THE SUPREME COURT AND THE ELECTORAL PROCESS

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The Constitution of the United States does little more than provide a general outline of the electoral system.[1] It establishes the basis of representation for the states in Congress and creates the Electoral College for the election of the President. The conduct of elections is left to the individual states, subject to limitations derived from constitutional restrictions on denial of the franchise[2] and the power of Congress to regulate elections.[3]

Provisions permitting Congress to alter the time and manner of conducting elections and authorizing Congress to enforce the amendments relating to the franchise have been interpreted by the Court as providing "concurrent authority" in elections.[4] State regulations are operative until the national government enters an area in which it shares authority with the states. In cases of conflict between the national and state regulations the Supreme Court has ruled that the supremacy clause of the United States Constitution requires that the national regulations prevail.[5]

From this constitutional basis the Supreme Court has handed down a number of decisions affecting the electoral system. It is interesting that no overall review of those decisions affecting the electoral system has been attempted. There are excellent works on individual cases and portions of the Supreme Court's relation to the election process, but no general treatment is available.[6] We feel that there now exists a sufficient

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[1] Provisions affecting the electoral system are U.S. CONST. art. I, §§ 2, 4, art. II, §1, art. IV, § 4, amends. XII, XIV, XV, XIX, XXIV.

[2] U.S. CONST. art. I, § 2, amends. XIV, XV, XIX, XXIV.

[3] U.S. CONST. art. I, § 4, amend. XIV, § 5, amend. XV, § 2, amend. XIX, amend. XIV, § 2.

[4] *Ex parte* Siebold, 100 U.S. 371 (1880).

[5] *Ibid.*

[6] An extensive study of many parts of the electoral process is found in *Electoral Process: A Symposium*, 27 LAW & CONTEMP. PROB. 157 (1962). Some of the less extensive works include Avins, *Fifteenth Amendment and Literacy Tests: The Original Intent*, 18 STAN. L. REV. 808 (1966); Cofer, *Suffrage and Elections—Constitutional Revision*, 35 TEXAS L. REV. 1040 (1957); Dickson, *The Poll Tax and Voter Registration*, 35 TEXAS L. REV. 1031 (1957); Heyman, *Federal Remedies for Voteless Negroes*, 48 CALIF. L. REV. 190 (1960); Kommers, *The Right to Vote and Its Imple-*

body of case law by the nation's highest court to undertake a survey of the field.

Out of the numerous Supreme Court cases dealing with this general subject, it is our contention that the Court has had a three-fold role. First, and least subject to controversy, there have been cases upholding congressional regulation of elections. Second, and the source of much debate, there have been decisions protecting the right to vote in cases alleging unconstitutional discrimination by the states. Third, and an area that has been largely neglected by commentators, there have been several important rulings in which state election procedures have been approved. Each of these three areas will be treated separately, followed by a general concluding statement.

We will not discuss dissenting or concurring opinions, composition of the Court, or the extra-legal factors which affect decisions. These are important areas for study, but to do an adequate piece of research on these topics would require several volumes. We realize that other students of the Court have dealt and will continue to deal with these subjects. It is our intention only to suggest general trends.

Upholding of Congressional Powers

The original Constitution gave Congress general authority to regulate the times, places (except Senators), and manner of holding national elections. Additional authority for regulation of certain aspects of both state and federal elections was given to Congress by the fourteenth, fifteenth, nineteenth, and twenty-fourth amendments. The exercise of national authority was first challenged in the 1880's. In *Ex parte Yarbrough*,[7] the Court upheld the congressional power to prevent fraud in elections for federal officials. The national government and the states were held to have concurrent authority in federal elections. When national and state laws are in conflict, the supremacy clause applies. The Court did note in this case that congressional regulation need not be complete, but Congress could pass legislation affecting those aspects of federal elections that are of national concern.

In 1880 litigation arose concerning the extent of congressional power under the fifteenth amendment, and the Court upheld the congressional legislation:

> If Congress has not, prior to the passage of the present

mentation, 39 Notre Dame Law. 365 (1964); Lugg, *State Legislatures' Authority Over the Selection of Presidential Electors*, 37 Conn. B.J. 7 (1963); Wroth, *Election Contests and the Electoral Vote*, 65 Dick. L. Rev. 321 (1961). There are also other items cited in the footnotes of this article which deal with certain aspects of the Court's role in the electoral process.

