-large system had reduced the political influence of African Americans since they constituted about one-third of the city population, but none had ever been elected to the City Commission, the divided Supreme Court claimed that the at-large system itself was not racially discriminatory and that in order to prove racial discrimination, such "intent" should be shown, a requirement which has since been called the "intent test."[24] The Supreme Court then remanded the case to the district court for further evidence.

Mobile shifted the court's position from its previous decisions in two regards. One was its narrow interpretation of the Fifteenth Amendment, saying it only prohibits denying the "act of voting" and vote dilution is not included in this protection. The other was a strict application of the Fourteenth Amendment, saying individual intent is the key for determining racial discrimination as in other civil rights cases. In *Mobile*, the plaintiffs could ultimately win in the district court because historians since then found an intent for racial exclusion in the city legislative record. In many cases of changes in local election rules preceding the Voting Right Act of 1965, however, it is likely that the proceedings were not recorded, or when such records were available, statements of racial discrimination were often not made public but

kept secret. Providing the "intent" of discrimination, thus, turned out to be an almost impossible task.

Applying the same standard of individual intent as in the cases of civil rights to the political cases remains a problem. Choosing a candidate falls in the domain of individual political freedom, and there is no way to force somebody to choose or not to choose a particular candidate based on his/her race. Such selection can, however, be motivated by racial prejudice, which more likely exists in one's thoughts than in public statements. This raises the question of whether using a subjective indicator like "intent" is appropriate, or whether more objective indicators should also be used in uncovering racial discrimination.

The case of *Mobile* was so controversial that the ruling was determined not by a majority but by a plurality of four justices who were joined by two concurring justices, while three dissented.[25] The Supreme Court could not therefore reach a lasting definition of political equality through *Mobile*, but the practical effect of the "intent test" started to be seen in subsequent lower court rulings—it practically denied the opportunity to solve the vote dilution cases through litigation.

Congressional Reaction to the "Intent Test"

The ruling of *Mobile* went not only against decisions the court had made on minority voting rights cases, but also against its general support for promoting minority rights as seen in the affirmative action cases. The civil rights activists strongly opposed the strict "intent test" and the narrow interpretation of Section 2. The "intent test" especially made a clear contrast with the vote dilution precedent of *Reynolds v. Sims* (1964), which ruled against malapportionment without requiring the plaintiffs to show the "intent" of discrimination. The fact that racial vote dilution was not treated with the same standard as *Reynolds*, but that a strict standard was applied to it, invited strong criticism from civil rights activists as well as Justice Thurgood Marshall.[26]

The timing of the ruling of *Mobile* coincided with the beginning of Ronald Reagan's administration alongside a Republican Senate, both of which were considered not to support minority rights. Members of the court who were to be appointed by them were expected to move it toward the right, so civil rights activists strongly lobbied liberal Democrats in Congress to decide that if litigation could not be expected to solve African American voting dilution cases, a legislative solution was needed. On the agenda was the question of extending Section 5 of

the Voting Rights Act before it would expire in 1982. The supporters of minority voting rights in Congress also tried to use this opportunity to include an amendment on the vote dilution question in Section 2, thus practically neutralizing the effect of *Mobile*. The House Judiciary Civil and Constitutional Subcommittee took up the issue in 1981, and held 18 days of hearings with 157 witnesses. Organizations which testified covered a wide range and thereby reflected a strong concern among the American public. These included civil rights groups such as the National Association for the Advancement of Colored People (NAACP) and its various subdivisions, the National Urban League, the King Center and Operation PUSH (People United to Save Humanity), feminist organizations like the League of Women Voters, public interest groups like Common Cause, and professional organizations such as the Lawyers' Committee for Civil Rights Under Law.[27]

The opinions in Congress, of course, were diverse. Some conservative representatives even challenged the extension of Section 5 itself, claiming that the role of the Voting Rights Act had ended since there was no longer any voting discrimination. To counter such claims, evidence of continuous discrimination was presented, among which was the list of objections in pursuant to Section 5 (1974–1981).[28] Other than Texas, whose question is more about Hispanics than African Americans, large numbers of cases were raised in Georgia (50), Alabama (36), South Carolina (34) and Mississippi (33). An outright denial of the vote was no longer included in the evidence, but a number of cases were related to problems concerning polling places, such as their being set up too far from African American residential areas or those for African Americans being changed on short notice. Among other cases were re-registration procedures which reduced the new registration ratio and indirectly discouraged voting among African Americans by requiring re-registration during office hours in the majority residential areas. Given such evidence of prevalent voting discrimination, the committee supported the bill extending Section 5 permanently, while members of the south and the west strongly opposed it. They claimed that the requirements for the "bailout" were too rigid under the existing law, no state had ever been released from the coverage, the preclearance requirements were regionally unbalanced, and the south was unfairly burdened with the test. One member even compared the ratios of African Americans who voted in the north to refute the claim of voting discrimination in the south: while 59.5% of African Americans in Mississippi

