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Effective Representation and Multimember Districts

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COMMENTS

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I. INTRODUCTION

Although most state legislative districts are "single-member" districts drawn to provide for the election of one representative by voters within a defined geographical area,[1] many states have established "multimember" districts in which voters elect two or more legislators from a single constituency.[2] In recent years, members of various minority interest groups, most typically, residents of urban Negro ghettos, have brought actions contending that multimember districting deprives them of equal protection of the laws in violation of the fourteenth amendment.[3] These challenges to multimember-

1. While the majority of state legislative districts in 1955 were of the single-member variety, only nine states were apportioned completely into single-member districts, and thus 12% of the nation's state senators and 45% of its state representatives were elected in multimember districts. Klain, *A New Look at the Constituencies: The Need for a Recount and a Reappraisal*, 49 AM. POL. SCI. REV. 1105, 1106-11 (1955). These findings were substantially confirmed in 1962 by P. DAVID & R. EISENBERG, STATE LEGISLATIVE REDISTRICTING: MAJOR ISSUES IN THE WAKE OF JUDICIAL DECISION 20 (1962) [hereinafter DAVID & EISENBERG]. David and Eisenberg found that 3,179 legislators were elected from 3,179 single-member districts across the nation, while 2,704 state legislators were elected from 927 multimember districts. Most of the multimember districts were house rather than senate districts. There have been no thorough studies showing the status of multimember districts since the major reapportionment cases of the early 1960's, but there seems to be a general trend away from their use: Maryland, Michigan, Ohio, Oklahoma, Pennsylvania, and Tennessee have eliminated multimember districts completely. *See* R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 504 (1968) [hereinafter DIXON].

2. The following states, among others, have some large multimember districts. In Arkansas, thirteen legislators are elected from one district, five legislators are elected from each of two districts, four legislators are elected from each of three districts, and three legislators are elected from each of six districts. Yancey v. Faubus, 251 F. Supp. 998, 1003-04 (E.D. Ark. 1965). In Georgia, seven legislators are elected from one multimember district and three legislators are elected from each of two districts. Dorsey v. Fortson, 228 F. Supp. 259, 262 (N.D. Ga. 1964). In Texas, fourteen legislators are elected from the multimember district of Dallas County, ten legislators are elected from Bexar County, and eight legislators are elected from Tarrant County: three districts elect two representatives each, two districts elect six representatives each, and other districts elect seven, five, four, and three representatives respectively. Kilgarlin v. Martin, 252 F. Supp. 404, 454-58 (S.D. Tex. 1966). In Mississippi, ten state representatives and five senators are elected from one district, five representatives are elected from each of two other districts, and seven legislators are elected from another district. Connor v. Johnson, 265 F. Supp. 492, 495-96 (S.D. Miss. 1967). In Wyoming, ten legislators are elected from one district, and four legislators are elected from each of two others. Schaefer v. Thomson, 251 F. Supp. 450, 452 (D. Wyo. 1965). In Nevada, forty assemblymen are elected from sixteen districs and twenty senators from thirteen districts. Dungan v. Sawyer, 253 F. Supp. 352, 357 (D. Nev. 1966). For a general discussion of the multimember district and its effects, see Silva, *Compared Values of the Single- and Multi-Member Legislative District*, 17 WESTERN POL. Q. 504 (1964); Hamilton, *Legislative Constituencies: Single-Member Districts, Multi-Member Districts, and Floterial Districts*, 20 WESTERN POL. Q. 321 (1967); DIXON, *supra* note 1, at 504-15.

3. *See, e.g.*, Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), *revd. on other*

districting schemes have been based on the argument that the concept of equal protection incorporates more than the mere notion that state legislative districts must be apportioned so that each elected official represents a substantially equal number of persons voting;[4] plaintiffs have claimed that the equal protection clause also guarantees a voter's right to "effective representation"—a concept of broader scope than mere mathematical equality among districts.[5] It is this right to effective representation which is allegedly infringed by the multimember districts.

The minority interest-group members who have challenged the validity of multimember districts have argued that since such districts have large populations, their groups become submerged in constituencies which are dominated politically by more powerful groups than their own, and which groups also espouse interests differing significantly from their own. Thus, the minority interest-group members have claimed that multimember districts have diluted their voting power and have precluded them from electing substantially the same number of representatives that they would have been able to elect had the multimember districts been apportioned into single-member districts. The above argument concludes that this inability on the part of minority groups to elect a number of

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grounds sub nom. Kilgarlin v. Hill, 386 U.S. 120 (1967); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965); Mann v. Davis, 245 F. Supp. 241 (E.D. Va.), *affd. sub nom.* Burnette v. Davis, 382 U.S. 42 (1965); Schaefer v. Thompson, 251 F. Supp. 450 (D. Wyo. 1965), *affd. sub nom.* Harrison v. Schaefer, 383 U.S. 269 (1966); Drew v. Scranton, 229 F. Supp. 310 (M.D. Pa.), *vacated and remanded*, 379 U.S. 40 (1964); Rockefeller v. Smith, 246 Ark. 794, 440 S.W.2d 580 (1969); Silver v. Brown, 64 Cal. 2d 3, 409 P.2d 689, 48 Cal. Rptr. 609 (1966); Kruidenier v. McCulloch, 258 Iowa 1121, 142 N.W.2d 355 (1966); Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556 (1964); Hainsworth v. Martin, 386 S.W.2d 202 (Tex.), *vacated and remanded*, 382 U.S. 109 (1965).

The Supreme Court has dealt with the issue of multimember districting in Fortson v. Dorsey, 379 U.S. 433 (1965), and Burns v. Richardson, 384 U.S. 73 (1966), and plaintiffs in many of the subsequent challenges to that form of districting have relied on the Court's decisions in those two cases even though the plaintiffs in *Fortson* and *Burns* were not granted relief.

4. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Swann v. Adams, 385 U.S. 440 (1967); Kilgarlin v. Hill, 386 U.S. 120 (1967); Kirkpatrick v. Preisler, 394 U.S. 526 (1969). The one man-one vote standard was made applicable to local governmental units in Avery v. Midland County, 390 U.S. 474 (1968). *See also* Hadley v. Junior College Dist., 397 U.S. 50 (1970).

5. The Supreme Court stated in *Reynolds v. Sims* that ". . . the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment . . . ." 377 U.S. at 565-66.

The Court had earlier held in *Wesberry v. Sanders* that under art. 1, § 2, of the Constitution one man's vote must be as nearly as practicable of the same value as another's in a congressional election. Justice Black, in his opinion for the Court, stated that the objective of the Constitution is to make "equal representation for equal numbers of people the fundamental goal . . . ." 376 U.S. 1, 18 (1964).

representatives substantially proportionate to their numbers amounts to a denial of effective representation in violation of the equal protection clause of the fourteenth amendment. In order to remedy this alleged constitutional infirmity, the groups have sought reapportionment of the multimember districts into smaller, more homogeneous single-member districts.

This argument based on the concept of effective representation rests primarily upon language contained in the Supreme Court's opinion in *Fortson v. Dorsey*.[6] In that case, the Court declined to grant relief to residents of a multimember district in Georgia who claimed that they had been denied effective representation. However, the majority opinion indicated in dictum that the effective representation issue was not foreclosed from judicial inquiry simply by virtue of a district's compliance with the one man-one vote standards set forth in the reapportionment cases.[7] The Court, in a paragraph that seems to invite challenges to multimember schemes, stated:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.[8]

In *Burns v. Richardson*,[9] decided one year after *Fortson*, the Su-

6. 379 U.S. 433 (1965). *Fortson* was the first case before the Supreme Court which involved a challenge under the equal protection clause to the validity of a multimember-districting scheme. Under Georgia's 1962 Senatorial Reapportionment Act, the state was divided into state senatorial districts which plaintiffs conceded were substantially equal in population. Throughout most of the state, from one to eight counties comprised a senatorial district and the voters elected the senator for that district on a district-wide basis. However, the seven most populous counties were each divided into anywhere from two to seven districts, and the voters in each of those counties elected at large the number of senators equal to the number of districts in the county. The plaintiffs in *Fortson* brought suit seeking a decree that the county-wide voting scheme in each of the multidistrict counties violated the equal protection clause of the fourteenth amendment. A three-judge district court granted plaintiffs' motion for summary judgment and held that the use of both single-member and multimember districts resulted in an invidious discrimination against the residents of the multidistrict counties. Dorsey v. Fortson, 228 F. Supp. 259, 263 (N.D. Ga. 1964). In reversing the district court's decision the Supreme Court held that a multimember district did not constitute a per se violation of the equal protection clause. The Court pointed out:

> Agreeing with appellees' contention that the multi-member constituency feature of the Georgia scheme was *per se* bad, the District Court entered the decree on summary judgment. We treat the question as presented in that context, and our opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause.

379 U.S. at 439. For an interesting commentary on the apparently inept manner in which plaintiffs' counsel handled the appeal before the Supreme Court, *see* DIXON, *supra* note 1, at 476-78.

7. 379 U.S. at 439.

8. 379 U.S. at 439.

9. 384 U.S. 73 (1966).

preme Court reaffirmed its position that, despite compliance with the equal-population test of *Reynolds v. Sims*,[10] apportionment schemes which minimize or cancel out the voting strength of a racial or political element may invidiously discriminate against the members of that element in violation of their right to equal protection.[11]

The Supreme Court has not decided a case involving an assertion of the claim that a multimember district denies the right of effective representation since *Fortson* and *Burns*. However, there have been several subsequent challenges in lower courts to the validity of such districts, and these challenges have generally failed because the factual evidence did not demonstrate conclusively that the voting strength of a legally cognizable racial or political element had been minimized or cancelled.[12] In *Chavis v. Whitcomb*,[13] however, a three-

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10. 377 U.S. 533 (1964).

11. Where the requirements of *Reynolds v. Sims* are met, apportionment schemes including multimember districts will constitute an invidious discrimination only if it can be shown that "designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."
384 U.S. at 88.

12. *See* Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), *revd. on other grounds sub nom.* Kilgarlin v. Hill, 386 U.S. 120 (1967); Mann v. Davis, 245 F. Supp. 241 (E.D. Va.), *affd. sub nom.* Burnette v. Davis, 382 U.S. 42 (1965); Schaefer v. Thomson, 251 F. Supp. 450 (D. Wyo. 1965), *affd. sub nom.* Harrison v. Schaefer, 383 U.S. 269 (1966); and Silver v. Brown, 64 Cal. 2d 3, 409 P.2d 689, 48 Cal. Rptr. 609 (1966).

