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Potential Dilution of Minority Voting Strength Not within Area of Constitutional Review.

Stephen L. Hubbard

Whether or not the traditional common law distinctions still serve the objectives of today's society is questionable. Our courts have recognized the inequities of the threefold system, and in the majority of jurisdictions the solution has been to carve out a number of liberal exceptions. The *Marior-enzi* decision dispenses with the classifications and joins the small minority of jurisdictions which have abrogated the landowner's immunity. One cannot help but wish that the courts which have abolished the classifications had given more specific and determinable reasons than simply to meet the needs of contemporary society. Regardless of the reasons, however, the concept of landowner immunity is under attack, an attack which could result in the eventual disappearance of the traditional classifications from all jurisdictions.

Lawrence Likar

CONSTITUTIONAL LAW—Reapportionment—Potential Dilution of Minority Voting Strength Not Within Area of Constitutional Review

Gilbert v. Sterrett,
509 F.2d 1389 (5th Cir. 1975).

Plaintiffs, black voters in two Dallas County precincts, filed a class action suit challenging a 1973 redistricting plan. The challenged plan involved a shift of approximately one-fourth of the black population from precinct four to precinct three. Plaintiffs contended that the 1973 plan would result in an unconstitutional dilution of their voting strength since by 1985 an 80 percent projected growth rate of the black population would have occurred in district four. It was alleged that shifting blacks from this "growth" district would prevent them from obtaining a majority in any precinct at least until 1985, the date of the next mandatory reapportionment.[1] The federal district court found the contested plan constitutionally sound and held that ordering reapportionment on the basis of projected population statistics would be speculative and beyond the mandate issued by the Supreme Court.[2] Plaintiffs appealed to the Fifth Circuit Court of Appeals. Held—*Affirmed.* The

1. Gilbert v. Sterrett, 509 F.2d 1389, 1392 (5th Cir. 1975). Decennial reapportionment of legislative districts is required. Reynolds v. Sims, 377 U.S. 533, 583-84 (1964).

2. Gilbert v. Sterrett, 509 F.2d 1389, 1392 (5th Cir. 1975). The constitutional mandate was first promulgated in Burns v. Richardson, 384 U.S. 73, 89 (1966) (whether plan operates to minimize or cancel out voting strength of racial or political elements).

plan did not unconstitutionally dilute the minority group's voting strength, for a minority group is not entitled to apportionment schemes which maximize their political advantages.[3]

Federal jurisdiction and judicial review was acquired through the Equal Protection Clause of the fourteenth amendment allowing courts to determine the constitutionality of state and local reapportionment schemes.[4] The Supreme Court standard, as expressed in reapportionment cases, required substantially or "as nearly as is practicable,"[5] equal legislative representation for equal numbers of citizens.[6] The sanctioning of *de minimus* population deviations acknowledged that mathematical exactness in enforcing one man, one vote was impracticable.[7] In examining *de minimus* deviations, the Supreme Court has recognized that due consideration must be given to reapportionment plans founded on "rational state policy."[8]

Relying on the fifteenth amendment, the Supreme Court expanded voter franchise by prohibiting a redistricting body from overweighing or diluting votes on the basis of race.[9] Abridgement of the right to vote, through dilution or minimization, was held to be as unconstitutional as an outright denial of suffrage.[10] The standard applied to dilution was that it was unconstitutional if it worked an invidious effect on an identifiable group.[11] Under this

3. Gilbert v. Sterrett, 509 F.2d 1389, 1394 (5th Cir. 1975), *quoting* Turner v. McKeithen, 490 F.2d 191, 197 (5th Cir. 1973).

4. Baker v. Carr, 369 U.S. 186, 252 (1962). For a comprehensive discussion of this case and prior developments see Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252. The Supreme Court entered the reapportionment field with the gross malapportionment of congressional districts due to urbanization. This marked the development of the one man, one vote doctrine—one man's vote should equal or weigh as much as that of another. Gray v. Sanders, 372 U.S. 368, 381 (1963). The net effect of urbanization without reapportionment of legislative districts is that rural areas elect the same number of representatives while possessing a fraction of the population of urban areas. *See* Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 68-69.