and 51.3% in South Carolina voted, only 40.4% in New York and 38.4% in Massachusetts voted in 1980.[29] As it seemed unavoidable to extend Section 5, opponents sought to acquire a much easier requirement for the bailout in exchange for extending it permanently.

Another focus in the debate was the vote dilution question, which involved most of the cases mentioned earlier. They were raised either in terms of redistricting or the method of election (mostly at-large). Directly responding to *Mobile*, many committee members agreed that the intent test made it too difficult to prove the existence of vote dilution.[30] The result test which uses the proportion of elected minorities as an alternative criterion was introduced in the debate, but the appropriateness of the concept of group representation was then questioned. The idea of including in the permanent section of the Act language which aimed to secure the election of certain minorities was opposed as "affirmative manipulation."[31]

The same question was raised again on the floor, and two opposing views were presented. The opponents of the result test felt that to include the vote dilution cases into Section 2 would be a "transformation of the purpose of the Voting Rights Act aimed at getting people registered to insure that certain groups have electoral representation."[32] The supporters argued that the legislative history of the original Voting Rights Act actually supported the concept of the result test rather than that of the intent test, thus this amendment was a legitimate congressional action.[33] There was strong resistance to the concept of proportional representation, which is supposed to be the logical extension of the result test, but adopting the result test as a means to facilitate vote dilution litigation was widely supported. Thus, the House overwhelmingly passed the Voting Rights Amendment with the result test at 389 to 24. The small number of opponents were predominantly southerners, 14 Republicans and six Democrats, indicating the stubbornness of southern resistance.[34]

The following year, the Senate considered the bill the House had passed. Although extending Section 5 permanently was not regarded as acceptable, the majority of the Senate Judiciary Committee recognized its necessity at the time and therefore decided to extend it for ten years. Bitter controversy resulted over the amendment of Section 2. Unlike the House which bypassed the question of how the result test and proportional representation were connected, the Senate Judiciary Constitutional Subcommittee regarded that "proportional representation

is the inevitable result of the proposed change in section 2, notwithstanding the disclaimer." It also quoted testimony against proportional representation to support its position:

> Nothing could be more alien to the American political tradition than the idea of proportional representation. Proportional representation makes it impossible for the representative process to find a common ground that transcends factionalized interests.[35]

The Senate Judiciary Committee thus sent a report to the floor without mentioning the result test.

The floor debate was virtually stopped by the filibuster of Senator Jesse Helms (R-N.C.) and others, who spoke for eight days before it was finally stopped by cloture. On the floor, Senator Robert Dole (R-Kan.) tried to adopt a compromised amendment that he hoped would be accepted by the House. The compromised bill decided to extend Section 5 for 25 years (neither permanently as the House bill stated nor only for ten years as the Senate Committee Report recommended) and included the result test with conditions.

Eventually Congress succeeded in writing two points into Section 2 to clarify what violates the Voting Rights Act, and both of them challenged the ruling in *Mobile*. One was that vote dilution, defined as the situation when "members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," is in violation of the Act. The other is that not only "intent" but also "result" can be used as a standard for determining vote dilution—"deny or abridge" was replaced with "in a manner which results in a denial or abridgement" to include dilutions that are not clearly intended, and "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" was added as a specific criterion for the result.

The amendment, however, included further clarification so that its opponents could accept the result test: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." By adding this, Congress tried to avoid establishing proportional representation as the new political right of minorities. These two pieces of clarification, accepting the result test as a method and denying proportional representation as its outcome, however, could be contradictory as the Senate Judiciary

Committee report warned against it. Interpretation of the language was again left to the judiciary.[36]

The Reagan administration, having lobbied against its passage, expressed its unhappiness by claiming "there are differences over how to attain the equality we seek for all our people,"[37] but Reagan did not veto the compromised bill given the large margin of congressional supporters that included southern Democrats.