In two cases relief was granted and the state was forced to subdistrict multimember districts. In Kruidenier v. McCulloch, 258 Iowa 1121, 142 N.W.2d 355 (1966), the Iowa supreme court voided a mixed system of single- and multimember districts on the ground that a resident of a multimember district possesses greater voting power than a resident of a single-member district because he is represented by more legislators. The court stated: "The Equal Protection Clause is violated if certain constituents are given an unequal number of representatives." 258 Iowa at 1155-56, 142 N.W.2d at 375. Although the plaintiff offered proof showing a minimization of interest-group voting strength, the court did not consider that element of the case in reaching its decision. Thus, the *Fortson* dictum was not the basis for the court's order that the entire state be redistricted into single-member districts.

In Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965), a legislative plan grouped three counties together into a multimember district from which three representatives were elected. Another district, which was made up of four counties, had three representatives. The court found no geometric, geographic, or equalization basis for the districting scheme. 247 F. Supp. at 107-08. It ordered the multimember districts to be subdistricted but, as in *Kruidenier*, did not rely on the *Fortson* dictum. Rather, the court reasoned that, in light of the

> pattern and practice of discrimination in Alabama as a backdrop, the cavalier treatment accorded predominantly Negro counties in the House plan takes on added meaning. The Court is permitted to find the intent of the Legislature from consistency of inherent probabilities inferred from the record as a whole. We, therefore, hold that the Legislature intentionally aggregated predominantly Negro counties with predominantly white counties for the sole purpose of preventing the election of Negroes to House membership.

247 F. Supp. at 109. The court had placed this "intent" within a constitutional framework:

> Any limitation of the persons for whom votes may be cast is logically a restriction on the right to vote. Political parties are not mentioned in the Constitution, but

judge federal district court[14] in Indiana found that the plaintiff had presented sufficient factual evidence to sustain his claim, and therefore held that the multimember district under attack in that case denied the plaintiff his right to effective representation in violation of the equal protection clause of the fourteenth amendment. Thus, by bringing the issue of effective representation squarely into the judicial arena, the *Chavis* court took another step into the "political thicket"[15] of extending the scope of judicial review over state legislative apportionment schemes. This Comment will analyze the soundness of that step. It is first necessary, however, to examine in greater detail the facts and holding in *Chavis*.

II. The Chavis Case

The plaintiffs in *Chavis* challenged the constitutionality of a multimember district consisting of Marion County[16] from which eight state senators and fifteen state representatives were elected at large.[17] One of the plaintiffs in *Chavis* was a Negro resident of

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the abridgement of voting rights on account of race, color, or previous condition of servitude is forbidden by the Fifteenth Amendment. The Supreme Court has long recognized that the Fifteenth and the more inclusive Fourteenth Amendments were adopted with the special intent of protecting Negroes and their voting rights. . . . We conclude that the Constitution itself requires a distinction between the familiar political abuse of gerrymandering and gerrymandering for the purpose of racial discrimination.

247 F. Supp. at 105. Thus, *Sims* also turned on grounds independent of the *Fortson* dictum.

In a recent Arkansas case, Rockefeller v. Smith, 246 Ark. 794, 440 S.W.2d 580 (1969), the plaintiffs alleged representational disparities between single- and multimember districts. The plaintiffs offered evidence which showed that identifiable interest groups were submerged into a large multimember district which elected thirteen legislators. The state supreme court reversed, on jurisdictional grounds, a county court's order granting relief.

13. 305 F. Supp. 1364 (S.D. Ind.), *redistricting order per curiam*, 307 F. Supp. 1362 (S.D. Ind. 1969), *prob. juris. noted*, 397 U.S. 984 (1970). The state had appealed the court's decision on the merits, and had appealed separately the subsequent redistricting order. Probable jurisdiction was noted in both cases on March 16, 1970. 397 U.S. 979 (1970). However, on March 23, 1970, that order was revoked, the cases were consolidated into one appeal, and probable jurisdiction was noted. 397 U.S. 984 (1970). *See* note 111 *infra*.

14. For a discussion of the procedural aspects of the case, *see* note 17 *infra*.

15. This phrase was first used by Justice Frankfurter in Colegrove v. Green, 328 U.S. 549, 556 (1946).

16. Marion County includes the city of Indianapolis and comprises the Twenty-Sixth District of the Indiana House and Nineteenth District of the Indiana Senate. 305 F. Supp. at 1366.

17. Pursuant to 28 U.S.C. § 2281 (1964), the suit was tried before a three-judge court in the Southern District of Indiana, since the complaint prayed that the statute establishing the multimember district, Ind. Ann. Stat. §§ 34-102, 34-104 (Burns Supp. 1968), be declared violative of the United States Constitution. The court stated that "[t]he complaint seeks declaratory relief pursuant to 28 U.S.C. § 2201 and injunctive relief would necessarily accompany a judgment adverse to defendants." 305 F. Supp. at 1366. The action was originally commenced against the Indiana General Assembly and

Marion County. Significantly, he did not claim that there were deviations in population among Indiana's legislative districts which violated the one man-one vote principle of *Reynolds v. Sims*; nor did he claim that the state had engaged in overt racial gerrymandering. Rather, the plaintiff relied solely on the claim that the Marion County multimember district diluted the voting strength of the

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its individual members; later the court granted the plaintiffs' motion to join Governor Edgar D. Whitcomb as a defendant. By further order of May 12, 1969, the district court granted the defendants' motion to dismiss as against the Indiana General Assembly and its individual members. 305 F. Supp. at 1366.

Although the court ruled that the claim was not properly a class action, it did permit plaintiffs to maintain the action individually. *See* the separate order of June 18, 1969, 305 F. Supp. 1359, 1363 (S.D. Ind. 1969). By an order on the same date, the court granted the petition of certain intervening defendants for leave to intervene *nunc pro tunc* June 12, 1969, pursuant to FED. R. CIV. P. 24(b)(2). Plaintiffs alleged that the state statutes which established the Marion County state house and senate district operated to violate their rights under the equal protection clause of the United States Constitution. Jurisdiction was predicated on 28 U.S.C. § 1343 (1964).

When the case finally went to trial, numerous plaintiffs sued in their own behalf and in behalf of persons similarly situated. Plaintiff Chavis is an Indiana resident living outside the Center Township Ghetto area. He alleged that he had an active interest in protecting the voting rights of the inhabitants of the Ghetto area whose interests and voting propensities approximated his own. However, the court ruled that he was not entitled to relief since he was not a resident or voter in the Center Township Ghetto. 305 F. Supp. at 1390.

Plaintiffs Ramsey and Bryant alleged that they were part of a cognizable interest group which regularly engaged in bloc voting and which was cancelled out by the voting of more powerful interest groups with contrary interests in Marion County. Plaintiff Bryant was granted relief, but plaintiff Ramsey was denied relief since he was not a resident of the Center Township Ghetto as defined by the court. 305 F. Supp. at 1390-91.

Plaintiff Hotz, a white resident of Marion County outside Indianapolis, alleged that suburban Republicans were "deprived of a proportionate voice as to who their Republican state legislators shall be, in years of Republican victory in Marion County." 305 F. Supp at 1367. The court ruled that her complaint was "directed to intraparty organization and selection of candidates and does not . . . rise to the degree of a constitutional deprivation of equal protection by reason of the statutes here under attack." 305 F. Supp. at 1389.

Plaintiff Rowland claimed that he was frustrated in his efforts to cast his vote intelligently by reason of the length of the ballot relating to candidates for the General Assembly in the multimember district. The court denied relief, ruling that the factor of lengthy ballots alone was "not sufficient to justify a declaration of the unconstitutionality of multi-member districting." 305 F. Supp. at 1389-90.

Plaintiff Walker appeared before the court in the dual status of a Negro voter residing in Lake County (which includes Gary and Hammond) and of an Indiana voter residing outside Marion County. He failed to obtain relief as a Lake County Negro since he did not show "that Lake County Negroes are a racial minority group which has been deprived of representation so as to distinguish them from other Lake County resident voters." 305 F. Supp. at 1390. Walker alleged that since he voted for fewer legislators than did Marion County residents, he therefore had fewer legislators to represent him in the state legislature. The court refused to grant him relief on this allegation and held that "in the absence of stronger evidence of dilution, his remedy is limited to the consideration which should be given to the uniform-districting principle in any subsequent reapportionment of the Indiana General Assembly." 305 F. Supp. at 1390.

ghetto residents within that district and thus abridged their right of effective representation as enunciated in *Fortson*.[18]

In order to demonstrate a denial of effective representation, the plaintiff in *Chavis* introduced extensive data which demonstrated that there existed within Marion County a "Center Township Ghetto" area.[19] Additional data showed that the residents of that area were clearly distinguishable from the residents of the remainder of the county in terms of salaries, housing, educational level, welfare status, and unemployment rate.[20] The plaintiff also established that the residents of the Ghetto were predominantly Negroes, and hence that they constituted a racially homogeneous group.[21] On the basis of this social and economic data, the plaintiff alleged, and the court found, that because of their distinctive minority characteristics, the Negro residents of the Ghetto had interests in areas of substantive law—such as housing regulations, welfare programs, garnishment statutes, and unemployment compensation—which diverged sharply from the interests of nonresidents of the Ghetto.[22] Thus, the court found that the Negro residents of the Center Township Ghetto were an identifiable element of the voting population within the Marion County multimember district.[23]

18. *See* text accompanying notes 6-9 *supra*.

19. After referring to dictionary definitions, pertinent demographic determinants, and the REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 6 n.1 (1968), the court adopted the following definition of the word "ghetto" for the *Chavis* case:

> Ghetto—A primarily residential section of an urban area characterized by a higher relative density of population and higher relative proportion of substandard housing than in the overall metropolitan area which is inhabited predominantly by members of a racial, ethnic, or other minority group, most of whom are of lower socioeconomic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom.