5. Wesberry v. Sanders, 376 U.S. 1, 8 (1964).

6. Lucas v. 44th Gen. Assem. of Colo., 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Repres. v. Tawes, 377 U.S. 656 (1964); YMCA v. Lomenzo, 377 U.S. 633 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

7. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 577 (1964); Millican v. Georgia, 351 F. Supp. 447, 448 (N.D. Ga. 1972) (good faith effort required).

8. Reynolds v. Sims, 377 U.S. 533, 579 (1964) (divergences from strict population principle permissible if based on legitimate considerations incident to the effectuation of a rational state policy); *accord*, Chapman v. Meier, — U.S. —, —, 95 S. Ct. 751, 764, — L. Ed. 2d —, — (1975); Honsey v. Donovan, 236 F. Supp. 8, 12-14 (D. Minn. 1964) (discusses Supreme Court decisions concerning federal constitutional aspects of state legislative redistricting).

9. Reynolds v. Sims, 377 U.S. 533 (1964).

10. *E.g.*, White v. Regester, 412 U.S. 755, 762 (1973); Kirkpatrick v. Preister, 394 U.S. 526, 533 (1969); Reynolds v. Sims, 377 U.S. 533, 555 (1964).

11. *E.g.*, White v. Regester, 412 U.S. 755, 765 (1973); Reynolds v. Sims, 377 U.S. 533, 561 (1964) ("invidious effect" is the constitutional standard when fundamental right or guarantee, such as voting, involved); Peters v. Clark, 508 F.2d 267, 268 (5th

standard a reapportionment scheme was deemed constitutional unless plaintiffs allege and prove substantial population inequality among districts, or provide evidence to support a claim of minimization or cancellation of voting strength, or racially motivated gerrymandering.[12]

Dilution of voting strength is usually accomplished by use of a districting plan which either disperses the votes of a minority thereby prohibiting those votes from influencing the outcome of elections, or concentrates minority votes in as few districts as possible, thereby "wasting votes."[13] These sophisticated methods of neutralizing the influence of minorities avoided the one man, one vote test by maintaining population equality, yet obtained the same result of diluting the voting strength of a particular group or interest.

Judicial reaction to such circumvention was expressed by development of a second test: whether "meaningful access to the political processes" was available to the particular minority group or interest.[14] The Supreme Court in *White v. Regester*[15] found an unconstitutional denial of access if the political processes were not equally open to participation.[16] Denial of access, however, did not mean that the mere failure to obtain legislators in proportion to the minorities' population would sustain a claim of invidious discrimination.[17] The plaintiffs were required to show a weakening or cancellation of

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Cir. 1975); *accord*, Reese v. Dallas County, Ala., 505 F.2d 879, 883 (5th Cir. 1975), which stated: "[F]inding an adverse effect on an identifiable group is not sufficient in itself to establish dilution. The effect must be invidiously discriminatory." *See generally* Comment, *Constitutional Law: State Apportionment—A Still Emerging Standard for Equal Protection*, 25 U. FLA. L. REV. 829 (1973).

12. *E.g.*, Burns v. Richardson, 384 U.S. 73, 88 (1966) (provided there are no population inequalities); Reynolds v. Sims, 377 U.S. 533, 568 (1964); Wright v. Rockefeller, 376 U.S. 52, 56 (1964). *See* Halpin and Engstrom, *Racial Gerrymandering and Southern State Legislative Redistricting: Attorney General Determination Under the Voting Rights Act*, 22 J. PUB. L. 37, 41 (1974).

13. Reese v. Dallas County, Ala., 505 F.2d 879, 882 (5th Cir. 1974).

14. Turner v. McKeithen, 490 F.2d 191, 194 (5th Cir. 1973). While the factors in determining "meaningful access" are not concrete, the court cites several which are indicative of such:

> Continuing effects of past discrimination on the minority group's ability to participate in the political processes; the opportunity for the minority group to participate in the candidate selection process; the responsiveness of elected officials to the particular concerns of the minority group; and the strength of the state's interest in multi-member or at-large voting.

