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The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard

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ARTICLE

THE REPRESENTATIVE EQUALITY PRINCIPLE: DISAGGREGATING THE EQUAL PROTECTION INTENT STANDARD

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Challenges under the Equal Protection Clause require proof of intentional discrimination. Though rarely questioned by legal scholars or the courts, that conventional account cannot explain the success of equal protection challenges to electoral structures that dilute the vote of racial minorities. In the Supreme Court's most recent decisions on vote dilution, the Court has invalidated local electoral structures under the Equal Protection Clause to the extent that they deprive African Americans of the opportunity for effective representation in the political process. The Court has reached its decisions despite the absence of any proof of intentional discrimination in the adoption of the electoral structures.

In the vote dilution cases, the Supreme Court is best understood as having applied a critical alternative principle underlying the Equal Protection Clause: the representative equality principle. Using this principle, which originated in the reapportionment cases of the 1960s, the Court has invalidated structures that undermine two preconditions of representative government: majority rule and effective representation of minorities in the political process. It has done so even in the absence of evidence of intentional discrimination.

The idea that courts should use judicial review to strengthen the political processes underlying democratic representation is well known. That form of judicial review is termed "representation-reinforcing judicial review." In this Article, I argue that the vote dilution cases, along with the reapportionment cases, constitute a distinctive form of judicial review, one

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that is a necessary precursor to representation-reinforcing judicial review. This form should be understood as "representation-structuring judicial review." By policing the basic structures of representative democracy, the Court protects majority rule and minorities' effective representation in the political process. In the absence of these critical preconditions, there might well be little representation to "reinforce."

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INTRODUCTION

In 1980, eight black residents of Burke County, Georgia, challenged an at-large system of representation in which the five members of the county board of commissioners were selected through countywide elections.[1] The

1. *See* Rogers v. Lodge, 458 U.S. 613, 615–16 (1982). *Rogers v. Lodge* is the most recent constitutional vote dilution case decided by the Supreme Court. Since *Rogers*, the Court has addressed vote dilution challenges under Section 2 of the Voting Rights Act, which prohibits the imposition or application of voting standards that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (2006); *see, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Johnson v. De Grandy, 512 U.S. 997 (1994); Holder v. Hall, 512 U.S. 874 (1994); Thornburgh v. Gingles, 478 U.S. 30 (1986); *see also* Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 41 (2006) (describing how "[t]he creation of a broad avenue of relief under the [Voting Rights Act] essentially eliminated the claims of 'unconstitutional' minority vote dilution [and t]he practice of seeking relief under the statute instead of the Constitution quickly became the norm").

county was majority-black, but no African American had ever been elected to the county board of commissioners.[2] The chances for the election of white representatives who would be responsive to the interests of black voters were remote, at best.

The reasons for this unresponsiveness were related to the political and social context surrounding the operation of the at-large scheme in Burke County, which represented a familiar pattern across many parts of the South. A history of voting discrimination meant blacks constituted only 38 percent of registered voters.[3] For an ordinary minority, this vote share would be enough to influence elections and policymaking. But African Americans in Burke County were not an ordinary minority that could either individually, or in coalitions with other groups, influence elections. Whites in Burke County rarely voted for black candidates or candidates who would be responsive to the interests of the black community.[4] Moreover, the absence of competition between political parties in the one-party Democratic South reduced electoral competition for votes—the primary structural incentive for parties to include the African American minority in the political process.[5] This combination of factors deprived blacks of the opportunity to influence the outcome of elections and left them politically marginalized.[6] Consequently, the Burke County Board of Commissioners was generally unresponsive to the needs of the black community—from the seemingly mundane issues of road paving in predominantly black neighborhoods, to the more consequential failure to remedy black complaints about school and grand jury segregation.[7] The result was a disproportionately poor, undereducated, and underserved black community with limited ability to effectively influence political affairs in the county.[8]

In a surprise ruling, the U.S. Supreme Court held that the at-large system in Burke County violated the Equal Protection Clause.[9] In *Rogers v. Lodge*, the Court invalidated the at-large plan despite the absence of any evidence

2. *See Rogers*, 458 U.S. at 623 (stating that black candidates had run for office in the Burke County Commission, but none had ever won); CHARLES S. BULLOCK III & RONALD KEITH GADDIE, THE TRIUMPH OF VOTING RIGHTS IN THE SOUTH 83–85 (2009) (describing the lag in black voter registration through the 1980s); McDonald et al., *Georgia*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 67–74 (Chandler Davidson & Bernard Grofman eds., 1994) (describing the history of voting laws in Georgia that were designed to disenfranchise African Americans).

3. *Rogers*, 458 U.S. at 615.

4. *Id.* at 623; McDonald et al., *supra* note 2, at 84 (describing voting in Georgia as ordinarily polarized along racial lines during this period).

5. *See Rogers*, 458 U.S. at 624–25 (describing the exclusion of blacks from the Democratic Party). *See generally* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 238–65 (1974) (offering an explanation for the emergence of the one-party South in the years following Reconstruction and continuing through the 1980s).

6. *See Rogers*, 458 U.S. at 623 ("Voting along racial lines allows those elected to ignore black interests without fear of political consequences.").

7. *See id.* at 625–26.

8. *See id.* at 626 (describing the depressed socioeconomic status of blacks in Burke county).

9. *See id.* at 627; *see also* U.S. CONST. amend. XIV, § 1.

of intentional discrimination in the county's adoption of the scheme in 1911.[10] Instead, the Court focused on the consequences of the districting scheme in the political and social context in which it operated.[11] Since the scheme operated to deprive blacks of the opportunity to effectively influence the political process, it violated the Equal Protection Clause.[12]

Why was *Rogers* a surprise? Largely because the holding in the case seemed to directly contradict the equal protection standard that the Court developed over the six years immediately prior to the decision. In a famous trilogy of cases in the late 1970s—*Washington v. Davis*,[13] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[14] and *Personnel Administrator of Massachusetts v. Feeney*[15]—the Court determined that, to successfully challenge a law under the Equal Protection Clause, litigants had to show that a state actor intended to discriminate against a particular class of individuals.[16] Under this model, which suggested a search for an individual perpetrator, the Court required either direct evidence of discriminatory intent in the form of testimonial statements or circumstantial evidence of discrimination from the context surrounding the adoption or active reaffirmation of a law.[17] Such evidence was not even presented in *Rogers*. In fact, the Court in *Rogers* never pointed to any particular perpetrator of discrimination.

In the present, *Rogers* remains a puzzle because it fits uncomfortably with what has since become the dominant account of equal protection. Resting on the trilogy of *Davis*, *Arlington Heights*, and *Feeney*, this conventional account depicts equal protection as a standard that only invalidates laws motivated by intentional racial discrimination. Rather than trying to reconcile the equal protection standard applied in *Rogers* with that applied in the *Davis* trilogy, scholars typically ignore *Rogers*.[18] The few who do pay any sustained attention to the case either describe it as an outlier, implicitly suggesting that the Court erred in its application of the

10. *See Rogers*, 458 U.S. at 626–27 (adopting the district court's finding that the electoral system was "neutral in origin").

11. *See id.* at 624–27.

12. *See id.* at 627.

13. 426 U.S. 229 (1976).

14. 429 U.S. 252 (1977).

15. 442 U.S. 256 (1979).

16. *Feeney*, 442 U.S. at 278; *Arlington Heights*, 429 U.S. at 265; *Davis*, 426 U.S. at 240.

17. *Arlington Heights*, 429 U.S. at 264–68.

18. *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Barbara J. Flagg, *Enduring Principles: On Race, Process, and Constitutional Law*, 82 CALIF. L. REV. 935 (1994); Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Eva Patterson et al., *The Id, The Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175 (2008); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494 (2003); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

intent standard,[19] or treat it as an example of the Court giving greater scrutiny to interests or rights considered fundamental.[20]

In this Article, I argue that the standard employed in *Rogers* should not be ignored. Far from an insignificant relic, it is best understood as the Court's most recent application of a critical alternative principle underlying the Equal Protection Clause: the representative equality principle. The conventional account suggests that *Davis* and its progeny established a universal intent standard applicable to all discrimination claims challenging facially neutral state actions under the Equal Protection Clause.[21] This is not the case. Instead, the Court has applied an alternative standard of proof that I refer to as an "operative effects" standard to challenges against electoral structures that allegedly undermine the structural mandate of representative equality. Under this operative effects standard, the Court measures the constitutionality of a voting scheme from the democratic effects of its current operation rather than the intent underlying its past adoption. The equal protection right protected by *Rogers* is therefore not simply a right to be free from biased decision making in the adoption of an electoral scheme. It is a structurally driven right to effective representation in the political process for politically marginalized minorities.

The operative effects standard reflected in *Rogers* should be understood as evolving from the reapportionment cases of the early 1960s, when the Court interpreted the Equal Protection Clause to require that every individual's vote be equally weighted through equally apportioned legislative districts.[22] The familiar standard established in those cases was

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19. *See* Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. (forthcoming Dec. 2012) (manuscript at 76), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920418#%23 (suggesting that the decision in *Rogers* was a response to congressional criticism of a prior case, *Mobile v. Bolden*, 446 U.S. 55 (1980), which Congress ultimately overturned statutorily with an amendment to the Voting Rights Act); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 313–15 (1997) ("One can only speculate . . . as to the legacy of [*Rogers*]."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (acknowledging that the Court in *Rogers* had employed a different standard of proof than the Court had applied in *Feeney*, but never offering a reason for the distinction).

20. *See* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1132 (1998) (arguing that the substance of the right being protected explains the Court's use of a more lenient standard in *Rogers*); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1136–37 (1989) (arguing that the Court applies a different intent standard in voting cases because of "the importance of the individual interest at stake"); *see also infra* Part II.

21. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-20, at 1509 (2d ed. 1988) (suggesting that in *Davis*, the Court "announced that henceforth every lawsuit involving constitutional claims of racial discrimination directed at facially race-neutral rules would be conducted as a search for a bigoted decision-maker"); Evan Tsen Lee & Ashutosh Bhagwat, *The* McCleskey *Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 150 ("Since its landmark decision in *Washington v. Davis* . . . the Supreme Court has consistently held that in order to establish a violation of the Equal Protection Clause based on racial discrimination, a litigant must show that the state had engaged in purposeful, or intentional, discrimination.").

22. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); *see also infra* Part II.B.

one-person, one-vote, a right that the Court at the time suggested was personal and individual.[23] However, in the process of construing the Equal Protection Clause to require one-person, one-vote, the Court also established the structural mandate that would drive the evaluation of whether the personal right was being violated—the mandate of fair and effective representation in the political process.[24] This mandate developed over time to require not only that majorities rule, but that majorities also account for and consider the interests of minorities in the representative process. I refer to this mandate as the "representative equality" principle. This Article makes the case that the representative equality principle is an already established, and normatively attractive interpretation of equal protection in the voting context—one that deserves full recognition alongside the discriminatory intent interpretation of equal protection.

Recovering the representative equality principle has important implications for substantive constitutional law concerning minority voting rights. First, there is the question of the constitutionality of the Voting Rights Act of 1965,[25] which rests in part on the issue of the extent of Congress's power to enforce the Equal Protection Clause. An account of the Equal Protection Clause as merely prohibiting intentional discrimination suggests that congressional authority to enact the Voting Rights Act is questionable, since the Act invalidates a whole host of state actions that would be found constitutional under the intent standard.[26] However, if the representative equality principle is recognized as a valid interpretation of the Equal Protection Clause, Congress has the authority to enforce that principle by barring electoral structures that undermine effective representation.

Second, there is the question of whether it is permissible for jurisdictions to consider race in drawing electoral district lines when the purpose is to secure opportunities for the effective representation of politically marginalized groups. Some scholars have argued that the use of race in this context is inconsistent with the colorblindness principle and therefore

23. *See infra* Part II.B.

24. *See infra* Part II.B.

25. 42 U.S.C. §§ 1971, 1973 (2006).

26. Several articles have been written assessing the constitutionality of the Voting Rights Act under the assumption that the Equal Protection Clause is exclusively animated by the antidiscrimination principle. *See, e.g.*, Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125 (2010); John Matthew Guard, *"Impotent Figureheads"? State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act after* Lopez v. Monterey County *and* City of Boerne v. Flores, 74 TUL. L. REV. 329 (1999); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725 (1998) (arguing for the continued constitutionality of the Voting Rights Act under the *Boerne* standard); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 749–51 (1998) (questioning the constitutionality of the Voting Rights Act); Jennifer G. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality after* City of Boerne, 59 N.Y.U. ANN. SURV. AM. L. 609 (2004); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69 (2003).

unconstitutional under the Equal Protection Clause.[27] Understanding the Equal Protection Clause as also encompassing a representative equality principle complicates this account, as the issue then pits two constitutional principles against each other.

Because I focus on identifying and situating the representative equality principle within the Supreme Court's equal protection jurisprudence, this Article does not flesh out the arguments for the constitutionality of the Voting Rights Act and of race-conscious districting. Nonetheless, this project takes the first step toward using the representative equality principle to resolve these controversies by building the necessary doctrinal and theoretical foundations.

Rethinking the Court's interpretation of the Equal Protection Clause also has important implications for our understanding of the proper judicial role in structuring representative democracy. The Court's elaboration of the mandate of representative equality is one example of an important judicial function that was anticipated, but not well theorized, by political process theorists.[28] I describe that function as "representation-structuring judicial review."

Political process theory, most prominently developed by John Hart Ely, seeks to reconcile judicial review with democracy.[29] In particular, process theory provides a justification for the unelected and unaccountable judiciary's role in the invalidation of democratically enacted laws.[30] According to process theory, laws enacted through a defective process suffer a democratic legitimacy deficit; as a result, the invalidation of such laws can in fact reinforce representative government.[31] Equal protection scholars further argue that the courts, in applying the discriminatory intent standard, correct democratic defects resulting from impure government decision making—decision making motivated by animus toward a minority. In doing so they protect minorities and buttress a government that is representative of all interests.[32]

The vote dilution cases demonstrate that process theory, as currently understood, is incomplete. In order to ensure a political process that is properly representative in that it is inclusive of all interests, process theory's suggested role for judicial review must extend beyond mere

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27. *See, e.g.*, ABIGAIL M. THERNSTROM, VOTING RIGHTS AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 143-67 (2009); Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 599–604 (1995). *But see, e.g.*, Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CALIF. L. REV. 1201, 1202–04 (1996); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48 (1997); James Thomas Tucker, *Affirmative Action and [Mis]representation: Part II—Deconstructing the Obstructionist Vision of the Right to Vote*, 43 HOW. L.J. 405, 443–44 (2000).

28. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 77–88 (1980).

29. *See id.* at 101–03.

30. *See infra* Part III.

31. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985) (describing process theory's approach to resolving the countermajoritarian difficulty).

32. *See infra* Part III.

reinforcement of representative government at the back end. Judicial review must also structure the government process so that it is representative at the front end. In this role, the courts are responsible for correcting defects in the basic electoral structure underlying representative government—defects that can only be ascertained through an assessment of the operation of an electoral scheme, and not through the intent of those adopting it.[33] Ely posits that courts can serve this structural role by enforcing other constitutional safeguards, largely outside of the Equal Protection Clause: maintaining constitutional checks on majority tyranny—through the preservation of separation of powers and federalism—and by ensuring that the interests of groups in the majority coalition are tied to those of minorities through generally applicable laws.[34]

I argue that Ely's suggested means for structuring representative government to account for minorities' interests are ultimately incomplete. Process theory's proposed constitutional checks on majority power, especially the strategy of ensuring that the interests of the majority coalition are tied to those of the minority through generally applicable laws, are premised on an assumption that members of the minority and the majority will be similarly situated and similarly impacted by the law. However, many minorities, especially politically marginalized ones, are vulnerable to generally applicable laws that impose disparate harms on them because they are differently situated from members of the majority coalition. While the egalitarian goal of process theory clearly does not require that minorities be guaranteed equal outcomes from laws, it does require the government to account for and consider all interests in the enactment of such laws. And generally applicable laws do not guarantee such accounting for and consideration of interests, particularly when the politically disempowered minority is differently situated, and therefore differently affected, by those laws.

The Court's vote dilution doctrine is one means of more fully reconciling majority rule with the protection of minority interests. The Court's review in vote dilution cases is aimed at structural impediments to opportunities for effective representation in the political process. The judicial invalidation of electoral structures that prevent minorities from having their interests considered and accounted for in the policymaking process is thus an additional process-based mechanism for attaining a government that is representative of all interests. Scholars have not yet fully appreciated this representation-structuring aspect of vote dilution doctrine.

The Article proceeds in three Parts. In the first Part, I describe the inconsistency between the Court's equal protection intent standard in the *Davis* trilogy and the standard employed in the vote dilution cases. I show that the evidentiary standards in these two lines of cases are distinct, with the Court in the *Davis* trilogy focused on identifying a perpetrator of discrimination, while in the vote dilution cases the Court focused on how

33. *See infra* Part III.
34. *See infra* Part III.

the laws in question operated in practice. I conclude this Part by arguing that previous scholarly attempts to make sense of the inconsistency fail to adequately explain the distinction.

In Part II, I argue that the standard employed in the vote dilution cases, which I call the "operative effects standard," is best understood as being derived from the reapportionment cases decided in the 1960s and early 1970s. In these two sets of cases, the Court restructured the pluralist marketplace to protect both majorities and minorities based on a representative equality principle. It is important to note that my goal in reconstructing the origins and development of this principle is not to try to accurately channel the justices' actual thinking or motivations for deciding these cases as they did. Instead, my focus is on the jurisprudence produced by the Court. I therefore seek an interpretation of the decisions that "best fits" the broader doctrinal landscape and argue that the representative equality principle offers the best explanatory fit.[35]

Finally, in Part III, I argue that this interpretation of the vote dilution cases rests on a very strong normative foundation. Although revising the baseline rules and structures of electoral representation to accord with the representative equality principle involves the Court in a substantive value choice regarding the form that our democracy will take, such a choice can be justified under a process-theoretic account of the proper judicial role in a democracy. The Court in these cases is engaging in representation-structuring judicial review in which it is establishing the essential preconditions for representative government and ultimately for the operation of a process-based, representation-reinforcing judicial review. If the Court did not play this role, it is not at all clear that other institutional actors would be able to fill the gap.

I. AN UNEXPLAINED EXCEPTION TO THE EQUAL PROTECTION INTENT STANDARD

In this Part, I examine how the Court in a trilogy of cases beginning with *Davis* reaffirmed an equal protection intent standard that invalidated laws only upon proof that a state actor had a discriminatory motive in the adoption of a law. I show how in doing so, the Court specifically rejected an alternative framework that would have looked to the discriminatory consequences of the operation of the law. I then argue that two important vote dilution cases decided shortly after this trilogy fit awkwardly within this intent-based evidentiary framework, and instead more closely accord

35. This methodological approach draws on the framework that Ronald Dworkin employs for how judges should decide hard cases. He explains:

> Law as integrity asks a judge deciding . . . a case . . . to think of himself as an author in the chain of common law. He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be.

RONALD DWORKIN, LAW'S EMPIRE 238–39 (1986).

with the alternative framework that the Court specifically rejected in the trilogy. I conclude with a description of two scholarly attempts to solve this puzzle, contending that they are both unsuccessful.