305 F. Supp. at 1373. The Center Township Ghetto consists of certain census tracts of land and their subdivsions within the city of Indianapolis in Marion County. 305 F. Supp. at 1380-81. As the court stated: "This does not represent the entire ghettoized portion of Center Township but only the portion which is predominantly inhabited by Negroes and which was alleged in the complaint." 305 F. Supp. at 1380-81. The approximate 1967 population of Center Township was 132,000 of which approximately 35,000 were white and 97,000 were nonwhite. Approximately 99.8% of the nonwhite population was Negro. 305 F. Supp. at 1380 n.11.

20. The court employed exhibits offered by both parties. Selected census tracts which were chosen for comparison included one relatively wealthy suburban area, three areas which were disputably within the Ghetto area as alleged by the complaint, six tracts within the Ghetto areas as referred to in the complaint, and one tract randomly chosen to typify a white ghetto portion not mentioned in the complaint. Eight tables were used comparing the different tracts with regard to housing, social, economic, and critical differentiating characteristics. Critical differentiating characteristics included owner-occupied dwelling units, deteriorated and dilapidated housing conditions, old-age assistance recipients, high school graduates, juvenile delinquency cases, unemployment rate, income, and automobile ownership. 305 F. Supp. at 1372-81.

21. 305 F. Supp. at 1381.

22. 305 F. Supp. at 1386.

23. 305 F. Supp. at 1386.

After demonstrating that the Negro Ghetto residents were an identifiable element, the plaintiff introduced evidence which demonstrated that the votes of these residents were minimized by the multi-member-districting scheme. In past elections, the slate of candidates offered by one party generally captured all of the Marion County district's legislative seats.[24] Since much of Marion County was a predominantly white suburban area,[25] both major parties generally offered candidates who catered to the views of the white majority,[26] and thus, the differing views of the Negro residents of the Center Township Ghetto were effectively unrepresented. Proof of inadequate Negro representation on party slates was evidenced by the fact that, from 1960 to 1966, while the residents of the Ghetto accounted for 17.81 per cent of the total population of the county, only 4.75 per cent of the senators and 5.97 per cent of the representatives resided in the Ghetto.[27] Furthermore, by controlling the nominating machinery, the political parties were able to exert considerable influence over the actions of the legislators after they were elected[28]—if a legislator's views consistently diverged from the party line, he normally was not nominated for re-election. Because a party's slate of candidates could succeed only by seeking to obtain the votes of the white majority, the court found that "a legislator elected from Marion County is hesitant to express the interests of the residents of the Center Township Ghetto unequivocally in the legislative chambers, even though he may believe it proper that those interests be furthered."[29] Finally, the court determined that the population of the Center Township Ghetto "is sufficient in size to elect approximately two members of the House of Representatives and approximately one senator if these were specific single-member legislative districts within Marion County."[30] Viewing all of these factors to-

24. The district court stated that "since 1920 only slightly more than 1% of the General Assembly candidates from Marion County have been elected from the political party which did not generally prevail." 305 F. Supp. at 1385. For party statistics in this regard, specifically dealing with Marion County, see Hamilton, *supra* note 2, at 324.

Silva, *Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District*, 17 WESTERN POL. Q. 742, 769 (1964), states that "the more members per district, the greater the disproportion between each party's share of the statewide vote and its share of seats in the chamber." Many monographic studies of state and metropolitan areas have demonstrated the validity of this generalization. *See, e.g.*, Waltzer, *Apportionment and Districting in Ohio: Components of Deadlock*, and Lamb, *Michigan Legislative Apportionment*, in THE POLITICS OF REAPPORTIONMENT 173, 267 (M. Jewell ed. 1962); M. COLLINS, M. DAUER, P. DAVID, A. LACY, & G. MAUER, EVOLVING ISSUES AND PATTERNS OF STATE LEGISLATIVE REDISTRICTING IN LARGE METROPOLITAN AREAS (1966); DIXON, *supra* note 1, at 506-07.

25. 305 F. Supp. at 1386.

26. 305 F. Supp. at 1386.

27. 305 F. Supp. at 1384.

28. 305 F. Supp. at 1386.

29. 305 F. Supp. at 1386.

30. 305 F. Supp. at 1385.

gether, the court concluded that the Marion County multimember district minimized the votes of the Negro residents of the Center Township Ghetto area. On the basis of its finding that the Negro residents of the Center Township Ghetto were an identifiable element, and its finding that the multimember-districting scheme minimized the votes of these residents, the court held that the plaintiff had been invidiously discriminated against in violation of his right to effective representation implicit in the equal protection clause of the fourteenth amendment.[31]

III. The Multimember District: A Political and Legal Analysis

In order to assess the impact of the *Chavis* case, it is first necessary to analyze in greater detail the concept of effective representation that underlies the *Fortson-Chavis* rationale, and to consider how a multimember district may offend that concept. Finally, it must be determined whether the right to effective representation warrants the constitutional protection that the *Chavis* case extends to it.

A. *Interest Groups and Effective Representation*

The most significant aspect of the *Chavis* opinion is its recognition that ensuring the equal population of legislative districts does not necessarily ensure that all the voters in those districts are equally represented. Most courts have felt that the demands of equal representation are satisfied if state legislative districts are apportioned so that a substantially equal number of voters reside in the various districts within the state.[32] But voters are not fungible[33]—they have diverse interests. Since governmental policy can either impede or further those interests, voters with inconsistent interests tend to differ over who should determine that policy. If an individual's interests substantially conflict with those of a majority of the voters in a legislative district, the candidate of his choice will probably not be elected.[34] Thus, as a matter of political reality, the

31. 305 F. Supp. at 1385-86.

32. *See* cases discussed in note 12 *supra*, as indicative of the courts' unwillingness to become involved with the intricate concepts of representation. *See also* the discussion at note 45 *infra* of the courts' treatment of alleged political gerrymandering.

33. The distinctive thing about people, in contrast to trees or acres, is that the *people are not fungible*. Failure to perceive this leads to the "identity of interest" fallacy which underlies such simple arithmetic measures as the electoral percentage . . . and which is the central fallacy of a rigid, simplistic "one man-one vote" theory. Although legislators are elected "by voters," as Chief Justice Warren said, they are elected by voters who have interests which lead them to organize for group political action.

Dixon, *supra* note 1, at 272.

34. Of course, factors such as the personal attributes of a particular candidate and a lack of awareness of the candidates' positions on the part of the electorate will occasionally upset the operation of this model.

strength of an individual vote is dependent upon the voting strength of the interest group or groups to which that vote is connected. Effective representation as a political concept, therefore, should be defined in terms of the voting strength of interest groups.[35]

Multimember districting is particularly conducive to the dilution

35. *See*, Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 218 (1964):

> [I]n apportionment cases the personal civil right of the voter is intertwined with large, overriding questions concerning representation—*i.e.* concerning political philosophies and practices of representation in a dynamically democratic public order, in which groups are as relevant as individuals. Indeed, groups and parties are the building blocks of political power. Because apportionment involves the creation and control of political power, the group dynamics of American politics cannot be ignored forever in reapportioning legislatures.

Professor Dixon has continually advanced the theme that fair representation is not achieved through mere compliance with one man-one vote standards. The most recent statement of this thesis is found in DIXON, *supra* note 1, at 17: "in reapportionment cases more is involved than the self-centered constitutional right of a voter to cast a vote which, at least in mathematical, nonfunctional terms, is weighted equally with votes of others throughout the districts . . . ." In Professor Dixon's view, this "more" constitutes fair representation and is comprised of several components, at least some of which "are as amenable to judicial review as the equal protection standard." *Id.* The book in its thorough history of the reapportionment revolution brings the theme of effective representation into continual focus.

The importance of the group in determining the strength of the votes of individuals who are members of that group was referred to in the original reapportionment cases by both Justices Harlan and Stewart. Justice Harlan pointed out in his dissent in *Reynolds v. Sims* that:

> [It is] obvious, and, in the context of elections, more meaningful to note that people are not ciphers and that legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where electors live.

377 U.S. at 623-24. Justice Stewart would have applied to reapportionment cases an equal protection standard which keyed on whether a certain state reapportionment scheme preserved effective majority rule and whether any rational basis was present in the classifications of constituencies comprising that scheme. 377 U.S. at 751. In support of this standard, Justice Stewart argued:

> Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate. In practice, of course this idea is approximated in the particular apportionment system of any state by a realistic accommodation of the diverse and often conflicting political forces operating within the State.

377 U.S. at 749. Justice Harlan pointed out the importance of group power in order to bolster his argument that the difficult determination of what interests are to be represented should be left exclusively with the legislature. Justice Stewart pointed to the importance of interest groups since he believed that *all* questions of apportionment could not be solved at the threshold by merely inquiring into whether each district has the same number of inhabitants. For an elaboration of the pluralistic nature of American politics, see R. DAHL, A PREFACE TO DEMOCRATIC THEORY 145-46 (1956); A. DEGRAZIA, PUBLIC AND REPUBLIC: POLITICAL REPRESENTATION IN AMERICA (1951); and Friedmann, *The Changing Content of Public Interest: Some Comments on Harold D. Lasswell*, in NOMOS V: THE PUBLIC INTEREST 84 (C. Friedrich ed. 1962). Friedmann states that "one of the outstanding . . . problems of contemporary industrialized society, and most particularly in the United States, is the position of group interests between the state and the individual." *Id. See* notes 66-71 *infra* and accompanying text.

of interest group voting strength because a greater number of voters must be members of an interest group in order for that group to control election results in a multimember district than would be necessary to gain this control in a single-member district.[36] Illustratively, if a single-member district in a state is composed of one hundred voters, an interest group consisting of fifty-one members will effectively control election results. If the state decides to combine two single-member districts and create a multimember district

36. *See generally* note 2 *supra*. David and Eisenberg disapprove of the generalizations in existing publications in regard to what will happen under one districting plan rather than another, generalizations usually based on what is referred to as "common knowledge," are generalizations that do not rest at all on any adequately comprehensive view of recent state experience.
DAVID & EISENBERG, *supra* note 1, at 21. *See also*, Silva, *supra* note 2, at 508-09. However, while generalizations are often inaccurate, especially those concerning the cause-and-effect relationship between a particular districting scheme and its representational effectiveness, it is still worthwhile to note the supposed advantages and disadvantages of single- and multimember districts. Professor Dixon summarizes nine attributes of single-member districts. He attributes five of these attributes—localism, less qualified candidates, weak and decentralized parties, emphasis on candidates rather than parties and issues, and legislative responsibility to the constituency involving some independence from the party—to the small size of the district rather than to the fact that only one legislator is elected from a single-member district. Multimember districts, on the other hand, are likely to have less localism, more qualified candidates, more emphasis on parties rather than individuals, and stronger and more dominant party apparatus. As Professor Dixon points out, any defects resulting from the small size of single-member districts could be disposed of by having smaller legislatures and larger single-member districts. DIXON, *supra* note 1, at 504-05. *But cf.* note 74 *infra* and accompanying text.