Id. at 194: *accord*, Bradas v. Rapides Parish Police Jury, 508 F.2d 1109, 1112 (5th Cir. 1975); Robinson v. Commissioners Court, 505 F.2d 674, 678-79 (5th Cir. 1974); Moore v. Leflore County Bd. of Elect. Comm'rs, 502 F.2d 621, 624 (5th Cir. 1974); Van Cleave v. Town of Gibsland, 380 F. Supp. 135, 138 (W.D. La. 1974).

15. 412 U.S. 755 (1973).

16. *Id.* at 766. "Open to participation" was held to encompass the question of whether the minority members had "less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 765-66; *accord*, Moore v. Leflore County Bd. of Elect. Comm'rs, 502 F.2d 621, 624 (5th Cir. 1974); Wallace v. House, 377 F. Supp. 1192, 1198 (W.D. La. 1974) (crucial inquiry is whether the plan leaves black citizens at liberty to participate in the electoral process on the same plane with white citizens).

17. White v. Regester, 412 U.S. 755, 765-66 (1973); *accord*, Chapman v. Meier, —

their voting strength with evidence that the group had been denied equal access to the political process.[18] The standard of review, to determine whether participation had been denied, was to examine the redistricting plan in "light of past and present reality, political and otherwise."[19]

The "equality of participation" standard was not carried to its logical end—the right to be equally represented. Instead of coping with the difficulties of representative reapportionment, the trend has been toward distinguishing prior cases, especially in the sense that meaningful access had previously been applied only in cases involving multi-member or at-large voting districts.[20] In recent decisions there has been an increased reliance on the "real life impact" test handed down by the Supreme Court in *Whitcomb v. Chavis*.[21] This test required plaintiffs to show the alleged discriminatory effect of the reapportionment scheme on their actual voting power, which by its very nature, is difficult to prove.[22] As stated by the Court, "the voting power of ghetto residents may have been 'cancelled out,' . . . but this seems a mere euphemism for political defeat at the polls."[23]

In *Gilbert v. Sterrett*,[24] the court upheld a challenged reapportionment scheme reasoning that as long as there existed an immediate compliance with constitutional standards concerning racial balance and population equality of the two precincts, potential racial proportions need not be considered.[25] This decision can be compared to *Robinson v. Commissioners Court*,[26] decided by the same court a year earlier, where the court found a challenged reapportionment scheme unconstitutionally diluted the black vote. While the court used several factors in finding denial of access, the most crucial was the Commissioner's fragmenting of what could have otherwise been a "cohesive voting

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U.S. —, —, 95 S. Ct. 751, 761, 42 L. Ed. 2d 766, 779 (1975); Whitcomb v. Chavis, 403 U.S. 124 (1971) where the court states:

> The mere fact that one interest group . . . 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 this segment of the population is being denied access to political system.

Id. at 154-55. *But cf.* Graves v. Barnes, 378 F. Supp. 640, 643 (W.D. Tex. 1974); Wallace v. House, 377 F. Supp. 1192, 1199 (W.D. La. 1974).

18. White v. Regester, 412 U.S. 755, 765-66 (1973).

19. *Id.* at 769-70. In essence, this is the "totality of circumstances" test. *See* Taylor v. McKeithen, 499 F.2d 893, 911 (5th Cir. 1974); Van Cleave v. Town of Gibsland, 380 F. Supp. 135, 138-39 (W.D. La. 1974). For a criticism of this test see Note, *Equal Protection of the Laws*, 87 HARV. L. REV. 1851, 1859 (1974).

20. Taylor v. McKeithen, 499 F.2d 893, 909 (5th Cir. 1974).

21. 403 U.S. 124, 146 (1971).

22. *Id.* at 155.

23. *Id.* at 153. Mr. Justice Douglas dissented:

> [I]t is asking the impossible for us to demand that the blacks first show that the effect of the scheme was to discourage or prevent poor blacks from voting or joining such party as they chose.

Id. at 180.

24. 509 F.2d 1389 (5th Cir. 1975).

25. *Id.* at 1392.

