

JUSTICE THOMAS AND THE VOTING RIGHTS ACT

*Judge Edith H. Jones**

It is a pleasure to participate in a Special Issue of Regent University's Law Review honoring Justice Clarence Thomas. A fitting topic for this occasion is Justice Thomas's concurrence in *Holder v. Hall*,¹ interpreting the 1982 amendments to the Voting Rights Act. This opinion encapsulates the late 20th century debate over judicial activism and the transition to a truly integrated multi-racial society. The *Holder* concurrence is a tribute to candor, clarity, and courageous independent legal thinking. If it does not eventually become the law of the land, it will nonetheless be regarded as an insightful analysis of the intractable problems that confront judicial attempts to restructure American society by redistricting its legislative bodies.

Voting rights litigation has become a continuation of politics by other means. Nearly thirty years ago, the Act substantially accomplished the enfranchisement of black Americans.² The preoccupation of interest groups in recent decades has been to extend the Act beyond the ballot to the racial makeup of representation in legislative bodies. The principal vehicle for this crusade is litigation founded on claims, brought under Section 2 of the Voting Rights Act, that minority citizens' votes are "diluted" if minorities are usually outvoted by white citizens in legislative districts and are unable to elect minority representatives.³ Simply stating the vote dilution theory evokes its complexity, its fundamentally political character, and the need for shadings, qualifications, and caveats at every turn. Nevertheless, this unwieldy theory and the Court decisions expounding it have controlled legislative districting decisions from every hamlet to the United States Congress since the early 1970s.

Justice Thomas's concurrence in *Holder* asserted that vote dilution is not a concern of the Voting Rights Act, properly interpreted. As a matter of statutory interpretation, Justice Thomas's arguments are strong; only a few critics have dared tackle them on the merits.⁴ But the

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¹ 512 U.S. 874 (1994).

² See Abigail M. Thernstrom, *Whose Votes Count?* 18 (1987).

³ Section 5 of the Voting Rights Act has also been interpreted to comprehend vote dilution claims within the scope of preclearance authority granted to the Justice Department. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969). Section 5 preclearance applies only to specific parts of the United States, however, and its impact is correspondingly limited. *Holder* does not consider Section 5, and I will not do so either.

⁴ See, e.g., Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV.

power of the concurrence transcends the verdict on his specific position, for, if Section 2 as amended is even ambiguous about coverage of vote dilution claims, courts have interpretive discretion.⁵ Courts need not undertake the task of fabricating ever more complex vote dilution theories if they are unsuited to do so and if the price, toted against institutions of self-government, would be too high.

The virtues and necessities of judicial self-restraint thus lie at the heart of Thomas's concurrence. As will be seen, these questions, emphasized in his opinion, have been raised from the inception of legislative districting cases. Placing the *Holder* concurrence in context with earlier decisions and dissents helps to explain how the Supreme Court created the quagmire that is current vote dilution law. This history, together with observations about the lower courts' dilemma in applying the caselaw and a forecast of the issues that await the next decennial round of redistricting cases, demonstrates the practical wisdom of judicial self-restraint advocated by Justice Thomas.

Stemming back to the Supreme Court's determination in 1961 to make legislative districting "justiciable" and then to declare it the subject of equal protection analysis, a series of powerful, albeit lonely, dissents paved the way for Justice Thomas's opinion in *Holder*. Far from representing an eccentric or novel disagreement with judicial superintendence of legislative districting, Thomas's views reflect and verify the dismay of Justices Frankfurter, Harlan, and Stewart as they tried to discourage the Supreme Court from wandering into the "political thicket"⁶ of redistricting. The themes struck by these justices, dwelling on the amenability of legislative districting to judicial review, are best recalled in the words used as the redistricting saga unfolded.

An idea of debasement or dilution of a citizen's vote, justified only by the "frail tautology that 'equal' means 'equal,'"⁷ drove the Court's reapportionment decisions from the beginning. Justice Frankfurter, dissenting from *Baker v. Carr*, explained that "[t]alk of 'debasement' or

L. REV. 109, 118-20 (1994); Scott Gluck, Note, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 381-83 (1996); Andrea Bierstein, *Millennium Approaches: The Future of the Voting Rights Act after Shaw, De Grandy, and Holder*, 46 HASTINGS L.J. 1457, 1518-21 (1995). But see James F. Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 RUTGERS L.J. 517, 570-71 (1995) (defending Justice Thomas's position).

⁵ Describing the problems inherent in selecting multi-member over single-member districts, Justice Harlan observed: "If courts cannot intelligently compare such alternatives, it should not be readily inferred that Congress has required them to undertake the task." *Allen*, 393 U.S. at 586 (Harlan, J., concurring in part and dissenting in part).