III. MAJORITY-MINORITY DISTRICTS AND EQUAL REPRESENTATION

Activist Solutions through *Thornburg v. Gingles* (1986)

The Amendment of 1982, as it was intended, functioned to facilitate vote dilution litigation, and the success rate of plaintiffs in Section 2 cases exceeded 90% in the four years after it was passed.[38] It aimed at securing equal representation for minorities by defining what constitutes and how to determine a "violation" of political equality, thus preventing the erosion of minority political power. Furthermore, an activist path to empowering minority groups was sought through the case of *Thornburg*.

Thornburg was raised in 1982 as a vote dilution case in a multimember district, but before the trial took place, Section 2 was amended, so the court then relied on the "result test." The court raised doubts about the theory that race must be the primary determinant of a voter's choice of candidates, and regarded age, religion, income, and education as more relevant to voters and incumbency, campaign expenditure, name identification, and media use as more relevant to the candidates than race. At the same time, however, it recognized the correlation between race and a voter's choice as a reality.[39] Because the electoral outcome of minorities might be attributed to racial vote dilution, a specific case should be seen in the "totality of [its] circumstances." As the components of the "totality of circumstances," which would trigger a violation of the Voting Rights Act, the court pointed out three conditions: the practice of racial block voting (e.g. whites vote in a block to defeat a minority's choice), the existence of a substantial proportion of a minority population in an area, and the existence of a coherent voting pattern within a minority group.

The court ruled that if racial block voting as a "phenomenon" exists

regardless of the intention of each individual, and if African Americans are both geographically concentrated and politically coherent to constitute a common interest group, but have not been able to elect their favorite candidate, racial vote dilution exists, and thus their right to elect their own representative must be enhanced regardless of the intent of the majority. It also presented the "nonretrogression standard," meaning that the electoral influence of minority groups should not be weakened as a result of changes in a voting system.

The court did not specifically determine that a minority group's choices were to be the candidates of their own racial or ethnic group, but since the ruling relied on Section 2 of the Amendment of 1982, which stipulates "the extent to which members of a protected class have been elected to office" as one of the criteria used in the result test, this identification was presumed to be implied. Thus *Thornburg* is interpreted to set the rule for mapmaking in areas where racial discrimination exists in voting (broadly defined) in the following ways:

a. If an at-large district is divided into new single-member districts, majority-minority districts (districts where the members of the minority group(s) constitute the majority of the voting population) must be created close to the ratio of the minority population so that the number of minority candidates elected can approximate the minority's political influence in the previously-existing district.

b. If redistricting takes place, the drawing of boundaries should be done in such a way that a maximum number of majority-minority districts can be created.

According to these conditions, if interpreted strictly, the minority population should be geographically compact and politically coherent in order to be entitled to such majority-minority districts. In subsequent mapmaking, these conditions were not given enough consideration, while the mandate for creating the maximum number of majority-minority districts seemed to be overly emphasized.

Majority-Minority Districts and Their Legal Question

Lower courts started to use *Thornburg* as a standard for their rulings, interpreting that the Supreme Court mandates the states to enhance the chances for electoral success among minorities wherever possible, and an increasing number of local district changes were made to produce so-called majority-minority districts. A substantial change to

reflect the Voting Rights Act Amendment of 1982, however, did not take place until the nationwide congressional redistricting after the 1990 census. Except for seven at-large states, 43 states redrew district boundaries, and among them were those states which were required to go through the preclearance of Section 5.

While districts for local elections tend to be small enough to create majority-minority districts with ease, congressional districts tend to be larger and cover more diverse areas. Thus, it is sometimes difficult to find a sufficient proportion of African Americans (65% is said to be a safe number for electoral success) in geographically compact areas, especially in rural areas. The state legislatures, mostly run by Democrats, also tried to protect the partisan interests of incumbents by leaving enough Democratic voters in the areas remaining under Democratic incumbents. Faced with the mandate to maximize majority-minority districts, insufficient African American concentration, and partisan interests, the new districts sometimes turned out to have bizarre shapes. Some examples of districts which raised questions include Georgia 11th (64% African American), Florida 3rd (55% African American), Florida 23rd (52% African American), Louisiana 4th (66% African American), North Carolina 1st (57% African American), North Carolina 12th (55% African American), and South Carolina 6th (62% African American) (see the maps at the end of this article).

