NORTH CAROLINA LAW REVIEW

Volume 80
Number 4 *Baker v. Carr: A Commemorative Symposium*

Article 10

5-1-2002

The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny

Heather K. Gerken

THE COSTS AND CAUSES OF MINIMALISM IN VOTING CASES: *BAKER v. CARR* AND ITS PROGENY

HEATHER K. GERKEN*

Professor Gerken uses Baker v. Carr *as a case study for exploring whether and when a minimalist strategy is likely to succeed in voting cases. She makes two arguments. First, she suggests that* Baker *and its progeny reveal the* costs *of atheoretical decisionmaking. Without an intermediary theory for explaining what the vague norm of equality should mean in the context of malapportionment, the Court could describe equality only in the most abstract terms. It could not identify sensible limiting principles for the rule it was developing, nor could it defend its own measure of equality against alternative measures. The result was a doctrine plagued by inconsistency, incoherence, and the unthinking adherence to a rigid, mechanical test. The second argument offered in this Article concerns the* causes *of minimalism in the malapportionment cases. Professor Gerken argues that it is difficult for the Court to develop an appropriate intermediary theory in voting cases because of the unique nature of the claims that arise from the political process. For such claims, the structures by which votes are aggregated and the ways in which individuals align themselves are crucial for understanding most harms. Both elements are difficult to square with a conventional individual-rights approach and the familiar protections it affords against judicial excess and error. Taken together, these two arguments point up the irony of the Court's minimalist strategy in applying one person, one vote. The Court's failure to articulate a set of mediating principles seems to stem from the Court's fear of abandoning the familiar protections against judicial mistake and excess that accompany a conventional individual-rights approach. It turns out, however, that an individual-rights approach without an adequate intermediary theory equally lends itself to judicial abuse.*

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* Assistant Professor of Law, Harvard Law School. I am deeply indebted to Richard Fallon, Luis Fuentes-Rohwer, Lani Guinier, Richard Hasen, Samuel Issacharoff, Pamela Karlan, Richard Pildes, David Simon, and William Stuntz for their helpful reads and suggestions. Thanks also for the excellent research assistance provided by David Arkush, Nick Bath, and Dom Lanza. All mistakes, of course, are my own.

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Many consider *Baker v. Carr*,[1] the topic of this Symposium, to be one of the finest accomplishments of the Warren Court. Despite dire warnings, the Court's entry into the political thicket seems to have been an unmitigated success. It transformed the political landscape, eliminating gross disparities in voting power across the country,

1. 369 U.S. 186 (1962).

seemingly without compromising its legitimacy in the eyes of most Americans.

The *Baker* line exemplifies what Cass Sunstein has termed "judicial minimalism."[2] These decisions embody "incompletely theorized agreements"—fact-based holdings rendered without any explanatory theory—or minimally theorized agreements which offer only the narrowest theoretical grounds for the result reached.[3] To be sure, these cases had a profound practical impact and first launched the Court into the political thicket. They thus violated one tenant of minimalism—that decisions be "narrow" in their application.[4] But in the long run the one-person, one-vote cases did little to define the conceptual terrain in voting-rights cases. That is because the Court failed to articulate an adequate mediating theory to explain what equality meant in the context of voting. Consistent with a minimalist approach, the Court reached a series of agreements on judicial outcomes but offered no adequate explanatory theory regarding the democratic process it was regulating.

The problem for the Court in implementing *Baker* was that the foundational norm it was applying—equality—is too abstract to have real meaning in the context of malapportionment.[5] For example, should "equal representation" mean equal population among districts? An equally weighted voted? An equal share of a

2. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–5, 9–14 (1999) [hereinafter SUNSTEIN]. For a spirited exchange on some aspects of minimalism not discussed here, see Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997) (arguing that judges should use a theoretical approach in solving questions of law); Ronald Dworkin, *Reply*, 29 ARIZ. ST. L.J. 431 (1997) (responding to the criticisms of Posner and Sunstein); Richard A. Posner, *Conceptions of Legal "Theory": A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377 (1997) (critiquing Dworkin's approach); Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389 (1997) [hereinafter Sunstein, *From Theory to Practice*] (same).

3. SUNSTEIN, *supra* note 2, at 11. Sunstein seems to equate fact-based, atheoretical decisionmaking and minimally theorized agreements, although the two may differ in practice. *See infra* text accompanying notes 80–82.

4. *See* SUNSTEIN, *supra* note 2, at 10. However, the wide application of these cases may stem in part from their minimalist theoretical underpinnings. *See infra* notes 115–21 and accompanying text.

5. *Cf.* Mahan v. Howell, 410 U.S. 315, 329 (1973) ("Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not.").

representative's attention? An equal share of political power? An equal share of legislative success?[6]

Because abstraction is a common problem in equal protection, we often see courts and commentators resort to what I term "intermediary theories" or "mediating principles" in figuring out what equality means in a given context. The most prominent are the antidiscrimination principle[7] and the subordination theory.[8] Mediating principles function like a lens. They frame the question, filtering out some facts and focusing on others, and they can lead us to different conclusions about the constitutionality of the same action.[9]

In the immediate wake of *Baker*, some members of the Court tried to offer a set of mediating principles to give shape and content to the emerging norm of equality in the context of apportionment. As the one-person, one-vote doctrine developed, however, the Court abandoned its efforts to develop such principles.[10] Instead, the Court

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6. Sandy Levinson further explores and develops these questions in his contribution to this Symposium. *See* Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002).