26. 505 F.2d 674 (5th Cir. 1974).

community."[27] While *Robinson* is distinguishable from *Gilbert* in that population inequalities and irregular boundaries were involved, the comparison remains apposite. Since *Robinson* held that "dismemberment of the black community had the effect of debilitating the organization and decreasing the participation of black voters in county government,"[28] *Gilbert* may be viewed as a refusal to extend this concept to include "potential" dilution by the fragmentation of a projected black minority.[29]

The contention of the plaintiffs in *Gilbert* was that the challenged plan fragmented the black minority, thereby preventing the development of a potential majority in one of the precincts.[30] Since the challenged reapportionment plan did not create significant population inequalities between the two precincts, the proper standard of review to be used in such a case is whether the plan, in its operation or effect, leaves black citizens at liberty to participate in the electoral process on the same plane with white citizens.[31] The emphasis placed on population equality in *Gilbert* can be interpreted in one of two ways: either the court is requiring population inequalities and unequal opportunities to participate, before finding impermissible dilution, or the court is simply refusing to expand their standards of review to encompass potential dilution. The first interpretation does not seem likely. Equal population and denial of access are two distinct standards, although they often co-exist. This distinction is clearly made in *Reese v. Dallas County, Alabama*,[32] in which the Fifth Circuit held that, "[t]he one man, one vote principle is violated when some votes carry more weight than others. Dilution in contrast, minimizes the impact of one group's votes, even though they are equal in weight to nondiluted votes."[33] The second interpretation is more probable, since the court's emphasis in *Gilbert* is on population equality and the absence of present dilution to justify the cursory treatment of potential dilution.

In advancing the potential dilution theory, the plaintiffs' position in *Gilbert* can be contrasted with the decision in *City of Richmond v. United States*.[34] While this case involved similar facts, such as racial and political backgrounds, it must be noted that the action was brought under Section Five of the Voting Rights Act of 1965, therefore involving substantially different requirements on behalf of the challenger of the reapportionment scheme.[35]

27. *Id.* at 679; *see* Holt v. Richmond, 334 F. Supp. 228, 232 (E.D. Va. 1971).
28. Robinson v. Commissioners Court, 505 F.2d 674, 679 (5th Cir. 1974).
29. Gilbert v. Sterrett, 509 F.2d 1389, 1392 (5th Cir. 1975) (by inference from the cursory treatment of evidence offered by plaintiffs and reliance on there being no "present dilution").
30. *Id.* at 1392.
31. White v. Regester, 412 U.S. 755, 766 (1973).
32. 505 F.2d 879 (5th Cir. 1974).
33. *Id.* at 882.
34. 376 F. Supp. 1344 (D.D.C. 1974).
35. In essence, Section Five of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c) shifts the burden of proof from challengers of a reapportionment plan to the districting

As in *Gilbert,* the black minority group had the potential to obtain a population majority within a short time, except for the action of the districting authorities. The similarities end there, for in *City of Richmond,* the court considered it their duty to prevent attempts, "to dilute the potential future voting power of black citizens as well as their present strength."[36] While *City of Richmond* treated present and potential dilution equally, *Gilbert* rejected potential dilution.

One possible explanation for dismissing the potential dilution argument is the reluctance which many courts express when dealing with "political questions."[37] This political aversion was overcome by establishing the justiciability of one aspect of state reapportionment—the equality of the vote.[38] There remained, however, the need for a case-by-case analysis and a "discriminating inquiry into precise facts and posture of the particular case."[39] The hesitancy shown in determining border-line political question cases might, in part, be the result of the massive resistance which the Supreme Court experienced from the one man, one vote decisions. The reluctance of the judiciary to extend the scope of the reapportionment cases is exemplified by the opinion in *Wendler v. Stone.*[40] Plaintiffs challenged a redistricting plan which allegedly worked a dilution of the vote of certain economic, political, and ethnic groups, although the plan satisfied the equal vote test in that it created districts of approximate population equality.[41] This claim was found to be non-justiciable in that it was a political question and would expose the court to charges of "judicial political gerrymandering."[42] In categorizing the petition of the plaintiffs as a political question, the court drew heavily from the Supreme Court's statement that the Equal Protection Clause protects against deprivation of an individual's voting rights, not the dilution of an interest group's voting strength.[43]