⁶ *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

⁷ *Reynolds v. Sims*, 377 U.S. 533, 590 (1964) (Harlan, J., dissenting).

'dilution' is circular talk. One cannot speak of [these without] a standard of reference as to what a vote should be worth."⁸ In *Baker*, the Court refused to describe "what a vote should be worth," confining its ruling "only" to the abstract justiciability of claims of vote dilution of the individual ballot based on differently populated legislative districts.⁹ Frankfurter foresaw that the Supreme Court's lack of standards for decision would catapult the lower courts into a "mathematical quagmire."¹⁰ Deciding legislative districts is not, he wrote, an appropriate task for the judiciary because there are no "accepted legal standards or criteria or even reliable analogies to draw upon."¹¹ He feared that *Baker* would empower the courts to "devise what should constitute" legislative bodies and would require them to decide among competing theories of representation and political philosophy.¹² All were prophetic words, fortified by his exhaustive review (unchallenged by the majority) of American constitutional and political history and a series of Supreme Court decisions that had steadfastly refused to entertain redistricting claims.

Early reapportionment decisions "solved" the equal protection problem of vote dilution in unequal districts by systematically prohibiting every basis of representation except the one man, one vote principle.¹³ Dissenting from these decisions,¹⁴ Justice Stewart skewered the Court's conclusion that deviation from a standard of proportional population equality was an unconstitutional debasement of the right to vote:

We are not told how or why the vote of a person in a more populated legislative district is "debased," or how or why he is less a citizen, nor is the proposition self-evident. I find it impossible to understand how or why a voter in California, for instance, either feels or is less a citizen than a voter in Nevada, simply because, despite their

⁸ *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

⁹ Vote dilution has been used in the Supreme Court in two ways. First, it describes the relative debasement of an individual's vote when he resides in a legislative district more heavily populated than another district. Second, it refers to the inability of a minority group with distinct political interests to succeed in electing representatives of their group because they are outvoted by the majority of the district. Creating a judicial remedy for either claim immerses the courts in legislative redistricting and engenders similar justiciability problems.

¹⁰ *Id.* at 268 (Frankfurter, J., dissenting).

¹¹ *Id.*

¹² *Id.* at 269, 300 (Frankfurter, J., dissenting).

¹³ See *Reynolds v. Sims*, 377 U.S. 533 (1964), and related cases.

¹⁴ Justice Stewart had concurred in *Baker v. Carr*, but he viewed the Equal Protection Clause as providing no remedy for legislative apportionment unless the challenged district lines wholly lacked a rational foundation. See *Baker*, 369 U.S. at 265. When the Court went on to extend the one man, one vote principle (*e.g.*, to both houses of each state legislature), Justice Stewart began to dissent.

population disparities, each of these States is represented by two United States Senators.¹⁵

Justice Harlan, whose disagreement with judicial reapportionment paralleled Frankfurter's, excoriated the Court's refusal to articulate a precise constitutional test of apportionment as proof that it could not do so:

Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multi-member districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts.¹⁶

Justice Harlan also identified threats to federalism, and ultimately to self-government, in the Court's arrogant interference with the political process of redistricting.

Undaunted by these charges, the Court pursued its rigid policy, assuring that nearly every legislative body in the United States from school boards to seats in local and county government, to state legislatures—everybody except the United States Senate—would be reapportioned, probably under a court's watchful eye.

Dishearteningly, the Court never seriously responded to the dissenters' profound challenges: that legislative districting is political, not judicial business; that there are no judicially manageable standards for decisions; that redistricting by judges affronts representative self-government. While it might appear that the one man, one vote principle is both objective and judicially manageable, and perhaps the Court majority so believed, appearances are deceiving. Legislative districting is more art than science. The art lies in crafting boundaries that facilitate representation, the holding of elections, and, of course, securing victory for one's preferred candidates. No choice of district lines is value-neutral from the standpoint of any of these goals.¹⁷ When, as a result of the apportionment decisions, judges were called on to draw legislative maps, unwittingly or not, their chosen lines had political consequences. If legislators continued to perform the task, bowing to the one man, one vote principle could furnish convenient cover for district lines based on shameless self-interest. As Justice Harlan observed, the Court had

¹⁵ *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 746 (1964) (Stewart, J., dissenting).

¹⁶ *Reynolds*, 377 U.S. at 621 (Harlan, J., dissenting).