Dixon cites other attributes of the single-member district which relate to its essential character. First, legislators elected from single-member districts are likely to have shorter tenures of office. *But see* Silva, *supra* note 2, at 513. Second, he states that single-member districts are more conducive to gerrymandering than are multimember districts. Third, single-member districts lead to the maintenance of a two-party rather than a multiparty system. This tendency may relate not only to the single-member district, but more fundamentally to the kind of electoral system employed. DIXON, *supra* note 1, at 505.

While it is the thesis of this Comment that large multimember districts may lead to underrepresentation of significant minority interests, it must be emphasized that multimember districts are not inherently evil and that many commentators argue that they should not be completely discarded. David and Eisenberg suggest that small multimember districts are not as likely to involve the problem of minimization as large multimember districts, and that small multimember districts may indeed offer certain advantages over single-member districts. The case for the single-member district, they contend, while apparently ignoring urban ghettos such as the one involved in *Chavis*, is weakest in metropolitan areas where communities of interests are likely to be broad. Oppressive gerrymandering is less feasible in small multimember districts and will be avoided if the parties are sufficiently competitive so that they can divide the delegation. David and Eisenberg thus urge that in a county with a population between one-half and one million people, a few small multimember districts would be preferable to many single-member districts. DAVID & EISENBERG, *supra* note 1, at 22.

Although they believe that any district whose residents elect four or five members at large should normally be divided into small units, David and Eisenberg see no harm in continuing the policies of many states in which two- or three-member districts are widely used. *Id.* Obviously, however, the Marion County monolithic district in the *Chavis* case, with its fifteen representatives and eight senators elected at large, is far beyond the size limits for multimember districts envisioned by these authors.

whose residents elect two representatives, that district would embrace approximately two hundred voters. The fifty-one-member interest group would thus be reduced to a minority group which would be unable to elect any representatives merely on the strength of its fifty-one votes.[37] The plaintiffs in *Chavis*, for example, proved that Marion County legislators consistently resided in suburban, predominantly white, Washington Township in numbers "far disproportionate to Washington Township's percentage of the population."[38] The Center Township Ghetto had a twenty-two per cent larger population than did Washington Township, but was the residence of only approximately one-fourth of the senators and one-third of the representatives it would have had if the Ghetto had elected a percentage of the county's legislators equal to its percentage of the county's population.[39] As a result, Ghetto residents who were sufficient in number to control at least one—and probably more—single-member district were not able to exercise a proportionate degree of control in the Marion County multimember district.

Thus, because interest groups, and not individuals, are the real electors of representatives, and because multimember districts may dilute interest group voting strength, multimember districts are considerably more likely to thwart effective representation than are small, more homogeneous single-member districts.[40]

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37. It is crucial to recognize the tendency for strong political-party control over nomination procedures. A political party will realize that in large districts only one party will prevail at any given election, and thus will select a slate of candidates which will appeal to "majority interests." As a result, individuals seeking to represent minority groups residing in large multimember districts may not even succeed in placing their names on the ballot.

38. 305 F. Supp. at 1381-85.

39. 305 F. Supp. at 1384-85.

40. For a thorough treatment of the concept of effective representation, see Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 MICH. L. REV. 729 (1969), in which the author argues that the problems of effective representation present essentially political questions which are too complex for judicial resolution. *See also* Eulau, Wahlke, Buchanan & Ferguson, *The Role of the Representative: Some Empirical Observations on the Theory of Edmond Burke*, 53 AM. POL. SCI. REV. 742, 742-49 (1959); J. WAHLKE, W. BUCHANAN & L. FERGUSON, THE LEGISLATIVE SYSTEM: EXPLORATIONS IN LEGISLATIVE BEHAVIOR (1962); Kornberg, *Perception and Constituency Influence on Legislative Behavior*, 19 WESTERN POL. Q. 285 (1966); Wahlke, Buchanan, Eulau & Ferguson, *American State Legislators' Role Orientations Toward Pressure Groups*, 22 J. POL. 203 (1960).

Despite the complexity of the concept of effective representation, voting power plays a major role in representative democracy. Therefore, voting strength can serve important functions by providing a wedge for opening channels of communication between voters and representatives—a function of particular value to often ignored minority groups—and by providing a vehicle for interest-group approval or disapproval of legislative behavior. Conversely, an interest group's lack of voting strength is likely to emasculate that group and thus cause elected representatives to become unresponsive to its needs.

B. *The Equal Protection Clause and Effective Representation*

Once it is established that subdistricting of multimember districts can achieve more effective representation for a greater number of interest groups, it must be determined whether the failure to subdistrict violates the equal protection clause. The court in *Chavis* did not clearly articulate the legal basis for its conclusion that a multimember-districting scheme resulting in the minimization of the voting strength of an interest group deprives the members of that interest group of their right to equal protection. It is clear, however, that the court neither invoked traditional equal protection standards, nor relied upon the reasoning of the reapportionment cases that state representatives must be elected by substantially equal numbers of voters.[41]

The traditional test for determining whether a state has denied an individual equal protection under the law has been whether a statutory classification "can be deemed to be founded on some rational and otherwise constitutionally permissible state policy."[42] Under this test the complainant asserting a denial of equal protection has the burden of showing that the applicable statutory classification has no reasonable basis and is purely arbitrary and capricious.[43] In a case like *Chavis* the state may be able to point to several permissible state policies which rationally justify multimember districting. For example, multimember districts may facilitate compliance with one man-one vote standards, and may prevent gerry-

41. None of the plaintiffs complained that impermissible population variations existed between the Marion County district and other districts in the state. *See* note 17 *supra*. Nonetheless, the district court's relief included a redistricting of the entire state as to both houses of the Geeneral Assembly. *See* text accompanying notes 104-11 *infra*.

42. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 681 (1966) (Justice Harlan, dissenting).

43. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911), contains a classic formulation of the requirements of the equal protection clause:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Clearly, multimember districts may be founded on the basis of some permissible state policy.

See the discussion on the merits and problems of multimember districts at note 36 *supra*, and text accompanying note 44 *infra*. While multimember districts are actually being established, the policy reasons for their establishment are surely not irrational—disputable as they may be among the political scientists.

mandering.[44] However, the reapportionment cases established the principle that restrictions on the franchise require close judicial scrutiny,[45] and more recent cases have extended that principle by holding that such restrictions cannot be upheld unless they are necessary to the achievement of a compelling state interest.[46]

It is unlikely that multimember districts which minimize the voting strength of an identifiable element of the voting population could meet the Court's hybrid rationality test.[47] The policy arguments which are traditionally set forth to justify such districts are presently subject to much dispute[48] and seem to be far outweighed by the disadvantages inherent in the establishment of multimember districts. The principal objection to multimember districts is based on their tendency to deprive minority groups of effective representation. Since the goal of both the one man-one vote rule and the *Chavis* holding is to promote "fair and effective representation,"[49] it would seem to be irrational to justify a denial of effective representation to a minority group by a strict adherence to equal-population formulas. Moreover, the fact that other states have satisfied the one man-one vote standard without resorting to multimember districts indicates that such districting is not necessary to the achievement of the compelling state interest involved—equal-population districting. It would appear, therefore, that multimember districts which dilute the voting strength of an identifiable element of the

44. *See* note 47 *infra.*

45. ". . . any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562 (1964). *See also* Avery v. Midland County, 390 U.S. 474 (1968).

46. In Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969), the Court held that ". . . if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determined whether the exclusions are necessary to promote a compelling state interest." *See also* Cipriano v. City of Houma, 395 U.S. 701, 704 (1969).

47. The Supreme Court in *Reynolds* mentioned the use of multimember districts: "One body could be composed of single-member districts while the other could have at least some multimember districts." 377 U.S. at 577. This statement was made to rebut the argument that *Reynolds* had destroyed the utility of the concept of bicameralism. But in Lucas v. Fourty-Fourth Gen. Assembly, 377 U.S. 713, 731 n.21 (1964), the Court, in referring to large multimember districts, said "we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties." Two desirable aspects of multimember districts which might be considered compelling state interests are the prevention of gerrymandering and the facilitation of "home rule" plans or implementation of legislative programs. While gerrymandering may be alleviated through large multimember districts, there is no net gain if large interest groups are left with *no* voting strength. And the facilitation of legislative programming has small significance if many voters have no voice in establishing those programs.

48. *See* note 36 *supra.*

49. Reynolds v. Sims, 377 U.S. 533, 565 (1964). *See also* Chavis v. Whitcomb, 305 F. Supp. 1364, 1386 (S.D. Ind. 1969) (responsive and effective representation).

voting population cannot be justified within the Court's definition of rationality.

However, while it may be appropriate to define effective representation in terms of interest-group political action, the Supreme Court has not yet squarely adopted that position. Since its decision in *Baker v. Carr*,[50] the Court has condemned progressively smaller deviations in population among both state legislative and congressional districts.[51] As one commentator has argued, this obsession with absolute population equivalency is based upon the fallacious equation of equal population with equal representation.[52] If the Supreme Court has, in fact, concluded that equal population is to be equated with equal representation, then the plaintiff in *Chavis* arguably failed to state a cause of action, because there were no alleged devia-

50. 369 U.S. 186 (1962).

51. In Kirkpatrick v. Preisler, 394 U.S. 526, 529-30 (1969), the Court invalidated a districting plan which created congressional districts which varied from the ideal figure, based on 1960 census figures, by 12,260 (2.84%) below to 13,542 (3.13%) above. The Court rejected Missouri's argument that there was a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. 394 U.S. at 530.

In Wells v. Rockefeller, 394 U.S. 542 (1969), the Court applied these principles in invalidating New York's 1968 congressional districting statute, which treated seven sections of the state as homogeneous regions and divided each of these regions into districts of virtually identical population. Thirty-one of the forty-one districts were constructed in such a manner, while the remaining ten were composed of groupings of whole counties. The most populous district had more than 26,000 (6.488%) above the mean population while the smallest district had over 27,000 (6.608%) below the mean. 394 U.S. at 545.