Intentionally creating majority-minority districts soon invited legal challenges. Whites in such districts claimed that their right to equal protection under the law was violated by the creation of such districts since the minorities would be getting greater protection and that they were used only as a "filling population" in such districts. Such claims were raised especially in geographically quilted districts, where the newly combined areas were not compact or did not share any historical or traditional political interests, the criteria used in conventional mapmaking.

The odd shapes of the districts above certainly triggered legal challenges, but the fundamental questions raised in these cases were about what constitutes equal and fair political representation. As long as the American political system maintains rule by the majority, rather than being based on proportional representation, not everyone can be represented by the person he/she voted for, which is more so the case when the representatives are chosen by a plurality. If political freedom based on an individual's free choice is to be appreciated, however, such

an outcome should be accepted as the price. There can never be an absolute guarantee for everyone to elect his/her choice, and no one wants to give up his/her share in order to guarantee the election of somebody else's choice.

When whites discovered they were placed in majority-minority districts as a "filling population," they therefore challenged the outcome. There have been numerous cases of partisan gerrymandering, but opposition to it has not been as intense as in instances of racial gerrymandering. Although people can change their party affiliation, receive better education and move up or down socio-economic ladders, they cannot change their race, which along with ethnicity and religion touch upon their identity. So if they are divided along such lines, there is no way to bridge different groups together. We have to remember that African Americans had been treated as a filling population for white districts for a long time, and they could not change that situation. If the result of *Thornburg* is only to replace African Americans with whites, rather than bridging the races, the concept of political equality has not made sufficient progress.

Among the contested districts, Louisiana 4th became the test case for how the court would interpret Section 2. In *Shaw v. Reno* (1993), the Supreme Court did not rule that majority-minority districts were unconstitutional, but recognized they were useful if narrowly tailored to further a compelling governmental interest. It did, however, warn that majority-minority districts based solely on race could be regarded as unconstitutional. Justice Sandra O'Connor also commented that "racial gerrymandering, even for remedial purposes, may Balkanize us into competing racial factions."[40]

Following this ruling, the drive for majority-minority districts slowed down, and in some cases, redrawing the boundaries was ordered so that geographical compactness could be restored even at the cost of a minority's political influence. In *Johnson v. De Grandy* (1994), the Supreme Court further ruled that the *Thornburg* criteria did not suffice to force creating majority-minority districts.[41]

One North Carolina redistricting expert remarked about the process: "It's almost as if you had a speed limit sign saying, 'Maximum speed 55, minimum speed 65.' "[42] Without enhancing the political rights of minorities, overall political equality cannot be reached, but overall political equality can be abridged by the very process of such enhancement. How to balance these remains to be solved.

African American Interests and Fair Political Representation

The short-term political effect of the majority-minority districts seems to be positive. In the elections of 1982, 15 out of the 16 African American freshman members of the House of Representatives were elected from majority-minority districts, and they included the first African Americans elected from the southern states since the turn of the century.[43] Without the creation of majority-minority districts, achieving such a result would have been very difficult for African Americans.

Unlike the legal questions raised against majority-minority districts, their negative political effect was less obvious, but in the long run it could be quite significant. It is true that the shift from the at-large system to the single-member system at the state and local levels brought about an increase in African American political power. At the federal level, however, even with the increased number of African American congressional members, they cannot constitute a winning majority. Even if their number were increased further to equal the African American percentage of the entire voting population, only a dozen or so would be added. Given the ruling in *Shaw*, such a limited increase is not likely to take place in full, but still an increase might help achieve different legislative results, as it might have in the case of the Omnibus Crime Bill of 1991. The voting record shows that despite the Democratic leadership's push, all the white Democratic members from Alabama, Louisiana and Mississippi, and all but one each from Georgia and North Carolina opposed the provision that allows recognizing death penalties given disproportionately to African Americans as a form of racial discrimination.[44] One additional African American vote might symbolically change the political landscape in such emotionally charged cases.

