NATIONWIDE PRECLEARANCE OF SECTION FIVE OF THE 1965 VOTING RIGHTS ACT: IMPLEMENTING THE FIFTEENTH AMENDMENT

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INTRODUCTION

In an effort to effectuate the purpose of the fifteenth amendment,[1] Congress passed the 1965 Voting Rights Act ("Act").[2] President Lyndon Johnson hailed the Act as a "triumph for freedom as huge as any ever won on any battlefield."[3] Yet even after more than 20 years as a statute, the voting rights of citizens still are abridged by states and subdivisions within states on account of race. This phenomenon has many dimensions, but has been collectively referred to as vote dilution.[4]

This Comment argues that technological sophistication has outdated and diminished the effectiveness of the Act.[5] Primarily, this Comment suggests that despite the recent amendment to section 2 of the Act, which has been one of the most effective swords for eradicating minority vote dilution, that section has now become a plowshare. In contrast, section 5 of the Act, which has previously been regarded as nothing more than a shield against the implemen-

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1. The fifteenth amendment provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation. U.S. CONST. AMEND. XV.

2. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb (1982)) (enacted pursuant to § 2 of the fifteenth amendment).

3. 1982 U.S. CONG. & AD. NEWS 177.

4. Some of these practices include purges of registration rolls, changing voting places on short notice, the establishment of difficult registration procedures; decreasing the number of voting machines in minority areas; and the threat of reprisals for exercising the right to vote. *See generally* MINORITY VOTE DILUTION (C. DAVIDSON ed. 1984).

There are four general categories of racial gerrymandering: at-large voting, and the cracking, stacking, and packing of minority voters in a single-member districts. *See* Parker, *Racial Gerrymandering and Legislative Reappointment*, in MINORITY VOTE DILUTION, *supra*, at 85-117; *see also* Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391 (1973). This Comment focuses on the phenomenon of racial gerrymandering as it occurs in single-member districts.

At-large member districts can dilute a racial minority group's voting strength if the district is sufficiently large enough to ensure that the minority's voting age population within the district is less than that of another racial group. However the phenomenon of stacking, packing and cracking a racial minority's group voting strength are the consequences of discriminatory line drawing among district boundaries and consequently occur only in single-member districting systems.

The impact of legislative as well as executive decisions to annex and to deannexate neighboring communities and the incorporation of predominately White enclaves is of the same phenomenon.

5. This Comment is premised on the assumption that racial bloc voting occurs; that our society has a limited amount of goods and services; that our political system exacerbates the differences among the political winners and losers and that voters justifiably cast their ballots in hopes of implementing policies that are primarily beneficial toward themselves.

tation of more oppressive practices of vote dilution, should be interpreted to apply throughout the United States in order to fully effectuate the original purposes of the Act.[6]

I. MINORITY VOTE DILUTION UNDER THE VOTING RIGHTS ACT

The Voting Rights Act was passed pursuant to Congress' authority under section 2 of the fifteenth amendment.[7] The principle weapons for securing voting rights are sections 2 and 5 of the Act.

A. *Section 2*

Section 2 allows citizens in any political subdivision in the country to challenge existing voting practices. The 1982 amendments obviate the need for proving intent and avoid characterizing legislative actions as being racially motivated.[8] Now, in order to prove a violation of section 2, plaintiffs need only show that the challenged electoral practice results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color or language of a minority group.

Plaintiff's case often relies upon certain social and institutional factors[9] in

6. Allegations of the denial of the right to vote can rest upon a combination of constitutional claims, including the equal protection clause of the fourteenth amendment, the fifteenth amendment's prohibition of abridgement on account of race or under § 2 and § 5 of the 1965 Voting Rights Act.

This Comment addresses claims that have traditionally been brought pursuant to § 5 of the Act. This Comment also suggests that § 2 and § 5 of the Act ought to be interpreted as complementary provisions upon which a plaintiff can state a cause of action rather than alternatives from which a plaintiff must choose.

7. The Voting Rights Act was not Congress' first attempt to secure voting rights for racial minorities. *See, e.g.,* Ex Parte Yarbrough, 110 U.S. 651 (1884) (Civil Rights Act of 1870 is a valid exercise of congressional power to protect the right to vote in congressional elections); United States v. Reese, 92 U.S. 214 (1876) (fifteenth amendment guarantees congressional protection of the constitutional right to be free from racial discrimination in the exercise of the franchise).

8. The full text of § 2, as amended, reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) [language minority status] of this title, as provided in subsection (b) of this section.
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> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, if it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (b) (West Supp. 1988).

9. The Senate Report approved of the use of criteria first articulated in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973)(en banc), *aff'd on other grounds sub. nom.*, East Carrol Parish School Bd. v. Marshall, 424 U.S. 636 (1976). *Zimmer* outlined the factors necessary to maintain a constitutional standard for vote dilution claims, without regard to the discriminatory intent of the legislators. Those factors are: the extent to which history or official discrimination in the state or political subdivision has effected the right of the member of the minority group to register, vote, or otherwise participate in the democratic process; the extent to which voting in the elections of the state or political subdivisions is racially polarized; the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the

order to infer that racial minorities are not able to participate in elections on an equal footing with non-minority group members.[10] In other words, to allege a section 2 claim plaintiffs have to show that in the "totality of the circumstances" within the jurisdiction of the electoral system, as presently structured, denies minorities equal access to the political process. Consequently, the success or failure of vote dilution cases under section 2 may simply depend upon the resources of the plaintiff and the manner in which the evidence is perceived by the trier of fact.

A proviso, known as the Dole Compromise, was part of the 1982 amendments, it warns that section 2 does not guarantee proportional representation. Thus, in light of the Dole Compromise, it appears that section 2 classifies vote dilution by simply looking to the past success of the minority group in the political system in comparison to de jure discriminatory practices.[11]

B. *Interpretation of Section 2*

The Supreme Court interpreted the amended section 2 in *Thornburg v. Gingles*.[12] The plaintiffs in *Gingles* challenged one single-member district and six multi-member districts drawn under a reapportionment plan by the North Carolina General Assembly to redistrict the state's Senate and House of Representatives. The plaintiffs alleged that the redistricting scheme impaired Black citizen's right to vote in violation of the fourteenth and fifteenth amendments and section 2. The district court found that North Carolina had officially discriminated against Black's exercise of the franchise from 1900 to 1970; historic discrimination in education, housing, employment and health services; continuing practical impediments of Blacks to elect representatives of their choice; racially polarized voting; and that Blacks had disproportinately not been elected to political office in the districts in question and throughout the state.

On appeal, the Supreme Court found that the 1982 amendments made clear that a violation of section 2 could be proved by showing discriminatory results alone, rather than discriminatory purpose, and that the amendments established the relevant legal standard of the results test.[13] The Court affirmed

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minority group; if there is a candidate slating process, whether the members of the minority group have been denied access to that process; the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; whether political campaigns have been characterized by overt or subtle racial appeals; the extent to which members of the minority group have been elected to public office in the jurisdiction.

Because § 2 claims are grounded in the proof of a substantial number of factors one commentator has noted that "the central limitation of section 2, then, is that in failing to articulate a theory of equal electoral opportunity, it ultimately offers little guidance for those courts seeking to depart from the *Zimmer* factors." Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189, 198 (1984) (authored by Howard M. Shapiro).

10. A correct calculation of whether or not racial vote dilution occurs should factor out instances of a minority group's failure in the political system, from a group's perpetual inability to use the political system to their advantage due *solely* on account of racial discrimination and the structure of the electoral system. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4. (1938).

11. Section 2 is overinclusive as it attempts to account for all of the possible reasons why minority voters are not effective in the political system, consequently minority voters bear the burden of this shot-gun blast approach.

12. 478 U.S. 30 (1986).

13. Justice Brennan, in writing for the majority, articulated three critical factors that must be

the totality of the circumstances test applied by the district court and held that the redistricting plan diluted Black votes in the disputed districts.

Despite the new amendments and the incorporation of the results test under section 2, plaintiff still carries a heavy burden of fact gathering and proof. Moreover, application of the section depends upon balancing numerous factors, which for the most part depends upon a trier of fact's interpretation of the *Zimmer* factors, while at the same time the remedy is limited in that section 2 claims cannot guarantee proportional representation.[14] These difficulties are only exacerbated by the lack of a single opinion in *Gingles*.[15]

C. *Section 5*

Section 5 suits can only be brought in jurisdictions with a history of racial discrimination and low minority voter participation.[16] These jurisdictions are

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prevalent in a series of elections rather than in a single election. First, the minority group must be politically cohesive. Second, the minority group must be large enough and geographically compact to constitute a single member district. Third, he noted that racial bloc voting is a prerequisite for bringing a vote dilution claim. Racial bloc voting would serve to ascertain whether the minority group's candidate choice was defeated when Whites voted as a group to defeat the minority's preferred candidate. If these factors do exist in multi-member districts, then plaintiffs have a greater likelihood of success in a vote dilution claim.