¹⁷ *Cf. Baker*, 369 U.S. at 299 (Frankfurter, J., dissenting) ("No shift of power but works a corresponding shift in political influence among the groups composing a society.").

removed any real constraint upon redistricting other than self-interest (and compliance with a mathematical formula).¹⁸ The Court's initial apportionment decisions neither eliminated nor transcended politics; they merely changed the superficial language of the debate and shifted some of the power struggles to the courtroom.

In short order, multi-member legislative districts, then a prominent feature in numerous state legislatures and thousands of municipal governing bodies, attracted judicial scrutiny.¹⁹ Ironically, many multi-member districts had been instituted as a reform measure to counteract the endemic corruption of ward politics.²⁰ The Court nonetheless pointedly described them as often "undesirable" because they made "an intelligent choice among many candidates [on long ballots] . . . quite difficult" and because individual constituencies within the multi-member districts had no single representative of their interest.²¹ A footnote, however, refused to intimate any constitutional flaw in multi-member districts.²²

Only one year later, what the Court had refused to intimate suddenly became conceivable, as the Court was asked to declare that citizens in Georgia's multi-member legislative districts did not enjoy representation equal to their fellows whose districts were represented by single legislators. In *Fortson v. Dorsey*, the Court now pronounced: "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."²³ But as there was no evidence to support the plaintiffs' claim, the Court compounded its non-holding by stating: "This question, however, is not presented by the record before us."²⁴

The Court had moved from not intimating unconstitutionality to not speculating upon the possible unconstitutionality of multi-member districts. Who could be surprised when, within a year, the Court suddenly defined a principle of unconstitutionality—again *in dicta*? This

¹⁸ See *Reynolds*, 377 U.S. at 622–23.

¹⁹ Justice Frankfurter prophetically questioned judicial capability to decide between multi-member and single-member legislative districts in his dissent to *Baker v. Carr*. See 369 U.S. at 328 (Frankfurter, J., dissenting) ("[T]he choice of elections at large as opposed to elections by district . . . is a matter of sweeping political judgment having enormous political implications, the nature and reach of which are certainly beyond the informed understanding of, and capacity for appraisal by, courts.").

²⁰ See *City of Mobile v. Bolden*, 446 U.S. 55, 70 n.15 (1980) (Stewart, J., plurality opinion).

²¹ See *Lucas*, 377 U.S. at 731.

²² See *id.* at 731 n.21.

²³ 379 U.S. 433, 439 (1965).

²⁴ *Id.*

time, the stated constitutional question was the opposite of that raised in *Fortson*: it was alleged that Hawaii's multi-member districts over-represented some geographical areas as compared to single-member districts. Still rejecting the particular claim, the Court now concluded confidently that:

Where the requirements of *Reynolds v. Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."²⁵

Moreover, the Court hypothesized, the "invidious effect" might be shown if "districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators who are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one."²⁶

The basis for challenging multi-member legislative districts had emerged with no discussion at all of what equal representation might mean, whether and how courts would evaluate the relative influence of competing groups within districts (the group theory of representation) or of votes inside and outside the multi-member districts, or whether the claim could involve substantive outcomes of elections.

*Whitcomb v. Chavis*²⁷ only deepened the uncertainty. As the dissenters there observed, black voters supported their case against multi-member districts in Marion County, Indiana, with proof based on the factors identified in *Burns*.²⁸ Further, only a handful of black legislators had been elected in Marion County's history. Yet despite *Fortson* and *Burns*, the plaintiffs failed to prevail.²⁹

Whitcomb was based on minorities' access to election processes rather than proportional electoral outcomes. Where no purposeful racial discrimination had occurred,³⁰ the failure of "ghetto residents" to elect legislators in proportion to their population could not prove discrimination absent evidence that "ghetto residents had less opportunity . . . to participate in the political processes and to elect legislators of their choice."³¹ Indicia of exclusion were lacking: blacks had not been prevented from registering, choosing political party

²⁵ *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson*, 379 U.S. at 439).

²⁶ *Id.*

²⁷ 403 U.S. 124 (1971).

²⁸ *Id.* at 178 (Douglas, J., dissenting in part and concurring in the result in part).

²⁹ *Whitcomb* at least laid to rest challenges founded on a disparity between multi-member and single-member districts.

³⁰ See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

³¹ *Whitcomb*, 403 U.S. at 149.

membership, participating in a political party, or being represented in their choice of candidates. There was no evidence that blacks were excluded from the candidate slates of either party. On the other hand, it was proven that blacks supported the Democrats, and if the Democrats won, so did they.