Generally, if African American members want to get bills on their agenda passed, they have to form coalitions. For example, the Congressional Black Caucus (CBC) attempted to pass a substitute in the Fiscal Year 1994 Budget Resolution with additional defense cuts and tax increases so as to use more money for education, job training, health, and other domestic programs, all of which greatly concern African Americans. Other than the 36 Democratic CBC members, only one Republican, one Independent, and 49 Democrats supported the CBC substitute, which left it far short of passage. On the other hand, in the

case of the Fiscal Year 1994 Appropriations for the D.C. Crime and Youth Initiative, for which the Democratic leadership took the initiative, the attempted budget cut was defeated with the help of five Republicans and nearly 200 Democrats that did not include 21 southern Democrats.[45]

The liberal to moderate Democrats who joined such coalitions to support the African American agenda are more likely than the Republicans and conservative Democrats to lose their seats because of the majority-minority districts. African American votes they have received will be taken away from them when the majority-minority districts are created, and some white liberal to moderate Democrats have already faced difficult campaigns. For example, the defeats of three Democratic incumbents by Republican opponents in the elections of 1992 may be directly attributed to the creation of majority-minority districts: Ben Erdreich lost to Spencer Bachus in Alabama 6th, Tom McMillen lost to Wayne T. Gilchrest in Maryland 1st, and Jerry Huckaby lost to Jim McCrery in Louisiana 5th.[46]

As these cases demonstrate, the creation of majority-minority districts enhanced not only African American power, but also Republican power as a by-product. In Georgia alone, Republicans increased their House seats from one to four, partly because creating the 11th district diverted Democratic votes from the 1st, and making the 2nd district majority African American shifted Democratic votes from the 3rd. In 11 southern states together, the number of Republican congressmen jumped from 39 to 48.[47] That is why the Republican party, which has little enthusiasm for African American political empowerment, was quite eager to support the creation of majority-minority districts.[48] For liberal white Democrats and African Americans combined, majority-minority districts may end up in a zero-sum or even a negative-sum game, and Congress may become ideologically whiter and more Republican.

Even at the cost of a potential decline in aggregate liberal political power, some African Americans still want to have their own people representing them, which raises the question of whether African Americans can be represented fairly only by African American officials and leads to two contradictory concepts of representation. One is representation by description, meaning that one must be represented by a person of the same gender, race or religion. The other is representation by substance, meaning that one can be represented fairly by a person who

does not belong to the same group or groups as long as common interests are represented.[49] In American political history, descriptive representation has certainly served as a symbolic indicator of a particular ethnic group's status in society, and as the group moved closer to the mainstream, more of its members were elected to office. Electing African Americans can break the "pattern of behavior" of both whites and African Americans themselves based on existing stereotypes, and racially mixed governing bodies can present different viewpoints.[50]

Descriptive representation, however, is neither necessary nor sufficient for promoting African American interests. As Swain's research has shown, if the percentage of African Americans is substantial in their district, white politicians have not neglected their power of votes.[51] As long as the votes are not denied or diluted, political necessity rather than good intention works as the vehicle for fair representation. On the contrary, insisting on descriptive representation may function to divide society into "we" and "they," leaving little room for compromise. As groups claiming "their" particular interests increase in number, the lines cutting across American society will make it more fragmented.

Moreover, not all African Americans are politically coherent or necessarily share the same values, as is reflected by some who hold public office. Examples include CBC member Gary A. Franks (R-Conn.), who represents a predominantly white conservative district and constantly votes against CBC positions, and Justice Clarence Thomas who is widely known to be critical of affirmative action. When African Americans are increasingly polarized into upper middle class and underclass and cease to present a monolithic profile, the rationale for descriptive representation also ceases to exist because what certain African Americans believe to be "their" interests may not be shared by African American candidates running from their districts.

One factor that attracted African Americans to descriptive representation was their frustration with the existing parties, which failed to deal sincerely with certain issues such as the concentration of poverty and crime among African Americans, which a majority of them feel more strongly about than do other groups. This was particularly true during the Republican administrations of Presidents Reagan and George Bush. The Democratic Party also aimed to move toward the center to regain the white middle class at the expense of minorities, which caused some African Americans to feel that having their own po-

litical party was necessary to represent their interests substantially as well as descriptively. This sentiment has since then subsided somewhat because in terms of effectively influencing policy, working inside the Democratic Party is still more realistic.