However, in part III-C of his opinion, in which he enunciated the proper statistical and evidentary standards for vote dilution claims, Justice Brennan was joined only by a plurality of the Court. He concluded that plaintiffs need not prove causation or intent to prove racial bloc voting and that defendants may not rebut a case with evidence of causation or intent.

Justice O'Connor, in her concurrence, joined by three other Justices, agreed that statistical evidence of divergent racial voting patters could establish that minority groups are politically cohesive and that such evidence could not be refuted by other evidence that the voting patterns were the result of something other than race. However she advocates the use of circumstantial evidence in the inquiry on whether vote dilution exists in order to ascertain whether the minority group's lack of electoral success is attributable to factors other than racial bloc voting.

14. In order to avoid this dilemma one student suggests that "courts should, as a matter of course, remit consideration of the appropriate remedy for a proven section 2 violation to the responsible local authority. The proposed remedial changes in voting procedures would then be subject to the preclearance provisions of section 5 of the Voting Rights Act." Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1208 (1985) (authored by Robert Barnes).

While this procedural guise is indeed attractive, it is insufficient for those states and political subdivisions not subject to § 5, which is most of the United States, particularly most inner city communities of the North and West.

15. One perceptive group of scholars has noted that the Court's analysis adopts a "functional" approach that considers whether a majority of Black voters regularly vote as a bloc and the extent to which Black supported candidates are regularly elected. Thus under the majority's analysis the post-*Gingles* standard of § 2 centers on actual outcomes rather than the voting preferences of Black and White voters. Justice O'Connor's concurrence, in contrast, is more faithful to the pre- City of Mobile v. Bolden, 446 U.S. 55 (1980), cases in that it is a contextual approach that takes into account factors such as the presence or absence of a majority vote rule, seats up for election and the number of candidates running.

Future cases must decide whether the Court equates polarized voting with vote dilution or whether it endorses the more elaborate *Zimmer* factors. Jacobs and O'Rourke *Racial Polarization in Vote Dilution Cases Under Section 2 of the Voting Rights Act: The Impact of Thornburg v. Gingles*, 3 J. L. AND POL. 295 (1986).

Another scholar notes that since only a plurality of the Court agreed with Brennan's definition of racial bloc voting, *Gingles* fails to provide necessary guidelines to lower courts on how to determine what degree of racial polarization constitutes racial bloc voting in order to maintain a § 2 claim. Note, *Thornburg v. Gingles: The Supreme Court's New Test for Analyzing Minority Vote Dilution*, 36 CATH. U.L. REV. 531 (1987) (authored by Mary J. Kosterlitz).

16. Voter participation is traditionally defined to mean voter turnout. *But see* Harrison, *The*

required to preclear voting laws or procedures with the United States District Court for the District of Columbia or with the United States Attorney General.[17] The standard that the district court and the Attorney General apply is whether the change will have the purpose or effect of denying or abridging the right to vote on account of race or color, if it does then preclearance will be denied.

D. *Interpretation of Section 5*

The Supreme Court has broadly interpreted section 5. In *South Carolina v. Katzenbach*[18] the Court considered the constitutionality of major provisions of the Act. The Court emphasized that Congress had adopted the Act because "sterner and more elaborate measures" were necessary to combat the "unremitting and ingenious defiance of the Constitution" by states which perpetuated the insidious and pervasive evil of racial discrimination in voting procedures.[19] Those sterner measures of the Act, namely section 5's suspension of the voting tests and preclearance requirement, were an appropriate vehicle to enforce Congress' responsibility. The Court concluded that pursuant to section 2 of the fifteenth amendment Congress had the full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

Section 5's coverage formula is outlined in section 4(b). The Court accepted the coverage formula under 4(b) as "rational." Section 4(b) is triggered if the state was one of those which on the effective date of the Act employed a test or device as a prerequisite to voting and in which less than 50% of eligible voters were registered to vote or actually voted in the preceding presidential election.

In reaching its conclusion, the Court observed that, as evidence of disen-

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Relationship Between Black Political Participation and the Voting Rights Act, 11 NAT'L BLACK L.J. 79 (1989); *see also Black Participation in the Political Process: Myth or Reality?* 2 BLACK L.J. (1972). There are other methods by which citizens can demonstrate their approval or disapproval of contending political platforms. Individuals can decide to support a candidate who has little, if any, realistic chance of winning as a symbolic gesture, decide not to cast a ballot or participate in other ways, such as by raising campaign funds and encouraging others to vote.

17. Section 5, in pertinent part, reads:

> Whenever a State or political subdivision . . . [covered under section 4(b)] . . . shall elect or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on . . . [the applicable date of comparison] . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualifications, prerequisite, standard or practice, or procedure does not have the purpose and will not have the effect or denying or abridging the right to vote on account of race or color, in contravention to the guarantees set forth in [section 4 (f)(2), protecting certain language minorities], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure:
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> *Provided*, That such qualification . . . has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

42 U.S.C. § 1973(c) (1982).

18. 383 U.S. 301 (1966).

19. *Id.* at 329-31.

franchisement, Congress began with reliable data of existing voting discrimination and that section 5 applied if the states or political subdivisions employed tests or devices for the 1964 presidential election and had less than 50% of its non-White residents of voting age registered to vote.

As to the underinclusiveness of the formula, in light of evidence that other regions of the nation which practiced voting discrimination through methods other than voting tests and devices and were not subject to section 5, the Court declared that legislation need not eliminate everything at the same time.[20]

In *Allen v. State Board of Elections*[21] the Court held that section 5 applied not only to tests or devices that could deny minority voters the opportunity to cast a ballot, but also to electoral structures that could dilute the strength of minority voters. Therefore, such practices as numbered posts elections,[22] staggered terms, the changing of positions from elective to appointive or anti-single shot voting requirements[23] now have to be precleared in covered jurisdictions.[24]

Further, in *Georgia v. United States*[25] the Court declared that legislative redistricting is a voting change that has to be precleared under section 5. Before the Court in *Georgia* was the reapportionment plan for the state legislature. The proposed plan decreased the number of single member districts from 118 to 105 and increased the number of multi-member districts from 47 to 49. The prior apportionment plan had generally followed county lines, but the proposed plan did not as 31 of the 49 multi-member districts and 21 of the 56 single-member districts irregularly crossed county boundaries. Georgia state law required a run off election if a majority of the vote was not won in the general election and state law required numbered posts elections in multi-member districts. The Attorney General denied preclearance because of these factors.

A second reapportionment plan, even though it increased the number of single member districts to 128 and decreased the multi-member districts to 32, was also denied approval by the Attorney General. The Court agreed with the Attorney General's contention that under such conditions, these changes have the potential of diluting the Black population voting strength.

After *Georgia*, preclearance appears to be a bargaining tool that the Attorney General can use to ensure that minority voting strength is not diluted. For instance, if single member districts were created and the state's majority vote requirement in multi-member districts was eliminated, then it appears that the proposed electoral changes in *Georgia* would have had a greater

20. *Id.* at 331.

21. 393 U.S. 544 (1969).

22. Numbered post elections require candidates to choose one of the numbered spots on the ballot that they are running for in a multi-member election. This, in effect, turns a multi-member election into a composition of smaller elections for each available numbered post.

23. Single-shot or bullet voting is the selection of fewer than the number of selections allowed on a ballot. The significance of such a practice is that it results in a vote being cast of an individual's preferred candidates only, rather than casting votes for almost all the candidates. Single-shot voting can be prohibited by not counting ballots which do not select the minimum number of candidates required.

24. The Court extended *Allen* in Perkins v. Matthews, 400 U.S. 370 (1971), to require preclearance for polling place location changes in covered jurisdictions.

25. 411 U.S. 526 (1973).

chance of being precleared. This bargaining between the state and federal authorities is necessary to ensure that a minority group's voting strength is protected. Nevertheless, even with the creation of single member districts, federal authorities should still preclear the proposed redistricting schemes in order to prevent discriminatory line drawing.

1. *Non-Retrogression Test*

The application of section 5 does appear to possess a major limitation. In *Beer v. United States*[26] the Court construed section 5 to prohibit only those changes that would have a retrogressive effect on preexisting minority voting strength.