[7] 110 U.S. 651 (1884).

> laws, imposed any penalties to prevent and punish frauds and violation of duty committed by officers of elections, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power."[8]

Eighty years later, the Court in *Hanna v. Larche*[9] approved the creation of the Civil Rights Commission which was provided for in the 1957 Civil Rights Act. According to this decision, the Commission was a fact-finding board and was an appropriate agency under the congressional delegation of authority to enforce the fifteenth amendment.[9] In *United States v. Raines*,[10] the Court upheld the 1957 act's provision that allowed the Justice Department to instigate suits for those deprived of the vote on racial grounds.

In 1960, Congress passed another Civil Rights Act which contained provisions governing the conduct of elections. These provisions were upheld in a number of Supreme Court decisions.[11] In 1965, Congress approved the Voting Rights Act which was far more extensive than the 1960 act in attempting to control the discriminatory practices used against voters by some states.[12] The act was sustained in *South Carolina v. Katzenbach*.[13] Congressional action was deemed an appropriate measure for the enforcement of the fifteenth amendment. The Court specifically noted the carefulness of the congressional hearings prior to the enactment of the statute.[14] It was also pointed out that the use of federal examiners in certain areas to register voters is "entirely consistent" with the fundamental principle of the fifteenth amendment, i.e., the prevention of discrimination in voting.

The Court also upheld as constitutional those provisions of the act which specified what constituted an unfair literacy test or device and the application of the coverage formula. Again, the Court ruled that these procedures were entirely justifiable as methods appropriate to eliminate discrimination against voters. In no way could these provisions be construed as a bill of attainder, because the fifteenth amendment was placed in the Constitution to protect individuals and groups.[15]

Aside from legislation implementing the fifteenth amendment, Congress has also passed regulations affecting political activities of public officials. In *Ex parte Curtis*,[16] the Court sanctioned measures to limit

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[8] *Ex parte* Siebold, 100 U.S. 371, 388 (1880).
[9] 363 U.S. 420, 452 (1960).
[10] 362 U.S. 17 (1960).
[11] Louisiana v. United States, 380 U.S. 145 (1965); United States v. Mississippi, 380 U.S. 128 (1965); Alabama v. United States, 371 U.S. 37 (1962).
[12] For an excellent discussion of the 1965 act, its advancements over previous congressional action, and its constitutionality, see Christopher, *The Constitutionality of the Voting Rights Act of* 1965, 18 STAN. L. REV. 1 (1965).
[13] 86 Sup. Ct. 803 (1966).
[14] *Id.* at 808.
[15] *Id.* at 816.
[16] 106 U.S. 371 (1882).

political influence on public officials. Subsequently, the Hatch Act, as applied to federal employees, was upheld in *United Public Workers v. Mitchell.*[17] In that case the Court recognized that national government employment was not a right but a privilege and subject to certain conditions including restrictions on political involvement. State employees can also have their political rights restricted when they are employed by state agencies supported in part or whole by federal grants or loans.[18] That the congressional grant of authority extends over political parties engaged in national elections was evidenced in the Court's sustaining of the Federal Corrupt Practices Act of 1925.[19]

From this review of cases dealing with congressional regulation of elections, three tendencies are clearly manifest. First, the Court has found legislation to insure fairness in elections to be within the authority of Congress. Second, the Court has sanctioned laws aimed at securing political rights for Negroes. Third, congressional legislation placing restrictions on political activities of federal employees has been upheld.

Protection of the Right to Vote from Unconstitutional Discrimination by the States

Discrimination by the states or their agents has occurred in four major areas: (1) fraudulent counting of votes; (2) racial restrictions on the franchise; (3) sexual restrictions on the franchise; and (4) geographical distribution of the vote.

The Court has held that fraudulent practices can be punished.[20] In general, attempts by both Congress and the states to insure fair elections have received the Court's blessing. The right to vote includes the corollary right to have the vote counted. Procedures which fail to insure that votes are counted and permit the stuffing of ballot boxes have been condemned.[21]

While the fifteenth amendment prohibits the states from restricting the right to vote on the basis of race, there have been various attempts to circumvent the amendment. The sophisticated methods employed by states have given rise to a great deal of litigation.[22] Although most of those attempts have been rejected by the Supreme Court, the time and cost of litigation have delayed implementation of the fifteenth amendment.