A. The Trilogy and the Reaffirmation of the Intent Standard

The usual scholarly starting point for what has been described as the equal protection antidiscrimination principle is the much-scrutinized case of *Davis*. In that case, the Court held that the evidentiary burden for equal protection challengers was to show that a law or action was motivated by the discriminatory intent of a particular state actor—or "perpetrator"—of discrimination.[36]

The importance of *Davis* lies not only in its requirement that plaintiffs demonstrate the discriminatory intent of one or more perpetrators, but also in its rejection of an alternative evidentiary framework that the Court had developed in its interpretation of the Equal Protection Clause and Title VII of the Civil Rights Act[37] in the decade preceding the case.[38] This alternative framework denied the relevance of the perpetrator's motives to the assessment of the constitutionality of a law under the Equal Protection Clause in part because of the difficulty of ascertaining the motive of a collective body and the futility of invalidating statutes on the basis of

36. *See* Washington v. Davis, 426 U.S. 229, 239 (1976). This evidentiary burden did not originate in *Davis*. Rather, the Court had employed a similar standard in varying form in deciding challenges to alleged discriminatory jury selection and racial gerrymandering since the early years of the twentieth century. *See, e.g.*, Cassell v. Texas, 339 U.S. 282, 286 (1950); Akins v. Texas, 325 U.S. 398, 403 (1945); Hill v. Texas, 316 U.S. 400, 404 (1942); *see also* Wright v. Rockefeller, 376 U.S. 52, 57 (1964) (applying a perpetrator intent standard to the race-based drawing of district lines); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (applying what the Court later interpreted to be a perpetrator intent standard to the race-conscious drawing of district lines); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 538–64 (describing the history of the Court's jury selection cases); Haney López, *supra* note 19, at 8 ("The Court from its earliest years recognized that judging state conduct for its constitutionality often required evaluating government purposes."); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1818–50 (2008) (describing the relevance of legislative purpose in the Court's assessment of the constitutionality of laws in the period from the late nineteenth century to the 1970s); Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 358 (1949). The Court, however, has historically addressed Fourteenth and Fifteenth Amendment challenges to laws that allegedly deny the vote on account of race under a standard that has tended to focus on evidence from the operation of the law. *See, e.g.*, Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 50 (1959); Lane v. Wilson, 307 U.S. 268, 275 (1939); Myers v. Anderson, 238 U.S. 368, 379–80 (1915); Guinn v. United States, 238 U.S. 347, 364–65 (1915).

37. 42 U.S.C. § 2000e (2006).

38. *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) (explaining that the focus in other cases during the prior decade decided under the Equal Protection Clause and the Fifteenth Amendment "was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did"); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (establishing the alternative evidentiary framework in a Title VII challenge to a corporation's employment promotion practices).

discriminatory intent, since such laws could always be reenacted without such a motive.[39]

More importantly, the alternative evidentiary framework, as developed in the statutory context of Title VII, also seemed to accept disparate impact as sufficient for a prima facie finding of discrimination.[40] This framework incorporated a baseline of equality of opportunity as the measure for discrimination. It also focused attention away from whether a perpetrator intended to deprive individuals of equal opportunity to whether the law itself, combined with other structural sources of inequality, operated in a way that deprived individuals of such opportunity. For example, in the central case establishing this alternative evidentiary framework, *Griggs v. Duke Power Co.*, the Court invalidated, under Title VII, a power company's requirement that employees either have a high school diploma or pass an intelligence test to be promoted.[41] It did so even though it found that the employer had been trying to improve employment opportunities for blacks by providing financial support for employees seeking high school training.[42] The Court determined that the employment test was nonetheless prima facie discriminatory because the promotion criteria operated in a context in which blacks had historically received inferior education that resulted in their disparate exclusion from promotion opportunities.[43]

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39. *See* Palmer, 403 U.S. at 224-25 (suggesting that the discriminatory motive of the state actor was irrelevant in a case addressing an equal protection challenge to a city's closure of formerly segregated pools after a court order that it operate these pools on a desegregated basis); *United States v. O'Brien*, 391 U.S.367, 383 (1968) (rejecting a motive-based challenge to a law on the grounds that "[i]nquiries into congressional motives or purposes are a hazardous matter"); *see also* Ely, *supra* note 28, at 1212–17 (elaborating on the concerns associated with the motive inquiry of ascertainability and futility and identifying an additional concern of disutility in which the Court invalidates laws that are "laudable in operational terms simply because the process which produced them was disreputable").

40. *See Griggs*, 401 U.S. at 430 (explaining that, under Title VII of the Civil Rights Act, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"). The Court had, a year earlier, signaled the importance of discriminatory impact to the constitutional inquiry without going so far as to hold that such impact could alone be the basis for finding a state decision unconstitutional under the Equal Protection Clause. *See Palmer*, 403 U.S. at 220, 224 (noting the lack of disparate impact resulting from the decision of the city to close pools while also announcing that the motivation for the decision was not relevant to the constitutional inquiry). *But see, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) ("[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."); Jefferson v. Hackney, 406 U.S. 535, 548 (1972) ("The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be."); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 544–48 (1977) (describing the pre-*Davis* uncertainty around whether discriminatory purpose or effect was the proper equal protection standard).

41. *Griggs*, 401 U.S. at 436.

42. *Id.* at 432.

43. *Id.* at 430–31.

In the trilogy of cases beginning with *Davis* and continuing through *Arlington Heights*, and *Feeney*, the Court changed course. In particular, it reaffirmed that the intent of the perpetrator, rather than the consequences of the operation of the law, was central to the assessment of whether a state action violated the Equal Protection Clause.[44] In the most extreme version of the perpetrator intent standard articulated in *Feeney*, a challenger to a state action would need to show that the decision maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[45] This evidentiary requirement of perpetrator intent, the Court conceded, was greater than the burden it had established under Title VII.[46] But it explained that the Constitution requires the challenger to a state action to prove something more than the disparate impact of that action.[47] This shift to the perpetrator intent standard had an obvious and significant effect on the outcome of cases.

For example, when the Court addressed the validity of a qualifying test for a position as a police officer in the Washington D.C. Metropolitan Police Department in *Davis*, it upheld the test. It did so even though the test operated to disproportionately exclude blacks from officer positions because of the inferior education that blacks received in Washington D.C.[48] The Court upheld the test because the Police Department had shown good faith in actively recruiting blacks to integrate the police force.[49] According to the Court, this evidence contradicted any argument that the police department intended to discriminate against blacks in the administration of

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44. *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."). Despite this assertion, it is fairly clear that the Court in *Davis* was reaffirming an evidentiary standard that it had veered away from in cases decided during the prior decade. *See* Haney López, *supra* note 19, at 23 (describing *Davis* as a rejection of the structural implications of *Griggs*); Siegel, *supra* note 19, at 1134 (describing the Court's decision in Davis as one in which it announced its "new-found commitment to motive review"). The Court reaffirmed this standard without explaining why discriminatory motive was relevant and without adequately reconciling prior case law. *See* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 113 (1977) (explaining that the Court in *Davis* and *Arlington Heights* "[never] articulate[d] why motive is relevant in constitutional adjudication"); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1104 (1978) (criticizing the Court's confused reconciliation of *Palmer v. Thompson* with its decision in *Davis*).

45. *Pers. Adm'r v. Feeney* , 442 U.S. 256, 279 (1979).

46. *See Davis*, 426 U.S. at 239; Barbara J. Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 963 (1993) (describing the *Davis* intent standard as a "significant departure" from the *Griggs* standard).

47. *Davis*, 426 U.S. at 242; *see also Feeney*, 442 U.S. at 273 ("[T]he Fourteenth Amendment guarantees equal laws, not equal results.").

48. *See* Davis v. Washington, 512 F.2d 956, 961 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976) (explaining that the difference in test passage rates was properly attributed to "the long history of educational deprivation, primarily due to segregated schools, for blacks").

49. *See Davis*, 426 U.S. at 246.

the test.[50] In other words, even though the test operated discriminatorily, the challengers had failed to prove the discriminatory intent of the perpetrator.

For the first time, the Court in the trilogy also clearly identified the evidence that would be relevant to proving discrimination under the Equal Protection Clause. Rather than looking to evidence from the context surrounding the operation of the state practice, only evidence from the context of the decision to adopt the state practice would be relevant to finding a violation of the intent standard.[51] While disparate impact remained relevant, only in extremely rare circumstances would it be dispositive.[52] Instead, dispositive evidence would have to be in the form of a direct testimonial statement in which one or more state actors during the decision-making process expressed animus towards the group.[53] Alternatively, discriminatory intent could be inferred from circumstantial evidence such as the sequence of events leading up to the decision, deviations from the normal decision-making procedures, or the decision maker's failure to consider factors ordinarily relevant to the decision.[54]

When evaluating the constitutionality of a housing ordinance that operated in a manner that disproportionately disadvantaged racial minorities in *Arlington Heights*, the Court, applying these evidentiary factors, upheld

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50. *See id.* at 246 ("We think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers . . . negated any inference that the Department discriminated on the basis of race . . . .").

51. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

52. *Davis*, 426 U.S. at 240 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.") (emphasis omitted).

53. *See id.*

54. *See id.* Criticism of this motive inquiry is widespread. *See, e.g.*, Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 397 (describing the barrier of proving intent as impenetrable); Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1056 (1978) ("Dual requirements [of fault and causation] place on the victim the nearly impossible burden of isolating the particular conditions of discrimination produced by and mechanically linked to the behavior of an identified blameworthy perpetrator, regardless of whether other conditions of discrimination, caused by other perpetrators, would have to be remedied for the outcome of the case to make any difference at all."); Lawrence, *supra* note 18, at 319 (suggesting that the intent standard "places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute"); *see also* Eisenberg & Johnson, *supra* note 18, at 1160 (explaining that a primary source of dissatisfaction with the equal protection standard is the difficulty of proving discriminatory purpose). It is especially difficult under this standard to redress discrimination motivated by unconscious bias. *See, e.g.*, Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3 (2006) ("Unconscious bias . . . generates inequalities that our current antidiscrimination law is not well equipped to solve."); Lawrence, *supra* note 18, at 322 (explaining that much of racially discriminatory activity "is influenced by unconscious racial motivation" and that a standard "requiring proof of conscious or intentional motivation . . . ignores much of what we understand about how the human mind works").

the law because "there [was] little about the sequence of events leading up to the decision that would spark suspicion."[55] In addition, statements from the administrative record indicated to the Court that there were other non-racial reasons for adopting the ordinance.[56] Finally, the Court concluded that testimony of a board member responsible for the decision to adopt the ordinance failed to provide any support for an inference of discriminatory purpose.[57] As in *Davis*, the lack of perpetrator intent once again trumped any concern about the discriminatory operation of the statute in the Court's decision to uphold the law.

Finally, in *Feeney*, the Court rejected as irrelevant the fact that a Massachusetts veterans' job preference operated in a context in which women had historically been disproportionately excluded from military service.[58] As a result of this history, the preference in the words of the author of the majority opinion, Justice Stewart, "operate[d] overwhelmingly to the advantage of males."[59] Rather than rely on this powerful evidence of the discriminatory operation of the preference scheme linked to ongoing discriminatory practices, the Court looked instead exclusively to the context surrounding the decision to adopt and reaffirm the veterans' job preference to determine its constitutionality.[60] The Court identified as the dispositive question, "whether the [challenger to the preference] ha[d] shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."[61] From this starting point, the majority determined that the legislative decision to establish the veterans' preference in the period after the Civil War and its subsequent decision to modify and reaffirm the preference during World War I and World War II was motivated by a desire to protect veterans and not a desire to discriminate against female job applicants.[62] To support this conclusion,

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55. *Arlington Heights*, 429 U.S. at 269.

56. *Id.* at 270.

57. *Id.*

58. *See* Anthony v. Massachusetts, 415 F. Supp. 485, 489 (D. Mass. 1976) (describing the historical limitations on the service of women in the military).

59. *Feeney*, 442 U.S. 256, 259 (1979).

60. In doing so, the Court gave a nod to the *Arlington Heights* factors in a footnote, explaining that "[p]roof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in [*Arlington Heights*]." *Id.* at 279 n.24. The Court goes on to explain that the focus of the inquiry is to ascertain "[w]hat a legislature or any official entity is 'up to.'" *Id.* The majority continued by explaining that

> when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the preference scheme], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

Id. at 279 n.25.

61. *Id.* at 276.

62. *Id.* at 278–80. Specifically, the Court held:

the majority pointed to the good faith attempts by the Massachusetts legislatures that modified the law "to include as many military women as possible within the scope of the preference."[63] Lacking evidence of discriminatory motivation, the Court upheld the veterans preference. In the process, it disregarded both the gender disparities resulting from the preference and the fact that it operated in a context in which women still suffered from discrimination in their opportunities to serve in the military, and upheld the preference.[64]

One of the Court's principal justifications for its movement away from an evidentiary standard that invalidated laws on the basis of their operation was that the standard lacked an appropriate constitutional baseline to measure when a law operated to discriminate against members of a particular group.[65] Any standard that focuses on disproportionate disadvantage has to answer the question: disproportionate disadvantage as compared to what? A logical baseline for measuring a violation of equal protection is equality of outcome, a baseline that the Court seemingly accepted in developing the alternative framework in the Title VII context.[66] According to this baseline, any state action that impacts one group differently from another group would be presumptively discriminatory unless justified. The problem with a pure discriminatory impact standard is that it would potentially subject to strict scrutiny every state action unless that action achieved the nearly impossible task of equal outcomes for all groups.[67] To protect against this danger, the alternative evidentiary framework required that the challenger of an employment practice produce evidence of discrimination from the context in which the practice operated to show that the difference in treatment was not due to random chance or reasons unrelated to surrounding structural discrimination.[68]

The Court rejected an equality of outcome baseline in the trilogy. It did so, however, without acknowledging that the baseline did not simply require equality of outcomes, but operated in conjunction with an

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> The District Court's conclusion that the absolute veterans' preference was not originally enacted or subsequently reaffirmed for the purpose of giving an advantage to males as such necessarily compels the conclusion that the State intended nothing more than to prefer 'veterans.' Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law.

Id. at 277.

63. *Id.* at 269.

64. *Id.* at 279–81.

65. Washington v. Davis, 426 U.S. 229, 248 (1976) (expressing concern about the far reach of a standard that invalidated a statute designed to serve neutral ends that in practice benefited or burdened one race more than another).

66. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (describing as the objective of Title VII, the "achieve[ment of] equality of employment opportunities and [the] remov[al of] barriers that have operated in the past to favor an identifiable group of white employees over other employees").

67. *See* Ely, *supra* note 28, at 1258.

68. For example, an employer could defend an employment practice that had a disparate impact on a minority group by showing a business necessity for the practice. *See* Griggs, 401 U.S. at 429–30.

assessment of the context surrounding the operation of a practice. Instead, the Court simply announced that a discriminatory impact standard would "render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be."[69] It would therefore subject to potential invalidation "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[70] This impact standard was untenable, according to the Court, because it would overly constrain the constitutionally prescribed legislative prerogative to enact laws and it would give the court too much power to invalidate these laws.[71]

In rejecting the disparate impact standard, the Court did not render irrelevant evidence of disproportionate disadvantage. Such evidence could serve as a starting point for an assessment of whether an actor was motivated by discrimination in its enactment of a law.[72] In fact, the Court suggested that a massive disparate impact alone could potentially constitute prima facie evidence of discrimination under the Equal Protection Clause.[73] For example, voting criteria that prevent all but a few members of a minority group from participating in an election or a licensing arrangement that results in a denial for nearly every member of a minority group would be presumptively unconstitutional.[74] However, in practice it seemed the state action would only be subject to heightened scrutiny if it could be shown that there was no other explanation for it apart from discrimination. Thus, even though only 1.8 percent of Massachusetts's veterans were women, the fact that the veterans preference could be explained as a law intended to benefit veterans, and not simply to disadvantage women, overcame the huge disproportionate impact to serve as a basis for upholding the law.[75]

According to most equal protection scholars, the *Davis* trilogy established a universal perpetrator intent standard that has been applied with some slight variations to all challenges to alleged discriminatory state actions. This is reflected in the antidiscrimination standard's focus on the subjective motivations of a particular state actor and the rejection of particular substantive outcomes, such as equality, as a constitutional

69. *Davis*, 426 U.S. at 241 (quoting Jefferson v. Hackney, 406 U.S. 535, 548 (1972)).

70. *Id.* at 248.

71. *See* Flagg, *supra* note 18, at 952 ("[A]pplying strict scrutiny in all disparate impact cases would engage the courts too extensively in overseeing social policy.").

72. *See Davis*, 426 U.S. at 242 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

73. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

74. *See id.* (citing Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

75. *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 270 (1979).

baseline for evaluating whether an action violates the Equal Protection Clause.[76]

This conventional account of a uniform perpetrator intent standard is, however, oversimplified. The Court has not reviewed all state actions under the Equal Protection Clause in a universal manner. In the next section, I argue that in two important voting cases decided shortly after the trilogy, *City of Mobile v. Bolden*[77] and *Rogers*, a majority of the Court deviated from the two central features of the antidiscrimination principle articulated in the trilogy. These cases involved challenges to districting schemes that allegedly deprived minority groups of the opportunity to influence the political process. In *Bolden* and *Rogers*, the Court focused on evidence from the context surrounding the operation of the law, rather than on the discriminatory intent of those adopting the law. I argue that, in doing so, the Court employed an implicit substantive baseline for measuring the scheme's constitutionality. In the next Part, I argue that the metric the Court used to decide the vote dilution cases is best understood as representative equality.

B. The Vote Dilution Cases: An Exception to the Intent Standard

Almost immediately after deciding *Feeney*, the Court began to deviate from the intent standard in two cases involving claims of vote dilution, *Bolden* and *Rogers*. In these cases, black residents in two southern counties alleged that an at-large scheme of electing county representatives deprived them of the opportunity to influence the political process. Since the *Davis* trilogy of cases was in the process of being decided as the two vote dilution cases moved through the judicial pipeline, from the lower courts' perspective the applicable equal protection standard was unclear.

Bolden involved a claim by black residents of Mobile County, Alabama, that the at-large electoral system operating in the county violated the Equal Protection Clause.[78] The district court conceded that at the time the at-large system was adopted in 1911, blacks had been effectively disenfranchised. The at-large system therefore could not have been adopted with the intent of diluting the black vote.[79] Nonetheless, the court held that the at-large

76. *See, e.g.*, Haney López, *supra* note 19, at 23 (explaining that the Court in *Davis* "renounce[d] a constitutional commitment to ensuring equitable outcomes"); Siegel, *supra* note 19, at 1134–35 (describing the diminishing importance of disparate impact to the Supreme Court's equal protection analysis).

77. 446 U.S. 55 (1980).

78. The at-large electoral system was also challenged under Section 2 of the Voting Rights Act and the Fifteenth Amendment. *Bolden*, 446 U.S. at 60–61.