Moving to broader questions concerning political representation, the Court in *Whitcomb* raised serious doubts about the theory underlying multi-member district challenges and the efficacy of single-member district remedies. The Court noted that each losing voter in a single-member district is just as “under-represented” as a black voter in an overwhelmingly white multi-member district.³² The Court asked rhetorically, how does one measure inequality in such circumstances? Is a voter who supports a losing black candidate more under-represented than the voter who supports a losing white Democrat or losing Republican in years of defeat? Is a ghetto district less represented when its citizens can vote to influence the election of several multi-member district legislators, or when it elects only one or two single-member district legislators? How does one gauge legislators’ unresponsiveness to a minority’s distinct interests, and how does one necessarily remedy this problem by creating single-member minority-dominant districts? Finally, the Court worried that permitting challenges for under-representation could “spawn endless litigation” over claims concerning other “submerged” minorities that could only be solved in the end by proportional representation or cumulative voting.³³

Whitcomb expressed two theories of “equality”: that of equal access to the ballot and that of equal group representation. Equal access to the ballot, expressly compelled by the Fifteenth Amendment, is undebatable and undebatably good. Equality of representation, the theory underlying minority vote dilution claims, was expressly defined in *Whitcomb* to exclude proportional representation of minorities and to include “only” the idea of equal access to political processes. The Court had yet to answer satisfactorily how one diagnoses an unconstitutional lack of equal access in the first place, or how the diagnosis and the remedy exclude proportional representation.

A claim for equality of representational opportunity remained unrealized until the Court heard a challenge emerging from Texas, unsurprisingly a former member of the Confederacy. In *White v. Regester*,³⁴ the Court sustained a challenge to multi-member state legislative districts that had allegedly diluted the black vote in Dallas and the Hispanic vote in San Antonio. The Court accepted the district

³² See *id.* at 153.

³³ See *id.* at 156–57.

³⁴ 12 U.S. 755 (1973).

court's findings, which included all of the factors identified in *Whitcomb* and represented "a blend of history and an intensely local appraisal of the design and impact of the . . . multi-member district in the light of past and present reality, political and otherwise."³⁵ This description of desirable fact-finding procedure, together with the *Whitcomb* indicia of exclusion from the political process, took the place of any rigorous legal standard and became known, though perhaps exaggeratedly, as the "results test."³⁶ Agreeing that minority voters had been systematically excluded from the electoral process, the Court ordered single-member districts as the solution. *White* never addressed the questions about representation set out in *Whitcomb*.

The "results" test was apparently as difficult for minorities to pursue as for courts to apply,³⁷ but it prevailed longer than any previous version of the vote dilution theory. In 1980, however, *White* lost ground to the Court's insistence that the Fourteenth Amendment is violated only in cases of intentional or purposeful discrimination, not simply when the "results of" legislative action unequally affect various groups.³⁸

A political firestorm erupted as minority groups and advocates of their interests pressed Congress to reinstate the "results" test.³⁹ Congress responded in 1982 by amending Section 2 of the Voting Rights Act. The amendment, unaltered since then, stands as an epitome of the art of legislative compromise. Section 2, as amended, reads as follows:

(a) 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 abridgment of the right of any citizen of the United States to vote on account of race or color, . . .

(b) A violation of subsection (a) is established if, based on the totality of 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

³⁵ *Id.* at 769-70.

³⁶ *White* also concluded the "multimember districts [were] being used invidiously to cancel out or minimize the voting strength of racial groups." *Id.* at 765. This conclusion might imply a finding of purposeful dilution. *Bolden*, 446 U.S. at 69.

³⁷ *White* held that the "plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election [are] not equally open to participation . . ." 412 U.S. at 766.

³⁸ See *Bolden*, 446 U.S. 55. It might be more accurate to say that the plurality in *Bolden* disagreed with *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976), and its interpretation of *White v. Regester*, rather than with *White per se*.

³⁹ See generally THERNSTROM, *supra* note 2, at 79-136.

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.⁴⁰

This amended Section 2 plainly borrows from *Whitcomb* (no right to proportional minority representation) and *White* (the “results” test), superimposing these formulations on the preexisting language (quoted from the Fifteenth Amendment) that addressed abridgment of the individual right to vote. Like the Supreme Court, Congress had begged off specifying any exact standard of liability or prescribing any precise remedy.