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[17] 330 U.S. 75 (1947).
[18] Oklahoma v. United States Civil Serv. Comm., 330 U.S. 127 (1947).
[19] Burroughs & Cannon v. United States, 290 U.S. 534 (1934).
[20] *In re* Green, 134 U.S. 377 (1890).
[21] United States v. Classic, 313 U.S. 299 (1941); *In re* Green, 134 U.S. 377 (1890); *Ex parte* Yarbrough, 110 U.S. 651 (1884); *Ex parte* Siebold, 100 U.S. 371 (1880).
[22] Various methods have been employed to restrict the application of the fifteenth amendment. Their use and impact are discussed in Key, Southern Politics 533-663 (1949); Tussman, The Supreme Court on Racial Discrimination (1963).

States have employed discriminatory practices at several stages of the electoral process — the general election, the primary, and the pre-primary period. There has been less of a constitutional problem at the election stage because of the devices used to exclude Negroes from primary participation as well as the adoption of complicated registration procedures.

Initially, the white primary appeared to be a legitimate means of excluding the Negro from voting. Primaries were considered party procedures, conducted by a private organization, and beyond the scope of congressional power. This belief was affirmed by the Court in 1921. In *Newberry v. United States*,[23] the Court ruled that regulation of a primary did not come under the congressional authorization in article I, section 4 of the Constitution.

The Court, however, gradually changed its view that the primary was not part of the electoral process. Texas primary law limited participation in primaries to whites. In *Nixon v. Herndon*,[24] the Court avoided the question of whether a primary was an election by relying on the equal protection clause of the fourteenth amendment. Classification of Negroes and whites by the Texas legislature was held a "direct infringement" of the fourteenth amendment. Such classification was beyond the scope of reasonable classification allowed the states.[25]

The Texas legislature attempted to circumvent this decision by authorizing each political party to determine the eligibility of those voting in its primaries. Under this authority the State Executive Committee of the Democratic Party permitted only whites to participate in the primary. Nixon instigated another suit challenging this procedure. In *Nixon v. Condon*,[26] the Supreme Court affirmed Nixon's contention by ruling that the legislation authorizing political parties to determine voter eligibility in primaries was a state action. The decision also was based on the equal protection clause of the fourteenth amendment.[27] The subterfuge was taken a step further when Texas parties eliminated Negroes on their own volition. The Court allowed this procedure in *Grovey v. Townsend*[28] on the ground that the state was not involved and that primaries were prior to the actual election. In other words, the parties acted as a private association. Exclusion of Negroes by the Texas Democratic Party did not violate the equal protection clause because the state had no part in the process.

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[23] 256 U.S. 232 (1921).
[24] 273 U.S. 536 (1927).
[25] *Id.* at 541. Reasonable classification includes such matters as age, residence, and previous criminal record. See Davis v. Beason, 133 U.S. 333, 345-47 (1890).
[26] 286 U.S. 73 (1932).
[27] *Id.* at 88-89.
[28] 295 U.S. 45 (1935).

Twenty years after the Court first ruled that the primary was not an integral part of the electoral process, the issue was reconsidered in *United States v. Classic*.[29] This time the issue involved tampering with ballots in a Louisiana primary. The Court reversed its original position and stated that primaries were a part of the election process. The Court concluded that primaries in Louisiana were the only stage in which the voters' choice was significant. The Court pointed out that article I, section 2 of the Constitution states that Congressmen are to be chosen by the people of the several states, and reasoned that the congressional authorization to make regulations for these elections extends to primaries. Unlike the fourteenth amendment, this authorization applies to individuals as well as states.[30] This decision foreshadowed the demise of the white primary.