Beer involved the redistricting of the New Orleans city council. The city charter required a seven member council, with one member being elected from each of the five districts and two being elected by the voters at-large. In 1961, using the data in the 1960 census, the city redistricted the council districts.

In one of the newly drawn districts Blacks composed a majority of the population but were only half of the registered voters. In four other districts White voters outnumbered Black voters. For the next nine years no Black was elected to the council. In 1970 a new city plan was adopted that provided for Black population majorities in two districts, but a Black voter majority in only one district.

The Court held that in order to pass the preclearance requirement of section 5, a proposed change must enhance or leave unchanged the position of minorities with respect to their effective exercise of the franchise.[27] The change also must not otherwise discriminate on the basis of race or ethnic group status so as to violate constitutional standards.[28] It appears that the Court interpreted the section by looking at the voting strength of a minority group, as it existed prior to the proposed voting change, as the benchmark that can not be retrogressed in the new voting scheme.

In practice, however the non-retrogression test of *Beer* has not proven to be a hindrance to the application of section 5. Rather non-retrogression is the starting point for analyzing proposed electoral changes, a secondary inquiry is whether the change violates the fourteenth or fifteenth amendments.[29] If the

26. 425 U.S. 130 (1976).

27. *Id.* at 141.

28. *Id.* Consistent with the non-retrogression test established in *Beer* the Court considered the effect of annexations on the voting potential of minority voters in Richmond v. United States, 422 U.S. 358 (1975). The Court held that reducing the relative political strength of the minority race in the enlarged city as compared to what it was before the annexation did not violate § 5, as long as the post-annexation city fairly recognizes the minority group's political potential.

The Court was not blind to the obvious, as it did recognize that the Black community would have fewer council seats in the enlarged city, and if there was an at-large voting scheme and racially polarized voting then Blacks could be excluded from the post-annexation city government. As in *Georgia*, the Court seems to suggest that the problems associated with the annexation of a majority White population area can be obviated if at-large election districts are replaced with single-member districts. *See id.* at 368-71.

29. *See, e.g.*, White v. Register, 412 U.S. 755 (1972) (multi-member districts in Dallas and Bexas, Texas counties violate the equal protection clause of the fourteenth amendment); Zimmer v. McKeithen, 485 F.2d 1297, *aff'd on other grounds sub. nom.* East Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (factors which establish an equal protection violation); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redrawing city boundaries to effectively disenfranshise Black voters in municipal elections violates the fifteenth amendment); Smith v. Allwright, 321 U.S. 649 (1944) (White primary estab-

change violates either prong then preclearance has been denied.[30]

E. *Comparison Between Section 2 and Section 5*

Cases brought pursuant to section 5 differ from cases brought under section 2 in several respects. States or local jurisdictions have enacted and implemented the redistricting plan being challenged in section 2 cases. By contrast, in jurisdictions under section 5, redistricting plans enacted by states or localities cannot be implemented until federal preclearance has been obtained.

Thus, not only are section 5 claims filed by the state or local political bodies to prove that the proposed plans do not have a discriminatory purpose or effect, but under section 2 it is the minority voters who have to prove that the existing districting plan has been enacted or maintained for discriminatory purposes. Consequently the much litigated section 2 places a greater onus on the aggrieved minority.[31]

II. NATIONWIDE APPLICATION OF SECTION 5

The fourteenth and fifteenth amendments provide the foundation for both the right to vote and the major provisions of the Act. The Supreme Court has continually affirmed that section 5 of the fourteenth amendment and section 2 of the fifteenth amendment invest Congress with broad powers to enforce the substantive rights of those amendments. Yet, in 1982, when section 2 was amended, Congress refused to amend section 5 to apply nationally.

It has been argued that while section 5 does provide unique procedural protections, it has a less stringent substantive standard than cases arising under section 2,[32] yet despite the non-retrogression test the major limitation on section 5 is its that its application is limited to only all or parts of 22

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lished by the state political convention is an abridgment of the right to vote in violation of the fifteenth amendment); Terry v. Adams, 345 U.S. 461 (1953) (exclusion of Black voters from the "preprimary" election process violates the fifteenth amendment).

Since the *Zimmer* factors, which establish a fourteenth amendment violation have been incorporated under § 2, the practical effect of the second prong of the preclearance analysis is to ascertain whether § 2 has been violated. Moromura, *Preclearance Under Section 5 of the Voting Rights Act,* 61 N.C.L. REV. 189, 245-46 (1983). *See supra* note 6.

30. The Court has continued to interpret § 5 expansively. In Pleasant Grove v. United States, 479 U.S. 462 (1987), preclearance was denied, in part, because the proposed annexation change had the potential *future* effect of diluting minority voting strength.

31. It is conceded that § 5 can only be invoked when a voting change occurs while § 2 can be used to challenge an existing electoral system. This distinction becomes most significant when plaintiffs in jurisdictions that are subject only to § 2 bring racial gerrymander suits. *See, e.g.,* Latino Political Action Comm. v. City of Boston, 609 F. Supp. (D.Mass. 1985) (no violation of section 2), *aff'd,* 784 F.2d 709 (1st Cir. 1986); Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984) (same); Cousins v. City Council of Chicago, 322 F. Supp. 428 (N.D. Ill. 1971), *aff'd,* 503 F.2d 912 (7th Cir. 1974) (same).

Moreover, under § 5 plaintiff should present a prima facie case that shows that the results or effects of a proposed redistricting scheme disproportionately impacts upon a minority racial group which would shift the burden of proof to the state or political subdivision. This procedure is consistent with other antidiscrimination statues. *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(after proof of a prima facie case of employment discrimination under Title VII burden shifts to employer to articulate legitimate non-discriminatory reason for the employee's rejection); Duke v. Griggs Power Co., 401 U.S. 424 (1971) (Title VII requires employer to justify that employment tests reasonably measure job performance).

32. Despite the unclear impact of the 1982 amendments as interpreted by *Gingles,* plaintiffs still might contend that § 2's broad based inquiry approach is better than § 5's non-retrogression limita-

states.[33] Section 2, in contrast, has applied nationwide since its passage. The reason for reluctance in the application of section 5 nationwide is due to its "uncommon exercise of congressional power."[34]

In fact, as Congress considered whether to amend section 5 to apply nationally there were four reasons generally put forth as to why such a step was unwarranted.[35] First, shortly after the Act was passed the Supreme Court found that the coverage formula was "rational in both practice and theory." Second, the Court's reasoning was based upon the extensive congressional findings in the legislative history of voting rights abridgement in the covered jurisdictions. These two claims can be considered as one as they both seem to evidence a concern that federal preclearance is punitive.

Third, the Act already contained a trigger formula, in section 4, under which the federal district court could order preclearance in a state or political subdivision not presently covered. Finally, there was the potential for serious administrative problems with nationwide preclearance as slightly more than a dozen employees reviewed all submissions from covered jurisdictions.

While these are valid considerations, they are more the product of pessimism than pragmatism. Moreover, each contention can be obviated to allow for nationwide application of section 5 and the elimination of racial gerrymandering.

A. *Gerrymanders*

Gerrymandering has been defined as discriminatory districting which operates to unfairly inflate the political strength of one group and deflate that of another.[36] The goal of a gerrymander is to create a scheme that will cause the targeted group to waste a substantial proportion of its votes in electing a can-

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tion. *See, e.g.*, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 140 (1984) (authored by Mark E. Haddad).

However, as another scholar has pointed out, § 2 is particularly inappropriate for racial gerrymanders. Note, *supra* note 9, at 195.

33. Section 5 originally covered Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and Yuma County in Arizona, Honolulu County in Hawaii, and 39 counties in North Carolina. H. R. REP. NO. 397, 91ST CONG., 1ST SESS. 3 (1969).

Added to coverage is also Alaska, Arizona, Texas and parts of California, Colorado, Connecticut, Florida, Hawaii, North Carolina, South Dakota, and Wyoming. 46 FED. REG. 879-80 (1981).

While this Comment concedes that *Beer* limits the overall effectiveness of § 5, nationwide coverage of voting rights laws or changes as defined under § 4 would nevertheless all but eliminate racial gerrymanders.

34. *See, e.g.* Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 48 (1978)(Powell, J., dissenting); United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 141 (1978)(Stevens, J., dissenting); Morris v. Gressette, 432 U.S. 491, 504 (1977); Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969).

35. SENATE COMM. ON THE JUDICIARY, REPORT ON S. 1922, S. REP. NO. 417, 97TH CONG., 2D SESS. 15 (1982), cited in Days and Guinier, *Enforcement of Section 5 of Voting Rights Act* in MINORITY VOTE DILUTION, *supra* note 4, at 172-73.