Although these cases dealt with congressional districts, there is no reason to believe that the same principles are not applicable to state legislative districts, since the Court has referred to the two types of districts interchangeably. Dixon, *Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, 1969 SUP. CT. REV. 219, 222.

52. "The Court fallaciously equated 'equal-population' districting with 'equal representation.'" Dixon, *supra* note 51, at 228. Professor Dixon distinguishes the concepts of equal representation and equal population:

> Functionally, however, there is no such thing as "equal representation" in a district system of electing legislators. There may be "equal population" districts, which is an objectively verifiable concept. But with a district basis there can never be "equal representation" because all districting discriminates by discounting utterly the votes of the minority voters. This is the well-known, simple plurality rule and it operates district by district as a winner-take-all rule. In this precise sense all districting is gerrymandering, both in single member districting and in multimember districting, although the effect is more dramatic in the latter instance. *Id.* at 227.

Dixon also argues that equal representation would be possible only under a system of proportional representation:

> A goal of "equal representation" can be approximated only through abolishing districts and using proportional representation, such as . . . some version of the Hare system. Such proportionalization, whereby all the votes cast in the area covered by the legislature are pooled and contending groups achieve legislative representation closely proportional to their total popular vote, does represent voters equally in proportion to their numbers. In short, "equal representation" is generically a proportional representation concept. *Id.* at 228.

tions in population among Indiana's legislative districts. But, as the plaintiff in *Chavis* also demonstrated, equal population cannot be equated with equal representation, and the Court's language in *Fortson* suggests that the Court may be willing to recognize this distinction.[53] Furthermore, that language is consistent with the Court's decisions striking down population deviations among districts. It would seem possible that by using computers and other data-gathering aids, state legislative districts could be drawn which have absolutely equal populations and which also do not minimize the voting strength of an identifiable element of the voting population.[54] Hence, multimember districting should not be presumed to be necessary to the enforcement of the one man-one vote rule.[55]

In appears, therefore, that multimember districts which dilute the voting strength of cognizable interest groups cannot be justified under the equal protection clause, within the Supreme Court's expressed conceptions of equal and effective representation. It must be realized, however, that litigation problems in this area could be quite complex, since the issues involved are considerably more subtle than merely applying the one man-one vote test. It is, therefore, useful to set out the elements of a cause of action alleging infringement of the right to effective representation through multimember districting.

IV. Multimember Districts and Equal Protection: The Prima Facie Case

A. *Identification of the "Racial or Political Element"*

In order to state a good cause of action in an effective-representation case, the plaintiff must first show that he is a member of a cognizable racial or political interest group.[56]

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53. *See* text accompanying notes 6-8 *supra*.

54. *See* Dixon, *supra* note 51, at 251-53.

55. In a typical reapportionment case, once the plaintiff proves that population variations exist among legislative districts, the state bears the burden of showing that such discrepancies are necessary to the achievement of a compelling state interest. *See* note 46 *supra*. It is clear from the language in *Fortson* and *Reynolds*, however, that the state does not bear the burden of justifying the existence of a multimember district. The state need not assume that burden until the plaintiff has satisfactorily demonstrated that his vote has been diluted through the minimization of the voting strength of his racial or political interest group.

The different allocations of the burden of proof in these two types of cases are easily reconcilable. In one man-one vote cases, deviation from the arithmetic equality among districts amounts to a per se dilution of the right to vote. But according to *Fortson* and *Burns*, a resident of a multimember district does not make out a prima facie case simply by proving the existence of that multimember district; he must also prove that his vote has actually been diluted through minimization or cancellation of his particular racial or political element's voting strength.

56. "The first requirement implicit in Fortson v. Dorsey and Burns v. Richardson, that of an identifiable racial or political element within the multi-member district,

Thus, in *Chavis*, the plaintiff sought to establish that the Negro residents of the Center Township Ghetto constituted an identifiable racial element.[57] Based on the evidence presented, the court concluded that the salaries, housing, educational level, welfare statistics, and unemployment rate of the residents of certain proximately located census tracts in Center Township brought those tracts within the scope of the term "ghetto."[58] The court determined that because of the vast socioeconomic differences between the Center Township Ghetto and other parts of Marion County, the needs of the Ghetto residents differed substantially from the needs of the residents in the more affluent sections, and that the Ghetto residents had interests in areas of substantive law[59] which were not shared by their suburban counterparts. Thus, the court held the Ghetto residents to be a cognizable racial element.

The court's reasoning in *Chavis* indicates that in order to constitute an identifiable racial or political element, an interest group must be comprised of individuals who share more than an isolated set of characteristics. The members of the group must share a common "life-style," including such factors as geographical proximity, relative equality in economic wealth and social status, and religious, ethnic, or racial ties.[60] Only if a group is sociologically homogeneous can a court reasonably conclude that the members of the group have sufficiently common interests in pervasive and well-defined areas of substantive law—interests that distinguish the group from other residents of a multimember district in terms of the group's governmental needs. Therefore, a careful factual inquiry is necessary before a court can grant standing to members of any group in multimember-district litigation, and no single common characteristic, such as religious affiliation or veteran status, should be considered determinative if members of the group have varying interests in other areas.[61]

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is met by the Negro residents of the Center Township Ghetto." Chavis v. Whitcomb, 305 F. Supp. 1364, 1386 (S.D. Ind. 1969).

57. The Center Township Ghetto "does not represent the entire ghettoized portion of Center Township but only the portion which is predominantly inhabited by Negroes and which was alleged in the complaint." 305 F. Supp. at 1380-81. The approximate 1967 population of this area was 132,000 of which approximately 35,000 were white and 97,000 nonwhite. Approximately 99.8% of the nonwhite population was Negro. 305 F. Supp. at 1380 n.11.

58. *See* note 19 *supra.*

59. *See* note 20 *supra.*

60. *See generally* G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (2d ed. 1962); C. SILBERMAN, CRISIS IN BLACK AND WHITE (1964); and K. TAEUBER & A. TAEUBER, NEGROES IN CITIES: RESIDENTIAL SEGREGATION AND NEIGHBORHOOD CHANGE (1965).

61. Under some circumstances, race alone may be a sufficiently identifying characteristic. *See* notes 62-65 *infra* and accompanying text.

Because the interpretation of socioeconomic data usually is an intricate process, difficult questions will arise when a court undertakes to determine whether a particular interest group is sufficiently identifiable to be given legal recognition for purposes of establishing a prima facie case in a challenge to the validity of a multimember district. This determination may be considerably simplified, however, when the alleged interest group consists of the inhabitants of a Negro urban ghetto. The continuing controversy over school integration obviates the need for extensive proof that race is widely recognized as an important differentiating characteristic among Americans; and the social and economic homogeneity that is found among urban Negro ghetto residents is well documented.[62] These observations suggest that in cases in which Negroes reside in racially segregated communities, they will presumptively possess substantially common interests in pervasive areas of substantive law which justify considering such communities as identifiable racial elements for purposes of granting such Negroes standing in multimember-district litigation.[63] This is particularly true in Southern cities, where multimember districts are prevalent[64] and where there has been historic hostility to the full extension of voting rights to Negroes.[65]

The *Fortson* dictum, however, was not limited to the voting problems of racial elements; it also covered political elements.[66] While it is unclear to what extent the courts will be willing to grant standing to political elements to challenge multimember-districting schemes, the challenging party clearly would bear the burden of demonstrating that a particular group of residents has sufficient sociological homogeneity to be classified as an identifiable political element meriting legal recognition. In order to sustain that burden, the challenging party would be required to produce data which

62. *See* note 60 *supra.*

63. In *Chavis,* the fact that a particular census tract included Negro inhabitants did not ensure that that tract was part of the Center Township Ghetto in light of variances between the included ghetto tracts and other relatively middle-class tracts inhabited by Negroes. 305 F. Supp. at 1379-80. Nevertheless, in the Southern states the overwhelming significance of the racial factor may group together persons of somewhat varying economic and social status. The potentially expansive interests of Southern Negroes in the civil rights area and the historic treatment of the Negro in the South, coupled with the social mores of Negroes vis-à-vis whites generally, may sufficiently identify that racial element as a readily cognizable minority interest group.

64. *See* note 2 *supra.* Southern rural areas are typically not racially segregated. *See, e.g.,* Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), *revd. on other grounds sub nom.,* Kilgarlin v. Hill, 386 U.S. 120 (1967) (Dallas); Dorsey v. Fortson, 228 F. Supp. 259 (N.D. Ga. 1964), *revd.,* 379 U.S. 433 (1965) (Atlanta).

65. *See, e.g.,* Smith v. Allright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965).

66. 379 U.S. at 439.

demonstrates socioeconomic similarities among a substantial group of individuals. Although this normally would be a formidable task in a nonracial context, it is conceivable that certain racially heterogeneous suburban,[67] urban, or rural groups could be isolated as distinct political elements as well within the meaning of the relevant language in *Chavis*. There are, however, problems with this argument. Such groups—unlike Negroes living in urban ghettos or rural pockets—are likely to be highly variegated in terms of the social and economic status of their members.[68] As a result, parties who allege that they are a part of a cognizable political element will not have a distinguishing characteristic as obvious or as significant as race, nor an isolated residential setting like a ghetto, from which the conclusion of socioeconomic homogeneity may be rather easily drawn. In order to prove the existence of an interest group which shares a common life-style, these parties will have to point to factors such as the relative permanence of the group within the area, the income and educational levels of group members, their job status, and their religious or ethnic affiliation. In light of the degree of social diversity which characterizes most communities, it seems doubtful that many groups sufficiently homogeneous to constitute nonracial political elements will develop.[69]

67. Suburbs can be defined as "those urbanized, residential communities which are outside the corporate limits of a large central city, but which are culturally and economically dependent upon the central city." THE SUBURBAN COMMUNITY xvii (W. Dobriner ed. 1958). In a complex study, O. WILLIAMS, H. HERMAN, C. LIEBMAN & T. DYE, SUBURBAN DIFFERENCES AND METROPOLITAN POLICIES (1965) [hereinafter WILLIAMS] examine various suburban areas and conclude "that differentiation and specialization in metropolitan areas results not only in interdependence among local units of government . . . but also in divergent local interests and policies that perpetuate demands for autonomy." *Id.* at 289. Although this study indicates that suburban attitudes often favor some form of metropolitan government, nonetheless, it points out the fact that suburbs include many elements with varying attitudes toward governmental policy. In at least one case plaintiffs have attempted to identify a suburban or rural group as a cognizable interest group. *See* Kruidenier v. McCulloch, 258 Iowa 1121, 142 N.W.2d 355 (1966), in which various plaintiffs alleged that they belonged to a "rural minority," a suburban "community of interests," and the minority Republican party. The opinion of the court does not mention these allegations, and relief was granted on other grounds than the *Fortson* dictum (*see* note 12 *supra*). These allegations are discussed in DIXON, *supra* note 1, at 481-83.