Just two years later, in *Smith v. Allwright*,[31] the Court outlawed the white primary as contrary to the fifteenth amendment's prohibition against discrimination in voting. The majority opinion pointed out that although primaries may be conducted by the party, a party exists under state statutory authority. Hence, the party takes the character of a state agency, and its primaries are an integral part of its activities as an agency operating under state law. This decision prompted South Carolina to attempt a different method of excluding Negro participation in primaries. All laws and constitutional provisions pertaining to party organization were repealed. On this basis it was argued that the Democratic Party was a private club, and whatever this club did had no state sanctions. A federal district court held even this procedure to be a violation of the intent of the fifteenth amendment.[32] The Supreme Court refused to review the decision of the court of appeals affirming the district court.[33]

There remained only one device to maintain the white primary. In a Texas county the Jaybird Democratic Association was created to conduct a pre-primary primary. As a self-governing, voluntary association, Negroes were excluded from its membership. Jaybird selections were then ratified in the Democratic Primary. The Court was not deceived by this legal subterfuge and declared that the fifteenth amendment was adopted precisely to prevent this type of deception. In effect, the Jaybird selections were the only effective part of the electoral process.[34]

In addition to the white primary, registration procedures specifically designed to prevent Negro participation in the electoral process were used. The method most commonly adopted was the "grandfather clause."

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[29] 313 U.S. 299 (1941).
[30] *Id.* at 315.
[31] 321 U.S. 649 (1944).
[32] Elmore v. Rice, 72 F. Supp. 516 (E.D. S.C. 1947).
[33] Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).
[34] Terry v. Adams, 345 U.S. 461 (1953).

According to V. O. Key, the procedure was first employed in the Louisiana Constitution of 1898:

> No male person who was on January 1st, 1867 or at any date prior thereto, entitled to vote under the Constitution or statutes of any State of the United States, wherein he resided, and no son or grandson of any such person not less than twenty-one years of age at the date of the adoption of the constitution, . . . shall be denied the right to register and vote in this state by reason of his failure to possess the educational or property qualifications.[35]

This method was used by other Southern states with various modifications.[36] In 1915 Oklahoma's "grandfather clause" was tested and struck down in the case of *Guinn & Beal v. United States*.[37] In Oklahoma only those who resided in a foreign country or had been registered prior to January 1, 1866 were excused from the literacy test. In outlawing this "grandfather clause," the Court was careful to note that the validity of literacy tests was not being questioned.[38] The Court did point out that the fifteenth amendment was self-executing and that all attempts by states to restrict suffrage on the basis of race were unconstitutional.[39]

A more sophisticated version of the Oklahoma "grandfather clause" was outlawed in *Lane v. Wilson*.[40] In this instance all who voted in 1914 were exempt from other qualifications. Those who were qualified in 1916 but failed to register between April 30 and May 11, 1916 were perpetually disenfranchised. Frankfurter's majority opinion noted that the fifteenth amendment prohibited "sophisticated as well as simple-minded" discrimination. The Oklahoma procedure would have kept Negroes permanently disenfranchised as they were not registered before 1914.[41]

The use of literacy tests has been approved by the Court in principle.[42] Alabama used the literacy test as a substitute for the unconstitutional white primary. The Boswell Amendment limited voting to those who were able to "understand and explain" the Constitution of the United States to the satisfaction of the local registration board. These provisions were applied only to Negro applicants.[43] A federal

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[35] Quoted in KEY, *op. cit. supra* note 22, at 538.
[36] *Id.* at 539.
[37] 238 U.S. 347 (1915).
[38] *Id.* at 360.
[39] *Id.* at 363.
[40] 307 U.S. 268 (1939). See also Meyers v. Anderson, 238 U.S. 368 (1915).
[41] *Id.* at 275-76.
[42] Guinn & Beal v. United States, 238 U.S. 347, 360 (1915). For a defense of the literacy test by a Southerner, see Ervin, *Literacy Tests for Voting: A Case Study in Federalism*, 27 LAW & CONTEMP. PROB. 480 (1962).
[43] KEY, *op. cit. supra* note 22, at 539; TRESOLINI, AMERICAN CONSTITUTIONAL LAW 359 (1959).

district court declaration that Alabama's application of the literacy test was discriminatory was upheld by the Supreme Court in a *per curiam* opinion.[44] If used, the literacy test must be applied equally to whites and Negroes.

In 1937, the Supreme Court held that the payment of a poll tax as a requirement for voting did not violate the fourteenth, fifteenth, or nineteenth amendments.[45] However, with the adoption of the twenty-fourth amendment, the poll tax was outlawed as a requirement for voting in federal elections.