36. R. DIXON, *The Court, the People, and 'One Man, One Vote'* in REAPPORTIONMENT IN THE 1970's at 7, 29 (N. Polsby ed. 1971). Gerrymanders present difficult problems of proof as as Congressman Abner Mikva aptly put it, "[It is] somewhat like pornography. You know it when you see it, but it's awfully hard to define." HEARINGS ON H.R. 8953, AND RELATED PROPOSALS BEFORE SUBCOMMITTEES NO. 5 OF THE HOUSE COMM. ON THE JUDICIARY, 92D CONG. 1ST SESS. 98 (1971).

Usually a redistricting plan is only limited by the fact that districts are generally compact and contiguous and traditional political subdivision boundaries are followed. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 281.

didate or to disperse the voting group so that it supports a number of loosing candidates. Equipopulous gerrymandering is districting that satisfies the one person one vote requirement of *Reynold v. Simms*,[37] yet is discriminatory toward an identifiable group of voters.[38] When the identifiable group of voters is a racial minority then the fifteenth amendment is violated.[39]

Gerrymanders can be brought about through various methods. For instance, a phenomenon known as as cracking involves canceling out a population group that is concentrated in an area large enough for separate representation by breaking up the population into two or more districts with members from groups who are hostile to the cracked group's voting interests.[40] Alternatively, a redistricting plan might pack a group's vote by concentrating the voters in an area so that they provide excessive support for winning candidates.[41] A third method of diluting a group's voting strength is through stacking, or putting a large population concentration together with an even larger second voting group. The effect of such a configuration would usually deprive the first group of voters of a majority in a district.[42]

Today computers can produce variety of compact, contiguous districts and can also analyze politically relevant information so that the consequences of various schemes can be effectively predicted.[43] What is needed is an effective constitutional protection against discriminatory reapportionment schemes.[44]

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37. 377 U.S. 533 (1964).

38. Single-member winner take all residential districts inherently dilute some votes as a result of the possible concentration of group voting. Thus an appropriate standard of proof should require that an identifiable cohesive group is diluted beyond what could normally be expected. Engstrom, *supra* note 36, at 282.

39. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

40. Parker, *Racial Gerrymanderring and Legislative Disapportionment* in MINORITY VOTE DILUTION, *supra* note 4, at 89. One of the best illustrations of cracking involved Mississippi congressional districting. In 1966 the state legislature redrew the congressional district lines horizontally in an east-west fashion that cracked the heavy Black voting population into four of the state's five congressional districts. If the state had maintained its practice of drawing district lines in a north-south direction then the Delta region, which was predominately populated by Blacks in the northwestern part of the state, would have at least accounted for one of the congressional districts. *Id.* at 89-92.

Cracking can also occur in large urban areas where a minority group could constitute a majority of a contiguous election district.

41. *Id.* at 96. Packing can also occur when there is extensive population growth. Wright v. Rockerfeller, 376 U.S. 52 (1964), is the seminal case of packing. In *Wright* minority voters were concentrated into one of four congressional districts. In this district minority voters comprised 86 percent of the population but in the adjoining districts they comprised only 29, 28 and 5 percent.

42. Parker, *Racial Gerrymandering and Legislative Reapportionment* in MINORITY VOTE DILUTION, *supra* note 4 at 92-96. Stacking can occur in both multi- and single-member districts.

43. T. O'ROURKE, REAPPORTIONMENT: LAW, POLITICS AND COMPUTERS 87 (1972).

44. Various suggestions have been proposed by other commentators. For instance, one early writer simply advocated that the courts become more sensitive to the problem and announce some justiciable standard. Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, *supra* note 4. Another has suggested programming a computer to randomly produce districts with a quantitative measure of group voting strength to measure the minority voting strength before and after the proposed districting scheme. Computer produced plans that did not overstep a certain point would be implemented. Comment, *Racial Gerrymandering*, 51 CHI-KENT. L. REV. 584 (1974).

A third suggestion is to treat apportionment like school districting and select a commission to draw the district lines. Gottlieb, *Identifying Gerrymanders*, 15 ST. LOUIS U.L.J. 540 (1971). However, this is insufficient insofar as the contest then would be over the selection of members for the commission.

Some might argue that there is little distinction, if any, between political and racial gerrymanders. Moreover, in light of the recent Supreme Court decision in *Davis v. Bandemer*[45] the distinction between political and racial gerrymanders becomes even more important. If the two phenomenon are indistinguishable then *Davis* could undermine the application of nationwide preclearance.

1. *Political Gerrymanders*

Davis held that a reapportionment plan which gave the Indiana Democratic party 43 percent of the legislative seats and the Republican party the remaining 57 percent, even though the Democrats had won 51.9 percent of the vote in the last election, does not violate the equal protection clause of the fourteenth amendment.[46]

It is important to note that though there was some disagreement among the Justices as to whether a political gerrymander was justiciable, all of the Justices did agree that a racial gerrymander was justiciable.[47]

Nonetheless, it is questionable whether the Court would adopt the same approach that it took in *Davis* to determine whether a racial gerrymander exists. In *Davis* the majority analyzed the result of the only election held after the reapportionment plan and looked at the effect of the reapportionment plan on the election of Democratic candidates as a whole.[48] In contrast, the appropriate inquiry in determining whether a racial minority's voting strength has been co-opted out of the reapportionment plan solely because of their race is to ascertain whether the present design of the reapportionment scheme is necessary to achieve some legitimate goal.[49]

2. *Racial Gerrymanders*

A racial gerrymander is an invidious type of discrimination and is unlike a political gerrymander, which is the opportunity to redraw electoral districts and, as such, one of the spoils of the political game. In fact, the mere act of not distinguishing between the two avoids the real issue of racial groups joining together to keep out of the political arena a group that is of a different race,[50] rather than the temporary exclusion of political group simply because of a difference in political viewpoints.

While it is true that the majority of Blacks and other ethnic minorities are "liberal" and have a tendency to align themselves with the Democratic Party[51] and consequently any political gerrymander that impinges upon the Democratic party has an adverse effect on the voting strength of racial minorities,

45. 478 U.S. 109 (1986).

46. *Id.* at 127-43.

47. *Id.* at 124; *id.* at 160 (O'Connor, J., concurring).

48. *See, e.g.,* Gaffney v. Cummings, 412 U.S. 735 (1973) (state reapportionment plan that deviated by an average of 1.9% in population among districts satisfies political fairness principle and does not violate the equal protection clause).

49. *See, e.g.,* Karcher v. Daggett, 462 U.S. 725 (1983) (state must show with specificity that population deviations in reapportionment plan were necessary to achieve the preservation of the voting strength of racial minority groups).

50. *See, e.g.,* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4.

51. *See,e.g.,* N. NIE, S. VERBA, J. PETROCIK, THE CHANGING AMERICAN VOTER 253-55 (1976); D. IPPOLITO, T. WALKER & K. KOLSON, PUBLIC OPINION AND RESPONSIBLE DEMOCRACY 93-94 (1976); R. ABRAMSON, GENERATIONAL CHANGE IN AMERICAN POLITICS 76-82 (1975).

there is a substantial difference between political and racial gerrymanders.[52]

Further the claim that one cannot tell which party an individual will vote for is illusory as it is this basic assumption upon which gerrymanders are premised. This distinction is most apparent when the two party system is not as strong as it often alleged.[53] For instance, in apportioning a politically liberal legislative district the question on election day may not be so much as to whether the Democratic or Republican Party will win the election as much as which strand of the particular party will be in office.

Suppose a legislative district is composed of a highly concentrated group of minority voters and has traditionally voted for the Democratic candidate. If the minority voting group is divided into several districts when the district lines are redrawn during apportionment, the reapportionment plan will still result in a Democrat being elected but the candidate does not have to be sensitive to the needs of the minority voters.

One might question why a reapportionment plan might be drawn up to dilute minority voting strength, especially when the minority group has traditionally voted for the particular political party in control of the reapportionment scheme. Such practices probably are not a manifestation of the fear of not being reelected, as often the other party is not a viable alternative, but rather are the manifestation of an irrational decision to discriminate on the basis of race. This same motivating factor has historically prompted discrimination in the allocation of the goods and services of government.