The most recent chapter in redistricting history was written to interpret amended Section 2. Justice Brennan took the lead in *Thornburg v. Gingles*.⁴¹ While *White*’s results test focused on access to the political process, *Gingles* proposed a threshold measure of results comparing the status quo to a standard approximating representation.⁴² Not only did *Gingles* confirm vote dilution as a basis of Section 2 liability—relying on *ipse dixit* and selected legislative history—but its new test came as close to advocating the proportional representation of racial groups as an artful construction of the provision would allow.⁴³

As Justices Frankfurter, Harlan and Stewart might have predicted, the *Gingles* “test” has proved just as standardless as earlier vote dilution formulations. But *Gingles*’ open-endedness, comparative ease of proof, and bias toward creating minority legislative districts precipitated waves of redistricting legislation following the census-takings in 1980 and 1990. Inevitably, the Supreme Court has been required to address attenuated ramifications of *Gingles*, such as whether plaintiffs could challenge vote dilution in a legislature already divided into single-member districts;⁴⁴ whether Section 2 may require single-member rather than at-large electoral districts for judges;⁴⁵ and whether the

⁴⁰ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973 (1994)).

⁴¹ 78 U.S. 30, 48-51 (1986).

⁴² Under *Gingles*, a plaintiff must prove three preconditions in order to establish a Section 2 minority vote dilution claim: (1) the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district;” (2) the group is “politically cohesive;” and (3) white majority votes sufficiently as a bloc to enable it “usually to defeat the minority’s preferred candidate.” 478 U.S. at 48-51. If these criteria are satisfied, the Court held, the plaintiff must also prove entitlement to relief based on the “totality of circumstances” outlined by *White* and *Zimmer*. See *id.* at 79.

⁴³ See *Gingles*, 478 U.S. at 94 (O’Connor, J., concurring).

⁴⁴ See *Voinovich v. Quilter*, 507 U.S. 146 (1993).

⁴⁵ See *Chisom v. Roemer*, 501 U.S. 380 (1991).

provision requires maximization of minority seats.⁴⁶ *Holder*, too, called for post-*Gingles* exegesis.

Holder posed the question whether the size of a local governing body, the Bleckley County Commissioner's Office in Georgia, could be challenged as a device to dilute the black citizens' vote under Section 2.⁴⁷ Georgia law permitted up to five county commissioners, but a 1986 referendum had rejected a multi-member commission in favor of the county's single-commissioner government. Black voters alleged that since they constituted approximately 20% of the county's population, they had the potential to elect one member of a five-member commission. Based on *Gingles*, the plaintiffs' contention was novel on its facts and arguable in principle. Maintaining a single elective official would seem to be the ultimate vote-dilution device, if the other criteria for that cause of action were satisfied.⁴⁸

Despite the logical appeal of their claim, the *Holder* plaintiffs did not persuade a majority of the Supreme Court. Indeed, five members, the dissenters plus Justice O'Connor, believed that Section 2 encompasses a challenge to the size of a governing body, and the dissenters would have allowed the case to proceed.⁴⁹ Justice O'Connor, however, saw no principled remedy for this type of vote dilution, given the numerous possibilities for creating multi-member bodies.⁵⁰ Justice Kennedy and Chief Justice Rehnquist concluded that no cognizable Section 2 vote dilution claim exists because there is no benchmark against which "dilution" concerning the size of a governing body can be measured.⁵¹ Justice Thomas, joined by Justice Scalia, concurred, asserting that proper construction of Section 2 precludes all vote dilution claims; section 2 literally proscribes only those measures that restrict individual access to the ballot, not group-based claims of lack of representation.⁵²

Summarizing Justice Thomas's opinion, and worse, limiting consideration to parts of it, is like chipping a piece off a diamond. The opinion, like a gem, should be viewed intact, its insights merging and reinforcing one another as light rays diffuse through diamond facets. But circumstance constrains me to redact, while hoping that the conscientious reader will be moved to review Thomas's entire opinion. My object is to show how Justice Thomas recapitulated the themes of the

⁴⁶ See *Johnson v. De Grandy*, 512 U.S. 997 (1994).

⁴⁷ See *Holder*, 512 U.S. at 877-78. Challenges under the Fourteenth and Fifteenth Amendment were not ruled upon by the Supreme Court in *Holder* and were remanded to the lower courts.

⁴⁸ See *id.*

⁴⁹ See *id.* at 946-66.

⁵⁰ See *id.* at 885-91.

⁵¹ See *id.* at 884.

⁵² See *id.* at 891-946.

dissenters to the reapportionment decisions, confirming their analyses and predictions of the problems associated with judicially-governed redistricting.