68. *See* note 35 *supra* for a discussion of the general notion that legislative districts consist of a variety of different interests. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 273, points out that "even in the cities there are voters who approve of legislative frugality, who dislike freeways or who believe that urban redevelopment should be left to private initiative." For a study of how suburban groups may differ among themselves with respect to social and economic class and views on policy questions, see WILLIAMS, *supra* note 67, at 35-37, 211-38.

69. Auerbach, *The Reapportionment Cases*, 1964 SUP. CT. REV. 1, 38, stated that
> even in the small towns and villages there are voters who approve of public spending, who like freeways, and who believe that public initiative is essential to make our cities habitable. The welcome truth is that the members of no "interest" group have identical views about how to promote the group's welfare.

A determination of the special interests of any of these "political elements" in particular areas of substantive law does not simplify the test of identifiability.

The *Fortson* dictum's use of the term "political element" raises the question whether political parties are sufficiently identifiable so that their members may be granted standing to allege a denial of effective representation as a result of a multimember-districting scheme.[70] Surely, the mere use of the term "political element" does not compel a per se conclusion that political parties are legally cognizable interest groups. Moreover, under the *Chavis* test, a political party would seldom, if ever, qualify as an identifiable political element, because members of a political party normally come from different backgrounds and represent varying interests; they seldom share a common life-style.[71] Therefore, while common political affiliation may provide one piece of evidence to support a conclusion that a group of individuals shares a common life-style, this factor alone falls short of establishing identifiability within the meaning of the *Chavis* decision.

Once an interest group produces sufficient evidence for a court to conclude that that group is identifiable, it may also have to prove that it is large enough to merit legal recognition. Obviously, a handful of people living in a district containing thousands of voters cannot reasonably assert that they have a right to elect a legislative representative. While the issue of the size of the group will normally turn on the facts of a particular case, it is fair to say that when the members of an interest group number more than fifty per cent of the average population of single-member districts within the

70. *See generally* DIXON, *supra* note 1, at 485-99. For a discussion of the objectives and tactics of political gerrymandering, see A. DEGRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT 156 (1963).

While the Supreme Court has treated questions arising from racial gerrymandering as justiciable (Gomillion v. Lightfoot, 364 U.S. 339 (1960)), several courts have refused to entertain challenges involving political gerrymandering. *See, e.g.*, Sincock v. Gately, 262 F. Supp. 739 (D. Del. 1967); Meeks v. Avery, 251 F. Supp. 245 (D. Kan. 1966); Bush v. Martin, 251 F. Supp. 484 (S.D. Tex. 1966); Jones v. Falcey, 48 N.J. 25, 222 A.2d 101 (1966); Newbald v. Osser, 425 Pa. 478, 230 A.2d 54 (1967). These courts have relied on two recent Supreme Court cases: Badgely v. Hare, 385 U.S. 114 (1966), and WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965). In *Badgely*, the Court dismissed "for want of a substantial federal question" appeals from the Michigan supreme court by plaintiffs seeking relief on a gerrymandering claim. In *WMCA v. Lomenzo*, the Court affirmed in a per curiam opinion a district court's approval (238 F. Supp. 916 (S.D.N.Y. 1965)) of a reapportionment plan which was contested, *inter alia*, on the basis of partisan gerrymandering. In a separate concurring opinion, Justice Harlan asserted that by affirming the district court decision, the Supreme Court necessarily was affirming a holding that partisan gerrymandering is not subject to constitutional attack. 382 U.S. at 6. For an argument restricting the scope of these decisions, see DIXON, *supra* note 1, at 484-90.

71. *See* DIXON, *supra* note 1, at 51-53. Another court has stated that

> . . . [T]he Constitution does not prescribe a single approach or motivation for the drawing of district lines, and hence the Constitution is not offended merely because a partisan advantage is in view. *Indeed, it would be difficult to separate partisan interests from other interests, since partisan interests may well be but a summation of such other interests.*

Jones v. Falcey, 48 N.J. 25, 32-33, 222 A.2d 101, 105 (1966) (emphasis added).

state,[72] the multimember scheme could effectively dilute that group's voting strength. Of course, a single-member district could also be drawn to splinter the interest group; but such action, if done deliberately, would amount to a violation of the fifteenth amendment.[73] On the other hand, random drawing of single-member districts would be unlikely to decimate the voting strength of such a group, and the gerrymandering problem would be avoided if the legislature made some effort to draw the districts along rational interest-group lines.

Because of the uncertainties involved in attempting to determine what size groups should be protected in a given multimember district, it is arguable that no strict numerical test can or should be developed. Yet some consideration of group size is imperative for obvious practical reasons, and would be aided by sociological and demographic analysis of the voting power of groups of different sizes in single- and multimember districts. One difficulty with a numerical test is that a legislature could circumvent any such test simply by decreasing the number of districts, thereby simultaneously increasing the number of voters in each single-member district. Such action would have the dual deleterious effect of diluting the voting strength of interest groups within single-member districts[74] and increasing the size required of an interest group before its members could be granted standing to challenge the validity of a multimember district. These objections to a numerical test, however, are not completely convincing. First, it is unlikely that state legislators would vote to decrease the number of districts since in so doing they might effectively vote themselves out of a job. In addition, with an ever-increasing population, there appears to be a need for more, not fewer, representatives to meet the increasing workload.[75] Finally, the fact that a numerical test would frustrate some

72. If no single-member districts exist within the state, essentially the same result could be reached by taking 50% of the total state population and dividing that figure by the total number of legislators in the legislative body involved in the suit.

73. *See* Wright v. Rockefeller, 376 U.S. 52 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

74. This raises the issue of whether very large single-member districts which prevent substantial interest groups from electing representatives are constitutionally infirm. *See* Justice Harlan's concurring opinion to the Court's summary per curiam affirmance in *WMCA v. Lomenzo*, in which he asserted that discriminatory single-member districting is not subject to fourteenth amendment attack. 382 U.S. at 5-6. *See also* DIXON, *supra* note 1, at 484-90. Of course, fifteenth amendment challenges on the basis of racial discrimination would be justiciable.

75. *See* Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 977 (1968). It is by no means a unanimously held view that more legislative representatives are needed. *See* NATL. MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 44 (6th ed. rev. 1968); Wirt, *The Legislature*, in NATL. MUNICIPAL LEAGUE, SALIENT ISSUES OF CONSTITUTIONAL REVISION 68, 74 (J. Wheeler ed. 1961).

Moreover, in a state with a growing population, the size of single-member districts will increase merely by stabilizing the size of the legislative house, as is done with the

legitimate interests does not necessarily militate against the use of such a test.

It is submitted, therefore, that some form of numerical test should be required. If a numerical test were not required, the courts might be invaded with a large number of spurious suits. Furthermore, the process of redistricting is costly both in terms of time and of money. Thus, suits alleging a denial of effective representatives should not be readily maintainable unless the voting rights of members of ascertainable groups are clearly being diluted. While there may be some degree of arbitrariness in the use of the single-member district as the basis for the test, the size of these districts is determined on a rational basis since virtually all states have redistricted in the past eight years in order to conform to Supreme Court apportionment standards.

B. *Proving Minimization of the Interest Group's Voting Strength*

In addition to proving the existence of a legally cognizable interest group, a plaintiff who is challenging the validity of a multimember district must prove the minimization or cancellation of the voting strength of that group by the multimember district. The court's analysis in *Chavis* of the plaintiff's allegations of minimization of voting strength in that case indicates that the party claiming minimization must sustain a heavy factual burden in order to prove his case. Plaintiffs in pre-*Chavis* cases tended either to predict the possible effects of the multimember district before any elections actually had been conducted, or to analyze superficially the effects of a multimember district in past elections without amassing evidence which tangibly demonstrated minimization.[76] These pre-*Chavis* attempts to invoke the *Fortson* dictum were unsuccessful, most often because the plaintiffs did not meet the Supreme Court's requirement in *Burns v. Richardson*[77] that "the demonstration that a particular multimember scheme effects an invidious result must appear from evidence in the record."[78]

The plaintiff in *Chavis*, however, did present abundant evidence which demonstrated the adverse effects of the multimember scheme on the effective representation of Ghetto residents.[79] The first crucial fact was the residency pattern of elected legislators within Marion County from 1960 to 1969. Although legislators "consis-

United States House of Representatives. Thus, interest groups in states experencing population expansion may find it increasingly difficult to prove that they are large enough to merit legal recognition.

76. *See* cases cited in note 12 *supra*.

77. 384 U.S. 73 (1966).

78. 384 U.S. at 88.

tently resided in Washington Township in numbers far disproportionately [*sic*] to Washington Township's percentage of the population of Marion County,"[80] a disproportionately small number of legislators resided in the Center Township Ghetto.[81] The court observed that "[t]he Negro Center Township Ghetto population [was] sufficient in size to elect approximately two members of the House of Representatives and approximately one senator if these were specific single-member legislative districts within Marion County."[82] However, under the multimember system, the Ghetto was able to elect only one-fourth of the senators and one-third of the representatives to which its proportionate share of the county's population would have entitled it to elect under a single-member-districting scheme.[83]

In addition, the plaintiff introduced evidence to prove, and the court in *Chavis* found, that because the political parties controlled the nominating machinery, legislators elected from Marion County were reluctant to express the interests of the Ghetto residents in the state legislature.[84] The court discussed both past election results and the post-election behavior of legislators. Hence, it might be argued that *Chavis* stands for the proposition that a court can hold that an identifiable racial or political group is denied its legal right of effective representation only if, in addition to showing that the voting strength of that group is minimized or cancelled by the multimember districts, the plaintiffs also prove that the representatives elected have failed to respond to the group's wishes and needs.