Like the per se rule of one-person, one-vote for congressional districts,[54] a "mathematical formula" ought to be employed to ensure that large groups of minority voters are not diluted beyond normal standards.[55]

The adoption of such a formula would be two fold: the judiciary would not intrude into the redistricting scheme and it would eliminate retrospectively ordered judicial remedies as the court's inquiry would be limited to determining whether the formula was applied correctly.[56]

As in other areas of constitutional law, the protecting an individual's constitutional right does often involve balancing competing constitutional rights of others. But the process is not a zero-sum game, especially in the political process arena, since when an individual's political right is protected another individual does not "loose" rather the political process as a whole is

52. Racial gerrymanders are easy to detect if a particular racial group lives in a geographically concentrated area and votes as a political group. Moreover, if there were, for instance, an independent Black political party, *see* Ahadi, *An Independent Black Political Party: Posing an Alternative to Asses Elephants and Rainbows*, 11 NAT'L. BLACK L.J. 117 (1989), then racial and political gerrymanders would be coterminous and require the same protections.

53. *See, e.g., Davis,* 478 U.S. at 156 (O'Connor, J., concurring) and Lowenstein and Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. REV 1, 6 n.15.

54. Reynolds v. Simms, 377 U.S. 533 (1964).

55. See *supra* note 36. Some scholars have already advanced mathematical formulas for determining whether a racial gerrymander exists. Engstom and Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 4 LEGIS. STUDIES Q. 465, 469-73 (1977). Edwards, *The Gerrymander and "One Man, One Vote,"* 46 N.Y.U. L. REV. 879 (1971).

56. *See, e.g.,* United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (creating a safe district for minority voters to remedy a § 5 objection does not violate the equal protection clause nor the fifteenth amendment).

validated.[57]

For example, if the electors in a legislature come from racially gerrymandered districts then all legislation that is passed is inherently suspect. But if minority voters, who vote as a bloc are recognized then the legislation does not have the same underlying presumption of discriminatory motive.[58]

B. *National Preclearance is a Preventive Rather Than Punitive Measure*

Although Congress' grant of authority to enforce the fifteenth amendment is broad, it is not unlimited. Congress is empowered to enforce the substantive provisions of the amendment only through appropriate legislation. Nevertheless, the Supreme Court in addressing the scope of Congress' authority under the fourteenth and fifteenth amendments has adopted a deferential standard of review.[59]

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the [amendments] have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."[60]

However, insofar as the Court relied upon the historical evidence within the legislative history of the Act as a proxy for warranted legislative action, then *South Carolina v. Katzenbach* does not present as strong an argument for reliance on expanding section 5 nationally.

Presently preclearance is limited only by the historical anomaly of having a literacy test on a given date. Since there are other ways to abridge the right

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57. *Contra* Howard and Howard, *The Dilemma of the Voting Rights Act—Recongnizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1651-56 (1983).

58. It might appear to some that such a formulation is a "results-oriented" rather than a "process-oriented" approach to antidiscrimination law. *See, e.g.*, Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742 (1974).

Yet from the racial minorities point of view the claim is consistent with the "perpetrator perspective" of racial discrimination. *See, e.g.*, Feeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978).

> Another civil rights scholar put it more colloquially, but just as poignantly, when he wrote, You know, friend, we civil rights lawyers spend our lives confronting whites in power with the obvious racial bias in their laws or policies, and while, as you know, the litany of their possible exculpatory responses is as long as life, they all boil down to: 'That's the way the world is. We did not make the rules, we simply play by them, and you really have no alternative but to do the same. Please don't take it personally.'

D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 44 (1987).

59. This deference is appropriate since the Civil War amendments were passed as a specific hedge against the reserved powers of the states. *See, e.g.*, Comment, *The Inexorable Struggle to Achieve Political Equality: An Analysis of the Past and Present Issues Concerning Voting Rights in America*, 29 ST. LOUIS U.L.J. 147 (1984) (authored by Jeffrey J. Lowe).

Moreover the Court has declared that Congress can pass laws to enforce the remedial as well as substantive guarantees of the fourteenth and fifteenth amendments. Katzenbach v. Morgan, 384 U.S. 301, 641, n.10 (1966); *see also* EEOC v. Wyoming, 460 U.S. 226 (1983); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Fullilove v. Klutznick, 448 U.S. 448 (1980); and City of Rome v. United States, 446 U.S. 156 (1980). This doctrinal wrinkle is noteworthy in voting rights cases since these cases traditionally involve violations of both amendments. *See supra* note 6.

60. Ex Parte Virginia, 100 U.S. 339, 345-46 (1879). *See also* City of Rome v. United States, 446 U.S. 156, 176-77 (1980); Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966); South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966).

to vote[61] a literacy test, on its own, does not indicate whether protection is warranted. In other words, the fact that there was a literacy test in operation in most of the South as of November 1, 1964, and the effective date of the amendments to the Act, should not be a litmus test for protection against minority vote dilution.

Professor Robert Cottrol believes that the law needs to acquire greater historical sensibilities on the debate over racial justice.[62] He notes that the terms of the debate over law and race has shifted to "a focus on the extent to which the law can permit, or require remedial efforts to ameliorate the legacy of American racism."[63] In advocating an extension beyond the traditional outline and focus on the southern brand of de jure racism, Professor Cottrol astutely observes:

> "The North was more complex. Sharp lines were often drawn between Black and white . . . [We need to look] beyond the statutes and judicial pronouncements that established normative legal doctrines of racial egalitraianism . . . [we need] an examination of the behavior of law towards Blacks in northern cities. . . . Often the legal historian will find that egalitarian doctrine pronounced by state appellate courts or legislatures may have had relatively little effect on the actual behavior of police departments, trial courts, district attorneys, licensing commissions and school boards."[64]

1. *Race Discrimination in the North*

It is generally conceded that a "color line" and an official policy of racial discrimination existed in this country prior to the passage of the Civil War amendments.[65] Even after the passage of the Civil War amendments, the "separate but equal" doctrine was declared in *Plessy v. Fergurson*[66] and became national policy. Thus the focus of inquiry should be on state action that allowed the abridgement of the right to vote on account of race, the effective use of the franchise since the passage of the fifteenth amendment, and state discriminatory practices after the seminal decision of *Brown v. Board of Education*,[67] since these are the wrongs addressed by the Act.[68] However historical evidence on the practices of states outside of the South between the 1860's

61. Such activities may include reprisals and intimidating those who are registered, in order to ensure that they did not vote *See, e.g.*, R. WARNER, NEW HAVEN NEGROES: A SOCIAL HISTORY 181 (1940).

62. Cottrol, *Law, Politics and Race in Urban America: Towards a New Synthesis*, 17 RUTGERS L.J. 483 (1986).

63. *Id.*

64. *Id.* at 488-89. In a similar vein another researcher cautions, "[W]e must question conjectures about the lives of ordinary Negroes in the far west until considerable research is done." D. DANIELS, PIONEER URBANITES: A SOCIAL AND CULTURAL HISTORY OF BLACK SAN FRANCISCO 122 (1980).

65. *See* L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1961) (study of the northern states before the Civil War demonstrating that Blacks in these states were segregated "in virtually every phase of existence" and that a Jim Crow-type social order had been established in the North before moving to the South); *see also* G. MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS (1866).

66.. 163 U.S. 537 (1896).

67. 347 U.S. 483 (1954). *Brown* had nationwide reverberation, see for example, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf courses); New Orleans City Park Improvement Assoc. v. Detiege, 358 U.S. 54 (1958) (parks).

68. *Katzenbach*, 383 U.S. at 315-17.

to the 1980's is all but rare.[69]

Nevertheless historical evidence suggests that abridgment on account of race was practiced nationwide, rather than regionally, as has been traditionally thought. This evidence also suggests that Blacks and other racial minorities were discriminated against solely on account of their race in attaining important aspects of citizenship,[70] consequently one can infer that the "most precious jewel in the crown of civil liberties"[71] was also abridged.

2. *Great Migration*

After emancipation, many Blacks migrated from the southern plantations to the then developing northern cities in the 1880's and 1890's.[72] The Black population in nine major northern cities increased by 36 percent in the 1880's and by 75 percent in the 1890's.[73] Many states in the 1870's and 1880's enacted civil rights legislation and the rigid color line which had existed in public accommodations before the Civil War wavered.[74] Yet by the turn of the century many former slaves lived in slave-like conditions.[75]

A second wave of Black migrants, the so-called Great Migration, occurred from 1910 to 1920 and a third exodus took place from the 1940's to the 1970's.[76] The result of these waves of migration is that while in 1910, 75 percent of this nation's Black Americans lived in rural areas, 90 percent of those in the South; but as of 1970, 75 percent of Blacks lived in cities and half resided outside of the southern states.[77]

Though there were undoubtedly as many reasons for relocating as there were individuals who did relocate, it has been argued that this migration can be explained as both a flight from oppression and a quest for a better life.[78] But such a search ultimately proved to be illusive. A reversal in the relatively

69. D. DANIELS, *supra* note 64; K. KUSMER, A GHETTO TAKES SHAPE: BLACK CLEVELAND, 1870-1930 (1976); R. WARNER, *supra* note 61. *See also* Cottrol, *supra* note 62, at 484 n.5 and accompanying text.