79. *See* Bolden v. City of Mobile, 423 F. Supp. 384, 397 (S.D. Ala. 1976), *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd and remanded*, 446 U.S. 55 (1980). This effective disenfranchisement resulted from exclusionary voting rules enacted by the Alabama constitutional convention ten years earlier. *Id.* at 401. The county of Mobile also provided nonracial justifications for the at-large scheme. Brief for Appellant at 28, *Bolden*, 446 U.S. 55 (No. 77-1844), 1978 WL 207139, at *28 (describing the good government ends of the at-large system as "provid[ing] citywide perspective and responsibility for actions equally to each voter").

system unconstitutionally discriminated against the black residents of Mobile County.[80]

Two theories of intent supported the district court's finding of discrimination. The first was that, while the county adopted the system in a "race-proof situation," the state actors that enacted the at-large scheme could have foreseen its discriminatory impact.[81] They should have reasonably expected that blacks would one day be enfranchised and that an at-large district, which would comprise a larger number of voters than single member districts, would limit their opportunity to elect candidates of their choice in a context of societal racism.[82] The second theory was that, even assuming the legislature that adopted the at-large system was not discriminatorily motivated, the system currently was being retained in a context that denied blacks the opportunity to be effectively represented in the political process.[83]

By the time *Bolden* reached the Supreme Court, the Court in *Feeney* had already rejected the district court's first theory of discriminatory intent, that such intent could be found when government actors reasonably could have foreseen the discriminatory consequences of their actions.[84] The Court in *Davis* and *Feeney* also seemed to implicitly reject the district court's second theory, which indicated that discriminatory intent could be inferred from the conscious, but passive, retention of a system with discriminatory effects. Under a standard prohibiting the discriminatory retention of a policy with obvious discriminatory effects, it would have been difficult to sustain the decision to retain the promotion test employed in *Davis*. This test, like the at-large scheme in Mobile County, had a discriminatory impact on black candidates and operated in a context of great societal discrimination.[85] It would have also been difficult to sustain the veterans' benefit in *Feeney*, which dramatically and disproportionately benefitted men and operated in a context in which women were still excluded from certain aspects of military service.[86]

The Supreme Court ultimately upheld the at-large system in *Bolden*, but the justices were divided. A plurality of four justices explained that a showing that less than a proportionate number of blacks had been elected to the county commission would not be sufficient for a violation of the Equal Protection Clause.[87] Instead, it would be necessary to show that the at-large system was "conceived or operated as [a] purposeful devic[e] to further

80. *See Bolden*, 423 F. Supp. at 403.
81. *Id.* at 397.
82. *See id.*
83. *See id.* at 398 ("There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action.").
84. Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.").
85. *See supra* note 48 and accompanying text.
86. *See supra* notes 58–62 and accompanying text.
87. City of Mobile v. Bolden, 446 U.S. 55, 66 (1980).

racial . . . discrimination."[88] Interestingly, in articulating this standard, the plurality did not cite to any of the cases in the trilogy. Instead, the opinion referenced earlier vote dilution cases that, through their focus on evidence from the operation of the state electoral scheme, seemed to contradict the perpetrator intent standard established in the trilogy.[89]

Although some scholars who have studied the discriminatory intent standard suggest that the plurality opinion in *Bolden* fits neatly within the framework adopted by the Court in the trilogy,[90] it is not so clear that it does. While the plurality found the evidence from the operation of the electoral structure insufficient to show discrimination in the case,[91] it did not suggest that such evidence was irrelevant to the constitutional claim. In fact, the plurality did not foreclose the possibility that such evidence could be dispositive in the constitutional invalidation of an electoral scheme. The standard that the plurality employed suggested that a law could be invalidated if it simply was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination."[92]

At the same time, the plurality did not critique the challengers' failure to offer any evidence, circumstantial or direct, that the at-large system was adopted with an intent to discriminate against black voters. The plurality could have simply rejected the claim for failing to provide such evidence, as required under the standard established in the trilogy. Instead, the justices carefully examined evidence from the operation of the at-large scheme and explained why each piece of evidence, considered in isolation, was not a sufficient basis for invalidating the scheme.

Perhaps most importantly—even assuming that despite the standard articulated, the plurality in *Bolden* was simply following the evidentiary framework established in the trilogy as scholars have suggested—the key point is that the *Bolden* plurality could not secure a fifth vote for its reasoning. Justice Stevens concurred in the judgment but suggested an alternative, somewhat ambiguous, standard for evaluating claims of vote dilution that would focus on whether the practice was "manifestly not the product of . . . a traditional political decision."[93] Justice Blackmun also concurred for the simple reason that he felt the district court remedy went too far in invalidating the Mobile city commission system; he otherwise

88. *Id.* (alteration in original) (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)).

89. *See id.* (citing White v. Regester, 412 U.S. 755 (1973)). *See generally* Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 73 (1966). These cases are discussed in greater detail in Part II.C.

90. *See, e.g.*, Haney López, *supra* note 19, at 42–44.

91. The Court determined that the at-large system was constitutional from the fact that blacks could register, vote, and participate as candidates in the political process and from the insufficiency of other evidence presented from the context of the operation of the at-large system. *Bolden*, 446 U.S. at 73–74.

92. *Id.* at 66 (alteration in original) (quoting *Whitcomb*, 403 U.S. at 149).

93. *See id.* at 90–91 (Stevens, J., concurring); *see also* Pamela S. Karlan, Cousins' *Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521, 528–29 (1996) (describing the origin of Justice Stevens's unique standard in his earlier appellate jurisprudence premised on the view of the black community as just another ordinary interest group).

found the reasoning in the dissent persuasive.[94] For these justices—and in particular for Justice Blackmun, who joined the majorities in each of the trilogy cases—there seemed to be something different about vote dilution.

In fact, the dissenting justices in *Bolden* interpreted the plurality opinion as employing a distinctive standard that looked to the context of the operation of the at-large system—not to evidence of discriminatory intent at the adoption of the scheme. They therefore agreed with the majority's formulation of the equal protection standard insofar as it looked to whether the scheme was conceived or *operated* as a purposefully discriminatory device, but ultimately disagreed with the plurality's application of the standard.[95] For the dissenters, the plurality mistakenly relied upon certain contextual factors in isolation, such as the fact that blacks were still able to vote, register, and run for office. The plurality opinion seemed to indicate that at-large systems with these characteristics would be insulated from attack under the Equal Protection Clause. The dissenters found this approach to be inconsistent with the "totality of the circumstances" approach that had been articulated in prior vote dilution cases, which focused on the operational context of the scheme in the evaluation of discrimination.[96] When properly examining the totality of evidentiary factors surrounding the operation of the at-large system, the dissent argued that the at-large system clearly violated the Equal Protection Clause.[97]

After *Bolden*, the contours of the equal protection standard applicable to vote dilution claims were, at the very least, in flux. Even the "intent" standard employed by the plurality in *Bolden* seemed to require something different from that which had been required to prove a violation of the Equal Protection Clause in the *Davis* trilogy.

In *Rogers*, a vote dilution case decided only two years after *Bolden*, a majority of the Court again focused on the operation of the electoral system, not the intent of those who adopted it.[98] Other than the fact that the challenge was brought against a county commission system in Burke County, Georgia, rather than Mobile County, Alabama, there was little to differentiate the context surrounding the adoption of the at-large system challenged in *Rogers*. Both systems were adopted in 1911 at a time when, because of prior voting restrictions, blacks were disenfranchised.[99] Neither of the at-large structures had undergone significant changes since their

94. *See Bolden*, 446 U.S. at 80 (Blackmun, J. concurring).

95. *See id.* at 94 (White, J., dissenting) (noting that the Court did not question the vitality of a standard established in *White v. Regester* that looked to the context of the operation of the statute); *see also infra* Part II.C.

96. *See Bolden*, 446 U.S. at 102 (White, J., dissenting).

97. *Id.* at 97–99.

98. *See* Rogers v. Lodge, 458 U.S. 613 (1982).

99. At the time that both at-large schemes were erected, all blacks had been disenfranchised in both counties. *See* Bolden v. City of Mobile, 423 F. Supp. 384, 386 (S.D. Ala. 1976), *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55 (1980). In Georgia, the Disenfranchisement Act of 1908 excluded most blacks from voting. *See* McDonald et al., *supra* note 2, at 69.

adoption.[100] There was no testimonial evidence that the legislators had adopted the structure for the purpose of discriminating against minority voters, nor was there other evidence relevant to the context of adoption from which discrimination could be inferred.[101] And finally, both systems could have been justified on the basis of the "good government" principle that it is better to have a representative body comprised of individuals responsible to the entire geographic polity rather than subsections of the polity.[102]

Looking to the context surrounding the operation of the at-large scheme challenged in *Rogers*, there were also significant similarities.[103] Blacks in both counties could register and vote without any formal barriers.[104] However, even though blacks comprised a significant proportion of the population in both counties, they constituted a smaller minority of the registered voting population due to past discrimination against black participation in the political process.[105] Their minority status, combined

100. *Rogers*, 458 U.S. at 615 (explaining that the county had maintained an at-large voting structure since the creation of the Burke County Board of Commissioners in 1911); Bolden v. City of Mobile, 542 F. Supp. 1050, 1067–68 (S.D. Ala. 1982) (describing some of the minor modifications to the commission form of government and its at-large structure after 1911).

101. *Bolden*, 423 F. Supp. at 397 (acknowledging that the 1911 legislation was acting in a race-proof situation because of the disenfranchisement of blacks ten years earlier); *see also Rogers*, 458 U.S. at 619–22 (failing to identify any testimonial or circumstantial evidence from the adoption of the scheme that would prove the scheme's unconstitutionality under the perpetrator intent standard).

102. In an earlier case, the Supreme Court described the good government principles that justified multi-member districts. *See* Burns v. Richardson, 384 U.S. 73, 89 n.15 (1966). There was also a suggestion in one of the Supreme Court briefs for *Bolden* that the lower courts explicitly relied on a particular good government justification to uphold the law. *See* Brief for the Appellant at 27, *Bolden*, 446 U.S. 55 (No. 77-1844), 1978 WL 223226, at *27 ("Both [c]ourts below found that the City's existing form of government, together with its at-large electoral system necessarily attendant thereto, are facially neutral and were adopted for racially neutral, good-government purposes at a time when invidious racial motivations could have played no part . . . .").

103. In fact, if anything, the context surrounding the operation of the at-large system challenged in *Rogers* provided weaker evidence of discrimination than the context surrounding the operation of the at-large system in *Bolden*. For example, in *Bolden*, the district court found direct evidence of intent behind the maintenance of the at-large plan that the Supreme Court did not find in *Rogers*. *Bolden*, 423 F. Supp. at 397 ("The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected."). There was also more evidence that voting was polarized along racial lines in Mobile County than there was for Burke County. *See id.* at 386–94.

104. *Id.* at 387; *see also Rogers*, 458 U.S. at 624 (noting that black voter registration had increased since the Voting Rights Act, and suggesting that those who were registered voted without hindrance).

105. In Burke County, blacks comprised 53.6 percent of the county, but only 38 percent of the registered voting population. *Rogers*, 458 U.S. at 614–15. In Mobile County, blacks comprised 35.4 percent of the population, but only about 28 percent of the registered voters in the county. *See Bolden*, 423 F. Supp. at 386. The district court in *Bolden* did not directly mention the percentage of the voting age population of each race actually registered to vote. I therefore calculated this number on the basis of the information given in the opinion, which included total population, percent resident black, percent white registered to vote, and percent black registered to vote. I used the following equations to reach the percentage of

with racially polarized bloc voting by whites, precluded them from ever electing a black representative.[106] As a consequence, the county commissions in the two counties were generally unresponsive to the needs and interests of the black community.[107] This unresponsiveness correlated with a generally depressed socioeconomic status of blacks in the two counties.[108]

Despite the overwhelming similarities between the context of adoption and operation of the two at-large structures in *Bolden* and *Rogers*, the Court came to a different decision in *Rogers*.[109] Justice Blackmun, who was presumably unconcerned by the remedy that the lower court imposed in *Rogers*, joined the three dissenters from *Bolden*, along with the newly appointed Justice O'Connor, and Justice Burger, a member of the *Bolden* plurality, in the decision to form a majority that invalidated the at-large scheme. The majority explained that the evidence surrounding the operation of the at-large scheme was sufficient to support the district court's finding that the "system . . . is being maintained for discriminatory purposes."[110] Nowhere in the opinion did the Court explain who the perpetrator of discrimination was; nor did it identify who maintained the at-large system for discriminatory purposes. Both Justices Powell and Stevens, writing separate dissents, focused on this inconsistency between the intent standard employed by the majority in *Rogers*, which failed to identify such a perpetrator, and that employed in the trilogy, which did and seemed to require that future courts do so as well.[111]

Assessed against the central features of the antidiscrimination principle, the vote dilution cases, and particularly *Rogers*, fit rather awkwardly. First, under the equal protection standard applied in *Rogers*, the lack of an active perpetrator of discrimination was ultimately irrelevant to the Court's

registered voters that were black: Total population * percentage of white residents * percentage of white registered voters = number of white registered voters; Total population * percentage of black residents * percentage of black registered voters = number of black registered voters; Percentage of black registered voters in county = number of black registered voters/(number of white registered voters + number of black registered voters).

106. *Rogers*, 458 U.S. at 623–24; *Bolden*, 423 F. Supp. at 387–89.

107. *See Rogers*, 458 U.S. at 625; *Bolden*, 423 F. Supp. at 400.

108. *See Rogers*, 458 U.S. at 626; *Bolden*, 423 F. Supp. at 389–93.

109. In the absence of an aggressive judicial remedy imposed by the district court, Justice Blackmun joined the *Bolden* dissenters in the invalidation of the electoral structure. Quite unexpectedly, Chief Justice Burger switched from the plurality upholding the at-large structure in *Bolden* to the majority invalidating the at-large structure in *Rogers* despite the similarities in the context of the operation of the two systems. *See* City of Mobile v. Bolden, 446 U.S. 55, 58 (1980); *see also Rogers*, 458 U.S. at 614.

110. *Rogers*, 458 U.S. at 623.

111. *See id.* at 647 (Stevens, J., dissenting) ("It is incongruous that subjective intent is identified as the constitutional standard and yet the persons who allegedly harbored an improper intent are never identified or mentioned."); *id.* at 628–29 (Powell, J., dissenting) (noting the plurality's seeming approval of a perpetrator intent standard in *Bolden*). The Court inexplicably failed to provide the state with an opportunity to defend the constitutionality of the at-large scheme by showing that it was designed to achieve a compelling interest and that it was narrowly tailored to achieve that interest. It never evaluated whether the good government interests for the law were compelling or whether the at-large scheme was necessary to satisfy this interest.

assessment of the constitutional validity of the at-large scheme.[112] Instead, what mattered was how the scheme operated in light of the context surrounding it.[113] Second, the standard's focus on the operation of the at-large scheme necessitated some baseline for measuring its constitutionality. For the Court to find that an electoral scheme operates unconstitutionally, it must rely on some comparator of a properly operating electoral scheme—one that accords with a particular constitutional principle. The Court never clearly disclosed what this baseline was in *Bolden* or *Rogers*. But it seems clear that it was not reviving the substantive equality baseline that it specifically rejected in the *Davis* trilogy since the Court never mentioned a lack of proportionate representation for blacks as a relevant consideration.

In Part II, I argue that a principle of representative equality, premised in part on the opportunity for effective representation of politically marginalized minority groups, is the best candidate for the substantive baseline that guided the judicial determination of the constitutionality of the at-large schemes in the vote dilution cases. But before I probe the contours of the representative equality principle, in the next section I examine scholarly attempts to reconcile the standard employed in the vote dilution cases with the standard employed in the *Davis* trilogy.

C. Previous Attempts to Explain the Exception

Most scholars of the equal protection discriminatory intent standard assume that it applies universally, and that it invalidates laws adopted with a discriminatory motivation.[114] These scholars therefore identify the ambiguous equal protection standard employed in *Bolden* and the standard applied in the trilogy as one and the same.[115] *Rogers*, on the other hand, is even more clearly at odds with the traditional intent standard, and so it is often relegated to an aside, a footnote, or is altogether ignored. In these asides and footnotes, scholars concede that there is something unusual about the intent standard relied on in *Rogers* to invalidate the at-large scheme, but they offer little in the way of explanation for the standard or for how it can be reconciled with the *Davis* trilogy.[116] Instead, they mostly treat *Rogers* as an outlier.[117]

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112. *Id.* at 627 (majority opinion) (invalidating the voting scheme merely because it was passively "be[ing] maintained for the purpose of denying blacks equal access to the political processes in the county").

113. *Id.* at 624–627 (finding intentional maintenance of the scheme on the basis of evidence from the discriminatory operation of the scheme).

114. *See supra* note 21 and accompanying text.

115. *See, e.g.*, Haney López, *supra* note 19, at 35–42; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1095 n.81 (1989) (describing *Bolden* as a "decision cabining dilution claims to direct proof of intentional discrimination").

116. For examples of scholars engaging in a cursory discussion of *Rogers*, see *supra* notes 18–19.

117. *See supra* notes 18–19. This treatment of *Rogers* as an outlier fails to account for the cases that preceded *Bolden* and *Rogers*, which established and employed a standard that looked to the operation of the electoral scheme. *See infra* Part II.A.

This outlier status is bolstered by a standard descriptive account for why the Court reversed course in *Rogers*. For some scholars, the majority of the Court in *Rogers* was simply reacting to institutional pressures from Congress.[118] Almost immediately after the decision in *Bolden*, Congress initiated the process of amending a section of the Voting Rights Act to overturn the plurality opinion in *Bolden* by providing a statutory means of redress for vote dilution schemes that had discriminatory operative effects.[119] According to this account, *Rogers* therefore represented a temporary pullback from *Bolden*, and thus its equal protection standard should not be taken seriously as a reflection of current doctrine.

Descriptive accounts of the Court's actual purposes are hazardous because it is difficult to get inside the heads of the justices to understand what is really motivating their choices. But there is some evidence to suggest that the *Rogers* Court was not simply responding to institutional pressures. First, seven of the nine Justices voted consistently across both *Bolden* and *Rogers*.[120] Four of the Justices in the majority in *Rogers* had already acquiesced to the standard that focused on operative effects in their opinions in *Bolden*,[121] and two of the four Justices in the plurality in *Bolden* dissented in *Rogers*,[122] as did Justice Stevens who had concurred with the plurality in *Bolden* but disagreed with the evidentiary standard employed. For Justice Stevens, the concern that *Rogers* seemed to be inconsistent with the plurality decision in *Bolden* trumped any perceived institutional pressure to overturn *Bolden*. As for the other two justices that joined the majority in *Rogers*, Justice O'Connor was a new member of the Court whose subsequent jurisprudence was not entirely out of line with the heavily contextualized approach of the majority opinion in *Rogers*.[123] That leaves Chief Justice Burger, for whom institutional pressure may have been a factor, as he joined the plurality in *Bolden*, but then reversed course and joined the majority in *Rogers*. But even for Chief Justice Burger, there is evidence to suggest that he agreed with a standard that looked to operative effects in the vote dilution context and simply viewed *Bolden* as consistently applying such a standard. Evidence to support this conclusion is the fact that he joined the majority in a key case decided prior to *Davis*

118. *See e.g.*, Haney López, *supra* note 19 at 76.

119. Section 2 of the Voting Rights Act of 1982 provides:

> 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 the denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C. § 1973(a).

120. Justices Stewart, Powell, Rehnquist, Blackmun, Brennan, White, and Marshall.

121. Justices Justices Brennan, White, Marshall, and Blackmun.

122. Justices Justices Powell and Rehnquist.

123. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (authoring the opinion upholding affirmative action in education on the basis of a diversity rationale that looked to several current contextual factors of the benefits of diversity); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (authoring the opinion invalidating affirmative action in contracting in part on the basis of contextual factors surrounding the racial makeup of the legislature and the population of the city).

that overturned a voting scheme on the basis of such an operative effects test.[124]

Second, it is not even clear why members of the Court would have felt any institutional pressure in *Rogers*. Separate constitutional and statutory standards had coexisted in the public employment context after *Davis*, in which the Court determined that the equal protection standard differed from the Title VII standard.[125] This coexistence was facilitated at the time by a broad understanding of congressional enforcement power under both the Commerce Clause and Section 5 of the Fourteenth Amendment,[126] which gave Congress room to redress discriminatory conduct through statutes that would potentially be found valid under the Constitution.[127] Given this space for broader congressional enforcement, it is not clear why the Court would have felt pressure to change its constitutional standard to respond to congressional disagreement since neither the standard nor the decision threatened legislative prerogative.