One alternative to the dichotomy caused by majority-minority districts is illustrated by the attempt of New York City to go beyond the remedy of majority-minority districts to meet the subtle needs of each community. One of the reasons is the city's diverse racial and ethnic composition which has led not only to an African American-white cleavage, but also to multiple ethnic cleavages across the city. Such a city can only be maintained effectively by representing community-based concerns and interests, rather than those of a single group.[52]

This attempt by New York City reminds us of the principle of political representation: once an election is over, the person elected represents everyone in the district, rather than a particular group of people. If creating majority-minority districts makes African Americans divert from this principle and only seek to expand their influence, they will be isolated and the rest of society may become less sympathetic to African American concerns. A recent study shows some optimism about African American politics. As majority-minority districts expanded the membership of the CBC, African American members moved toward the center and started to represent the interests of their white constituents as well as those of African Americans.[53]

CONCLUSION

As the ruling in *Shaw* indicates, Americans should be able to exercise their political rights in a colorblind way. However, if being colorblind at the present only results in perpetuating existing racial discrimination, such conduct cannot be regarded as racially neutral. The present situation of African Americans cannot be truly understood without placing it in a historical context. If African Americans need political empowerment in order to have a level playing field, favorable rather than racially neutral measures are required.

Political empowerment of African Americans, however, does not necessarily require their being represented by African Americans. They can be represented fairly by non-African Americans, or their interests may cut across racial lines, but such claims can only be considered fair if whites accept them and put them into practice. The data presented

above indicate a persistent resistance among whites to being represented by African Americans or members of other minority groups. If representation by one's own people has any symbolic value, denying its utility to minority groups only would not be acceptable.

The widely shared belief in race-specific interests is also making it difficult to accept colorblind representation. As the middle class expands among African Americans, class rather than race is said to define their interests. Ironically, however, certain class-based problems are disproportionately concentrated among African Americans, thus making them significant in a racial context. More fundamental policies are required to deal with the root causes of such problems so that class problems increasingly reinforced by racial cleavage can be avoided.

Similar to affirmative action, majority-minority districts are intended to be a temporary measure within the framework of single-member districts to compensate for past injustices. Some local elections have shifted away from single-member districts by introducing "limited" or "cumulative" voting systems to secure minority representation. Nationally, however, American society is not likely to move toward proportional representation as the congressional debate above has indicated, and the single-member system requires a much stronger intention than proportional representation to realize the politics of inclusion.

If, however, equal "result" in politics is mistaken to be the number of African Americans elected, majority-minority districts as temporal measures may intensify, rather than soften, racial hostility and perpetuate racial divisions, resulting in a long-term negative effect for African Americans. This is because majority-minority districts may encourage African Americans to stick to their exclusive rights to be represented only by their own members in proportion to their number in society at large, thus becoming a permanent minority, instead of being politically integrated beyond racial lines.

Unrestricted exercise of the right to vote is the primary factor constituting "equality of opportunity," but it is not the sole factor. Every eligible person should be equally encouraged to vote, every vote cast must be given the same weight, and one's aspiration to run for office must not be dismissed on unrelated grounds such as race. The number of minorities elected, in that sense, can function as an interim indicator to show whether the "totality of opportunity" is equally provided, but the number cannot be the "result" itself. Political equality is not an en-

forceable "result" coming out of the system, but ultimately derives from the voluntary will of an individual to go beyond such problems as racial discrimination.

Notes

[1] Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics*, 4th ed. (Washington, D.C.: CQ Inc., 1994), 87–88.

[2] See Barbara C. Burrell, *A Women's Place is in the House: Campaigning for Congress in the Feminist Era* (Ann Arbor: University of Michigan Press, 1994), chapter 2, "American Views of Women as Political Leaders" (15–33).

[3] Albert C. McLaughlin and Albert Bushnell Hart, *Cyclopedia of American Government*, vol. 2 (Gloucester, Mass.: Peter Smith, 1963), 517. In 1861, only Maine, New Hampshire, Massachusetts, Rhode Island and New York out of the 34 states allowed African American suffrage.

[4] Lucius J. Barker and Mack H. Jones, *African Americans and the American Political System*, 3d ed. (Englewood Cliffs, N.J.: Prentice Hall, 1994), 241. Eight representatives were from South Carolina, four from North Carolina, three from Alabama and one each from Georgia, Florida, Louisiana, Mississippi and Virginia.

[5] As time passed, the grandfather clause virtually lost its significance, but poll tax requirements continued to exist, as did literacy tests which played a central role in voting restrictions.

[6] See Koji Takenaka, *Shikago kokujin getto seiritsu no shakaishi* (Social History of the Development of the Black Ghetto in Chicago) (Tokyo: Akashi Shoten, 1995), chapter 10 (393–453).