Harper v. Virginia State Bd. of Elections[46] outlawed the poll tax as a requirement for voting in a state election. The Court noted that there is no mention of the right to vote in state elections, but once a state grants the franchise it must meet other constitutional regulations including the equal protection clause.

> We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voting qualifications have no relation to wealth nor to paying or not paying this or any other tax.[47]

In an interesting case, *Lester v. Garnett*,[48] the Supreme Court overruled the contention that enlargement of the electorate by the nineteenth amendment exceeded the scope of the amending power because the state failed to give its consent to expanding the electorate. This, along with the Negro voting decisions, indicates that the states do not have complete control over the composition of the electorate.

The geographical gerrymander was used by Alabama to prevent Negro domination of local elections. Negroes constituted a majority of the electorate in Tuskegee. The Alabama legislature redrew the city boundary in such a way as to exclude all but a few Negroes from participation in city elections. The excluded area continued receiving such city services as water and fire protection. The shape of the city was transformed from a near square to a twenty-eight sided figure which vaguely resembled a seahorse.[49] The Court declared this procedure to be an unconstitutional violation of the fifteenth amendment which "forbids a state from passing any law which deprives a citizen of his vote because of his race."[50] The Court specifically charged that

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[44] Schnell v. Davis, 336 U.S. 933 (1949). See also Louisiana v. United States, 380 U.S. 145 (1965); Lassiter v. Northhampton, 360 U.S. 45 (1959).
[45] Breedlove v. Suttles, 302 U.S. 277 (1937).
[46] 86 Sup. Ct. 1079 (1966). See also Carrington v. Rash, 380 U.S. 89 (1965).
[47] 86 Sup. Ct. at 1081.
[48] 258 U.S. 130 (1922).
[49] For an excellent account of the case and background material see TAPER, GOMILLION v. LIGHTFOOT (1962).
[50] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

the sole purpose of the boundary change was "to despoil colored citizens, and only colored citizens of their theretofore enjoyed voting rights."[51]

The effect of this decision may have been limited by the Court in *Wright v. Rockefeller*[52] when the Court held that no one had a right to be in any particular congressional district. Proof that Puerto Rican voters were racially gerrymandered into a single district to dilute their voting strength was not evident merely by examining percentages. The Court assumed that other valid motives could be ascribed to the legislature.

Another line of decisions indicates that unconstitutional discrimination by the states is not limited to the determination of who shall vote. The Court has found that the unequal weighting of votes through malapportionment is also a form of unconstitutional discrimination.

> We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats of both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislatures is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with vote of citizens living in other parts of the state.[53]

As in the white-primary cases, the Court had not originally taken this position. To arrive at the above interpretation of the equal protection clause of the fourteenth amendment required considerable modification of earlier positions. Beginning with *Luther v. Borden*[54] and reaffirmed in *Pacific States Tel. & Tel. Co. v. Oregon*,[55] the Court stated that the guarantee of a republican form of government constitutes a political question which the Court cannot answer. In *Luther*, the Court was asked to decide which was the legal government of Rhode Island. In *Pacific States* the validity of an initiative tax placed on certain corporations was questioned. An amendment to Oregon's constitution had granted the state's citizens the right of direct legislation via the initiative and referendum. In both instances the Court refused to consider the constitutional issue, for to do so would require an application of the republican form of government clause which involved a political question.

When an apportionment question was brought before the Court

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[51] *Id.* at 347.
[52] 376 U.S. 52 (1964).
[53] Reynolds v. Sims, 377 U.S. 533, 568 (1964).
[54] 48 U.S. (7 How.) 1 (1849).
[55] 223 U.S. 118 (1912).

in the 1946 case of *Colegrove v. Green*,[56] the majority opinion did not apply the equal protection clause to guarantee equal congressional districts. To do so would draw the Court into the political thicket. According to Frankfurter, the Court had traditionally refused to decide such issues:

> It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention is an essentially political contest dressed up in the abstract phrases of law.[57]

The Court consistently followed this doctrine until 1962 for both the apportionment of congressional districts and state legislatures.[58]

The Supreme Court handed down its landmark decision of *Baker v. Carr*[59] on March 26, 1962. The importance of this decision is that it has served as the gateway to later apportionment decisions by establishing the jurisdiction of the Court, the justiciability of the issue, and the standing of the plaintiffs to sue in apportionment issues. *Baker*, however, did not define the meaning of the equal protection clause in apportionment controversies.