7. The antidiscrimination approach posits that individuals should not be treated differently based on arbitrary criteria; on this view, the focus of the equal protection injury is the motivation of the decisionmaker. For analyses of the antidiscrimination approach, see Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 241, 263–313 (1971) [hereinafter Fiss, *Fair Employment*] (describing and critiquing this approach); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 108–47 (1976) [hereinafter Fiss, *Equal Protection*] (same); Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 568 (1998) (same).

8. The subordination theory focuses not on intentional discrimination, but on actions that have the effect of further disadvantaging a group that traditionally has been relegated to an inferior position in society. For analyses of the subordination approach, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–10 (1986) (developing and further refining the subordination theory); Fiss, *Equal Protection*, *supra* note 7, at 147–70 (offering an early articulation of this approach); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 24–25 (1976) (discussing and further refining the subordination theory); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 941–42 (1989) (same); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411–12 (1994) (same).

9. *See, e.g.*, Heather K. Gerken, *Morgan Kousser's Noble Dream*, 99 MICH. L. REV. 1298, 1310–11 (2001) (book review) (offering an example of this analysis).

10. It is, of course, a bit artificial to speak about "the Court" as if it were a unitary entity rather than a series of shifting coalitions of Justices over a two-decade period. It is interesting, however, to note the continuity in the Court's approach over time. Indeed, one can find examples of the problems I discuss in cases resolved by the Warren Court, the Burger Court, and the Rehnquist Court. *See infra* text accompanying notes 70–73, 83–91, 95–108, 185–87.

either relied upon incompletely theorized agreements, never articulating the mediating principles it was employing to define equality in the malapportionment cases,[11] or offered a minimalist theory, the narrowest possible justification for the outcome it was reaching.[12]

This Article makes two arguments. The first concerns the *costs* of minimalism. While Sunstein has documented the benefits of the incompletely theorized agreement, *Baker* and its progeny exemplify its potential vices. Theories for applying the equality norm in voting cases do not just permit judicial action; they guide and constrain judicial discretion. Without an adequate theory for explaining what equality should mean in the malapportionment context, the Court could describe equality only in the most abstract terms. It could not identify sensible limiting principles for the rule it was developing, nor could it defend its own measure of equality against alternative measures. The result is the type of opinion we see in *Karcher v. Daggett*,[13] in which the Court describes the injury in circular terms, substitutes general paeans to individualism for concrete doctrinal analysis, and defines equality in a rigid, mechanical way.

The critique of minimalism offered here thus differs from those offered elsewhere and, indeed, shares many of the premises of Sunstein's own approach.[14] By "mediating theory," I do not refer to an abstract philosophical argument, derived independently of the cases before the Court and applied top-down.[15] I agree with Sunstein that the power of legal argumentation derives, at least in part, from its

11. *See infra* text accompanying notes 60, 66–67.

12. *See infra* text accompanying notes 61–65.

13. 462 U.S. 725 (1983).

14. While I share Richard Fallon's view that "incompletely theorized agreements" represent "a second-best approach," RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 106–07 (2001), I do not dwell here on the benefits of transparency. Further, in making this argument, I do not mean to suggest that "incompletely theorized arguments" have no benefits. Indeed, as Cass Sunstein has amply demonstrated and as Rick Hasen has argued in this Symposium, this approach can prove profitable in certain circumstances. *See* Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1473 n.9 (2001). For example, I agree with Hasen that ambiguity yields benefits in the early development of a new line of equal protection analysis, and I do not read his essay as disagreeing with the point I make here—that the Supreme Court should work to clarify and develop the doctrine once there has been time for experimentation and development in the lower courts.

15. Thus, I do not offer what Judge Richard Posner would term a Dworkinian critique of minimalism, *see* Posner, *supra* note 2, at 379–81, a characterization with which Dworkin himself seems to disagree. *See* Dworkin, *Reply*, *supra* note 2, at 431–45.

contextual, bottoms-up, analogical approach.[16] In the spirit of Sunstein's pragmatic approach, I offer the one-person, one-vote cases as a case study for assessing whether and when minimalism is likely to succeed in voting-rights cases; these cases provide a concrete example of potential pitfalls to incompletely theorized agreements and buttress Sunstein's own efforts[17] to ascertain when a minimalist approach should be employed.[18]

The second argument offered in this Article concerns the *causes* of minimalism in the malapportionment cases. Voting-rights scholars of every stripe have analyzed inconsistencies in the Court's theoretical approach to voting rights.[19] The question that has

16. *See* Sunstein, *From Theory to Practice*, *supra* note 2, at 390–92, 395–97. Even analogical reasoning, however, requires a theoretical framework for determining which analogies work and which do not. Thus, while the approach offered here bears little resemblance to Ronald Dworkin's "Philosopher's Brief," I think Dworkin is correct when he states that "analogy without theory is blind. An analogy is a way of stating a conclusion, not a way of reaching one, and theory must do the real work." Dworkin, *In Praise of Theory*, *supra* note 2, at 371.