In the introduction to his opinion, Justice Thomas advocates a systematic reassessment of the Court's interpretation of Section 2:

[T]he gloss we have placed on the words "standard, practice, or procedure" in cases alleging dilution is at odds with the terms of the statute and has proved utterly unworkable in practice. A review of the current state of our cases shows that by construing the Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of political theory—questions judges must confront to establish a benchmark concept of an "undiluted" vote. Worse, in pursuing the ideal measure of voting strength, we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success. In doing so, we have collaborated in what may aptly be termed the racial "balkaniz[ation] of the Nation."⁵³

The first part of the opinion⁵⁴ then traces the political decisionmaking implicit in legislative redistricting and identifies the preoccupation of *Gingles* and earlier cases with single-member districts as also essentially political:

The choice is inherently a political one, and depends upon the selection of a theory for defining the fully "effective" vote—at bottom, a theory for defining effective participation in representative government. In short, what a court is actually asked to do in a vote dilution case is "to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy . . ."⁵⁵

According to Thomas, the Court has favored single-member district schemes both as a benchmark to measure individual minority voting strength and as a remedy to guarantee minority electoral power.⁵⁶ There is no constitutional or historical mandate for this choice. Instead, it is a choice based on the evaluation that the purpose of a fully "effective" vote is controlling a legislative seat. This evaluation, however, is just one among many theories of representation in self-governing majoritarian or two-party systems.⁵⁷ The crux of the problem is this:

⁵³ *Id.* at 892 (Thomas, J., concurring) (quoting *Shaw v. Reno*, 509 U.S. 630, 658 (1993)).

⁵⁴ Part II of Justice Thomas's *Holder* concurrence discusses the statutory construction of amended Section 2 and is beyond the direct scope of this essay.

⁵⁵ *Id.* at 897 (quoting *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting)).

⁵⁶ *See id.*

⁵⁷ Justice Thomas recalls Justice Harlan's focus on the lack of a rule for courts to rely upon in deciding between multi-member and single-member systems: "Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers." *Allen v. State Bd. of*

[S]uch matters of political theory are beyond the ordinary sphere of federal judges. . . . The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law. As such, they are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories.⁵⁸

In addition to the preference for single-member districts, the decision on how many districts—or how much representation to afford minority groups, which culminated in *Gingles*' adoption of a rule of roughly proportional representation—is also political. Proportionality is not "required by any principle of law."⁵⁹

The Court's drive to enhance representation of minorities implicitly assumes that race matters politically and that each racial or ethnic group has distinct political interests.⁶⁰ Acting upon this assumption, the Court has encouraged "the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid.'"⁶¹ When racial groups are so segregated, their representatives may feel free to promote racial rather than community interests.⁶² As Justice Thomas suggests, "few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act."⁶³

Justice Thomas ringingly concludes the first part of his opinion:

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, as respondents would have us hold today, the "proper" sizes for local governing bodies.⁶⁴

Elections, 393 U.S. 544, 586 (1969) (Harlan, J., concurring in part and dissenting in part).

⁵⁸ *Holder*, 512 U.S. at 901–02 (Thomas, J., concurring) (footnote omitted).

⁵⁹ *Id.* at 903.

⁶⁰ Justice Thomas's opinion also demonstrates that the *Gingles* requirement of political cohesiveness is a meaningless, evanescent standard and, "as practically applied, has proved little different from a working assumption that racial groups can be conceived of largely as political interest groups." *Id.* at 905.

⁶¹ *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

⁶² At this point, *Holder* quotes a famous statement of Justice Douglas: "When racial or religious lines are drawn by the State, . . . antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan." *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

⁶³ *Holder*, 512 U.S. at 907.

⁶⁴ *Id.* at 913.

That the judicial interpretation of the Voting Rights Act has led to race-based districting is, to Justice Thomas, the gravest misadventure of the Supreme Court.⁶⁵ He is not a lone critic of this policy.⁶⁶ In fact, without acknowledging its decisions as the cause of the problem, the Court's current majority has condemned racial gerrymandering.⁶⁷ All the while, its adherence to current vote dilution law and its rule of rough racial proportionality perpetuates the mischief.⁶⁸ The misadventure would not have occurred had the Court withstood the temptation to remake American government by making political decisions concerning representation. Further, the ill consequences could have been avoided had the Court confined its work to the judicial role granted by the Fourteenth and Fifteenth Amendments: prohibiting intentional discrimination.⁶⁹

Disarray in current voting rights law is thus ultimately attributable to the failure to practice judicial self-restraint, as Justice Thomas's opinion abundantly demonstrates, and as Justices Frankfurter, Harlan and Stewart foresaw. The Supreme Court embarked on a political rather than judicial path. There were and are no judicially manageable standards for the undertaking, or, more precisely, the standards are based on political choices obscured by a veneer of legalistic analysis. The courts' arrogation of political power from the people and their representatives saps the creativity of our political process and, more ominously, has placed serious obstacles in the path of our becoming a color-blind society.