[7] The Supreme Court ruled that the 14th Amendment only gives power to Congress to regulate state actions, not private actions. *Civil Rights Cases*, 109 U.S. 3 (1883).

[8] *Smith v. Allwright*, 321 U.S. 649 (1944).

[9] Chandler Davidson and Bernard Grofman, eds., *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990* (Princeton: Princeton University Press, 1994), 45, 107, 137 and 195–96 respectively.

[10] Chandler Davidson, "The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities," in Davidson and Grofman, eds., *Quiet Revolution*, 30–31.

[11] The first extension was made in 1970, and Section 4 was made permanent at the same time. The second extension was made in 1982, and the next is expected in 2007.

[12] James E. Alt, "The Impact of the Voting Rights Act on Black and White Voter Registration in the South," in Davidson and Grofman, eds., *Quiet Revolution*, 374. The eleven southern states were Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

[13] Stanley and Niemi, *Vital Statistics on American Politics*, 399.

[14] House Judiciary Committee, *Voting Rights Act Extension* (Report No. 97–227) (Sept. 15, 1981), 10.

[15] Stanley and Niemi, *Vital Statistics on American Politics*, 402–4.

[16] Alt, "The Impact of the Voting Rights Act," 370.

[17] *Thornburg v. Gingles*, 1986 U.S. Lexis 121, 52; 92 L. ed. 2d 25, note 28.

[18] Quoted in Lani Guinier, "No Two Seats: The Elusive Quest for Political Equali-

ty," *Virginia Law Review* 77 (1991): 1428.

[19] See the cases of Michigan (1986) and New York (1989) in Andrew Hacker, *Two Nations* (New York: Scribners, 1992), 204–5.

[20] *Congressional Record* (Oct. 2, 1981), H 6848. Data given by Jonathan B. Bingham (D-N.Y.).

[21] *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

[22] Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), 899–902, and Davidson and Grofman, eds., *Quiet Revolution*, 37.

[23] Primary factors are a lack of minority access to the slating of candidates, the unresponsiveness of a legislature to their particularized interests, a tenuous state policy preferring at-large voting, and a history of past discrimination limiting political participation. Enhancing factors are large districts, majority vote requirements, a prohibition against voting for less than a full slate, and an absence of geographical subdistricts for candidates' residency. Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (Cambridge: Cambridge University Press, 1992), 34.

[24] 446 U.S. 55, 100 S. Ct. 1490, 64 L.Ed 2d 47 (1980).

[25] The plurality consisted of Justices Potter Stewart, Lewis F. Powell, Jr., and William H. Rehnquist and Chief Justice Warren E. Burger. Justice John Paul Stevens concurred in the judgement, Justice Harry A. Blackmun concurred only in the result, Justice Byron R. White wrote a dissenting opinion, and Justices Thurgood Marshall and William Brennan joined in a separate dissent.

[26] Grofman, Handley and Niemi, *Minority Representation and the Quest for Voting Equality*, 37–38.

[27] House Judiciary Committee, *Extension of the Voting Rights Act* (Hearings, Parts 1–3) (May 6, 7, 13, 19, 20, 27, 28, June 3, 5, 10, 12, 16, 17, 18, 23, 24, 25, and July 13, 1981).

[28] *Congressional Record* (Oct. 5. 1981), H 6941–43.

[29] Statement by Carroll A. Campbell (D-S.C.). *Congressional Record* (Oct. 5, 1981), H 6867.

[30] House Judiciary Committee, *Extension of the Voting Rights Act* (Part 1), 184.

[31] House Report No. 97–227 (House Judiciary Committee), *Voting Rights Extension*, 72.

[32] Statement by James Mitchell Collins (D-Tx). *Congressional Record* (Oct. 5, 1981), H 6863.

[33] An example is seen in the statement to this effect by Peter Rodino (D-N.J.) in *ibid.*, H 6842.

[34] *CQ Almanac 1981* (Washington, D.C.: CQ Inc., 1982), H 76–77.

[35] Senate Judiciary Committee, *Voting Rights Act* (Report) (1982), 40–41. The quotation is from the testimony of Professor Edward Erler of the National Humanities Center.

[36] PL 97–205 (June 29, 1982).

[37] *Public Papers of the Presidents, The Administration of Ronald Reagan, 1982*, 823.

[38] Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Cambridge, Mass.: Harvard University Press, 1987), 228.