Finally, the account of *Rogers* as a decision animated by institutional pressures becomes much less persuasive when accounting for its connection to doctrine preceding *Davis*. *Rogers* was not the one-off decision of a nervous Court. Instead, it is a decision that, through its employment of the operative effects standard, was very consistent with a line of constitutional vote dilution cases that the Court had previously decided. In the next Part, I focus on connecting *Rogers* to this line of cases.

In contrast to those who explain away *Rogers*, two other scholars have provided more comprehensive theories to try to account for the unique standard employed in that case. These scholars' theories are good starting points for making sense of the standard employed in the vote dilution cases, but they are ultimately incomplete.

Daniel Ortiz was the first to offer an explanation for the different equal protection standards.[128] He argued that the intent standard, insofar as it is said to invalidate laws only on the basis of the motivation of the state actor, is a myth.[129] Instead, the intent standard functions as a mechanism that

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124. *See* White v. Regester, 412 U.S. 755 (1973). White v. Regester is discussed in detail below. *See infra* Part III.C.

125. *See supra* notes 38–40 and accompanying text.

126. U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV, § 5.

127. *See* Katzenbach v. Morgan, 384 U.S. 641, 649–50 (1966) (broadly defining congressional enforcement power under Section 5 of the Fourteenth Amendment in upholding a provision of the Voting Rights Act); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253–61 (1964) (broadly defining congressional Commerce Clause authority in upholding Title II of the Civil Rights Act as applied to public accommodations); Katzenbach v. McClung, 379 U.S. 294, 301–05 (1964) (broadly defining congressional Commerce Clause authority in upholding Title II of the Civil Rights Act as applied to restaurants). The Supreme Court would not start to narrow these two bases of congressional authority until the mid-1990s. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 518–20 (1997) (narrowing congressional enforcement power under Section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549, 559–68 (1995) (narrowing congressional authority under the Commerce Clause).

128. *See* Ortiz, *supra* note 20.

129. *Id.* at 1106 ("Despite the doctrine's name, 'intent' often has little to do with purpose or motivation.").

allocates the burden of proof "differently in different contexts in order to 'balance' individual and societal interests consistently with the ideology of traditional liberalism."[130] This ideology directs that decision making involving the allocation of market goods like housing and employment should be left to the market.[131] To the extent that the state is involved in the allocation of these goods, the judiciary should be more deferential to legislative decisions in allocating them.[132] Where the allocation decision involves nonmarket goods like voting, jury selection, and education, liberal ideology does not establish a barrier to judicial intervention in decisions that affect the distribution of these goods.[133]

With respect to the nonmarket good of voting, Ortiz argued that the nature of this good has resulted in greater judicial lenience in the application of the intent standard and, specifically, the evidence needed to prove discriminatory intent.[134] Discussing *Bolden* and *Rogers*, he explained that in these cases, the Court "does not demand any showing of actual discriminatory motivation in the decision to adopt or retain the at-large system."[135] Instead, "intent [is] largely coextensive with adverse impact."[136]

Nine years after Ortiz's seminal piece, Sheila Foster offered an alternative account of the disaggregated intent standard.[137] According to Foster, the level of judicial restraint employed and the intent standard applied depend on three factors: "(1) the actor making the decision . . . , (2) the type of decision made . . . , and (3) the substantive right affected by the decision."[138] For Foster, the key variable that differentiates the vote dilution cases from other equal protection cases is the nature of the substantive right affected by the decision.[139] She argued that in cases involving fundamental rights, such as the right to vote, the Court exercises the least judicial restraint and subjects laws to invalidation that are shown to discriminate through objective, circumstantial evidence of intent or evidence of disparate impact.[140]

Ortiz's initial contribution and Foster's subsequent reformulation are extremely important in their recognition that the intent doctrine applies differently in different contexts. Insofar as one can describe it as such, the intent doctrine that the Court applied in the vote dilution cases of *Bolden* and *Rogers* is clearly different from that which it applied in the trilogy, which involved issues of housing and employment. However, both Ortiz

130. *Id.* at 1107.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 1127–31.
135. *Id.* at 1128.
136. *Id.* at 1129.
137. *See* Foster, *supra* note 20, at 1097–1100 (describing Ortiz's theory and then introducing her own).
138. *Id.* at 1121.
139. *Id.* at 1118–21.
140. *Id.* at 1122.

and Foster's accounts are incomplete descriptions of the relationship between the intent doctrine and the standard employed in the vote dilution cases.

First, both authors oversimplify the difference between the evidentiary burden imposed in the vote dilution cases and that imposed in the trilogy. It is not merely a matter of the Court applying a more lenient standard in the vote dilution cases than it did in the trilogy. What is particularly distinct is that according to the trilogy, the challenger's burden is to prove the actual motivations of a state actor that adopts a law.[141] But in the vote dilution cases, the burden is to show that the law operates in a political and social context that leads it to produce discriminatory consequences.[142] Neither Ortiz nor Foster explain why a plaintiff must prove the motivations of an actual perpetrator of discrimination in one set of cases and only the operation of the law in its present setting in the vote dilution cases.

Second, neither author is able to explain why some voting cases decided after the vote dilution cases continue to use an intent standard. For example, in cases involving challenges to the alleged race-conscious drawing of electoral district lines, the Court has again focused on the actual motivation of state actors rather than the operation of the law.[143] Neither Ortiz nor Foster provides any basis for distinguishing one subset of voting cases from another.

Third, while Ortiz recognizes that in the vote dilution cases the Court is in fact judging substantive outcomes rather than correcting procedural defects,[144] he never defines the particular baseline against which the Court judges these outcomes. Failure to identify the Court's baseline leaves Ortiz's descriptive theory of the equal protection standard incomplete, or at the very least unsatisfying. A standard that looks to substantive outcomes unmoored from a defined end is essentially arbitrary.

Both Ortiz and Foster provide an initial foundation for understanding the disaggregated intent standard by noting that the importance of voting and electoral structures plays a role in altering the intent standard applied by the Court. However, important gaps remain in the explanation of the distinction between the standard the Court employed in the vote dilution cases and the one it employed in the trilogy. In the next two Parts, I fill those gaps, first through an interpretation of doctrine, and second through a more normative justification of the doctrinal account.

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141. *See supra* notes 44–54 and accompanying text.

142. *See supra* notes 95–111 and accompanying text.

143. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) (establishing the plaintiff's burden as a showing that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"); Shaw v. Reno, 509 U.S. 630, 644 (1993) (applying strict scrutiny to "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race'").

144. Ortiz, *supra* note 20, at 1129 (arguing that in the vote dilution cases, the effect of the Court's rationale "is to make intent largely coextensive with adverse impact in voting cases").

II. THE REPRESENTATIVE EQUALITY PRINCIPLE

Election law scholars have thus far treated the reapportionment cases that established the requirement of one-person, one-vote as unrelated to the operative effects standard employed in the vote dilution cases. In this Part, I argue that the distinctive standard employed in *Bolden* and *Rogers* did not arise in a vacuum. Instead, the best way to make sense of the operative effects standard is by recognizing its relationship—from both the perspective of doctrine and democratic theory—to the standard employed in the one-person, one-vote cases.

Much has been written about the cases that made up the so-called reapportionment revolution[145]—a set of cases beginning with *Baker v. Carr*[146] in 1960 and culminating in 1964 with the decision in *Reynolds v. Sims*[147] that adopted one-person, one-vote as the standard for evaluating apportionments under the Equal Protection Clause.[148] In this Part, I focus on identifying the contours of a representative equality principle in these cases. Specifically, I argue that the Court, through the reapportionment revolution, is best understood as having established a representative equality principle that encompassed not only the familiar democratic principle of individual political equality and majority rule, but also the principle of effective representation of minorities. This latter aspect took shape in the decisions that followed directly after the reapportionment cases. It is against this baseline that districting practices alleged to dilute the vote are measured.

The judicial development of this substantive constitutional principle cannot be divorced from the concurrently shifting landscape of democratic theory. The previously dominant Madisonian theory of democracy had been principally concerned with constraining majority factions from tyrannizing minorities and had therefore been used to justify minority vetoes of majority decisions.[149] The disproportionate political strength of rural voters in malapportioned legislative districts was one version of such a minority veto. But the pluralist theory that emerged and became dominant

145. *See, e.g.*, STEPHEN ANSOLABEHERE & JAMES M. SNYDER, JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS (2008); GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION (2002); ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968); Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1; Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277; Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697 (1999); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000); Phil C. Neal, Baker v. Carr*: Politics in Search of Law*, 1962 SUP. CT. REV. 252.

146. 369 U.S. 186 (1962).

147. 377 U.S. 533 (1964).

148. The other cases are *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Gray v. Sanders*, 372 U.S. 368 (1963).

149. *See infra* notes 162–64 and accompanying text.

during the middle part of the twentieth century rejected majority factions as mythical in a democracy comprising so many diverse interest groups.[150] Instead, pluralist theory equated majority rule with "minorities rule," describing a system in which a majority governing at any particular time simply comprised a coalition of minority groups. These majority coalitions constantly shifted to encompass new and different groups as a result of bargaining between minority groups and changes to the political context.

The principal concern within the pluralist model was therefore not majority tyranny, but rather breakdowns in the pluralist marketplace in which dominant coalitions of minorities tyrannized other, less powerful minorities by permanently frustrating their will, principally through in-groups' exclusion of out-groups from the political bargaining process. It was this shift from Madisonianism to pluralism that I argue animated the Court's rejection of a minority veto in the reapportionment cases. However, while the Court was acquiescing in a representative equality principle of majority rule, it was simultaneously articulating a coordinate principle of effective representation, which ensured marginalized minorities access to the political process. What follows is an interpretive account of the reapportionment revolution, beginning with some background to the revolution.

Before engaging this discussion, a quick note on the methodology employed in this Part. My goal is to develop a principled explanation that lends coherence to the doctrine as an ideal jurist would do in approaching these precedents. In Part III, I go on to argue that this explanation is not only principled and coherent but rests on strong normative justifications regarding the Court's role in a democracy.

A. Background

In the United States, political representation in the federal House of Representatives and state legislatures is secured through districting—the process of creating geographic entities comprised of residents responsible for electing a collective representative. The Constitution in Article I, Section 4 gives states the authority to apportion legislative districts.[151] However, nothing in the Constitution establishes any explicit standard for how states are supposed to apportion their districts.[152] Historically, states have primarily employed one of two types of districting schemes: single-member districts in which residents of each district elect one representative to the legislative body and multi-member, or at-large, districts in which all the residents of each district jointly elect multiple representatives to the

150. *See infra* notes 209–16 and accompanying text.

151. Article I, Section 4 states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4.

152. *See* CHARLES W. EAGLES, DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S, at 22 (1990).

legislative body.[153] In most of the early states, districts apportioned for at least one house of the state legislature were comprised of individual towns or counties, which ensured the representation of political subdivisions in the state and federal legislature.[154]

Most states also mandated in their founding constitutions that at least one house of the state legislature be composed of representatives elected from equally apportioned districts.[155] Although counting mechanisms and apportionment baselines were often disputed, states drawing on ideas of popular sovereignty sought to maintain for at least one house the equal representation of the people.[156] But this was rarely achieved in practice.[157] Urbanization from the mid-nineteenth century forward resulted in dramatic declines in population in rural districts.[158] Rather than reapportion districts to account for the changing demographic landscape, rural legislators, unwilling to relinquish political power to the burgeoning cities, used their majorities in state legislatures to obstruct any change to district lines.[159] By the middle of the twentieth century, decades of legislative inaction had left many state and federal legislative districts grossly malapportioned and rural

153. *See* ANSOLABEHERE & SNYDER, *supra* note 145, at 44–46 (describing the origins of the two forms of districting during the post-colonial era that would serve as the blueprint for future approaches to districting). The choice between single-member and at-large districts is ultimately a choice between competing values. Single-member districts are seen as a means to ensure that voices of various minority factions are heard in the political process. *See* Neal, *supra* note 145, at 277. At-large districts are defended on the basis that they ensure that elected officials will be responsive to the needs of the entire jurisdiction rather than smaller fractional interests. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 538 (1997).

154. *See* ANSOLABEHERE & SNYDER, *supra* note 145, at 43 (describing the origin of the American idea of representing towns in the practices of England that were carried over to the colonies, which were considered compacts between towns); DIXON, *supra* note 145, at 60–61 (identifying the state constitutions that mandated representation for political subdivisions in at least one house of the state legislature); Auerbach, *supra* note 145, at 11–12 (describing some justifications for the representation of political subdivisions in legislative bodies).

155. *See* ANSOLABEHERE & SNYDER, *supra* note 145, at 38 ("The original constitutions of forty-one of the fifty states required that in at least one chamber the districts have equal populations, and twenty-three states required equality in both chambers of their legislatures in their founding documents.").

156. *See id.* at 45 (describing the evolution of the idea of apportionment by population); DIXON, *supra* note 145, at 59 (describing the lack of settled meaning of "population" and disagreements about whether to use gross population or qualified voters as the apportionment base); JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 120–22 (1989) (describing the reform movement for equal representation at the time of the Founding).

157. DIXON, *supra* note 145, at 58 ("[W]ith a few exceptions, anything approaching substantial equality of legislative district population in both houses of state legislatures was never the general practice in America until [the mid-1960s]."). States that mandated equal apportionment in their constitutions often qualified it with a requirement that each political subdivision be represented in the state legislature. This was justified on the basis that each political subdivision should be guaranteed a "right to be heard." *Id.* at 71–77. Most states had constitutional provisions that apportioned on the basis of factors other than population. *Id*. at 81–82.

158. *See* ANSOLABEHERE & SNYDER, *supra* note 145, at 11 ("By 1920, just over half of all Americans lived in urban areas, and by 1960, seven in ten Americans lived in urban and suburban communities."); *see also* DIXON, *supra* note 145, at 89.

159. ANSOLABEHERE & SNYDER, *supra* note 145, at 40; DIXON, *supra* note 145, at 82.

regions entirely overrepresented.[160] The result of this arrangement was minority rule in many states.[161]

State legislators representing rural districts justified malapportioned districts on the basis of the Madisonian democratic ideal of avoiding the tyranny of the majority. In particular, rural state legislators defended these districts as a means of protecting rural interest groups from being overridden by a dominant, monolithic urban majority.[162] They analogized to the constitutional protection given, through the operation of the U.S. Senate, to lesser-populated states against tyranny of the majority by the more heavily populated states.[163] The even distribution of political power to the states in this body acted to dilute the votes of individuals in the higher-population states.[164] Malapportioned districts likewise protected against majority tyranny by providing rural interest groups with a minority veto against an urban majority with adverse interests.[165]

The problem with this theoretical justification for malapportioned districts was that it lacked supporting evidence. Particularly, there was nothing to indicate that urban interests comprised a monolithic majority with interests adverse to those of their rural counterparts. In fact, there was evidence to suggest that urban and rural residents shared overlapping interests, including shared political party affiliations that would serve as the principal protection against one group tyrannizing the other.[166] The theoretical arguments from Madisonian theory instead bore all the resemblances of a post hoc justification to preserve the power of certain state legislators.

Nonetheless, since malapportioned districts often gave disproportionate power to the majority of state legislators who represented lesser-populated districts, these legislators had every incentive to maintain the system. They did so even in the absence of evidence of a monolithic urban majority determined to tyrannize rural interest groups. At the same time, the hands of the judiciary seemed tied. Both the state and federal courts refused to

160. *See* ANSOLABEHERE & SNYDER, *supra* note 145, at 26–27 (describing in a table the degree of malapportionment in each state); Karlan, *supra* note 145, at 1716.

161. This meant that a minority of the population was able to elect a majority of representatives in state and federal legislative bodies. *See* ANSOLABEHERE & SNYDER, *supra* note 145, at 32–34 (describing the degree of minority rule in several states in which "legislators representing one-third of the population, sometimes less, could constitute an outright majority in the state legislature").

162. *See id.* at 15.

163. *See id.* at 34–35.

164. *See id.* at 48.

165. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 30 (1956) ("Genetically the Madisonian ideology has served as a convenient rationalization for every minority that, out of fear of the possible deprivations of some majority, has demanded a political system providing it with an opportunity to veto such policies."); DIXON, *supra* note 145, at 83–84 (describing Madisonian-type arguments made in defense of malapportionment).

166. *See* Seth C. McKee, *Rural Voters and the Polarization of American Presidential Elections*, 41 PS: POL. SCI. & POL. 101, 101–04 (2008) (describing the rise and decline of urban-rural political cleavages in the United States).

interfere with what they deemed to be the exclusive prerogative of the state legislatures to draw district lines.[167]

Theoretical understandings of democracy, however, were shifting. The Supreme Court reversed course in 1960, entering what Justice Frankfurter famously described as the "political thicket" of apportionment.[168] In the process, the Court established a substantive baseline for measuring the constitutionality of all future districting schemes.

B. The Representative Equality Principle: Majority Rule

Before the Court entered into the political thicket of reapportionment in *Baker*, Justice Black, in an earlier case, had planted the seeds for the future development of a principle of representative equality premised on majority rule. This principle would serve as the basis for protecting the rights of members of majority coalitions against a minority veto maintained through malapportioned districts. Ultimately, it would also serve as the substantive baseline for measuring the constitutionality of malapportioned districts under the Equal Protection Clause.

In *Colegrove v. Green*, a plurality of the Court decided not to reach the merits of a challenge to the constitutionality of malapportioned federal congressional districts.[169] The plurality explained that controversies surrounding malapportioned districts were "not meet for judicial determination" because they involved questions peculiarly political in nature and involved harms suffered not by private individuals but by the polity as a whole.[170] The political branches of the state government, the

167. The problem was the lack of a clear constitutional vehicle to correct the problem of malapportionment. The Article IV, Section 4 guarantee of a republican form of government seemed to be closed off from judicial enforcement since the Court had already held that challenges under this clause were nonjusticiable and involved questions for Congress to decide and remedy. *See* U.S. CONST. art. IV, § 4; Luther v. Borden, 48 U.S. 1 (1849) (finding a controversy surrounding the question of which government was lawfully established under the Republican Form of Government Clause to be nonjusticiable under the political questions doctrine). Article I, Section 2, which states that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," offered a second potential vehicle since the emphasis on "the People" is evidence that population should be the basis for allocating political power. U.S. CONST. art. I, § 2; *see also* DIXON, *supra* note 145, at 104 ("From decennial reapportionment of seats to the states on a population basis, it is a short step to argue that congressional districting *within* states likewise should be on a straight population basis."). However, the provision is limited in its reach to federal legislative districts, which would leave state malapportioned districts untouched. Finally, the Equal Protection Clause provided a potential means for redressing malapportioned districts, particularly those in place in states; however, the clause had up to that point been consistently interpreted to protect only individual rights. *See, e.g.*, Breedlove v. Suttles, 302 U.S. 277, 281 (1937) ("The equal protection clause does not require absolute equality."). Instead, it has only served as a prohibition on arbitrary and unreasonable state actions. *See, e.g.*, Whitney v. California, 274 U.S. 357, 369 (1927) (explaining that the state has broad powers to classify individuals, and classifications will only violate the equal protection clause if done without "any reasonable basis and therefore [are] purely arbitrary").

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

169. *Id.* at 552.