Since Justice Thomas's views in *Holder* commanded only Justice Scalia's approval, and since history demonstrates that no more than a few Justices—albeit an eminent few—have recently subscribed to Justice Thomas's austere sense of judicial restraint, some might conclude that Thomas must be dead wrong or very old-fashioned. That conclusion would be rash. First, it must be emphasized that judicial involvement in legislative redistricting is of recent vintage: for 174 years of American history, federal courts played no such role. In the decades immediately preceding *Baker v. Carr*, various challenges to legislative districting had been repeatedly and summarily rejected by the courts. From this broader perspective, it is the contemporary justices—not Thomas, Scalia, Frankfurter, Harlan and Stewart—who deviate from tradition.

Second, advocates of judicial activism in legislative districting would be more persuasive if they could explain why judicial

⁶⁵ See *id.* at 892–93.

⁶⁶ See, e.g., THERNSTROM, *supra* note 2, *passim*; J. HARVIE WILKINSON, III, ONE NATION INDIVISIBLE: HOW ETHNIC SEPARATISM THREATENS AMERICA (1997).

⁶⁷ See *Shaw*, 509 U.S. at 647–49; *Bush v. Vera*, 517 U.S. 952 (1996).

⁶⁸ See WILKINSON, *supra* note 66, at 107.

⁶⁹ See *Bolden*, 446 U.S. at 55 (1980); THERNSTROM, *supra* note 2, at 238.

decisionmaking in this realm is objectively superior to legislative action. The process of litigation undoubtedly favors "civil rights" litigators by granting undivided attention to claims that would otherwise compete with other legislative priorities. Likewise, judicial standards, such as they are, most effectively address problems arising from binary litigation, even though legislative districting inevitably affects the myriad groups and interests who compose a political constituency. But the tendency of litigation to foster activists' goals is no defense of the courts. If the judicially-crafted test for vote dilution is so open-ended as to guarantee arbitrary results, then courts cannot be satisfactory arbiters. The lack of appropriate manageable judicial standards transforms judges into autocrats who are essentially usurping powers of the popularly elected legislatures.

Third, the judicially-crafted bias toward creating racial minority districts whipsaws legislators between racial line-drawing, which supports a charge of intentional discrimination, and ignoring race, which lays the basis for claims of vote dilution.⁷⁰ If the legislature creates minority districts, a lawsuit may assert that the minority population has been "packed" into them. Failure to create a minority-dominant district may, however, provoke a charge that the minority population has been "fragmented." Whatever the legislature does exposes it to court challenge, even if it scrupulously attempts to follow the law. A "standard" that never settles anything does not justify confidence in the competence of the judiciary that imposed it.

Fourth, the *Gingles* test leaves lower courts bereft of guidance on weighing and balancing the many potential factors probative in vote dilution cases. A few examples suggest the internal contradictions. The essence of vote dilution lies in a stunted opportunity to elect "representatives of their choice." Yet a history of electing minority representatives from an at-large district may or may not disprove racial polarization among the voters.⁷¹ The Fifth Circuit has held that once the threshold *Gingles* factors are proved, "it will be only the very unusual case in which the plaintiffs . . . [will] fail[] to establish a violation of § 2 under the totality of the circumstances."⁷² But the Fifth Circuit has also refused to "suggest that the totality of circumstances is an empty formalism or that clearing the *Gingles* hurdles preordains liability. To the contrary, this final inquiry can be powerful indeed."⁷³ Nor is clarity

⁷⁰ Cf. WILKINSON, *supra* note 66, at 108 (quoting *Nixon v. Kent County*, 76 F.3d 1381, 1396 (6th Cir. 1996) (en banc)).

⁷¹ See *Gingles*, 478 U.S. at 102-05 (O'Connor, J., concurring); *Harvell v. Blytheville Sch. Dist.*, 71 F.3d 1382, 1386 (8th Cir. 1995) (en banc).

⁷² *Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994) (quoting *Jenkins v. Red Clay Consol. Sch. Dist.*, 4 F.3d 1103, 1135 (3d Cir. 1993)).

⁷³ *Clark v. Calhoun County*, 88 F.3d 1393, 1396-97 (5th Cir. 1996).

enhanced by the maddening imprecision of statistical analysis, which is elevated to near-controlling importance by the *Gingles* threshold test. Testifying experts on opposite sides of a case routinely use the same bivariate ecological regression methodology, selectively cull election data, and produce results that are irreconcilable. The *White* factors, which are supposed to elaborate the totality of circumstances surrounding a vote dilution claim, consist of social and historical information that, as Justice Thomas demonstrates, “provide no rule for deciding a vote dilution claim”⁷⁴ Moreover, the *White* factors, insofar as they attempt to gauge the hangover impact of racial segregation and systemic discrimination, are increasingly anachronistic.