This interpretation of the *Chavis* opinion, however, is not compelled by the language of the decision, since the complexity of the opinion itself illustrates that any inquiry into the question whether representatives are "responsive" to the needs of an interest group is at best subjective, qualitative, and uncertain.[85] Moreover,

79. The *Chavis* court took pains to distinguish the facts in that case from those presented to the Supreme Court in *Fortson*:

> We further note that under Burns v. Richardson, at p. 88, invidious discrimination resulting from a multi-member districting scheme can be more easily shown if certain circumstances, which were not present in Fortson v. Dorsey, obtain. This case presents each of those circumstances, leading to the legal conclusions here stated.

305 F. Supp. at 1386.

80. 305 F. Supp. at 1381.

81. 305 F. Supp. at 1385.

82. 305 F. Supp. at 1385.

83. 305 F. Supp. at 1384. *See also* tables at 1381-85 which demonstrate population relationships among various townships and subdivisions of townships in Marion County and the number of legislators who resided in those areas in the years 1960-69.

84. 305 F. Supp. at 1386.

85. Proof of party control and subsequent legislative behavior may have been used by the *Chavis* court for several reasons. First, the court may have considered these factors as unessential but useful pieces of evidence demonstrating that plaintiffs had been denied effective representation. Second, the court may have used evidence of

the *Fortson* dictum discussed only the minimization or cancellation of the voting strength of racial or political elements of the voting population,[86] and not the relevance of the legislature's responsiveness to such elements. Therefore, a group seeking to prove that it has been denied effective representation should not be required to demonstrate as part of its prima facie case that the representatives who are elected from the multimember district are "unresponsive" to the group's wishes and needs.

Of course, the mere fact that an interest group is not able to elect exactly a proportionate number of legislators in every election does not necessarily support the conclusion that the voting strength of that group has been minimized. The enormous number of variables associated with the electoral process makes some random deviation from absolute proportionality inevitable. Nevertheless, gross disproportions existing over long periods of time, such as those described in *Chavis*,[87] cannot reasonably be attributed to chance, and hence should be viewed as strong evidence that the minority interest group involved has been denied effective representation.

C. *The Irrelevance of Intent in Proving Minimization of Voting Strength*

Even though a plaintiff may successfully demonstrate the minimization or cancellation of the voting strength of a legally cognizable interest group, the defendant may urge that the plaintiff is not entitled to relief until he also proves that the state intended to minimize or cancel the group's voting strength through the use of a multimember district. The Supreme Court in *Fortson* left the question of the need to prove intent open when it suggested that "designedly or otherwise" a multimember-districting scheme might operate to cancel out the voting strength of some racial or political element.[88] In *Chavis*, the district court summarily rejected the relevance of legislative intent by emphasizing the term "otherwise" in the *Fortson* Court's language.[89]. Other federal courts, however, have suggested that on the basis of *Wright v. Rockefeller*,[90] proof of leg-

party control to illustrate the fact that Ghetto voters could not elect Ghetto residents to represent them. Finally, the evidence may have served to rebut the argument that legislators elected from multimember districts represent all residents of a district, rather than just particular groups. These alternative interpretations suggest that a plaintiff's failure to prove party control and legislative unresponsiveness would not, and should not, be fatal to the establishment of a prima facie case.

86. *See* note 8 *supra* and accompanying text. *See also* note 40 *supra*.

87. *See* note 80 *supra*.

88. 379 U.S. at 439.

89. "It is largely beyond concern whether this effect occurs 'designedly or otherwise.'" 305 F. Supp. at 1370.

90. 376 U.S. 52 (1964). It should be noted that *Wright* was decided before the

islative intent to minimize interest group voting strength is essential to a successful challenge to the validity of a multimember district.[91]

In *Wright*, the plaintiffs attempted to prove that the New York legislature, in establishing congressional districts, segregated the voters in Manhattan by virtue of race and place of origin.[92] The plaintiffs alleged that the legislature intentionally fenced Negroes and Puerto Ricans out of a predominantly white upper-middle-class district and into three other districts, thereby diminishing their effectiveness as a minority-group voting bloc since they were unable to elect a representative in the all-white district.[93] The plaintiffs asked the court to infer discriminatory intent on the part of the legislature in establishing the four Manhattan congressional districts from the fact that three of the districts were drawn to include the overwhelming number of Negro and Puerto Rican citizens in the county of New York, whereas the fourth district was populated by only a minute percentage of Negroes or Puerto Ricans.[94] In ad-

Supreme Court laid down the one man-one vote test in Reynolds v. Sims, 377 U.S. 533 (1964).

91. In Kilgarlin v. Hill, 386 U.S. 120 (1967), plaintiffs attacked the validity of the 1965 Texas Apportionment Statute, TEX. REV. CIV. STAT. ANN. art. 195(a) (1969) on several grounds, one of which was that the apportionment of Texas into single-member, multimember, and floterial districts, rather than into single-member districts only, constituted arbitrary and capricious gerrymandering. The district court stated that "[p]laintiffs contend that . . . [this districting plan] 'constitutes a scheme designed to minimize or cancel out the voting strengh of racial and political elements (i.e., the Republican Party, liberal Democrats, and the Negro race) within said districts.' They [the plaintiffs] claim that the combination plan results in a constitutionally proscribed political and racial gerrymandering." 252 F. Supp. at 432. The court considered of crucial importance the absence of any evidence of legislative discriminatory intent: "No witness testified that racial considerations motivated the Legislature when it drew the district lines . . . , and the Court will not infer the existence of such a sinister motive in the action of the Legislature without clear proof thereof." 252 F. Supp. at 437.

Justice Douglas, in his concurring opinion of the Supreme Court's reversal of the district court in *Kilgarlin* on other grounds, stated that he reserved the question of effective Negro disenfranchisement through multimember districting until the case is once again brought before the district court. 386 U.S. at 126.

In Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965), the court, in finding intent by the Alabama Legislature to gerrymander racially, pointed out: "Strong inferences can be drawn from the reapportionment of some of the Senate districts of a legislative purpose to prevent the election of Negroes to membership in the State Senate." 247 F. Supp. at 106.

92. 376 U.S. at 53.

93. 211 F. Supp. 460, 461 (S.D.N.Y. 1962).

94. The view that racially drawn districts per se would also violate the Equal Protection Clause of the Fourteenth Amendment finds support in the *per curiam* decisions of the Supreme Court following Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). These cases outlawed racial segregation in public parks, beaches, buses, and golf courses without any discussion of harm resulting from discrimination in the use of those facilities.

Opinion of Judge Feinberg, in *Wright v. Rockefeller*, 211 F. Supp. at 468-69. *See also* McLaughlin v. Florida, 379 U.S. 184 (1964), in which the Supreme Court noted that the standard traditionally applied in equal protection cases, which prohibits only arbitrary or invidious discrimination and grants the legislature the widest discretion in making

dition, the plaintiffs introduced evidence showing irregularities in the boundary lines themselves.[95]

In denying relief to the plaintiffs, the Supreme Court accepted the conclusion of the divided three-judge district court "that [plaintiffs] failed to prove the New York Legislature was either motivated by racial considerations or in fact drew the distinctions on racial lines."[96]

Based on this language in *Wright*, lower federal courts in cases involving challenges to the validity of multimember schemes have sometimes included the factor of legislative intent as a required element in a cause of action alleging infringement of a minority interest group's right to effective representation.[97] However, the fact that a finding of legislative intent may be required in cases alleging actual racial segregation or racially discriminatory districting[98] does not necessarily compel the conclusion that such a finding is essential to a successful challenge to a multimember-districting scheme. While *Wright* specifically dealt with alleged racial discrimination, such allegations are not essential in a multimember-districting case.[99] As in the reapportionment cases, the crucial consideration in multimember-districting cases is whether the districting scheme involved has the effect of diluting the votes of one class of individuals as compared to the votes of other residents of the state.[100] Once a plaintiff demonstrates that a legally cognizable interest group, of which he is a member, has had its voting strength minimized by

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classifications, is not applicable to racial classifications because the strong policy embodied in the fourteenth amendment of eliminating racial classification renders racial discrimination constitutionally suspect. Therefore necessity, and not mere rationality, is the controlling test in cases involving racial classifications. 379 U.S. at 196.

95. 211 F. Supp. at 469-71, 474.

96. 376 U.S. at 56. The Court agreed with the three-judge district court that plaintiffs' evidence allegedly proving a prima facie case of legislative intent to segregate inferred an equally or even more persuasive finding to the contrary. Justices Goldberg and Douglas dissented. For a thorough analysis of burden of proof problems, see Note, *Wright v. Rockefeller and Legislative Gerrymanders: The Desegregation Decisions Plus a Problem of Proof*, 72 YALE L.J. 1041 (1963).

97. *See* cases cited in note 91 *supra*.

98. In Gomillion v. Lightfoot, 364 U.S. 339 (1960), plaintiffs alleged that a local ordinance altered the shape of the city from a square to a twenty-eight-sided figure; the effect of the ordinance was to remove from the city limits almost all of the city's 400 Negro voters. The Court ruled that on the basis of the alleged facts, the ordinance constituted discrimination against Negro plaintiffs in violation of the due process and equal protection clauses of the fourteenth amendment and of the right to vote as guaranteed by the fifteenth amendment—and that, therefore, those facts sufficiently stated a cause of action. 364 U.S. at 346.

99. The plaintiff in *Chavis* did not allege that the multimember scheme abridged his fifteenth amendment right to vote, probably because proof of legislative intent to discriminate was not available, and because the boundary lines of the Marion County District were not overly irregular as were the lines in *Gomillion*. *See* note 98 *supra*.

100. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

the establishment of a multimember district, he has shown that his right to vote has been diluted. Since the clear message of *Reynolds* is that vote dilution violates the fourteenth amendment to the same extent as invidious discriminations based on race,[101] no showing of actual legislative intent to abridge the franchise of certain interest groups should be required when a showing of vote dilution is made by a plaintiff.

Members of a racial minority group, therefore, should have alternative grounds for contesting the validity of a multimember-districting scheme: such plaintiffs may challenge a districting scheme by showing either that the legislature intended to segregate on the basis of race, or that an improper minimization of their interest group's voting strength results from a districting scheme, regardless of legislative intent.[102] The plaintiff in *Chavis* employed the second alternative, and alluded to his race only insofar as it established that he belonged to a cognizable racial element.[103] His complaint did not allege that district boundaries were drawn on the basis of race; rather, it alleged that the multimember district resulted in an invidious discrimination by diluting his right to vote. The plaintiff viewed the factor of legislative intent as irrelevant and therefore unnecessary to his complaint.