170. *Id.*

plurality concluded, should resolve these controversies about the proper allocation of political power.[171]

For Justice Black, writing in dissent, the question of the constitutionality of malapportioned districts was justiciable because it implicated individual rights.[172] This conclusion, however, was ultimately premised on an assumption about the proper structure of representative government. Justice Black explained that "the constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast."[173]

Implicit within Justice Balck's idea that a system should be designed to give approximately equal weight to each vote cast was a suggestion about the form of election system that states should maintain. Some of the particularities of that form were revealed later in Justice Black's *Colegrove* dissent, where he argued that the mandate of equal apportionment of districts between the states under Article I, Section 2 was directed at making "illegal a nation-wide 'rotten borough' system."[174] This was a reference to the oft-maligned "rotten borough" system of England in which some members of Parliament represented boroughs with very few residents, a system that led to the devaluation of the vote of residents for members of Parliament who represented high population boroughs.[175] The purpose of Article I, Section 2 was therefore to establish a system of representation in the House that would prohibit inequities in the effectiveness of an individual's vote. Under this provision, "[a]ll groups, classes, and individuals shall to the extent that it is practically feasible be given equal representation in the House of Representatives, which, in conjunction with the Senate, writes the laws affecting the life, liberty, and property of all the people."[176]

Justice Black's dissent thus reflected an understanding that the Constitution not only protects the individual right to vote, but also the right to an effective vote, which is to be measured in accordance with a structure of government considered appropriately representative. That structure of government is one that provides the people with equal representation. While this account seems uncontroversial now, this was not the only or even dominant basis of representation then. For alternatives, one could look to the system of representation by geography in the federal Senate and

171. *See id.* at 554 (citing Article I, Section 4 of the Constitution, which gives Congress the authority to "alter" state regulations on "[t]he Times, Places, and Manner of holding Elections" for the state legislature and the federal House of Representatives).

172. *See id.* at 568 (Black, J., dissenting) ("It is my judgment that . . . the complaint presented a justiciable case and controversy . . . since the facts alleged show that they have been injured as individuals.").

173. *Id.* at 570 (Black, J., dissenting); *see also* Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 51 (1986) (describing the infamous British "rotten borough" system).

174. *Colegrove*, 328 U.S. at 570.

175. REID, *supra* note 156, at 119–20 (describing the borough system of representation in England, which involved the representation of geographic space and not people).

176. *Colegrove*, 328 U.S. at 570–71.

in many state houses, which were designed to ensure that the voices of political sub-entities would be heard.[177] Such apportionments were often justified as a means for securing interest-based representation for distinct groups.[178]

Notably, if the constitutionality of a districting scheme depends on whether it provides an effective vote measured according to the proper form of representative government, it follows that the legislative motivation behind the challenged scheme should be irrelevant to the constitutional inquiry. This fits with Justice Black's conclusion that "[w]hether [malapportionment] was due to negligence or was a wilful effort to deprive some citizens of an effective vote, the admitted result is that the constitutional policy of equality of representation has been defeated."[179] In other words, it did not matter whether state legislators intended to draw malapportioned districts to deprive individuals of an effective vote or not. What mattered was that malapportioned districts operated in a manner that deprived individuals of an equally effective vote.

It would take fifteen years for the Court to finally move in the direction of Justice Black's dissent, and when it did, it initially did so only in a halfway and unsustainable manner. In *Baker*, voters challenged malapportioned state legislative districts in Tennessee under the Equal Protection Clause.[180] The Court rejected the *Colegrove* plurality's non-justiciability finding and held that such claims were in fact justiciable.[181] To reach this conclusion, the Court distinguished equal protection challenges to malapportioned districts from those claims that could be made under the clause guaranteeing a republican form of government, which the Court continued to consider nonjusticiable. In the process of distinguishing the two types of claims, the Court tried to frame the equal protection claim in exclusively rights-based terms in order to contrast it with the structural concerns that underlay the Guarantee Clause.

The majority explained that claims under the Guarantee Clause[182] were non-justiciable because of the lack of a manageable judicial standard for assessing when a government is republican in form.[183] In contrast, "[j]udicial standards under the Equal Protection Clause [were] well developed and familiar."[184] Those standards focus on the process of

177. *See* ANSOLABEHERE & SNYDER, *supra* note 145, at 47.

178. *See* DIXON, *supra* note 145, at 83–84 (quoting statements by state elected officials defending malapportionment as a means to protect rural interest groups).

179. *Colegrove*, 328 U.S. at 572.

180. *See* Baker v. Carr, 369 U.S. 186 (1962); Neal, *supra* note 145, at 254 (describing the degree of malapportionment in Tennessee when the case reached the Supreme Court). As discussed above, questions about the validity of malapportioned state districts fell outside of the purview of Article I, Section 2, which was solely concerned with federal legislative districts.

181. One reason for the reversal of course is that only four Justices remained from the decision in *Colegrove* and two of them, Justices Black and Douglas, had dissented in *Colegrove*. *See* Neal, *supra* note 145, at 257.

182. U.S. CONST. art. IV, § 4.

183. *See Baker*, 369 U.S. at 209–10.

184. *Id.* at 226. *But see* McConnell, *supra* note 145, at 106 (criticizing this assertion).

decision making, invalidating laws that discriminate against individuals if the "discrimination reflects no policy, but simply arbitrary and capricious action."[185] As Justice Clark elaborated in his concurrence, this would subject to invalidation only those malapportionments that were so "topsy-turvical" that they lacked any rational design.[186]

The *Baker* standard, which focused on the process of designing the districts, proved unsustainable because it was divorced from any articulation of the right in question. The malapportionment of state legislative districts did not discriminatorily or otherwise deprive anyone of their right to vote. Nor did it deprive individuals of the opportunity to have their votes counted. The process-based inquiry left undefined what the state was arbitrarily and capriciously doing that was unconstitutional through its malapportionment of districts. Justice Frankfurter, writing in dissent, identified this weakness in the majority's attempt to frame the equal protection claim in rights-based terms without identifying the particular right that was being discriminatorily denied. He asserted that the challenge to the malapportioned districts was simply a democratic structure-based "Guarantee Clause claim masquerading under a different label."[187] The litigants' complaint against the state system of malapportionment was simply that "the basis of representation . . . hurts them" by allowing a minority to rule.[188] Such a claim, Justice Frankfurter maintained, is nonjusticiable under either the Equal Protection Clause or the Guarantee Clause because it involves the federal court in a political debate that it is not competent to engage.[189]

The Court was incompetent because the challengers' attempt to frame the issue as a personal one about the debasement or dilution of their vote requires a political assessment about the proper form of representation for which the Court lacks comparative insight. To assess whether a vote has been diluted such that an individual is not able to effectively influence the political process requires a determination of the level of influence that the Constitution assures any individual. As Justice Frankfurter explained, "[S]ince 'equal protection of the laws' can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship."[190] This determination, "with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably republican state."[191] In

185. *Baker*, 369 U.S. at 226 (emphasis omitted).
186. *Id.* at 254 (Clark, J., concurring).
187. *Id.* at 297 (Frankfurter, J., dissenting).
188. *Id.* at 298.
189. *Id.*; *see also* Guy Uriel Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1109 (2002) (arguing that in *Baker*, Justice Frankfurter was centrally concerned about preserving the legitimacy of the Court, which he felt would be undermined by "judicial supervision of democratic politics").
190. *Baker*, 369 U.S. at 301 (Frankfurter, J., dissenting).
191. *Id.*

other words, in addressing the dilutive effects of an apportionment, the equal protection of the individual cannot be divorced from a finding about the proper form of representative government.

Two years after *Baker*, the Court returned to the question of the constitutionality of malapportioned federal congressional districts in Georgia. For the first time, the Court in *Wesberry v. Sanders*[192] held these districts unconstitutional, and it did so under Article I, Section 2.[193] In rationalizing this invalidation, the Court placed much greater emphasis than the majority in *Baker* on the deficiencies of such districts from the perspective of representative government rather than individual rights. In doing so, it took a step avoided in *Baker* toward defining the proper form of representative government against which malapportioned districts would be judged.

The Court interpreted the requirement under Article I, Section 2 that representatives be chosen "by the People of the several States" to mean that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[194] This interpretation, the Court explained, was derived from the intent of the Framers of the Constitution who desired to establish through this provision a House of Representatives that was fundamentally democratic.[195] To define what it meant for the House to be democratic, the majority returned to the argument Justice Black introduced in his dissent in *Colegrove*.[196] It defined the democratic structure that the Framers sought to create in the House in contrast to the rotten borough system of Parliament in England that they wanted to avoid.[197] In this more democratically structured House, the people should be able to elect members of the House and "each voter should have a voice equal to that of every other in electing members of Congress."[198] In other words, the Framers sought to create in the House a democratic structure that guaranteed equal representation for equal numbers of people.[199]

The Court left two fundamental questions unaddressed, even as it articulated this ideal ofdemocratic government as securing political equality. The first question revolved around the principle that underlay the idea of equal representation. Is the goal simply equality for equality's sake, or is there some other democratic principle that underlies this goal? The second question concerned the problem of malapportioned state legislative districts that are not subject to the mandate of Article I, Section 2. Did the Court intend after *Wesberry* that federal congressional districts would be constitutionally required under Article I, Section 2 to be equally apportioned while state legislative districts could remain malapportioned so

192. Wesberry v. Sanders, 376 U.S. 1 (1964).
193. *Id.* at 17.
194. *Id.* at 7–8.
195. *Id.* at 8.
196. *See supra* notes 173–76 and accompanying text (explaining Justice Black's dissent).
197. *Wesberry*, 376 U.S. at 14–15.
198. *Id.* at 10.
199. *Id.* at 10–11.

long as the apportionment was not done in an arbitrary and capricious manner under the Equal Protection Clause?

In *Reynolds*, a case decided the same year as *Wesberry*, both sets of questions were answered through the judicial construction of a representative equality principle under the Equal Protection Clause. This principle identified the democratic basis for the goal of equal representation and applied it to state legislative apportionments. In particular, the Court explicitly adopted majority rule as a central democratic objective that mandated the invalidation of even those rationally created malapportioned districts. In reaching this conclusion, the Court tried to avoid Justice Frankfurter's criticism in *Baker* that, through its imposition of a particular theory of representative government, the Court was masquerading a Guarantee Clause claim under the label of equal protection. The Court did so again by attempting to frame the issue in individual-rights based terms. But in doing so, it clearly conceded that these individual rights claims would be addressed differently from others it had previously recognized under the Equal Protection Clause. The most important difference being that the determination of whether the right in question was violated would not be based on whether there was some defect in the process of decision making, such that it reflected arbitrariness or capriciousness. Instead, it would be based on a determination of whether the state reapportionment operated contrary to the representative equality principle of majority rule.

As Justice Black had done in dissent in *Colegrove*, the majority in *Reynolds* defined the individual right at stake in the malapportionment of districts as derivative of the right to vote. In an oft-quoted passage, the Court explained,

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the 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.[200]

Rather than avoiding the question that the assertion of vote dilution naturally raises—dilution as compared to what—the Court adopted and elaborated upon the baseline of representative equality established in *Wesberry*. An individual's vote has been diluted when she has been deprived of the equal representation that is fundamental to democratic government.[201] It is fundamental because in a democracy premised on representative government, a majority of the voters must be able to elect a majority of the legislators "responsible for enacting laws by which all citizens are to be governed."[202] Marrying the principle of representative government to the individual right to an undiluted vote, the Court declared that if a democratic government of laws is to be sustained, "the overriding objective [of apportionment] must be substantial equality of population

200. Reynolds v. Sims, 377 U.S. 533, 555 (1964).
201. *Id.* at 567–68.
202. *Id.* at 565.

among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state."[203] In other words, the principle of representative equality requires "one person, one vote."[204]

The Court's opinion in *Reynolds* is best explained as adopting majority rule as a principal baseline value underlying representative equality. Evidence in support of that interpretation can be found in the Court's explicit subordination of other bases of representation that did not depend on majority rule. The Court in *Reynolds* dismissed a theory of representative government premised on geography, confidently asserting that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities."[205]

Importantly, the Court also rejected a Madisonian conception of representative government. As Justice Stewart emphasized in dissent, from a Madisonian perspective, the prioritization of majority rule undermines interest-based representation by allowing a monolithic majority to control outcomes and subordinate "a medley of component voices" that represent minorities in society.[206] The Court's response to this alternative theory of representative government was just as dismissive as its rejection of a geographic basis of representation. Implicitly relying on the rights-protective provisions of the Constitution, it explained that there are other constitutional means that provide for the protection of members of minority groups.[207] And these other means according to the Court, make a system that guarantees minority rule over majorities unnecessary.[208]

Lying in the background of the Court's rather blithe response to concerns about insufficient representation of minority interests was a shift in political theory away from a fixation on the power of a monolithic majority. The pluralist theory of democracy associated with political scientists such as Robert Dahl, Earl Latham, and David Truman, had emerged as one of the

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203. *Id.* at 579.

204. Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

205. *Reynolds*, 377 U.S. at 562.

206. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 751 (1964) (Stewart, J., dissenting) (a companion case to *Reynolds v. Sims*). Early democratic theory was centrally concerned about a monolithic majority tyrannizing the minority. Implicit within the Madisonian concept of a majority faction that has interests "adverse to the rights of other citizens" is the view that majorities can be unified and monolithic. *See* THE FEDERALIST NO. 10, at 43 (James Madison) (George W. Carey & James McClellan eds., Liberty Fund 2001); *see also* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 144 (Robert M. Baird & Stuart E. Rosenbaum eds., Prometheus Books 1991) (1861) (describing as a principle danger of representative democracy, the "danger of class legislation on the part of the numerical majority, these being all composed of the same class").

207. *Reynolds*, 377 U.S. at 566.

208. *Id.* at 565–66. The Court's response makes sense if the concern is that the monolithic majority group will use its power to tyrannize minorities by depriving them of their constitutional liberties. Minorities can simply obtain relief for such constitutional violations in the courts. However, if the concern is that the monolithic majority will use its control over the political process to not only advance its own interests, but also to ignore the interests of minorities in the political process, the Court's response provides little comfort. The Constitution, for example, will not protect the interests of rural minorities to have government revenues directed toward their particularized needs.

dominant accounts of representative government by the time the Court decided Reynolds.[209] And pluralist theory provided a refutation to Justice Stewart's logic.

Pluralist theory posits that in a well-functioning political marketplace, rule by a monolithic majority is a myth.[210] Many individuals with diverse interests comprise the United States. The possibility that a monolithic majority will emerge from this panoply of interests, the theory holds, is therefore simply unimaginable.[211] Rather, majority rule is really "minorities rule" in that any majority that governs at any point in time will be comprised of a coalition of several minority groups with crosscutting and overlapping interests.[212] Importantly, the minority groups comprising the in-group coalition in power will ordinarily include members with overlapping and crosscutting allegiances with members of minority groups out of power.[213] These overlapping and crosscutting allegiances between members of the in-group and out-group serve as the principal protection against tyranny of the majority over the interests of the minorities. They do so by ensuring that the majority accounts for and considers the interests of the minority in its decision making.[214]

Another protection against majority tyranny, according to pluralist theory, is the inherent instability of majority coalitions. The on-going political bargaining between interest groups along with changes in the political context can lead to shifts in the composition of the coalition that has the ultimate power to govern.[215] Thus, in a properly operating pluralist

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209. *See generally* DAHL, *supra* note 165, at 30–31; ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1963); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951); Earl Latham, *The Group Basis of Politics: Notes for a Theory*, 46 AM. POL. SCI. REV. 376 (1952).

210. DAHL, *supra* note 165, at 133; *see also* Auerbach, *supra* note 145, at 52 ("The 'monolithic' majority feared by Mr. Justice Stewart does not exist; the majority is but a coalition of minorities which must act in a moderate, broadly representative fashion to preserve itself.").

211. *See* Auerbach, *supra* note 145, at 52 (explaining that the multiplicity of interests that exists in American society "keep[s] any one interest, or combination of interests, from dominating our society"). Although Madisonian theory has been equated with the dangers of tyranny by a unified and monolithic majority, it does suggest that the possibility of a monolithic majority faction is greatly diminished in a large and diverse republic. *See* THE FEDERALIST NO. 10, *supra* note 206 (James Madison). In the context of current American society, Madison would likely agree that the idea of a monolithic majority is a myth.

212. DAHL, *supra* note 165, at 133; *see also* Auerbach, *supra* note 145, at 55–56 (describing the multiple and overlapping loyalties that individuals share with different groups that "tempers the single-mindedness of each group and makes it amenable to legislative compromise").

213. *See* DIXON, *supra* note 145, at 51 (Pluralism is premised on the idea of "[t]he richness and complexity both of individual and group life, and the current tendency of all individuals to have membership in several minorities at any given time, combine to give us a system . . . of shifting concurrent minorities"); TRUMAN, *supra* note 209, at 43 ("Any society . . . is a mosaic of overlapping groups of various specialized sorts."); Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 735 (1983) (describing the nature of cross-cutting cleavages).

214. *See* Auerbach, *supra* note 145, at 55.

215. *See id.* at 52 (describing this political bargaining process as a central feature of legislative and administrative processes). According to pluralist theory, the legislature

marketplace, minorities are usually protected against permanent frustration of their political will. A minority out of power one day can be part of the majority in power the next through participation in the give and take of a competitive political marketplace.[216] This process of minority interest bargaining and coalition building provides the additional layer of protection that renders unnecessary a guarantee of minority rule for the representation of minority interests.

Applying this theory to the reapportionment cases, residents of rural districts, or any other ordinary minority, did not need the extra protection of a minority veto provided by malapportioned districts. Assuming that a particular minority had the opportunity to engage in the give and take of politics, their interests would be protected through a process of accommodation and compromise in the pluralist marketplace.

The Court in *Reynolds* should thus be understood as having adopted a substantive constitutional principle of representative government under the Equal Protection Clause that was premised on equal representation and majority rule. In the process, it established an equal protection standard that invalidated malapportioned districts, not because they were adopted with impure motives, but because they operated in a way that conflicted with this principle. The triumph of substance over process is evidenced by the Court's clear rejection of a process basis, offered by Justice Clark in his *Reynolds* concurrence, for invalidating the malapportioned districts. In this concurrence, Justice Clark suggested that the Court should have simply held that the apportionment scheme was arbitrary, in that it constituted "a crazy quilt" that revealed invidious discrimination in its creation.[217] Despite the seeming simplicity of such reasoning and its consistency with the Court's past equal protection jurisprudence, no other justice joined Justice Clark's concurrence.

C. The Representative Equality Principle: Effective Representation

The general scholarly consensus is that *Reynolds* marked the culmination of the reapportionment revolution.[218] I argue, however, that in the years following *Reynolds*, the reapportionment revolution continued and the representative equality principle evolved in the face of newer types of equal protection challenges to districting and apportionment. Political equality and majority rule remained as the central mandate for the apportionment of

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serves as the "referees" of group bargaining and seeks to serve the winning coalition in the policy-making process. *See* Latham, *supra* note 209, at 390. Public policy, therefore represents the "equilibrium reached in the group struggle at any given moment." *Id.*

216. DAHL, *supra* note 165, at 132 ("Elections and political competition[s] . . . vastly increase the size, number, and variety of minorities whose preferences must be taken into account by leaders in making policy choices.").

217. Reynolds v. Sims, 377 U.S. 533, 588 (1964) (Clark, J. concurring) (citing Baker v. Carr, 369 U.S. 186, 253–258 (1962) (Clark, J., concurring)).

218. *See supra* note 145 (citing various scholars).

electoral districts.[219] But the Court's response to vote dilution claims in subsequent cases reveal an additional imperative under the Equal Protection Clause. This imperative, which focused on providing minorities with equally effective representation in the political process, is traceable to the pluralist account that the political marketplace is not always inclusive of all interests.