The Supreme Court’s tangled web of vote dilution case law has spawned decennial turmoil for legislative bodies and courts, casting serious doubts on its efficacy. But the most vivid proof of the inadequacy and inadvisability of redistricting by the judiciary is yet to come. Vexing, politically-charged issues remain unresolved by the courts even at this late date. Two prominent voting rights experts eagerly catalogue some of these issues:

How far must political cartographers go in drawing districts for protected minority groups when these clash with other criteria for districting, such as the desire to honor the geographic integrity of various governmental units? How can courts rationally decide among competing districting plans when the computer revolution in political map drawing makes possible hundreds of unique plans, all of which have virtues and shortcomings? . . . How much weight, if any, should a court give to claims by defendants in voting suits that minority candidates’ party affiliation, as distinct from their ethnicity pure and simple, is the cause of their defeat at the polls?⁷⁵

Such issues will draw the courts even more deeply into the minutiae of redistricting.

Two other sorts of issues raise the most troubling questions about ongoing judicial involvement. Vote dilution law rests on assumptions about our society that are twenty-five years old; it cannot cope with dramatic demographic changes that have rendered the original assumptions obsolete. Waves of immigration have made it increasingly

⁷⁴ *Holder*, 512 U.S. at 937 (Thomas, J., concurring). Similarly, Justice Stewart described the *White* factors as “gauzy sociological considerations,” do not appear, “in any principled manner [to] exclude the claims of any discrete political group that happens, for whatever reason, to elect fewer of its candidates than arithmetic indicates it might.” *Bolden*, 446 U.S. at 75 n.22 (plurality opinion). See also *Gingles*, 478 U.S. at 92–93 (O’Connor, J., concurring) (the basic contours of a vote dilution claim require no reference to most of the *White* factors).

⁷⁵ Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in *QUIET REVOLUTION IN THE SOUTH* 378, 387 (Chandler Davidson & Bernard Grofman eds., 1994).

difficult to define racial minorities for purposes of the Act. The temptation to aggregate, say, "Hispanics" from Cuba, Mexico, and Latin America, or "Asians" from Pakistan, India, China, and Southeast Asia, or African-Americans and native Africans will be nearly inescapable, given the racial allocation of legislative power implicit in *Gingles*. But aggregation bespeaks a wilful blindness to differences in culture, educational attainment, and outlook among these groups that amounts to neo-racist paternalism. *Gingles* does not envision mindless aggregation based on skin color. Will the courts require or permit it?⁷⁶ Such crude measures of political alliance must foster racial dissension throughout society, paradoxically, even as racial intermarriage and harmony in everyday life are increasing. As Justices Thomas and Harlan asked, how can courts possibly gauge the "fair" or "just" amount of representation to be afforded solely by virtue of skin color or ethnicity in a multiracial society?

An obvious "remedy" for ever-bolder claims of vote dilution, especially in a multi-racial society, consists of representation arrangements that do not depend on geographically based districts. As Justice Thomas notes, the *Gingles* requirement that the minority reside in a geographically compact district is arbitrary, and amended Section 2 in no way limits judicial remedial creativity. A shift of personnel on the federal courts could easily portend judicial decrees compelling cumulative voting or other bizarre electoral solutions.⁷⁷ If the transfer of power from democratically elected representatives of the people to tenured academics and federal courts were not already obvious, it will at that point become too serious to ignore.

Justice Thomas's opinion in *Holder* exposes the treacherous path the Court has taken by engaging, unbidden, in legislative redistricting to solve unintentional minority vote dilution. The path violated norms of judicial restraint from its inception and has led, at this point, to "race-based districting, which balkanizes contiguous communities, as the foundation of the American political order."⁷⁸ Having already succumbed to the temptation of playing politics rather than law, the Court will find it hard to return to a properly limited judicial role. But if it does not do so, I fear, with Justice Thomas, that our children will live in a far less democratic and more racially troubled society. *Holder* offers a path of dignified retreat or, at least, a way to say, "Stop!"

⁷⁶ Cf. *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc) (disallowing vote dilution claim by coalition of different minority groups); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988) (allowing coalition of black and Hispanic voters to make vote dilution claim).

⁷⁷ See *Holder*, 512 U.S. at 908-10 & nn.15-17 (Thomas, J., concurring).

⁷⁸ WILKINSON, *supra* note 66, at 105.