70. *See* Karst, Supreme Court, 1976 Term—*Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

71. Remarks of President Reagan on signing H.R. 3112 (1982 amendments of 1965 Voting Rights Act) into law. 18 WEEKLY COMP. PRES. DOC. 846 (June 29, 1982).

72. Even the western frontier also seemed more promising than the conditions in the South. With the return of the former confederates to power in the 1880's, Henry Adams of Louisiana claims to have organized 98,000 Blacks to go to the new western territory of Kansas. J. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF THE NEGRO AMERICANS 399 (3rd. ed. 1967).

73. E. FORNER, AMERICA'S BLACK PAST 324 (1970).

74. It might be argued that since the right to vote was one of the civil rights legislative enactments, antidiscrimination legislation regarding voting rights, in general, and vote dilution, in particular, is inappropriate in the North. While it is true that during the Reconstruction period Blacks enjoyed the favors of the Republican Party in the North and were elected in unprecedented numbers, Blacks enjoyed relatively the same amount of success in the South—that fact has not inhibited nor prohibited the enactment of antidiscrimination legislation directed toward the "solid South."

Some would still further maintain that what differentiates the South from the North was the enactment of the Black Codes, or *de jure* segregation, which reinstituted slavery in all but name only in the South. But changes in the economic conditions and political factions in the North all but did the same there too, under the guise of what has been labeled *de facto* segregation. The distinction between *de jure* and *de facto* segregation is unpursuasive when it involves a fundamental constitutional right such as voting.

75. E. FORNER, *supra* note 73, at 324.

76. *Id.*

77. *Id.* at 325.

78. *Id.*

good race relations occurred when Northerners experienced new competition for jobs and housing.[79] Not only did this friction erupt in racial violence that pitted Blacks against Whites, in such cities as New York, Chicago, Springfield, Ohio in 1904[80] and Springfield, Illinois in 1908[81] and East St. Louis, but it was later evident in the practices of the cities and private parties within them as evidenced in the race riots of the late 1960's.

Thus to continue to focus of antidiscrimination legislation solely on the deep South not only ignores the migration of millions of individuals to other regions of the nation but it also discounts the discriminatory practices in those areas. Further, the guarantees of the Civil War amendments will still be illusive anywhere but in the South.[82]

A few illustrative cities will show that the denial of the effective participation in government and the goods and services derived therefrom occurred in a practical sense, throughout the nation, as it was legally prescribed in the South, and that this denial is reflective of what went asunder for all racial minorities.

a. Chicago

Before the Great Migration, when Chicago was run by the Republican Party, Blacks only got the crumbs from the political table in order to ensure that they did not vote Democratic.[83] Yet, in still, Chicago was perceived as a land of opportunity,[84] partly because it was a growing, industrial city and partly because its politics were factional and based upon ethnic coalition building.

Because of this need for coalition building each new ethnic group had to be wooed and as a consequence Blacks and other ethnic minorities had at least a formal chance to participate in politics.[85] By 1920 Chicago Blacks had achieved more in politics, when measured in terms of participation and patronage than in any other American city.[86]

Yet in terms of other minority groups Blacks still were treated differently. For instance, Blacks got menial jobs from the patronage system. That is, while Blacks were employed as janitors in city government above their proportion in the population, their proportion in the clerical ranks was below their population proportion.[87] Furthermore, Blacks also received their patronage from the system at a lower rate than other minorities and the political

79. At the turn of the century Syracuse, Ohio went so far as to forbid Blacks from settling within city limits. J. FRANKLIN, *supra* note 72, at 443.

80. *Id.*

81. *Id.*

82. Such would indeed be an odd turn of events. For an earlier analysis of this type of argument see, Karst, *Not One Law at Rome and Another at Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383 (1972).

83. I. KATZNELSON, BLACK MEN, WHITE CITIES: RACE, POLITICS, AND MIGRATION IN THE UNITED STATES, 1900-38, AND BRITAIN, 1948-68, at 91 (1973).

84. The word on the grapevine was that Chicago was *the* place. "Chicago for a while seemed to be everything. You could not rest in your bed at night for Chicago," a Hattiesburg, Mississippi resident is claimed to have said. E. SCOTT, NEGRO MIGRATION DURING THE WAR (1920) (quoted in KATZNELSON, *supra* note 83, at 86.)

85. *Id.* at 111-13.

86. *Id.* at 95.

87. *Id.* at 98.

machine did not provide adequate police protection in Black neighborhoods.[88]

In sum, Blacks had no real alternative as even the political machine had a stake in maintaining the status quo.[89] Furthermore, while other ethnics could get reciprocation and patronage from the machine, Blacks were detached and obligated to the machine. Although Blacks in the North had at least the power to vote, "new, more indirect, but almost equally powerless quasi-colonial patterns of racial dominance and social control replaced the Southern colonial system."[90] Ironically, in an ethnically heterogeneous, machine-run city whose factional brand of politics was based on ethnic coalition building and maintaining electoral districts that were ethnically based, the most identifiable racial group was still on the outside looking in.[91]

In comparison with other cities throughout the nation, Chicago is the exception rather than the rule since there was a Black political machine, but in comparison with the political forces within the city, Blacks were held at arms length as their political organizations was dominated by a citywide organization.[92]

b. New York

Another northern city that allowed Blacks the opportunity to formally participate in the political process was New York City. They could do little more. It is important to note that, as in Chicago, there was an established political machine in operation when the largest influx of Black migrants settled in New York's Harlem district. Consequently, not only was there was not a viable alternative political party, but Blacks could not bargain within the established party.

One historian claims that Harlem's political power was not a wedge for economic development as it could have been nor was it translatable into economic and social mobility for its practitioners, rather political powerlessness was the norm for the generation that lived in that area.[93] He concludes that as a result of this political powerlessness the social and economic problems of the city's Blacks grew to unmanageable proportions.[94]

The rewards that Blacks did get were conferred on a few handpicked leaders. This was used as an instrument of political deception. The most telling worth of Black participation in the party is that not only were they treated differently than other ethnic groups, but they were not even allowed into the

88. *Id.* at 101.

89. *Id.* at 103.

90. *Id.* at 109. The author continues,

> "[l]ike most of us, the Southern black migrants tended to see history in terms of images; the North, for them was the North of Lincoln, the Abolitionists, the Freeman's Bureau, the Radical Republicans—a North of hope. This pattern of images, however, was seriously distorted, the hope misplaced, for in the North in the late nineteenth and early twentieth centuries, anti-black racism was part of the region's conventional wisdom."

Id. at 115.

91. Present day Chicago perhaps best evidences this continuing practice. In 1986 when the late Harold Washington ran for reelection for mayor, Councilman Vrdolyak, a lifetime white Democrat switched to the Republican Party in order to challenge Washington in the general election. Moreover, after Washington's death the in-fighting within the Democratic Party continues and is largely divided among racial lines.

92. *Id.* at 118.

93. *Id.* at 66.

94. *Id.*

district political clubs, but had to form their own. For instance, Edward Chief Lee was picked to head the United Colored Democracy (UCD) of Tammany Hall. But his political power was more illusory than real. On paper, Lee controlled the doling out of patronage positions, in reality, the UCD was a segregated institution whose primary tasks were winning votes for Tammany Hall and isolating Blacks from positions of real political influence.[95]

It seems that Blacks were only formally a part of the political process as ultimately they were unwanted.

> "[Thus the question] is not whether blacks in New York could participate in the city's politics (they could), nor are we concerned here with shifts in electoral behaviour, in the period of migration, but rather, with the terms of participation, with the critical structural decisions that limited and shaped behavioural possibilities."[96]

c. Cleveland

Cleveland, Ohio presents another interesting view of the efforts of the newly arrived Blacks to participate in the political system. In 1884 a state civil rights act was passed, but when Blacks brought suits to enforce these laws they were not always successful. By 1928 these antidiscrimination laws were a dead letter.[97]

In the political arena, although in the late 1880's Blacks were initially well received by White voters, by 1907 Black candidates were less appealing to Whites as evidenced by the establishment of a White only direct primary. Further, from 1910 to 1920 no Black candidate could get enough White votes to win an election.[98]

By 1916 an increasing number of White residents wanted to keep Black residents out of their neighborhoods. This segregation in housing patterns may be indicative of the potential occurrence of racial gerrymanders. An increasing segregationist trend was also evident in public accommodations and the public school system.