Just before the reapportionment revolution, a leading political scientist, Robert Dahl, published an important book criticizing Madisonian democratic theory: *A Preface to Democratic Theory*. In it, Dahl suggested that rather than fixating on concerns about majority tyranny, "the more relevant question is the extent to which various minorities in a society will frustrate the ambitions of one another."[220] In a society where members of groups hold multiple identities and interests and in which social cleavages are crosscutting and overlapping, this concern is not particularly pressing.[221] Members of a frustrated minority group can always use their membership in, and allegiance to, other groups to garner support for their interests to prevent the submergence of their will. But Dahl was writing in the context of enduring societal divisions. He likely recognized the reality that rather than being crosscutting and overlapping, some cleavages were deep and reinforcing and that these latter cleavages arose from deep-seated animus and distrust between certain groups.[222] Because of these deep and reinforcing social cleavages, certain groups face great difficulty in creating political coalitions with members of other groups, even those other groups with which they share some aspect of identity or interest. This leads to the political marginalization of certain groups who are left out of the political bargaining process in the pluralist marketplace. And unless the marginalized group comprises a majority in an electoral jurisdiction,[223] this

219. This mandate required that at least every ten years, states, counties, and cities that used single-member districting schemes had to reapportion to equalize the population of each of their districts. *See* Karlan, *supra* note 145, at 1715.

220. DAHL, *supra* note 165, at 133; *see also* DIXON, *supra* note 145, at 37 (describing the twentieth century shift from Madisonianism and its central concern with protecting a minority from majority tyranny to "pluralism-in-fact" with its central concern of providing "means for minority access to government and minority participation in the multifaceted process of decision-making").

221. *See* Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 97 (1959) ("The evidence available suggests that the chances for stable democracy are enhanced to the extent that social strata, groups and individuals have a number of cross-cutting politically relevant affiliations.").

222. Writing in the mid-1950s, Dahl described as "[a] central guiding thread of American constitutional development . . . the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision." DAHL, *supra* note 165, at 137. He included African Americans in the South as one such active and legitimate group. *See id.* at 138; *see also* EDWARD ALSWORTH ROSS, THE PRINCIPLES OF SOCIOLOGY 164–65 (1920) (describing the dangers of violence in a society divided along a single, reinforcing cleavage).

223. There are contexts in which a politically marginalized minority might be able to develop a coalition with another sympathetic minority, which also may happen to be similarly marginalized.

can lead to the permanent frustration of the will of that group and the group's exclusion from any influence over policymaking.

The judicial doctrine that developed in the years following *Reynolds* reflected an awareness of this potential breakdown in the pluralist marketplace. A central concern was redressing structural impediments to opportunities for politically marginalized minorities to influence the political process.[224] In this doctrinal development, the focus of judicial scrutiny was more on the operative effects of the structural impediment rather than the process of their adoption.

The seeds of this doctrine emerged in response to an equal protection challenge to the election of state senators in multi-member at-large districts in *Fortson v. Dorsey*.[225] In *Reynolds*, the Court had held that at-large districts in which multiple legislators were elected from one district were not unconstitutional per se so long as they complied with the one-person, one-vote requirement.[226] The district at issue in *Fortson* complied with this mandate. Seven state senators represented a multi-member district that had approximately seven times the population of other single-member state senatorial districts in Georgia.[227] Nonetheless, the challengers claimed that the multi-member district submerged the interests of members of minority groups residing in it.[228] They explained that it did so by making it more difficult for minorities in the larger multi-member districts to build majority coalitions to influence elections than it was for minorities in the smaller single-member districts.[229] The Court ultimately rejected this claim and a similar claim brought the next year in Hawaii for lack of evidence that the interest of the particular group had been submerged.[230]

Significantly, though, the Court in *Fortson* left the door open to future challenges to multi-member districts. The Court explained, "[O]ur opinion is not to be understood to say that in all instances or under all circumstances such a system . . . will comport with the dictates of the Equal Protection

224. Like the one-person, one-vote doctrine, the cases establishing the principle of effective representation did not fit neatly within the individual rights framework previously established for the Equal Protection Clause. Instead, the Court in these cases responded to group challenges to electoral structures that did not provide effective representation. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001) ("Vote dilution claims implicate a special kind of injury, one that does not fit easily with a conventional view of individual rights. That is because they require a court to consider the relative treatment of groups in determining whether an individual has been harmed.") (emphasis omitted).

225. 379 U.S. 433 (1965).

226. Reynolds v. Sims, 377 US. 533, 578–79 (1964).

227. *Fortson*, 379 U.S. at 437.

228. *See* Brief for the Appellees at 9, *Fortson*, 379 U.S. 433 (No. 178), 1964 WL 81329, at *9. In a related case decided a year later, challengers to multi-member districts in Hawaii complained that the co-existence of a multi-member and single-member districting system resulted in the unequal and therefore unconstitutional submergence of minority voters. *See* Reply Brief for John A. Burns, Governor of the State of Hawaii at 17–27, Burns v. Richardson, 384 U.S. 73 (1966) (Nos. 318, 323, 409), 1966 WL 115395, at *17–27.

229. *See* Brief for the Appellees at 8, *Fortson*, 379 U.S. 433 (No. 178), 1964 WL 81329, at *8.

230. *See Burns*, 384 U.S. at 88; *Fortson*, 379 U.S. at 439 (Harlan, J., concurring).

Clause."[231] It also proffered a standard for evaluating such claims: "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."[232]

Notably, the *Fortson* standard specifically rejects a pure process-based approach to addressing claims of interest submergence or vote dilution. Whether there is a defect in the political process that causes the apportionment scheme to minimize or cancel out the voting strength of racial or political elements is ultimately irrelevant. Instead, the central issue is whether the scheme "operates" in a way that minimizes or cancels out the voting strength of particular groups. This suggests, at the very least, judicial recognition that there is some substantive value relevant to the evaluation of these claims of vote dilution. As with any standard that focuses on the operation of a state law, there must be a baseline for measuring when the state law violates the Constitution—in this context, a baseline for determining when a state apportionment scheme has unacceptably minimized or cancelled out the voting strength of a racial or political element.

Two cases decided in the early 1970s are best understood as developing the contours of a constitutional baseline of effective representation in the political process as an addendum to the representative equality principle. This baseline of effective representation provided a subsequent guide for the Court's choice of standards in *Bolden* and *Rogers*.

In the first case, *Whitcomb v. Chavis*,[233] poor black residents of the Center Township Ghetto in Marion County, Indiana, claimed that the multi-member districting scheme in place in the county submerged their interests.[234] The challengers did not try to argue that the State of Indiana intentionally adopted the multi-member districting scheme to minimize or cancel out their vote. In fact, they conceded that there was no basis for such a claim since the multi-member districting scheme was adopted at a time when there were no substantial ethnic or racial enclaves in Marion County.[235]

Instead, the challengers relied on the standard developed in *Fortson*, which required them to prove that the multi-member constituency apportionment scheme, under the circumstances of the case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. They therefore based their case on evidence from the political and social context in which the multi-member scheme operated, to argue that the scheme deprived them of effective representation

231. *Fortson*, 379 U.S. at 439.
232. *Id.*
233. 403 U.S. 124 (1971).
234. Brief of the Appellees at 5–12, *Whitcomb*, 403 U.S. 124 (No. 92), 1970 WL 136610, at *5–12.
235. *Id.* at 28–29.

in the political process.[236] This included evidence that residents of the Center Township Ghetto shared distinctive interests in such things as "housing regulations, sanitation, welfare programs, garnishment statutes, and unemployment compensations, among other others."[237] They presented evidence showing that state legislators elected in the multi-member district disproportionately hailed from other parts of the county and proved unresponsive to the community's interests.[238] Finally, the challengers offered evidence showing that residents of the Center Township Ghetto would be able to elect candidates of their choice who would be responsive to their interests if the state replaced the multi-member district with single-member districts.[239]

As it had done in the prior two challenges to multi-member districts,[240] the Court rejected the claim of the residents of the Center Township Ghetto because they had not proven that the multi-member district diluted their vote.[241] As the Court explained, the fact that Center Township Ghetto residents were not able to elect a proportionate number of state legislators responsive to their needs and interests did not, in itself, prove a claim of vote dilution.[242] Rather, the residents had to show that the electoral scheme deprived them of the opportunity "to participate in the political process[] and to elect legislators of their choice."[243] This, the Court explained, they had not done.[244] Rather than reflecting the lack of opportunity to influence the political process, the unresponsiveness of Marion County legislators resulted from the fact that Republicans had won four of the five elections from 1960 to 1968 while the residents of the Center Township ghetto had voted overwhelmingly Democratic.[245] During this time, the Democratic Party had shown itself to be inclusive of the residents' interests. The party had slated candidates from the Center Township Ghetto in the one election that the party won, and there was no evidence that they had failed to slate such candidates in the other elections.[246] The Court therefore inferred that had the Democrats won more than one election, the interests of the Center Township Ghetto would have been more fully represented.[247]

While the Court rejected the vote dilution claim in *Whitcomb*, it nonetheless reaffirmed the *Fortson* standard for valid vote dilution claims, which focused on the operation of the electoral scheme rather than the

236. *Id.* at 11.
237. Chavis v. Whitcomb, 305 F. Supp. 1364, 1386 (S.D. Ind. 1969).
238. *Id.* at 1381–85.
239. *Id.* at 1385.
240. *See supra* notes 225–32 and accompanying text.
241. *Whitcomb*, 403 U.S. at 153–55.
242. *Id.* at 149–55.
243. *Id.* at 149.
244. *Id.* at 150.
245. *Id.*
246. *Id.* at 152.
247. *Id.* at 152–53.

process of its adoption.[248] A lack of proportionate representation, however, was determined in *Whitcomb* to not be the proper constitutional baseline for assessing whether a scheme cancelled out or minimized the voting strength of racial or political elements under the *Fortson* standard. Instead, the Court in *Whitcomb* suggested that access to the political process in terms of the effective opportunity to influence electoral outcomes would be the appropriate baseline for assessing whether the pluralist marketplace was functioning properly. It explained:

> The mere fact that one interest group or another concerned with the outcome of . . . elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that . . . the population is being denied access to the political system.[249]

Whitcomb left open an important question: what evidence would be necessary to show that an electoral structure operated to deprive a racial or political element of access to the political process? The Court answered this question two years later in *White v. Regester*,[250] when it unanimously invalidated two multi-member voting districts in Texas because they provided members of two politically marginalized racial groups with less opportunity than other residents "to participate in the political process[] and to elect legislators of their choice."[251]

In Dallas County, Texas, African Americans, who comprised nearly 25 percent of the one million residents, registered and voted freely.[252] Yet they had only elected two blacks to the Texas House of Representatives since Reconstruction in the mid-nineteenth century.[253] These two were the only blacks ever slated by the Dallas Committee for Responsible Government (DCRG), the chief Democratic candidate slating organization in Dallas County.[254] In contrast to the situation in Marion County, Indiana, where African Americans excluded by one political party could presumably join and support the opposing political party, Texas was essentially a one party state in which the Democratic Party controlled most elected offices.[255] The party primary was therefore the only election that really mattered. This meant that the DCRG exerted a great degree of control over who would be

248. *Id.* at 143 ("Multi-member district systems . . . may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'").

249. *Id.* at 154–55.

250. 412 U.S. 755 (1973).

251. *Id.* at 766.

252. Brief of Appellees Thelma Washington and George Allen at 9, *White*, 412 U.S. 755 (No. 72-147), 1973 WL 171747, at *9.

253. *White*, 412 U.S. at 766.

254. *Id.* at 766–67.

255. *See* Brief for Appellees Regester at 30, *White*, 412 U.S. 755 (No. 72-147), 1973 WL 171745, at *30 (explaining that "[t]he Democratic nomination remains the crucial determinant" for securing elected office as reflected in the fact that "[o]nly one of the fifteen Dallas County Legislators was Republican in 1970 and he was able to win only by dint of substantial expenditures and endorsement in the general election by the DCRG and all major newspapers").

selected for office through its decision about which candidate to slate for elected office.[256] Its refusal to involve blacks in the slating process acted as a major impediment to black access to the political process in Dallas County by eliminating the opportunity for them to influence which candidate would be elected at this pivotal stage of selection.[257]

In addition, the DCRG refused to slate candidates responsive to African Americans because it did not need the support of members of the black community to secure election in the county.[258] The DCRG likely recognized that blacks were politically isolated in a county with a racially polarized electorate in which most white voters refused to vote for black candidates or even candidates responsive to black interests. Those few candidates that did try to appeal to the interests of the black community suffered electoral costs as the DCRG engaged in racially charged campaign tactics designed (usually successfully) to appeal to white voters who were intent on punishing these candidates.[259] Given this dynamic, any candidate that made it through the nomination process could not fairly be seen as responsive to the black community in Dallas. This lack of responsiveness combined with other electoral rules to effectively prevent blacks from "enter[ing] into the political process in a reliable and meaningful manner."[260]

Similarly, Mexican-Americans in Bexar County, Texas, were found to have little opportunity to influence the political process. This group, which comprised 29 percent of the county, had suffered deprivation in the areas of education, employment, economics, housing, and health.[261] Their lack of influence followed from a history of political exclusion in which, as the district court described, "a cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures . . . operated to effectively deny Mexican-Americans access to the political processes in Texas."[262] The Court concluded that in Bexar County, "[s]ingle member districts were . . . required to remedy 'the effects of past and present discrimination against Mexican-Americans,' and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities."[263]

Consistent with the Court's approach in *Whitcomb* and the standard first articulated in *Fortson*, none of the evidence on which the Court relied in *White* to invalidate the multi-member districts in Texas had anything to do with the process of adoption of the electoral scheme. The Court instead

256. *White*, 412 U.S. at 766–67.
257. *Id.* at 767.
258. *Id.*
259. *Id.*
260. *Id.* at 766–67 (describing other electoral rules like a majority vote requirement and a so-called place requirement).
261. *Id.* at 768.
262. Graves v. Barnes, 343 F. Supp. 704, 731 (W.D. Tex. 1972), *aff'd sub nom.* Archer v. Smith, 409 U.S. 808 (1972), *aff'd in part, rev'd in part sub nom.* White v. Regester, 412 U.S. 755 (1973).
263. *White*, 412 U.S. at 769 (quoting *Graves*, 343 F. Supp. at 733).

squarely focused on evidence from the context in which the multi-member electoral structures operated to support its invalidation of the structures. Specifically, it measured the operation of the two multi-member schemes against the constitutional baseline of access to the political process and found that they both operated in an unconstitutional manner—a manner that undermined representative equality. The Fifth Circuit would later summarize the evidence relevant to prove an equal protection violation under the standard articulated in *White*. The circuit court explained that members of a minority group can prove dilution through "an aggregate of . . . factors [including] lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system."[264]

What is notable about this list is that none of the evidence listed is focused on showing that the multi-member districts themselves cause politically marginalized groups to be deprived of the opportunity to influence the political process. Rather, the multi-member system is viewed as a structural impediment to remedying a breakdown in the pluralist marketplace at the societal level in which structural cleavages—reinforced by animus, distrust, and indifference—serve as obstacles to political coalition building between groups. The constitutional objective in these contexts was to force states to establish single-member districts in their stead. These districts would provide members of previously excluded racial groups with an opportunity to influence the electoral process through political bargaining in smaller districts comprised of residents open to including those groups in the majority coalition.

With its decision in *White*, the Court put in place the second part of the basic doctrinal structure underlying the representative equality principle. Not only are electoral structures that operate to undermine individual political equality and majority rule unconstitutional, electoral structures that operate to deprive minorities of the opportunity for representation in the political process violate the Equal Protection Clause as well.

There is important evidence that the representative equality principle was intended as a separate basis for evaluating certain laws under the Equal Protection Clause providing a distinct standard from the antidiscrimination principle that the Court reaffirmed in the *Davis* trilogy. In *Davis*, the Court extensively discussed several of its prior equal protection cases involving education, welfare, racial gerrymandering, and jury selection to support its argument that a process-based perpetrator intent standard had always been employed in the equal protection context.[265] It also disapprovingly cited

264. Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973).

265. *See* Washington v. Davis, 426 U.S. 229, 239–42 (1976) (citing Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (school segregation); Jefferson v. Hackney, 406 U.S. 535 (1972) (welfare); Alexander v. Louisiana, 405 U.S. 625 (1972) (jury selection); James v. Valtierra, 402 U.S. 137 (1971); Turner v. Fouche, 396 U.S. 346 (1970) (jury selection); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Hunter v. Erickson, 393 U.S. 385 (1969); Whitus v. Georgia,

several lower court opinions establishing a disparate impact test for employment discrimination claims.[266] Yet the Court never discussed or cited any of the one-person, one-vote cases or the vote dilution cases that collectively established the representative equality principle. This omission of the reapportionment cases should not be considered a simple oversight for two important reasons: First, the reapportionment cases were particularly salient at the time that the Court decided *Davis*, as reflected in the parallel adjudications in which the Court cited and relied on the reasoning in those cases. Second, and perhaps more tellingly, Justice White wrote the majority opinion in both *White* and *Davis*. This suggests that the Court saw the reapportionment cases as addressing a distinct problem that required the adoption of a distinct standard.

In sum, the best explanation for what the Court did in the reapportionment revolution was to define the two principal imperatives underlying the representative equality principle—majority rule and effective representation for minority groups. These imperatives implicitly served as the constitutional baseline for the evidentiary standard employed by the Court in *Bolden* and *Rogers* to evaluate the operation of the electoral scheme. The evidence in *Rogers* that blacks in Burke County, Georgia, had never elected an African American to the Board of Commissioners and had little opportunity to elect a candidate responsive to their interests, combined with the absence of competition between political parties and the general unresponsiveness of the Board to the African American community, indicated that the pluralist marketplace had broken down. In this context, the structural impediment of at-large districts had to be removed and replaced by single member districts that would provide blacks with equal opportunity to influence the political process.

The reapportionment cases provide a basis for understanding the standard employed in *Bolden* and *Rogers*, and particularly the constitutional baseline that the Court measured the at-large scheme against. In the next Part I argue that the Court's enforcement of a baseline of representative equality is justified as a form of representation-structuring judicial review. I also

385 U.S. 545 (1967) (jury selection); McLaughlin v. Florida, 379 U.S. 184 (1964) (cohabitation statute); Wright v. Rockefeller, 376 U.S. 52 (1964) (racial gerrymandering); Eubanks v. Louisiana, 356 U.S. 584 (1958); Avery v. Georgia, 345 U.S. 559 (1953) (jury selection); Cassell v. Texas, 339 U.S. 282 (1950) (jury selection); Patton v. Mississippi, 332 U.S. 463 (1947); Akins v. Texas, 325 U.S. 398 (1945) (jury selection); Hill v. Texas, 316 U.S. 400 (1942) (jury selection); Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); Neal v. Delaware, 103 U.S. 370 (1881) (jury selection); Strauder v. West Virginia, 100 U.S. 303 (1880) (jury selection)). The Court also explained away cases that seemed to turn on disparate impact, arguing that they were in fact cases that looked to discriminatory purpose. *Id.* at 242–43 (citing Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Palmer v. Thompson, 403 U.S. 217 (1971)). The next year, in *Arlington Heights*, the Court asserted that a few other cases that seemed to turn on the operative effect of a law were in fact cases about discriminatory purpose. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (citing Gomillion v. Lightfoot, 364 U.S. 339 (1960) (racial gerrymandering); Lane v. Wilson, 307 U.S. 268 (1939) (vote denial); Guinn v. United States, 238 U.S. 347 (1915) (vote denial); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discriminatory exclusion from a benefit)).