> We conclude that the complaint's allegation of a denial of equal protection presents a justifiable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.[60]

The number of states with legislatures substantially deviating from the population principle assured that the meaning of the equal protection clause would be challenged.[61] The meaning of the equal protection clause had been opened to new and broader interpretations since the 1954 school segregation decision.[62] In reargument of the case the Court had exhaustively examined the congressional debates and

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[56] 328 U.S. 549 (1946). The exact ruling in this case has been questioned because of the special problem of timing raised in Justice Rutledge's concurring opinion. Without Rutledge's vote the Court would have been evenly divided on whether a political question had been raised.

[57] *Id.* at 553-54.

[58] Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952). For a discussion of the development leading to the Court's acceptance of *Baker*, see Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 328 (1962); McKay, *Political Thickets and Crazy Quilts; Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963).

[59] 369 U.S. 186 (1962).

[60] *Id.* at 237.

[61] For a summary of the deviation from the population standard just prior to the establishment of the "one man, one vote" principle see New York Times, June 21, 1964, §E, p. 3.

[62] Brown v. Board of Educ., 347 U.S. 483 (1954).

state ratification of the fourteenth amendment. However, the Court's investigation failed to establish the original intent of the amendment's framers. The Chief Justice concluded that:

> This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.[63]

With this declaration the Court could expand the amendment on the basis of wording, for it was no longer necessary to justify the interpretation on an original intent. Whether or not the framers had intended to apply the amendment to apportionment questions was no longer an issue. The question now before the Court was what do the words "equal protection of the laws" encompass?

The application of "one man, one vote" through "equal protection" to states was instituted in *Gray v. Sanders*,[64] a decision involving Georgia's county unit system. The issue in *Gray* was slightly different from the apportionment issue. Since the Georgia county unit system applied only to primary elections for state-wide offices, the issue was the weight of a citizen's vote within a single constituency, Georgia. Justice Douglas, speaking for a majority of the Court, declined to apply "one man, one vote" beyond the present circumstances, but his arguments alluded to a broader interpretation. First, he rejected an analogy of the county unit system to the Electoral College, noting that the Electoral College and senatorial representation are the only weighting of votes authorized by the Constitution.[65] Second, he pointed out the Court's belief that the American tradition of political equality required the "one man, one vote" rule:

> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysberg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean one thing—one person, one vote.[66]

Wesberry v. Sanders,[67] the first major apportionment decision of 1964, was decided without an interpretation of the equal protection clause. The Court held that states must apportion congressional districts on the

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[63] *Id.* at 489.

[64] 372 U.S. 368 (1963). This decision overruled South v. Peters, 339 U.S. 276 (1950). A brief law note that explains succinctly the Georgia System is 47 COLUM. L. REV. 284 (1947).

[65] 372 U.S. 368, 378, 380 (1963).

[66] *Id.* at 381.

[67] 376 U.S. 1 (1964).

population principle of "one man, one vote." The decision was based on the Court's understanding of representative government implied in article I, section 2 of the Constitution. The words "by the people of the several states" were interpreted to mean that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."[68] First, this rule had been applied for the first fifty years of this country's history by the widespread practice of electing representatives in statewide elections.[69] Second, the debates of the framers at the Philadelphia Convention as well as the arguments in *The Federalist* indicated the founding fathers' intention to base representation in the House of Representatives solely on population.[70]

Six decisions,[71] rendered on June 15, 1964 held that all states must apply "one man, one vote" to both houses of their legislature. The Court's majority held that all states must respect this principle and guarantee each citizen a substantially equal vote:

> An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of the majority of a State's electorate, if the apportionment schemes adopted by the voters fails to measure up to the requirement of Equal Protection Clause.[72]

Implementation of the rule was delegated to lower courts whereby local circumstances could be examined. In so doing, the Supreme Court made it clear that such considerations as area, history, or group interests could not be used to justify a deviation from the constitutional principle of equally-weighted votes.[73]

The above discussion indicates the major Court decisions limiting unconstitutional discrimination by the states. From this discussion it is apparent that the Court has established two rather clear lines of ruling which affect the electoral process. First, there has been a gradual expansion of the concept of election to include the pre-election stages in the areas protected against discrimination by the states. Second, the right to vote has been interpreted to mean more than the mere act of voting. All voters are to have as nearly as possible a vote of equal weight in elections except those for Senator and President.