V. The Appropriate Relief

The district court in *Chavis* determined that the dilution of the voting strength of residents of the Center Township Ghetto would continue as long as Marion County remained a large multimember district for purposes of electing members to the state Senate and House of Representatives.[104] The court also noted that "to redis-

101. 377 U.S. at 586.

102. It may be argued that these alternatives give black or other racial groups a heads-we-win-tails-you-lose option—if a racial ghetto is crammed into one large single-member district, its residents can base their claim on the ground of racial segregation; but if the ghetto is split up among several small single-member districts or absorbed by a large multimember district, the residents can argue their claim on the ground of vote dilution. *See* text accompanying notes 114-15 *infra*.

103. 305 F. Supp. at 1373-81.

104. 305 F. Supp. at 1399.

While there are several variations of the multimember district, none of these variations would necessarily ensure effective representation. For example, as in *Fortson*, some multimember districts have been subdistricted so that legislators reside in the various subdistricts, but are elected at large. Some states have "negative residence" provisions which require that one or more of the representatives from a multimember, multicounty district come from the smaller counties. Under rotation provisions, one or two seats are rotated in each election so that some of the legislators in a multimember, multicounty system will come from smaller counties. While these measures do alleviate the *Chavis* problem somewhat, the at-large voting provisions make it possible for a majority of the population of a multimember district to prevent a minority interest group from electing any candidates.

A final variant of multimember districts consists of "place" voting. Under this system,

trict Marion County alone, to provide single-member or any other type of districts meeting constitutional standards, would leave impermissible population variations between the new Marion County districts and other districts in the State."[105] In addition to those variations that would exist between new Marion County districts and other districts in the state, the court took judicial notice of impermissible population variations which already existed among districts in the state other than the Marion County multimember district. The court therefore concluded that a redistricting of the entire state for both houses of the General Assembly was necessary.[106] However, the court initially withheld issuing an injunction until the state legislature had time to enact statutes redistricting Marion County and the rest of the state pursuant to the court's opinion.[107]

Although the Governor and state legislature were allowed approximately two months—until October 1, 1969—to redistrict the state, the Governor failed to call a special session of the legislature for the purpose of accomplishing that redistricting task.[108] There-

widely used in the South, all candidates in a multimember district designate the particular seats for which they are running. A candidate runs only against the others who have designated the same seat, and all voters in the district vote for all seats. DIXON, *supra* note 1, at 514-15. This system has the advantage of at least offering the voter the opportunity to choose one candidate over another. However, it may be harmful to Negro candidates because it spotlights them. Thus, the different variations of the multimember monolith do not necessarily lead to the election of representatives who are members of identifiable racial or political elements. *See* DIXON, *supra* note 1, at 512-15.

105. 305 F. Supp. at 1399.

106. 305 F. Supp. at 1399-400. The court cited Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 673 (1964):

> [r]egardless of possible concessions made by the parties and the scope of the consideration of the courts below, in reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites.

305 F. Supp. at 1391. Observing that the populations of the State of Indiana and of the United States are highly mobile, and thus require occasional re-examination, the court concluded that voting strength is a question not "easily accommodated by classical concepts of res judicata or of stare decisis." 305 F. Supp. at 1371. In light of changing demographic patterns and the more refined one man-one vote standards developed since Stout v. Bottorff, 249 F. Supp. 488 (S.D. Ind. 1965), the district court felt that redistricting of the entire state was warranted.

The court warned that it was in no way intimating that Negroes residing in the Ghetto were entitled to a certain number of legislators to represent them as a minority group: "Legislative districts are to be drawn with an eye that is color blind." 305 F. Supp. at 1391. But the court also emphasized that sophisticated gerrymandering has been soundly condemned. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960).

107. 305 F. Supp. at 1400.

108. Chavis v. Whitcomb, 307 F. Supp. 1362 (S.D. Ind. 1969). On August 20, 1969, Governor Whitcomb moved the court to stay proceedings. This motion, along with a similar motion by intervening defendants who were joined by Governor Whitcomb, was denied on September 4, 1969. The Governor did not call a special session of the Indiana General Assembly for the purpose of redistricting the state as the court had

fore, on October 15, 1969, the court invited various parties[109] to submit proposed redistricting plans to it. As minimal guidelines to be followed by the parties in drawing up their proposals, the court required that 1960 census data be used,[110] that single-member districts be preferred to multimember districts, and that county and township boundary lines be followed in drawing proposed districts whenever possible.

After considering the various plans presented to it, the district court, on December 15, 1969, accepted the plaintiff's proposal and delivered an order redistricting the state into one hundred single-member house districts and fifty single-member senate districts.[111] The court found that the plaintiff's plan for redistricting Marion County protected the minority interest group comprised of the residents of the Center Township Ghetto against minimization of voting strength, whereas the proposal submitted by the state combined, in several instances, suburban areas with portions of the Center Township Ghetto,[112] and thus failed to cure the defects in the multimember-districting scheme which was held unconstitutional by the court.

In its redistricting order, the district court did not explain why single-member districts were preferable to multimember districts, except to observe that a scheme of single-member districts would be more likely to assure the Ghetto minority group of some legislators than would a scheme of multimember districts. Yet while the court condemned racial gerrymandering, it did not consider that its plan might tend to "crowd" Ghetto residents into districts, as New York

instructed him to do. 305 F. Supp. at 1400. Accordingly, the court concluded that it would itself redistrict the state pursuant to its earlier opinion of July 28, 1969, which appeared at 305 F. Supp. 1364. 307 F. Supp. at 1364.

109. The plaintiffs in *Chavis*, the Senate Legislative Apportionment Committee, and the House and Senate majority and minority leaders, among others, eventually submitted plans to the court. 307 F. Supp. at 1365.

110. Objections were raised to the court's use of 1960 census figures in drawing districts on the grounds that these statistics were so outdated that they could no longer be regarded as credible. In response to these objections, the court cited Grills v. Branigan, 284 F. Supp. 176, 180 (S.D. Ind. 1968): "[T]he Census of 1960 must be tolerated until the next official census in order to maintain relative political stability." 307 F. Supp. at 1365.

111. 307 F. Supp. at 1367. The state had appealed the district court's decision on the merits to the United States Supreme Court. After the district court rendered its December 15, 1969, order redistricting the state (307 F. Supp. at 1362), the state presented to Justice Marshall an emergency application for a stay of the district court's judgment. Justice Marshall referred the application to the entire Supreme Court which granted the stay on February 2, 1970. 396 U.S. 1055 (1970). On February 6, 1970, the Court upheld the stay in a 7-1 decision, with Justice Douglas dissenting. 396 U.S. 1064 (1970). The state's appeal on the merits is still pending before the Court. Appeals from the July 28, 1969, opinion (305 F. Supp. at 1364) and the December 15, 1969, order (307 F. Supp. at 1363) have been consolidated into No. 1198. 397 U.S. 984 (1970). *See* note 13 *supra* for a summary of the consolidation of the various appeals.

112. 307 F. Supp. at 1365.

was alleged to have done in *Wright v. Rockefeller*.[113] Although the court's action in *Chavis* arguably could be attacked on the ground that it amounted to outright racial gerrymandering, in that the new districts were drawn specifically with a view to the Ghetto residents' race, such a challenge would be difficult to sustain in light of the requisite proof of the element of intent in a racial gerrymandering case.[114] Moreover, the plaintiff surely could not object to the operation of his own redistricting plan. Even assuming a new party to the litigation were granted standing to challenge the court's plan and that party cleared the legislative-intent hurdle, it could still be asserted that the new plan was the only way in which the compelling state interest in equal and effective representation could be implemented.[115]

VI. Conclusion

The questions of determining the optimum size of districts and the most equitable and practical boundary lines for districts may well extend beyond judicial competence and into the sole purview of legislative authority. Although it is highly unlikely that any state legislature will ever answer those questions perfectly, legislatures should not be deterred from attempting to redistrict in a manner which promotes more effective representation for as many citizens as possible. But when a certain threshold of representational inequity is reached and the state legislature does not provide a remedy, then the courts must hear legitimate complaints and, in appropriate cases, respond to those complaints by granting affirmative relief.

A Supreme Court affirmation of the district court's ruling in *Chavis* would bring the concept of effective representation directly into the mainstream of the reapportionment revolution. The representational inequities in the Marion County multimember district present a blatant example of the inability of mere population equivalency between legislative districts to ensure effective representation. While the Supreme Court in *Fortson* and the district court in *Chavis* did not clearly explain the relationship between effective representation of interest groups and the equal protection clause, the doctrinal basis for that relationship can be deduced when

113. 376 U.S. 52 (1964).

114. *See* notes 88-103 *supra* and accompanying text.

115. *See* notes 52 and 55 *supra*. The possible problem of crowding an interest group into a single-member district—if such a problem exists in the constitutional sense—is considerably less harmful than the problem of minimization which may arise in a multimember-district situation. Although crowding may reduce the number of representatives which a particular interest group can elect by itself and in coalition with other groups, minimization through multimember districting often deprives an interest group of any representation at all. Thus, subdistricting, such as that ordered in *Chavis*, can provide a substantial interest group which is submerged in a large multimember district with at least some representation.

the right to vote is viewed as a "fundamental right" guaranteed by the equal protection clause, and the value of the individual vote is recognized as dependent on the voting power of the interest group to which the voter belongs.

By establishing strict standards for the identification of a racial or political element and for the demonstration of minimization of voting strength, courts will be reasonably able to determine whether an interest group's vote is being diluted.[116] Yet adherence to such strict standards will not prevent courts and legislatures who are engaged in redistricting from conforming both to the one man-one vote rules and to the more subtle requirements of effective representation.

116. Whatever theoretical problems are normally encountered when a court attempts to apply the tests for identifiability of an interest group, these problems may be greatly minimized when the plaintiffs in a case are residents of an urban Negro ghetto, as in the *Chavis* case. It can be readily demonstrated that Negro voters in many states belong to groups that have interests which set those groups apart as identifiable racial elements. When Negroes are submerged in large multimember districts, their voting strength may be minimized, and thus they may be denied their right to effective representation.