266. *See Davis*, 426 U.S. at 244 n.12.

argue that this accords with a proper role for an unaccountable and unelected judiciary in a democracy.

III. THE REPRESENTATIVE EQUALITY PRINCIPLE AND REPRESENTATION-STRUCTURING JUDICIAL REVIEW

Political process theory is one of the most important theories of judicial review in a democracy.[267] Drawn from the famous footnote four in *United States v. Carolene Products Co.*[268] and principally developed by John Hart Ely, process theory identifies a basis for reconciling the unelected and unaccountable judiciary's role in the review and invalidation of laws with a system of democracy in which the laws enacted are responsive and accountable to the will of the people. According to process theory, the two principal functions of judicial review in a democracy are clearing the channels of political change and facilitating the representation of minorities.[269] In performing these roles, courts are engaging in representation-reinforcing judicial review in which they correct process-based malfunctions in a representative democracy. Part of the allure of process theory is the idea that it constrains judges to only overturn actions of the representative branches when such actions are the product of a democratically defective process; by limiting judges to these procedural bases for overturning laws, process theory hopes to eliminate or narrow the discretion of judges to make substantive value choices.[270] A number of scholars have described how the intent standard articulated in the *Davis* trilogy, and its focus on the process underlying the adoption of laws, fit neatly within this theoretic account.[271]

There is, however, potential for conflict between judicial enforcement of the representative equality principle on the one hand, which necessarily rests on a substantive value choice about the proper form of democratic governance, and the process-based account of the Equal Protection Clause on the other. I argue in this Part that the two can be reconciled. Representation-reinforcing judicial review is itself premised on a certain pluralist conception of representative democracy; even conventional process theory requires a substantive value choice in that sense. In its

267. *See generally* ELY, *supra* note 28. The theory, however, does not lack competitors and it is often criticized. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 194–99 (1990); Ackerman, *supra* note 31; Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 511–16 (1981); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980). *But see* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991).

268. 304 U.S. 144 (1938).

269. *See* ELY, *supra* note 28, at 103.

270. *See id.* at 102–03.

271. Flagg, *supra* note 18; Lawrence, *supra* note 18; David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995). *But see* Ortiz, *supra* note 20 (questioning the accepted belief that process theory underlies the intent doctrine).

enforcement of the representative equality principle, the Supreme Court is working on the basis of a similar political conception of democracy, with the difference that in this case its review serves to establish critical preconditions for representative democracy.

In the two subsections that follow, I discuss the two primary representation-reinforcing roles that process theorists typically ascribe to courts. I show that although judicial enforcement of the antidiscrimination principle in the *Davis* trilogy and its progeny fits neatly within one of the two primary roles, judicial enforcement of the representative equality principle does not fit neatly within either role. Instead, I argue that the judicial enforcement of the representative equality principle fits and is justified by an essential third role for the Court, the need for which is implicit within process theory: representation-structuring judicial review.

A. Representation-Reinforcing Judicial Review

The starting point for process theory is the famous footnote four in *Carolene Products*. In that footnote, Justice Stone imported into an ordinary case an extraordinary account of the function of judicial review in a democracy.[272] According to this account, the representative institutions of government should be responsible for making substantive value choices that affect society.[273] The role of the courts, through judicial review of laws, is to correct systematic malfunctions in the political marketplace. The courts should do so by guarding against two principal defects that indicate that the political process is "undeserving of trust."[274] First, courts should

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272. In *Carolene Products*, the Court applied minimal rational basis scrutiny to evaluate the constitutionality of the statute. Under this standard, the statute had a strong presumption of constitutionality. Justice Stone, however, explained in footnote 4:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within the specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subject to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Prods. Co., 304 U.S. at 152 n.4 (citations omitted). Paragraphs two and three of the footnote are central to the process-theoretic account. John Hart Ely, the principal proponent of process theory interprets paragraph two as designating to the courts the role of "keep[ing] the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open." ELY, *supra* note 28, at 76. Ely interprets paragraph three as directing courts to "concern [themselves] with what majorities do to minorities." *Id.*

273. ELY, *supra* note 28, at 103.

274. *Id.*

correct defects that arise from "the ins . . . choking off the channels of political change to ensure that they will stay in and the outs will stay out."[275] This is the anti-entrenchment rationale for judicial review.[276] Second, courts should guard against defects in contexts in which "no one is actually denied a voice or a vote, [but] representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interests."[277] This is the antidiscrimination rationale for judicial review.[278] The responsibility for protecting against entrenchment and discrimination is properly given to the Court because elected representatives cannot be trusted to identify and rectify either of these defects since they are often the source or beneficiaries of the defects. Judges, on the other hand, are relative outsiders and experts in process and therefore well situated to properly evaluate and resolve the defects.[279]

1. Anti-entrenchment Review

Both Ely and current law of politics scholars view the reapportionment cases as clear examples of the anti-entrenchment form of representation-reinforcing judicial review. Through this anti-entrenchment role, courts are responsible for invalidating obstacles to the effective functioning of "the democratic process that the legislature itself creates."[280] Ely describes restrictions on the vote, including the devaluation of votes through malapportionment, as the "quintessential stoppage" in the democratic process that the Court has actively reviewed to prevent the ins from choking off the channels of political change by deciding who stays out of the democratic process.[281] More recently, law of politics scholars such as Samuel Issacharoff and Richard Pildes have fleshed this argument out, suggesting that the Court invalidated malapportioned districts in response to an entrenchment problem reflected in the unwillingness of certain legislators to relinquish power.[282] In particular, they argue that the standard

275. *Id.*

276. Kathleen M. Sullivan & Pamela S. Karlan, *Foreword: The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 697 (2004).

277. ELY, *supra* note 28, at 103.

278. Sullivan & Karlan, *supra* note 276, at 697.

279. ELY, *supra* note 28, at 103.

280. Ortiz, *supra* note 20, at 727.

281. *See* ELY, *supra* note 28, at 117. Ely is also concerned with restrictions on freedom of expression and delegation of lawmaking to indirectly accountable agencies. *See id.* at 105–16, 131–34.

282. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 595 (2002) (describing the concern animating the reapportionment cases as the ends-oriented manipulation of districts); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 44 (2004) ("The justification for judicial review in contexts such as malapportionment is to address the structural risk of political self-entrenchment."); *see also* Klarman, *supra* note 153, at 513 (describing malapportionment as an entrenchment problem). These scholars have suggested that the Court's focus should be less on protecting the rights of individuals and more on securing "an appropriately competitive partisan environment." Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998).

of one-person, one-vote, which required state legislatures to reapportion on a periodic basis, was intended to redress the problem of entrenchment.[283]

However, a closer look at the reapportionment cases, particularly those establishing one-person, one-vote as the constitutional standard, and the rationales underlying them, reveals that the Court is not merely engaging in anti-entrenchment judicial review. It is surely the case that concerns about entrenchment partially motivated political outsiders to challenge malapportioned districts. The impetus for the challenge to the malapportionment in Tennessee in *Baker* was the failure of rural state legislators to agree to reapportion every ten years as required by the state Constitution. And for one Justice at least, the decision to join the majority holding in *Baker* that malapportionment presented a justiciable controversy was a response to the lack of alternative political channels to force state legislators to reapportion.[284] But the cases that followed *Baker* indicate that the Court was doing something more than simply responding to the process defect of legislative entrenchment. And this suggests that we need to look elsewhere for a process-theoretic justification for judicial review in these cases.

First, the anti-entrenchment explanation cannot account for the judicial invalidation of malapportioned districts that arose from requirements embedded in state constitutions. Many states sought to replicate the federal model of representation in the Senate and House of Representatives. They therefore required in their constitutions that one house of the state legislature be apportioned on the basis of geography—usually on the basis of political subdivisions like counties—and the other house on the basis of population.[285] Many of these constitutional systems of apportionment pre-dated the mass migrations to the cities that began in the late nineteenth century.[286] Rural state legislators, therefore, cannot be seen as actively entrenching their own power in these contexts any more than senators in the context of the U.S. Senate. Rather, legislators represented political subdivisions of varying sizes in accordance with a state constitutional mandate. Nonetheless, despite the absence of an entrenchment problem, the Court struck down these mini-federal plans in two of the companion cases to *Reynolds*.[287] It explained that these plans were inconsistent with the

283. *See* Foster, *supra* note 20, at 1118–19 (arguing that the vote dilution cases go "to the proper functioning of the democratic process" and are thus "critical to the functioning of an open and effective democratic process" (quoting ELY, *supra* note 28, at 105)).

284. *See* ANSOLABEHERE & SNYDER, *supra* note 145, at 156–58 (describing how Justice Clark switched sides from dissenting to concurring with the majority opinion in *Baker* after deciding that people of the state lacked any alternative political channels to correct the malapportionment).

285. *See id.* at 46–47 (describing the extent of constitutionally prescribed county representation in state legislatures).

286. *See id.*

287. *See* Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656, 674–75 (1964) (invalidating the apportionment formula of the Maryland state constitution because it did not apportion on the basis of population); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653–54 (1964) (invalidating the apportionment formula of the New York State Constitution because it did not apportion on the basis of population).

federal constitutional mandate that population be the basis of apportionment for the entire state legislature.[288]

Second, the Court's decision in a third companion case to *Reynolds*, *Lucas v. Forty-Fourth General Assembly of Colorado*,[289] is notable because it is also inconsistent with the idea that the Court was exclusively, or even predominantly, concerned with the problem of entrenchment. After the decision in *Baker*, the people of the State of Colorado agreed by popular initiative to maintain malapportioned districts in one house of their state legislature rather than adopt one that would provide approximately equally apportioned districts in both houses.[290] There was majority support for the districting arrangement in every county of the state, including the urban ones that lost political power due to the malapportionment.[291] While rural legislators likely supported the initiative, they were clearly not responsible for entrenching their own power in the state legislature; rather the responsibility lay with the people as a whole. Nonetheless, the Court invalidated the popularly ratified malapportioned scheme explaining that, irrespective of its means of adoption, it was inconsistent with the requirements of the Equal Protection Clause.[292] If the role of the Court in these cases was only to clear the channels of political change, the Colorado system of apportionment should have been upheld given the availability and utilization of the popular initiative, an alternative political channel to prevent entrenchment. The fact that the Court did not choose this path is evidence that it was concerned about something more than entrenchment.

Finally, the judicial solution to the problem of malapportionment in these cases does little to resolve the problem of legislative entrenchment. The judicial mandate of one-person, one-vote under the Equal Protection Clause requires that state legislatures reapportion after the census every ten years to provide for equally apportioned districts. If the concern with entrenchment is that state legislators will manipulate apportionments to maintain their power, then it is precisely the wrong answer to give them freer rein to configure their districts in a way that will best allow them to retain power and prevent outsiders from sharing in that power.[293] The constitutional

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288. *See Tawes*, 377 U.S. at 674–75; *WMCA*, 377 U.S. at 653–54.

289. 377 U.S. 713 (1964).

290. *Id.* at 717 (the residents of the State of Colorado adopted the malapportioned scheme by a vote of 305,700 to 172,725 and defeated the scheme that required equal apportionment in both houses by a vote of 311,749 to 149,822); *see also id.* at 731 (holding that "a majority of the voters [of] every county of the State voted in favor of the . . . scheme" that apportioned seats on the basis of geography rather than population).

291. *See id.* at 730.

292. The Court recognized that this case was distinct from other cases it had decided because "the initiative device provide[d] a practicable political remedy to obtain relief against alleged legislative malapportionment in Colorado." *Id.* at 732. Nonetheless, the Court held that the apportionment of Senate seats under the initiative "clearly involve[d] departures from population-based representation too extreme to be constitutionally permissible." *Id.* at 734–35.

293. *See* Engstrom, *supra* note 145, at 278 ("Not only had the Court failed to develop effective checks on the [legislative] practice of gerrymandering, but in pursuing the goal of population equality to a point of satiety it had actually facilitated that practice.").

bounds of equally apportioned districts is not much of a limit at all, given the many ways that districts can be configured within this constraint. Moreover, the requirement that legislators reapportion every ten years gives legislators constitutional cover for the continual revision of districts to better secure entrenchment in response to population shifts. These opportunities for entrenchment can be contrasted with the prior arrangement in many states in which political subdivisions were represented in at least one house and legislators could not control who their constituents were. Such an arrangement did skew representation in favor of rural districts, but at the same time, it limited the opportunity of incumbent legislators to manipulate district lines as a means to entrench their own power.

If the Court in the reapportionment cases was principally concerned with entrenchment, it could have invalidated only those malapportionments that clearly demonstrated legislative efforts to entrench incumbents' power. This could have been accomplished through the very process-based standard that Justice Clark advanced in his concurrences in *Baker* and *Reynolds*, when he suggested that apportionment schemes should be struck down when they were so "topsy-turvical" that they lacked any rational design.[294] This standard, which would have protected systems of apportionment by subdivision, would have invalidated obvious examples of entrenchment when legislators enact schemes that protect some political subdivisions and not others, or give unequal representation to political subdivisions for no rational reason.

In addition, if the Court were seeking to redress entrenchment problems, it could have limited itself to striking down those malapportionments resulting from the legislature's failure to follow a state constitutional mandate, which would be evidence of active entrenchment.[295] Alternatively, it could have invalidated legislative codifications of malapportionment when there were no feasible alternative political avenues for a majority of the people to overturn these legislative judgments. The unwillingness of the Court to limit its constitutional solution to correcting the problem of entrenchment is evidence that the reapportionment cases were about something more than fixing this particular process defect.

2. Antidiscrimination Review

The second role of representation-reinforcing judicial review that process theory advances is the facilitation of the representation of minorities. The courts do this by guarding against government decision making that is motivated by hostility or prejudice toward a particular group. According to process theory, it is appropriate to target these defects in the process of government decision making, rather than the outcomes resulting from the

294. *See* Reynolds v. Sims, 377 U.S. 533, 588 (1964) (Clark, J. concurring); Baker v. Carr, 369 U.S. 186, 254 (1962) (Clark, J., concurring).

295. This was the situation in Tennessee prior to *Baker*. *See* ANSOLABEHERE & SNYDER, *supra* note 145, at 25 ("Tennessee's state constitution of 1891 required equal representation of populations.").

decision, because the requirement that laws treat everyone equally is unattainable, and perhaps even unpalatable.[296] When evaluating the allocation of gratuitous benefits—benefits that are not constitutional entitlements—the courts should therefore focus on correcting process malfunctions indicated by government decisions motivated by dislike of a particular group.[297]

This emphasis on correcting defects in government decision-making processes is at the heart of the antidiscrimination principle, and it animates the intent standard reaffirmed in the *Davis* trilogy. Courts that apply this antidiscrimination principle to facially neutral laws scrutinize process defects at two stages. First, they assess whether there is direct or circumstantial evidence that the legislators were motivated by racial considerations in adopting a law that disproportionately disadvantages a racial minority.[298] This is the basis for the intent standard. Second, assuming such evidence demonstrates that the decision was race-based, courts then evaluate whether a compelling government interest supports the action, and if so, whether the action is narrowly tailored to achieve the compelling interest. This is the strict scrutiny standard that process theorists have described as the handmaiden of motive review.[299]

Scholars that examine the vote dilution cases through a process-theoretic lens try to fit them into this category of representation-reinforcing judicial review.[300] But there are two problems with such analyses: First, the allocation of representation cannot accurately be described as a gratuitous benefit that fits within this category of representation-reinforcing judicial review. Second, and more importantly, categorizing the vote dilution cases as instances of antidiscrimination review is based on a misunderstanding of what challengers are required to prove in those cases. As I argued in Part I, the Court, in cases like *Whitcomb*, *White*, *Bolden*, and *Rogers*, did not scrutinize the challenged laws for indications that racial bias motivated their adoption; nor did the Court subject the electoral schemes ultimately invalidated in *White* and *Rogers* to strict scrutiny, which would have required checking for a compelling interest or narrow tailoring at the back end. Instead, the Court has invalidated electoral schemes once they are shown to operate in a context that results in groups being deprived of the effective opportunity to influence the political process.

Rather than correcting a process defect, the Court in its enforcement of the representative equality principle is enforcing a substantive model of democratic representation. The choice, for example, in the one-person, one-

296. *See* ELY, *supra* note 28, at 135–36.

297. *See id.* at 136.

298. For further analysis, see the discussion of the famous trilogy of cases beginning with *Davis* in Part I.A; *see also* ELY, *supra* note 28, at 136–45 (describing the Court's use of motive analysis).

299. *See infra* Part I.A; *see also* ELY, *supra* note 28, at 145–46 (explaining how the strict scrutiny analysis, applied to suspect classification, "function[s] as a handmaiden of motivation analysis").

300. *See* Sullivan & Karlan, *supra* note 276, at 709 (describing vote dilution claims as being at "the intersection of the antientrenchment and the antidiscrimination rationales").

vote cases that the proper aggregation of votes in our representative government is by population is a clear value judgment.[301] It is a value judgment that rejects other bases of aggregation, such as by geography, which was utilized in the organization of the U.S. Senate and served as a model for many states prior to the Court striking them down.[302] Similarly, the adoption of majority rule and effective representation for minorities was a value judgment that subordinated a prior form of representative government that had provided a minority veto to protect against majority tyranny. This is essentially a judgment that the political marketplace is not comprised of a monolithic majority that necessitates special protection for minorities, but rather is comprised of many minorities whose opportunities for coalition building should be facilitated.

Judicial enforcement of the representative equality principle therefore enforces important substantive value judgments and does not fit neatly within either form of representation-reinforcing judicial review. I argue in the next subsection that what the Court is doing in these cases is engaging in a form of representation-structuring judicial review. The value judgments required for this form of review can be reconciled with process theory, and ultimately with democracy itself, because they set up the critical structural preconditions for representation-reinforcing judicial review—a government that is in fact representative of all interests.

B. Representation-Structuring Judicial Review

Process theorists tend to overlook the pivotal role that courts have played, and should continue to play, in securing the initial preconditions for representation-reinforcing judicial review.[303] In this role that I describe as representation-structuring judicial review, the Court has enforced the Constitution to structure the political marketplace so that majorities control and marginalized minority interest groups are included and accounted for.[304] Ely did dedicate an oft-overlooked chapter in his book *Democracy*

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301. Alexander Bickel, who was an opponent of the Court's reapportionment decisions, explained that "[w]ith respect to the apportionment problem . . . . [t]he issue [to be explored] . . . is one of the distribution of access and power among various groups, and the answer requires normative [value] choices and prophetic judgments." ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 35 (1970).

302. *See supra* note 154 and accompanying text.

303. *See* ELY, *supra* note 28, at 79 (noting that the republic the forebears envisioned was "one in which the representatives would govern in the interest of the whole people").

304. *See id.* at 77–78; Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 741 (2004) (explaining that Ely's concern was with fair majoritarianism and opening up the "pluralist's bazaar" to all comers). Bruce Ackerman, in a critique of the *Carolene Products* process-theoretic account offers the following amended process-based argument of what is required from the representative process that animates the discussion here:

> [A]lthough each of us cannot always expect to convince our legislators, we can at least insist that they treat our claims with respect. At the very least, they should thoughtfully consider our moral and empirical arguments, rejecting them only after conscientiously deciding that they are inconsistent with the public interest. If a group fails to receive this treatment, it suffers a special wrong, one quite distinct from its substantive treatment on the merits.

Ackerman, *supra* note 31, at 738.

and Distrust to describing the court's role in securing the structural preconditions for representative government, but even he placed much more emphasis on representation-reinforcing judicial review.[305] Here I will focus on this critical third function for judicial review and argue that it provides a normative justification for the Court's vote dilution doctrine.