In sum, Cleveland Blacks became increasingly aware that southern race prejudice was bearing its malignant fruit in their city. Unsurprisingly when Blacks became aware of this increasing racial hostility to their participation in the social system, Black political participation reached its highwater mark. Three Blacks sat on the city council in the 1920-30's but by the heart of the Depression Era Black political power had evaporated.[99]

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95. *Id.* at 69.

96. *Id.* at 83-84.

97. K. KUSMER, *supra* note 69, at 59 and 181.

98. *Id.* at 64-65.

99. Blacks were not to enjoy the benefits of their formal participation in the electoral system until 1969 when Carl B. Stokes was elected mayor of Cleveland. Though it is highly speculative as to why it took so long for another Black to attain such political prominence, the three councilmen may have been gerrymandered out of office. *Id.* at 273-74. For a further discussion of this genre of Black politics, see C. WYE, MIDWEST GHETTO: PATTERNS OF NEGRO LIFE AND THOUGH IN CLEVELAND, OHIO, 1929-45 (Ph.D. dissertation, Kent State U. 1973); S. DRAKE AND H. CAYTON, BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY 346-51 (1970); H. GOSNELL, NEGRO POLITICIANS: THE RISE OF NEGRO POLITICS IN CHICAGO (1935).

Stokes' election may be fatal to a claim under § 2, but under § 5 his victory does not go to the issue of whether *overall* minority voting strength has been diluted.

d. California

California is representative of the some of the racially discriminatory practices that went on west of the Mississippi River. However, since there were relatively fewer Blacks before the 1920's who could be targets for these practices, the victims of racism were primarily those of Asian decent.[100]

For example, it has been noted that Chinese laborers were employed in conditions that had all of the earmarks of slavery.[101] Like their counterparts in northern communities, the number of Asians living within the city limits of Los Angeles became an issue after 1876.[102] In order to drive them out of business and out of the city, a tax was passed.[103]

Asians were the victims of racism in northern California also. The administration of public licensing has become one of the most famous United States Supreme Court cases.[104]

Also in San Francisco light skinned Blacks "passed" as Spanish or Portuguese in order to minimize the amount of discrimination that they would receive.[105] Nonetheless race discrimination and racial prejudice towards Blacks became more prevalent after the large influx of Blacks in the 1920's.

In Sacramento there were efforts to prevent Japanese workers from being strike breakers. Even when Japanese tried to do better for themselves, their efforts were thwarted. For instance, college educated Japanese were denied managerial level jobs and were forced to engage in menial labor.[106]

III. JUDICIAL INTERPRETATION AND NATIONALIZATION OF ANTIDISCRIMINATION LAW

A. *School Busing*

A parallel source for the expansion of an antidiscrimination a doctrine that emanated in the South but that now has nationwide application are the school desegregation cases. A similar expansion of the antidiscrimination protections of voting rights is appropriate because voting is a constitutionally protected right.

The groundwork for national integration of schools was laid in *Green v. County School Board.*[107] The New Kent County, Virginia school board employed a freedom of choice plan, which allowed parents to decide what school to send their children to, as a means of implementing the *Brown* decision. The

100. Though the historical evidence is scarce because there was not legally mandated segregation should not be interpreted as evidence of no discrimination. In questioning about public accommodations, one hotel operator candidly responded, "It is our law never to give accommodation to Negroes." D. DANIELS, *supra* note 64 at 108.

101. Sandmeyer, *The Basis of Anti-Chinese Sentiment*, in RACISM IN CALIFORNIA: A READER IN THE HISTORY OF OPPRESSION 81 (R. Daniels and S. Olin, Jr. eds. 1972).

102. Locklear, *The Anti-Chinese Movement in Los Angeles*, in RACISM IN CALIFORNIA, *supra* note 101, at 97.

103. *Id.* at 100-01.

104. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discriminatory application of licensing ordinance toward Chinese laundrymen violates the fourteenth amendment).

105. D. DANIELS. *supra* note 64 at 129.

106. Cole, *History of the Japanese Community in Sacramento, 1883-1972: Organizations, Businesses and Generational Response to Majority Domination and Stereotypes* 57 (M.A. thesis, Cal. St.U. Sacramento 1973)

107. 391 U.S. 430 (1968).

Court reasoned that since New Kent County had a history of de jure segregated school systems the issue was whether the fourteenth amendment merely required desegregation or compelled integration. The court held that the school boards had the duty to achieve integration.

Swann v. Charlotte-Mecklenburg Board of Education[108] was the next significant case. It addressed the problem of applying the mandate of *Green* in a large southern metropolitan area. The North Carolina case involved a school district that also had a history of de jure segregation. Consistent with *Green*, the Court noted that it was now the duty of the federal courts to eliminate from the public school system all vestiges of state-imposed segregation. *Swann* is important because of the broad discretionary powers that it confers on the federal judiciary to remedy the results of purposeful discrimination.

Two years later the Court decided *Keyes v. School District No. 1, Denver, Colo.*[109] *Keyes* is significant because in that case the Court considered school desegregation in a major city out outside of the South. The Park Hill section of Denver, Colorado was before the court in *Keyes*. Denver does not have a history of de jure discrimination, in fact, the state constitution prohibited racial classifications of students.[110] At issue, was whether the actions of the school board evidenced an intent to segregate and maintain a segregated school system. If there was such an intent, then de jure discrimination could be inferred and would allow the federal district court to invoke its broad remedial powers under *Swann*.

Justice Brennan wrote for the Court and he set forth criteria that would facilitate a finding of purposeful discrimination and the appropriate remedies for such a violation. The correct legal standard for deciding school desegregation required proof that the school authorities pursed intentional segregative policy in the core center schools by finding the existence of a dual system, absent a showing that the district was divided into clearly unrelated units. Such a finding shifts the burden to the school officials to prove that their actions were not motivated by segregative intent.[111]

After finding that the defendants failed to rebut the presumption the Court concluded that it was appropriate to order desegregation to the districts that had been adversely affected.[112]

It is important to note that the actions of the school board were scrutinized in order to ascertain whether there was purposeful discrimination and, in this sense *Keyes* is consistent with cases involving southern school boards because it adheres to the purpose-impact distinction in antidiscrimination law.

Yet the most relevant of the school desegregation cases are *Columbus*

108. 402 U.S. 1 (1971).

109. 413 U.S. 189 (1973).

110. COLO. CONST. IX, § 8 (cited in *Keyes*, 413 U.S. at 191).

111. "[There was no] *de jure* segregation but where [there was] carried out systematic program of segregation affecting students it is only common sense to conclude that there is a dual system." *Keyes*, 413 U.S. at 201.

112. Justice Powell, in partial dissent, wanted to eliminate the distinction between *de jure* and *de facto* segregation and rely upon *Green* and *Swann* as establishing an affirmative duty of integration. *Keyes*, 413 U.S. at 224 (Powell, J., concurring and dissenting). Later Justice Powell noted, "[i]ndeed if one goes back far enough, it is probable that all racial segregation, wherever occurring and whether or not confined to the schools, has at sometime been supported or maintained by government action . . ." *Id.* at 228 n.12.

Board of Education v. Penick[113] and *Dayton Board of Education v. Brinkman.*[114] Not only did both cases consider the practices of northern school district, but the Court conceded that there was not a history of statutorily mandated segregation in the twentieth century Ohio. Moreover, for the Court, the starting point of analysis was when *Brown* was decided, that is, the Court considered whether in 1954 if there was a racially neutral unitary school system in operation in the respective school districts. The Court concluded that there was not. Thus with the finding of de jure segregation in 1954 as its underpinning, the Court concluded that it was appropriate to order integration.

Penick still maintains the distinction between de jure and de facto segregation. When the Court turned away from the effects of past segregation to consider the present practice of establishment of dual school systems, it no longer asked whether there was discriminatory purpose but rather whether the dual system had been abandoned. The conclusion in each case was that the school board had not abandoned the dual system, because it had not taken steps to achieve the greatest possible degree of actual desegregation.

A limit on the extent of the remedy available in interdistrict desegregation was announced in *Milliken v. Bradley.*[115] In *Milliken* the Court held that absent intradistrict violations there was no basis for an interdistrict remedy and as such it was inappropriate to order busing across interdistrict lines.