Judicial reluctance to deal with political questions can often be explained by the difficulty or impossibility of arriving at a "plainly discernible standard" to apply to the individual cases.[44] In the original reapportionment decisions

authorities. Georgia v. United States, 411 U.S. 526, 536-37 (1973). In states not affected by the Act, the challengers must overcome the presumption that the plan is constitutional and also produce clear and convincing evidence that the plan worked an invidious effect on an identifiable group. Reese v. Dallas County, Ala., 505 F.2d 879, 884 (5th Cir. 1974); *see* Cousins v. City Council of Chicago, 503 F.2d 912, 914 (7th Cir. 1974).

36. City of Richmond v. United States, 376 F. Supp. 1344, 1355 (D.D.C. 1974).

37. *See* Reynolds v. Sims, 377 U.S. 533, 582 (1964); Dixon, *The Warren Court Crusade For The Holy Grail of "One Man—One Vote,"* 1969 SUP. CT. REV. 219, 255.

38. Baker v. Carr, 369 U.S. 186, 237 (1962).

39. *Id.* at 217.

40. 350 F. Supp. 838 (S.D. Fla. 1972).

41. *Id.* at 840.

42. *Id.* at 840.

43. *Id.* at 840-41, *citing* Whitcomb v. Chavis, 403 U.S. 124 (1971).

44. *E.g.,* Reynolds v. Sims, 377 U.S. 533, 582 (1964); Baker v. Carr, 369 U.S. 186, 217 (1962); Wendler v. Stone, 350 F. Supp. 838, 840 (S.D. Fla. 1972).

this obstacle was overcome by the relatively simple standard of population parity between the apportioned districts.[45] The standard of approximate equality between the precincts, needed only population figures to enable the courts to determine whether the standard was met.

The insistence for a discernible standard is predicated upon the concern that the problems involved are simply beyond the power of the courts. While the "lack of judicially discoverable and manageable standards for resolving it"[46] is a valid reason for not accepting a dispute, an applicable standard should not be discarded simply because it involves questions of a political nature.

An analogous decision in contrast to *Gilbert* which deals with an applicable standard that may be applied in potential dilution cases is *Beer v. United States,*[47] where the proposed redistricting plan of New Orleans was held to have the effect of abridging the vote of the black citizenry.[48] The case held that the redistricting body had the burden of proving the reapportionment plan not only untainted by racial discrimination in objective, but also in potential effect.[49] In examining a reapportionment scheme, consideration of the plan's objective, such as population equality or the straightening of precinct lines, is insufficient. Its potential effect must also be weighed.

The standard proposed by *Beer* for determining the constitutionality of the reapportionment scheme concerning potential effects is relatively simple and straightforward:

> [T]he relevant comparison is between the results which the minority is constitutionally free to command and the results which the plan leaves the minority able to achieve. A substantial difference between the two, not justified by a compelling government interest is unconstitutionally enervating.[50]

Applying the "before and after" standard as stated in *Beer* to the *Gilbert* case would have necessitated a determination of whether a substantial difference in results existed. If found, the difference would have to be adequately justified by a compelling governmental interest. None was offered in *Gilbert.*

In examining potential dilution arguments, the contention of voting strength being diluted by means of preventing the development of a majority must be distinguished from the right to representation argument. The concept of equal right to representation was first mentioned in the context of reapportionment cases in *Reynolds v. Sims.*[51] "Full and effective repre-

45. *E.g.,* Reynolds v. Sims, 377 U.S. 533 (1964).
46. Baker v. Carr, 369 U.S. 186, 217 (1962).
47. 374 F. Supp. 363 (D.D.C. 1974), *appeal docketed,* 43 U.S.L.W. 3007 (U.S. July 9, 1974) (No. 73-1869).
48. *Id.* at 388.
49. *Id.* at 388.
50. *Id.* at 388.
51. 377 U.S. 533 (1964).