The structural preconditions that Ely's process theory describes for representative government require a balancing of popular control with egalitarianism. Ely described several forms of representation-structuring judicial review to secure the structural preconditions for representative government. These include judicial protection of the ballot and periodic elections, the divisions of power between the three branches of the federal government and between the federal government and the states, and the virtual representation of politically disempowered individuals and groups through the requirement of generally applicable laws.[306] These forms of judicial review fall outside of the *Carolene Products* footnote four framework since they are not solely concerned with process. Instead, these forms of judicial review necessarily involve the Court advancing substantive value choices about the proper form of representative government—one that balances majority rule with the equal treatment of minorities in the political marketplace.

However, while Ely recognized the need to safeguard the structural preconditions for effective democratic representation, the judicial tools that he offered for facilitating an inclusive and representative political marketplace are underinclusive, both normatively and descriptively. Ely's tendency was to leave many of the problems of representative government to correction at the back end through representation-reinforcing judicial review of already-enacted laws. But back-end review is limited. In particular, it cannot ensure opportunities for politically marginalized minorities to have their interests accounted for and considered in the political marketplace. Such opportunities can, however, be protected through the representative equality principle of effective representation. In the rest of this part, I describe the three main roles that Ely offered for the Court in structuring the representative process and show why they are not adequate for protecting politically marginalized minorities in the political marketplace. I then show how the Court's enforcement of the representative equality principle fills some of the gap in securing the equal treatment of minorities in the political marketplace.

Ely set forth a clear role for the courts in securing a representative government.[307] In a representative government, the vote is fundamental. Judicial safeguarding of the vote therefore represents more than simply the prevention of self-entrenchment or the clearing of the channels of political change. Without the ballot, there is no representative government. The ballot and frequent elections provide the principal structural mechanism for

305. Ely, *supra* note 28, at 87–88.
306. *Id*. at 77–86.
307. *Id.* at 116–18.

ensuring that the ruled control the rulers. If the rulers act contrary to the interests of the ruled, the ruled can simply vote them out of office and replace them with others that would better represent their interests.[308] But the vote only assures one aspect of representative government: majority control. While voting and elections serve to ensure that the rulers are accountable and responsive to the ruled, they do not necessarily guarantee that the rulers are accountable and responsive to all segments of the ruled. The rulers only really have to be responsive and accountable to a majority of the ruled in order to secure reelection. Voting as a method of popular control therefore provides little guarantee that the interests of minorities will be accounted for and considered in the decision-making process. Ely recognized this, explaining that since any majority can outvote the minority in an election, there is nothing to guarantee that the minority's votes will be effective in securing representation in the political process.[309]

Ely therefore suggested a second means built into the Constitution itself that helps reconcile popular control and the protection of minorities. This is the constitutional division of powers vertically between the states and the federal government and horizontally between the three branches of the federal government.[310] The Framers of the Constitution designed this pluralism of governing structures to ensure that no majority faction would be able to exert tyrannical control over all of the instruments of power.[311] However, while these constitutionally embedded mechanisms may be necessary, they are ultimately insufficient for protecting politically marginalized minorities in a system premised on majority rule. Even assuming that different majority coalitions control different parts of government, there is little to ensure the protection of minorities that are not part of the majority coalition at any level of the government. Instead, there is the distinct possibility that these minorities will be marginalized from the political marketplace at all levels of government in that their interests will not be considered or accounted for in government decision-making processes. This has been the case for African Americans for much of American history.

Therefore, in addition to the vote and the division of power, Ely also recognized the need in any theory of representation "to ensure . . . that the representative would not sever his interest from those of a majority of his constituency but also that he would not sever a majority coalition's interests from those of various minorities."[312] Toward this end, Ely pointed to a third tool that contributes to the reconciliation of popular rule and

308. *Id.* at 78.

309. *Id.*

310. *Id.* at 80. Another strategy that the Founders employed to protect minorities was the Bill of Rights. Ely recognized, however, that the problem with this strategy was that "[n]o finite lists of entitlements can possibly cover all the ways majorities can tyrannize minorities." *Id.* at 81.

311. *Id.* at 80; *see also* THE FEDERALIST NO. 51, *supra* note 206, at 268 (James Madison) (discussing the division of powers as a means for "ambition . . . to counteract ambition").

312. *See* ELY, *supra* note 28, at 82.

egalitarianism: virtual representation.[313] According to the theory of virtual representation, elected actors represent—through their support and enactment of generally applicable laws—individuals that can vote as well as those that cannot, because the interests of both parties are assumed to be very nearly related, and most inseparably connected.[314] The courts police the process of virtual representation by invalidating any laws that are not generally applicable, but that are instead biased in favor of one group over another.[315] This is perhaps the most promising avenue that Ely suggested for ensuring attention to the interests of the politically marginalized. I therefore explore it in some detail below.

McCulloch v. Maryland[316] serves as the leading example of judicial enforcement of the idea of virtual representation.[317] In that case, the Bank of the United States challenged the constitutionality of a state tax on the operation of banks not chartered by the state.[318] The Court invalidated the tax, but conspicuously explained that the rationale did not extend to other generally applicable real estate taxes to which the national bank was subjected.[319] According to process theory, this discrepancy can be explained from the perspective of virtual representation. Through the targeted tax on banks not chartered by the state, the state legislature had severed the interests of the politically empowered state banks from the politically powerless national bank through biased legislation that advanced

313. *See id.* at 82–87.

314. Edmund Burke famously explained:

> [Members of the British House of Commons] cannot faithfully serve their Constituents as legal Delegates, without favouring Non-Electors as virtual Representatives, and must still promote the Interests of those which have no Vote, by serving them well that gave them a Seat in the House, because the Interests of both Parties, throughout the Kingdom, are very nearly related, and most inseparably connected. Thus English Non-Electors are and ever must be virtually represented and favoured, while Electors themselves are faithfully served.

REID, *supra* note 156, at 58 (quoting LOYAL PATRIOT, SOME OBSERVATIONS OF CONSEQUENCE, IN THREE PARTS, OCCASIONED BY THE STAMP-TAX, LATELY IMPOSED ON THE BRITISH COLONIES 23–24 (1768)); *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 166 (1992) (describing virtual representation as the principal British justification for the taxing of colonies without providing them with the opportunity to elect members of Parliament); Michelman, *supra* note 173, at 51 ("Virtual representation doctrine reached its ultimate synthesis as the British response to colonial objections against taxation by a Parliament in which Americans were voiceless.").

315. The Equal Protection Clause currently serves as the primary tool for providing virtual representation through generally applicable laws. *See* ELY, *supra* note 28, at 86. But prior to the Equal Protection Clause, the courts enforced the mandate of virtual representation through the Article IV Privileges and Immunities Clause and the Article I Commerce Clause. *Id.* at 82–84. The courts have interpreted these two clauses to prohibit states from treating politically powerless geographic outsiders less favorably than locals when providing a set of entitlements. *Id.* at 84. Through this prohibition, the fate of the locals with political power is tied to the fate of the politically powerless outsiders. And through this tying of fates, the interests of the politically powerless are virtually represented in a political process responsive to the politically empowered. *Id.* at 84.

316. 17 U.S. 316 (1819).

317. ELY, *supra* note 28, at 85.

318. *McCulloch*, 17 U.S. at 319.

319. *Id.*

the interest of the state bank at the expense of the national bank. The national bank that had already lacked actual representation in the state legislature was now being denied virtual legislation as a result of the enactment of the biased law.[320]

The biased tax law can be contrasted with a generally applicable real estate tax that would impact the politically empowered state banks and the politically powerless national bank equally. Such a generally applicable tax offers a structural guarantee that the legislative decision-making process would account for the national bank's interests because of the need to be accountable to the politically empowered state banks in the levying of the tax.[321] Thus, by policing the representative process for defects in virtual representation, the courts could protect the politically powerless national bank by ensuring that its interests were tied to the politically empowered state bank.

Virtual representation is a promising tool for protecting the politically marginalized. However, judicial invalidation of targeted laws that indicate a breakdown of the system of virtual representation can still leave the interests of the politically marginalized unaccounted for in the political process. In particular, a central assumption underlying virtual representation is that there is a degree of homogeneity of interests between the politically empowered and disempowered.[322] For example, returning to *McCulloch*, the interests of the politically powerless Bank of the United States can be considered sufficiently protected when the state legislature passes generally applicable laws if it is similarly situated to the politically empowered state chartered banks. However, one can imagine a context in which the politically empowered state bank is differently situated from the politically powerless national bank such that a generally applicable law would affect the two entities in fundamentally different ways. Hypothetically, the state legislature's adoption of a generally applicable real estate tax on banks could ultimately bankrupt a financially weak and politically powerless Bank of the United States, while allowing the more financially sound and politically empowered state chartered banks to stay in business. The state legislature might have enacted the law out of simple

320. ELY, *supra* note 28, at 86 ("[C]onstitutional salvation would have been found only in a genuine guarantee of virtual representation.").

321. *See id.*

322. *See, e.g.*, BAILYN, *supra* note 314, at 168 ("Once a lack of natural identity of interests between representatives and the populace was conceded, the idea of virtual representation lost any force it might have had . . . ."); REID, *supra* note 156, at 60 (describing a major premise for the argument of virtual representation during the colonial period as being that the Americans and British non-electors shared interests). Ely does not ignore the fact that the interests of minorities will differ from those of members of the majority coalition. *See* ELY, *supra* note 28, at 78 (arguing that the ballot "does not ensure . . . the effective protection of minorities whose interests differ from the interests of most of the rest of us") (emphasis omitted). However, Ely suggested that these minorities are protected through representation-reinforcing judicial review. *See id.* at 87. As I discuss further below, such representation-reinforcing judicial review is not sufficient to protect against defects in the structure of representative government that lead to the failure to consider the interests of the minority in government decision-making processes.

hostility to the national bank, but it may also be the case that it enacts laws out of ignorance of, or indifference toward, the financial conditions and circumstances of the national bank.

Even more distressing, one can imagine a predominantly white, southern state legislature selected in elections in which their constituents vote in a racially polarized manner such that the white constituents vote for candidates responsive to their interests and never vote for candidates responsive to the interests of the ethnic minority community. Members of the state legislature selected in these contexts are likely to lack knowledge of the interests of the minority community since they never campaigned in their neighborhoods or asked for their votes in exchange for policies responsive to their interests. These divisions may leave the two communities disconnected from each other such that the majority has little knowledge of, or interest in, the conditions and circumstances that the minority community faces.

When deciding upon and enacting generally applicable laws on matters like public school funding, housing, and employment, legislators representing these districts are less likely to account for and consider the interests of the minority community. At the same time, societal divisions in wealth, education, and employment as well as segregation in housing will leave the majority and minority differently situated such that generally applicable laws impact the two in fundamentally different ways. In these circumstances, virtual representation alone will not ensure adequate consideration of minority interests.

A potential objection to equating the national bank in *McCulloch* with politically marginalized minorities in the United States today is that, for the most part, members of the latter groups can actually vote.[323] Presumably, the need for virtual representation diminishes when the non-electors are enfranchised because then they can secure actual representation by threatening to vote elected officials out of office if they fail to serve their interests.

To the extent that the political minority is an ordinary political minority that has the opportunity to participate in the pluralist marketplace, this threat is credible. Such minorities have the opportunity to form coalitions with disaffected members of the majority coalition to secure actual representation in the next election. Recognizing this potential, elected officials have incentives to account for the interests of the ordinary minority when making generally applicable public policy.

However, the distinction between being able to vote and not being able to vote for purposes of securing actual representation dissolves when the minority is politically marginalized. For these minorities, the threat to vote individuals out of office is not credible because societal animus or social

323. For example, the Fifteenth Amendment and the Voting Rights Act enabled racial minorities to vote, and the elimination of property qualifications and other wealth restrictions assured voting rights for poor people. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 211–12, 218–21 (2000) (describing these changes and their impact).

isolation prevents them from forming the necessary coalitions to influence elections unless they happen to comprise a majority in a particular jurisdiction.[324] These politically marginalized minorities face a political context in which voting is polarized and candidates for office can appeal exclusively to the majority community to win elections.[325] These candidates for office experience no electoral costs for failing to learn about the needs and interests of the minority community or even for failing to campaign for votes from these groups. When animus toward the minority group is particularly strong, the majority may even punish candidates that attempt to develop a platform that recognizes the interests of the minority. This can carry over to the policymaking domain, where elected officials negotiate and enact generally applicable laws that do not account for the needs and interests of the politically marginalized minority community.[326] Thus, with respect to the politically marginalized minority, the vote is rendered essentially meaningless.

But even assuming that the politically marginalized are not virtually represented in the political process, an argument can be made that representation-reinforcing judicial review is sufficient to ensure that they are being treated with equal concern and respect. Specifically, process theory suggests that the courts should invalidate laws passed out of simple hostility to a minority group.[327] As discussed above, this is the explanation for judicial scrutiny of the motivation of decision makers under the Equal Protection Clause.[328] The problem with this fallback option is that scrutiny of laws motivated by discrimination cannot adequately compensate for a political process that is not truly representative. In particular, it cannot correct for the infirmity in the representative process that results in laws passed out of ignorance and without consideration of the interests of the politically marginalized minorities who are neither virtually nor actually represented in the political process. Government decision makers' ignorance of the interests of the minority can be just as harmful to that group as hostility toward that minority.

Stronger representation-structuring tools are therefore necessary to reconcile the tension between popular control and egalitarianism. Judicial enforcement of the representative equality principle should be seen as one such tool. Through this tool, the Court has simultaneously enforced both majority rule and effective minority representation.[329] It has enforced the

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324. *See supra* notes 252–63 and accompanying text (describing the degree of societal animus and social isolation that African Americans and Mexican Americans faced in two counties in Texas).

325. *See* Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 665 (2006) (finding that since 1982, "[o]f the lawsuits analyzed, 155 considered the extent of racially polarized voting, 105 found the factor to exist").

326. *Id.* at 722–27 (surveying the degree of lack of responsiveness to minority communities identified in Voting Rights Act litigation).

327. *See supra* notes 296–97 and accompanying text.

328. *See supra* notes 298–99 and accompanying text.

329. *See supra* Part II.B–C.

requirement that popular control be maintained through districts that are equally apportioned.[330] At the same time, the Court has secured the accommodation of minority interests within the mandate of majority rule by invalidating districting arrangements that exclude the politically marginalized from the pluralist marketplace.[331] In doing so, courts have forced jurisdictions to structure their districts in a way that provides opportunities for representation in the political process for politically marginalized minorities. This has produced a greater likelihood that the interests of the marginalized will be accounted for in government decision making.

This judicial provision of opportunities for representation of all interests does not mean that every interest is guaranteed a group representative in office. The problem that representation-structuring judicial review responds to is that of the politically marginalized minorities' lack of access to the political process as a result of either societal animus toward them or simpe ignorance about their existence or needs. Those factors lead candidates and elected officials to not be particularly responsive to minority interests when running for office or when making policy once in office.[332] Enforcement of the representative equality principle guarantees that some of the political candidates for any particular governing body will have to account for and perhaps appeal to the interests of the politically marginalized minority group. And once in office, at least some elected officials in that political body will have to bring into consideration the interests of the politically marginalized in the policymaking process to have any hopes of securing reelection. This does not mean that the political body must pass laws favorable to the politically marginalized, but it should produce public policies that, at a minimum, compare favorably to what was enacted prior to the recognition of the particular group's interests.

The role of the courts in ensuring a government representative of all interests is, therefore, to remove electoral barriers that result in minority exclusion and force states to erect electoral structures that will remedy this deprivation. Performing these functions is perfectly consistent with the judicial role in structuring representative government that is outlined in process theory, because it reconciles egalitarianism with popular control. This is what the courts have been doing in the vote dilution cases.

Reexamining *Rogers* through this expanded process-theoretic lens, it becomes clear that the factors that the Court considered relevant in assessing the constitutionality of the at-large district are ones that go to the questions of the political marginalization of the minority group and the level of access it has to the political process. Racially polarized voting, and

330. *See supra* notes 200–05 and accompanying text.

331. *See supra* notes 251–60 and accompanying text.

332. For example, during the reauthorization of the Voting Rights Act in 2006, Congress documented the continued persistence of racially polarized voting and the general unresponsiveness of state and local legislators to minority communities in several jurisdictions. *See generally To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005).

particularly the unwillingness of whites to vote for minority-preferred candidates, evidenced the political marginalization of the African American community in Burke County, Georgia.[333] Moreover, the political party system of competition for votes had broken down. This competitive system could ordinarily be relied upon to create opportunities for access to the political process for minority communities, since one party or the other would likely account for their interests.[334] In Burke County, however, one party dominated.[335] Therefore, it could exclude politically marginalized groups from involvement in the candidate slating process without any electoral repercussions. And candidates for this party did not have to compete for the votes of groups excluded from the political coalition because of societal animus or ignorance. The result was a Burke County Board of Commissioners comprised of elected officials that were generally unresponsive to the needs and interests of the politically marginalized black community. In the policymaking process, road paving in black neighborhoods likely never made it onto the agenda, and complaints about school and grand jury segregation were likely ignored.[336] An unrepresentative process of selection therefore contributed to unrepresentative policymaking.

While the Court could not correct the underlying societal animus, it could correct the structural defect that led to the unrepresentative process. And it did so, of course, by invalidating the at-large structure.[337] This forced Burke County to replace the at-large structure with single-member electoral districts, some of which would provide the politically marginalized group with an opportunity to influence electoral outcomes.[338] Most importantly, these districts would serve the process-theoretic value of ensuring that minority interests are treated with equal concern and respect in the political marketplace. This value is at the heart of the constitutional representative equality principle and central to the reconciliation of popular control and egalitarianism.

CONCLUSION

The intent standard under the Equal Protection Clause is not universally applicable to all claims brought under the clause. While the Court, in much of its equal protection jurisprudence, has limited its review to laws motivated by discrimination, in an important set of cases it has not. In this latter set of cases, the Court has invalidated laws that are not motivated by bias but operate in a manner that is inconsistent with two judicially derived

333. *See supra* note 4 and accompanying text.

334. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 100–01 (1957) (describing how losing parties revise their political platforms to attract the supporters of the winning party).

335. *See supra* note 5 and accompanying text.

336. *See supra* note 7 and accompanying text.

337. *See supra* notes 109–10 and accompanying text.

338. McDonald et al., *supra* note 2, at 84 ("[M]any jurisdictions in Georgia and throughout the South have bowed to the inevitable and have adopted less dilutive forms of elections.").

principles of representative equality: majority rule and opportunities for effective representation of minority groups. Electoral structures that provide a single powerful minority control over the political process in the form of a veto, or that deprive a politically marginalized minority group of the opportunity to influence government decision making are not appropriately considered representative.

This alternative framework for evaluating challenges to electoral structures has important implications for the constitutionality of the Voting Rights Act. The Act, rather than simply being seen as a vehicle that is enforcing a constitutional antidiscrimination requirement, should also be seen as one enforcing the constitutional principle of representative equality. When assessing the constitutionality of the Act from this perspective, it therefore should matter much less that the Act is focused on the results of electoral schemes and not on their process of adoption. It also should matter much less that the Act sometimes requires that states engage in race-conscious decision making to secure the effective representation of minority groups. Reliance on race in the drawing of district lines may be in tension with the antidiscrimination principle, but it is often necessary to secure the critical preconditions for representative government to operate in the first place. And in this clash of constitutional principles, the establishment of the preconditions for representative government should ordinarily supersede the antidiscrimination mandate.