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[68] *Id.* at 8.
[69] *Ibid.*
[70] *Id.* at 8-18.
[71] Lucas v. Colorado, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).
[72] Lucas v. Colorado, 377 U.S. 713, 736 (1964).
[73] Reynolds v. Sims, 377 U.S. 533, 579-80 (1964).

LEGITIMATION OF STATE PROCEDURES

The role of the Court has not been only negative. There have been decisions in which the Court has approved various state procedures. This has enabled the states to experiment in the development of electoral improvement and modification.

With the rise of urban areas, some states felt it necessary to pass special legislation for the registration of urban voters. For example, the Court upheld Missouri's practice of classifying cities according to population and providing different registration procedures for each class of cities. Such classification did not constitute an equal protection violation[74]. In *Wiley v. Sinkler*,[75] the Court upheld South Carolina's system of pre-registration and practice of freezing registration from the first day of July until after the November elections. The Court stated that registration is among the suffrage qualifications a state may enact and failure to comply is sufficient to deny an otherwise qualified citizen the right to vote.[76] Further, the states need not register new residents immediately. In *Pope v. Williams*,[77] the Court upheld the Maryland requirement that all new residents wait one year before being allowed to vote.

By 1900 the Supreme Court had upheld the use of literacy tests to determine voter eligibility.[78] The Court has continued to uphold the use of the test, provided that it is applied in a non-discriminatory manner.[79] For example, in a 1959 decision, *Lassiter v. Northhampton*,[80] the Court upheld North Carolina's literacy test since it was applied equally to all races. By refusing to submit to the test the appellant forfeited his right to vote.[81]

Variations in the nominating process have been held constitutional as long as they reflect rational and non-discriminatory policy. For example, the Court upheld an Illinois law requiring that petitions to form a party and to nominate candidates be signed by at least 25,000 voters with at least 200 signatures from fifty different counties.[82]

There have been a few decisions in which the Court has approved

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[74] Mason v. Missouri, 179 U.S. 328 (1900).
[75] 179 U.S. 58 (1900).
[76] *Id.* at 66-67.
[77] 193 U.S. 621 (1904). For limitation on the residence requirement see Carrington v. Rash, 380 U.S. 89 (1965).
[78] Giles v. Harris, 189 U.S. 475 (1903); Williams v. Mississippi, 170 U.S. 213 (1898). For a discussion of the value of literacy tests see Ervin, *Literacy Tests for Voters: A Case Study in Federalism*, 27 LAW & CONTEMP. PROB. 480 (1962).
[79] Harman v. Forssenius, 380 U.S. 528 (1965); Schnell v. Davis, 336 U.S. 933 (1949).
[80] 360 U.S. 45 (1959).
[81] *Id.* at 46. See also South Carolina v. Katzenbach, 86 Sup. Ct. 803 (1966).
[82] MacDougall v. Green, 335 U.S. 281 (1948).

state variations in the application of the Electoral College. In 1892 Michigan provided for the electing of Electors from congressional districts rather than by the people at large. The Court noted that while this procedure was unique, it fulfilled the Constitutional requirement specified in article II, section 1.[83]

In *Ray v. Blair*,[84] the legal responsibility of Electors was defined. Blair qualified as a candidate for Elector, but he refused to pledge aid and support to the nominee of Democratic National Convention. Thus, Blair was refused certification as a candidate. The Alabama Supreme Court issued a writ of mandamus ordering Ray to certify Blair, and the United States Supreme Court upheld this writ. Justice Reed based his argument on the intention of the framers—the desire to secure a non-partisan choice. Electors, chosen by the party, are legally free to vote for whom they wish; they have only a moral obligation to support the party choice.[85]

Closely related to the legitimation of state procedures has been the Court's practice of suggesting possible innovations to the states. After the 1930 national census, Minnesota lost one congressman. The legislature passed a new apportionment plan, but the governor refused to approve it. In *Smiley v. Holm*,[86] the Court noted that approval by the governor was a part of the legislative process; thus, the proposed plan was invalid.[87] Furthermore, the Court stated that Minnesota could pass a valid redistricting plan or have all congressmen run at large until new districts were agreed upon by the legislature and governor.[88] In a New York case the Court held that congressmen gained as a result of population growth could run at large while the forty-three existing districts could be used until New York could agree to a new plan.[89]