Some might interpret *Milliken* to defeat the application of nationwide preclearance of legislative reapportionments and executive annexations since adhering to the the one-person, one-vote rule would inherently involve the restructuring of neighboring districts. However such an interpretation is short sighted. Chief Justice Burger, in his opinion for the Court in *Milliken,*[116] conceded that equipopulous racial gerrymandering, in one district by definition, does impact the supposedly "innocent" districts. Therefore whenever even a single legislative district is racially gerrymandered not only is the whole reapportionment plan tainted but subsequent legislative and executive decisions are also inherently suspect.

B. *Preclearance of Redistricting Schemes*

The ground work has been laid for an analogous interpretation and expansion of nationwide application of section 5's preclearance requirement. The scope of section 5 had been limited by section 4(b), but this limitation may well be illusory. In 1970, when the Act was amended, the use of literacy tests were suspended throughout the nation, not just in those areas covered under section 5. The Court found the suspension constitutional in *Oregon v. Mitchell.*[117]

Since *Oregon* obviated the "trigger" of section 5 and with the discovery of past discriminatory practices outside of the "solid South," it is nothing more than a historical anomaly that racial gerrymanders can be practiced in the

113. 443 U.S. 449 (1979).
114. 443 U.S. 526 (1979).
115. 418 U.S. 717 (1974).
116. *Id.* at 744-45.
117. 400 U.S. 112 (1970).

majority of this nation's state and political subdivisions.[118] This is not to say that nationwide preclearance is punitive, but is rather a prophylactic remedial measure to ensure the substantive guarantees of the fifteenth amendment.

1. *A Proposal for National Preclearance*

Commentators have repeatedly advocated extending section 5 to apply nationally.[119] One particular proposal by William Keady and George Cochran, uses the number of Black elected officials as a proxy of the effectiveness of minority voting strength.[120] They present evidence that states traditionally thought of as free of discriminatory practices do not have as many Black elected officials as the potential voting strength of Black residents. Consequently they infer that vote dilution occurs. The authors then note that after the implementation of section 5 there has been an increase in the number of Black voter registrants in the South,[121] and consequently advocate extending section 5 to apply nationally.

The authors propose that, with the exclusion of states or political subdivisions with de minimis percentage of minorities, political entities should have to bring suits for preclearance of electoral alterations that have the potential for discrimination in the local federal district court. These suits would be given a priority setting. The relief available would be identical to that under the present statute. Interested parties would be notified of the proposed electoral change and the pending suit when the claim is filed and could intervene as a matter of right within sixty days.[122]

If the United States or an interested party did not answer within sixty days then an uncontested judgment would be entered for the political subdivision. But the uncontested judgment would not preclude subsequent constitutional challenges. Decisions adverse to the United States or those defending on its behalf would be stayed upon filing notice of appeal. The appeals process would be expedited.

If constitutional counterclaims were defenses, then the preclearance issue

118. Besides with the 1982 amendments to § 4, which allow bailout, and the application of the non-retrogression standard, it appears that if states and political subdivisions do not practice racial gerrymanders then the prophylactic use of national preclearance will not warrant undue intervention or delay of proposed redistricting schemes.

119. *See, e.g.*, EXTENSION OF THE VOTING RIGHTS ACT: HEARING BEFORE THE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE JUDICIARY COMM. 94TH CONG., 1ST SESS. 169 (1975) (testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division); 121 Cong. Rec. 24,139 (1975) (proposal by Sens. Talmadge and Nunn); *id.* at 24,220 (letter from President Ford stating, in part, "Discrimination in voting in any part of the nation is equally undesirable.")

120. Keady and Cochran, *Section 5 of the Voting Rights Act: A Time for Revision*, 69 KY. L.J. 741 (1981).

121. Because of the secret ballot it is difficult to ascertain exactly how many of these new registrants actually do vote.

122. This is perhaps the most significant aspect of the proposal especially in light of the fact that the Reagan Administration was, at best, reluctant, and, at worst, openly hostile to the recognition and expansion of civil rights law. *See, e.g.*, JUSTICE DEPARTMENT AND VOTING RIGHTS ACT ENFORCEMENT: POLITICAL INTERFERENCE AND RETREAT (1982); Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984); Days, *Holding the Line*, 20 CREIGHTON L. REV. 1 (1986); Leadership Conf. on Civil Rights, *Without Justice*, 8 BLACK L.J. 29 (1983); Greenburg, *Civil Rights Enforcement Activity of the Department of Justice*, 8 BLACK L.J. 60 (1983); Washington Council of Lawyers, *Reagan Civil Rights: The First Twenty Months*, 8 BLACK L.J. 68 (1983).

would be severed and decided at that point, while the defenses could be adjudicated later.[123]

Keady and Cochran present one of the most detailed and legally viable proposals for nationwide preclearance, but their proposal is problematic in that it does not go far enough.

While it is noteworthy that the Act has resulted in more individuals registering, it is my claim that individuals can not only be registered but actually vote in elections, and yet if they live in a racial gerrymander their vote will still be diluted. Consequently, a focus on the the increase in the number of registered Black voters and Black elected officials is misplaced.

Besides, with the recognition that at large districts dilute minority voting strength,[124] antidiscrimination law ought to focus on creating single member districts and ought to ensure that discriminatory line drawing does not occur.[125]

Therefore, in addition to the above proposal, and to eliminate potential administrative problems with nationwide preclearance, cases should be tried in the local federal district courts, with the right to appeal to one of the intermediate federal court such as the United States Court of Appeals for the District of Columbia Circuit or the District of Columbia Court of Appeal and then to the United States Supreme Court. Prior concerns about the jurisprudence of southern jurists[126] can be assuaged because of the extensive development of preclearance law. But most importantly, in order to adhere to equipopulous districting there may be a continuing need to refer to the census, not as a guarantee of proportional representation,[127] but more as an assurance that population changes have not fluctuated significantly and undercut the significance of a non-discriminatory electoral scheme.

CONCLUSION

Section 5 of the 1965 Voting Rights Act ought to be interpreted to apply nationwide because, as that portion of the Act has been interpreted, it requires less empirical evidence than its "alternative," section 2. More specifically, section 5 is advantageous in that it can eliminate, or at least diminish, the practice of gerrymanders that dilute the vote of racial minorities in a geographically concentrated area.

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123. Keady and Cochran, *supra* note 120, at 781-83.

124. White v. Regester. 412 U.S. 755 (1973).

125. *See, e.g.,* Blacksher, *Drawing Single-member Districts to Comply with the Voting Rights Amendments of 1982,* 17 URB. LAW. 347 (1985).

126. Keady and Cochran, *supra* note 120, at 749-54.

127. One leading civil rights scholar has considered some of the problems involved in amending the voting rights laws to guarantee proportional representation. BELL, *supra* note 58 at 75-101. *See also* Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It go Away,* 33 UCLA L. REV. 257, 259 (1985) ("[T]here is something almost comic about assuming either judicial caution or the inherent legitimacy of the way we have chosen to structure political contests in this country.").

One of the strongest arguments against such a scheme is that it may increase the sense of racial differences on election day. BELL *supra* note 58, at 90. *See also* Wright v. Rockerfeller, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting).

Advocates of proportional representation claim that it the way to political power for Blacks and other racial minorities. Arguably such an argument only serves to relegitimize, rather than revitalize the electoral system. *See, e.g.,* Brown, *The Myths and Promise of American Democracy,* 11 NAT'L BLACK L.J. 13 (1989).

Throughout the history of the United States racial minorities have been treated similarly, both in and outside of the political arena. Consequently, the underlying assumption that vote dilution, in general, and racial gerrymanders, in particular, is more heinous in the once "solid South" than in other parts of the nation is untrue.

The Constitution does not limit nationwide application of section 5, if anything the history and purpose of the Civil War amendments would allow nationwide preclearance. Thus proposals advocating nationwide preclearance should not be summarily rejected. A pragmatic reading of the present Act warrants nationwide preclearance of redistricting changes.

This interpretation of the Act is not unprecedented, but is entirely consistent with the recognition of race as a factor in a voter's political choice. Furthermore, an accurate comparison of the realistic application of antidiscrimination law with our racially cognizant society are the "second wave" of school desegregation cases.

These cases demonstrate how a doctrine that had its genesis in the South was applied in other areas of the country. Furthermore as antidiscrimination doctrine of school desegregation has expanded, notions of de facto and de jure discrimination have likewise undergone a metamorphosis. Accordingly, a similar doctrinal development is not only possible, but appropriate for national preclearance of electoral alterations in order to eliminate racial gerrymanders throughout the United States and to fully implement the fifteenth amendment.