[39] 1986 U.S. Lexis 121, 8; 92 L.Ed. 2d 25, notes 31 and 32.

[40] *Time* (July 12, 1993), 31.

[41] *CQ* (July 2, 1994), 1825.

[42] *CQ* (July 3, 1993), 1761.

[43] The first African Americans elected from the southern states were Earl F. Hillard (D-Ala.), Corriene Brown (D-Fla.), Alcee L. Hastings (D-Fla.), Carrie Meek (D-Fla.), Eva Clayton (D-N.C.), Melvin Watt (D-N.C.), James Clayton (D-S.C.) and Robert C. Scott (D-Va.).

[44] *CQ Almanac 1991* (Washington, D.C.: CQ Inc., 1992), H 78–79.

[45] *CQ* (March 20, 1993), 700–1, and *CQ* (July 3, 1993), 1778–79.

[46] *CQ* (November 7, 1992), 3580-81.

[47] "An Old War, a New Fight," *U.S. News and World Report* (Sept. 26, 1994), 53.

[48] Refer to the opposing views of Benjamin L. Ginsberg, Chief Counsel of the Republican National Committee, and Jeffrey Wice, Counsel to the Democratic State Legislative Leaders Association, in *Editorial Research Reports* (Feb. 15, 1991), 109.

[49] Carol M. Swain, *Black Faces, Black Interests* (Cambridge, Mass.: Harvard University Press, 1993), 5.

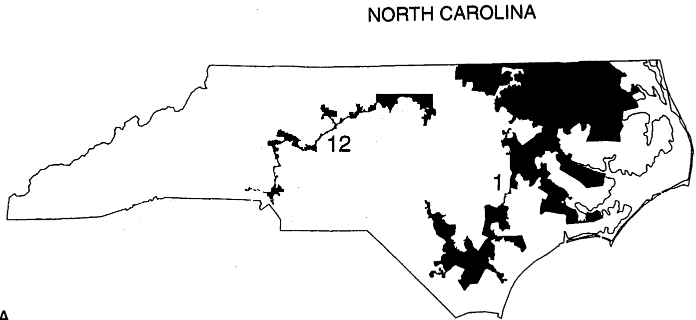
[50] Thernstrom, *Whose Votes Count?*, 239.

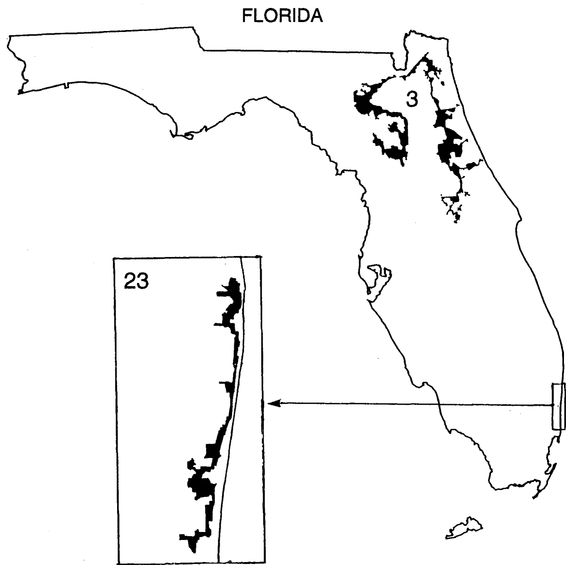
[51] Swain, *Black Faces, Black Interests*, chapters 7 and 8 (145–89).

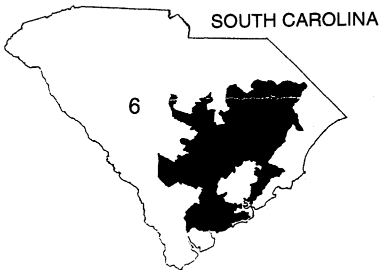
[52] Frank J. Macchiarola and Joseph G. Diaz, "Minority Political Empowerment in New York City: Beyond the Voting Rights Act," *Political Science Quarterly* 108 (1993): 55.

[53] David T. Canon, "Redistricting and the Congressional Black Caucus," *American Politics Quarterly* 23, no. 2 (1995): 159–89.

Maps







These maps are based on Jon Preirnesberger and David Tar, eds., *Congressional Districts in the 1990s* (Washington, D.C.: CQ Inc., 1993), 164, 191, 203, 316, 548, and 668.