The Court has also permitted the use of figures other than population as the basis for apportionment computations. Hawaii's use of voter registration figures was allowed because of the special problems arising from the use of either the total population figures or the state citizenship figures. Furthermore, the use of registration statistics did not provide an apportionment substantially different from the population distribution in this instance.[91]

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[83] McPherson v. Blacker, 146 U.S. 1 (1892).
[84] 343 U.S. 214 (1952).
[85] *Id.* at 228-30.
[86] 285 U.S. 355 (1932).
[87] *Id.* at 364-65.
[88] *Id.* at 374-75.
[89] Koening v. Flynn, 285 U.S. 375 (1932).
[90] Davis v. Mann, 377 U.S. 678, 686 (1964). See also Fortson v. Dorsey, 379 U.S. 433 (1965).
[91] Burns v. Richardson, 86 Sup. Ct. 1286 (1966). See also Carrington v. Rash, 380 U.S. 89 (1965), for the problem of using other statistics so as to discriminate against a group because of the nature of its employment (military in this case).

Thus, it is apparent that the Court's electoral role *vis-a-vis* the states' is both negative and positive. While some procedures have been outlawed, the Court has also suggested possible alternatives to meet constitutional standards.

CONCLUSION

From the foregoing it is evident that the Court has a three-fold electoral role. First, the Court has upheld congressional authority to regulate elections as contained in article I, the fourteenth amendment, and the fifteenth amendment. Congress has been indirectly encouraged to exercise its constitutional powers to insure fair elections and prevent state discrimination. Implicit in this support of congressional action is the Court's exercise of its broader function as umpire in disputes arising in a federal system.

Second, the Court has been active in protecting qualified voters from unconstitutional discrimination by the states. In doing this the Court has helped to establish national standards concerning who is qualified to vote. Minorities have had an appeal when they felt that the states prevented their participation in the electoral process.

Third, the Court has served as a legitimizing agent for procedures adopted by the states to meet problems peculiar to each state. By indicating acceptance of these different procedures, states have received encouragement for electoral experimentation. The Court has gone a step beyond legitimation of state procedures in recommending possible alternatives that a state might adopt.

The Court's adoption of this three-fold electoral role is a relatively recent phenomenon. Most of the Court's decisions have occurred in the twentieth century, reflecting its increasing concern for universal suffrage. It should also be noted that the Court's actions have been gradual and often erratic. The litigation concerning the white primary and apportionment are illustrative of this point.

What can be expected of the Court in the future? Obviously, any comments are only speculative. Congress, as evidenced by civil rights legislation, has become increasingly concerned with the protection of Negro rights. This could well signal a decline in litigation reaching the Court although the Court may still be asked to bestow its legal blessing on the actions of Congress. This, in fact, is what has occurred with various civil rights acts and the Voting Rights Act. Both the Court's earlier approval of congressional authority in the area of elections and the Court's policy of deference to congressional decisions suggests that future actions of Congress should have little trouble achieving legal

sanction.[92]

If the immediate impact of the court does decline, the importance of past decisions must not be ignored. These decisions provided a foundation for congressional action. Prior to 1957, the Court was the main source of protection for Negro rights in the South. The Court was able to erradicate many forms of legal subterfuge employed by the states to avoid the consequences of the fifteenth amendment. Had the Court failed to accomplish this, Congress most probably would have had to fight these same battles with the states. However, by the time the Congress established protection of Negro rights as national policy, procedures such as white primaries, private nominating clubs, grandfather clauses, and the like had been outlawed.

The decisions by the Court affecting the electoral system have opened the door to political changes. What changes occur depend on how the political branches respond to the Court's doctrine. These decisions merely establish a framework for elected officials. As C. Herman Pritchet has so succinctly observed in an address before the American Political Science Association: "The Court proposes, but politics disposes."[93]

[92] For a discussion of the Court's holding an act of Congress unconstitutional, see Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279, 286-91 (1958).

[93] Pritchet, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 870, 875 (1964).