17. Sunstein himself readily concedes that "[t]hose who generally believe in shallowness cannot reject the possibility that judges may have to get ambitious in order to think well about some cases; hence, conceptual assents, involving increasingly ambitious arguments . . . may be desirable." SUNSTEIN, *supra* note 2, at 248; *see also* Sunstein, *From Theory to Practice*, *supra* note 2, at 390 ("The notion of 'justificatory ascent' rightly signals the fact that a judge may have to get ambitious in order to think well about some cases."). Indeed, while Sunstein documents the many benefits to minimalism in what he terms his "descriptive" account, he does not assert that this approach should be used in every case. To the contrary, Sunstein acknowledges that there are circumstances in which a minimalist approach is inappropriate and can result in a flawed jurisprudence. SUNSTEIN, *supra* note 2, at 50, 57–58, 262.

18. While it is not clear whether, and to what extent, Sunstein would disagree with the arguments offered here, these claims would plainly be rejected by at least one prominent election law scholar, Daniel Lowenstein, who provocatively argues that "the Supreme Court has no theory of politics—and be thankful for small favors." Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 245–66 (David K. Ryden ed., 2000). In Lowenstein's view, the Supreme Court should not freeze one theory of the political process into the Constitution. *See id.* at 264. I disagree with Lowenstein as to the costs of atheoretical decisionmaking, *see infra* Part II, and I believe that the Supreme Court is, in fact, choosing a theory when it adjudicates these questions and ought to be explicit when it does so. *See infra* Part III.

19. For just a handful of examples, see LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 168–222 (2002) (critiquing the underlying assumptions and inconsistencies of the Supreme Court's jurisprudence on representation and race); Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 101–02 (1997) (noting the Supreme Court's failure to think about democracy in ruling on term limits); Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 815–41 (2001) (critiquing the Supreme Court's efforts to regulate political parties); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998) (arguing that "the Court's electoral

received less attention is: Why? Why does the Court so often fail to adopt a coherent set of mediating principles in the context of voting cases despite the doctrinal and institutional costs?

The second half of this Article provides at least a partial answer. The unique nature of the claims that arise from the political process makes it difficult for the Court to develop an appropriate intermediary theory in voting cases. For such claims, the structures by which votes are aggregated and the ways in which individuals align themselves are crucial for understanding most harms.[20] For this reason, the types of mid-level intermediary theories likely to make the most sense in the context of malapportionment are those that embody a structural approach to voting claims. By "structural approach," I mean a theory that is designed "to regulate the institutional arrangements within which politics is conducted"[21] rather than to vindicate conventional individual harms. In the context of voting, usually a structural approach also will entail judgments about the aggregation of votes, thereby requiring a focus on groups that further diverges from conventional individualist principles.

Because most sensible intermediary theories for applying the equality norm to malapportionment claims would have embodied a structural approach, these theories were unlikely to appeal to the Court. Questions regarding political structures and group preferences are precisely the types of inquiries the Court prefers to avoid. And with good reason. Both are difficult to square with a

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jurisprudence lacks any underlying vision of democratic politics that is normatively robust or realistically sophisticated about actual political practices"); Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 308–09 (1997) (critiquing inconsistencies in the Court's decisions in its 1995 Term); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1208–16 (1996) (making a similar argument in critiquing the *Shaw* cases); Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 831–43 (1985) (discussing intermediate questions of political theory in relation to the law of bribery); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 897–901 (1998) (exploring inconsistencies in judicial theories behind campaign finance reform); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 777–96 (2000) (exploring inconsistencies in the judicial conception of political parties). Jonathan Still has critiqued scholars for offering inadequately developed theories of equality, and he has provided six overlapping criteria for judging political equality. *See* Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375, 377–85 (1981).

20. *See infra* text accompanying notes 31–32 (discussing the limited nature of such theories).

21. Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1346 (2001). For a more detailed definition, see *infra* text accompanying notes 132–35.

conventional individual-rights approach and the familiar protections it affords against judicial excess and error.

Taken together, these two arguments regarding the costs and causes of minimalism point up a serious flaw in the Supreme Court's malapportionment jurisprudence. Whenever the Court decides the outcome in a malapportionment case, it necessarily makes a judgment about the nature of the democratic process. As I argue below,[22] the one-person, one-vote doctrine is implicitly premised upon assumptions about how political structures should aggregate group preferences, and it therefore does not fit neatly into a conventional individual-rights framework. While the Court has avoided acknowledging that fact by offering a series of incompletely or minimally theorized agreements in applying *Baker*, those agreements have not saved the Court from making structural judgments. Instead, the minimalist strategy has simply resulted in a jurisprudence that is doctrinally incoherent, plagued with inconsistencies, and marked by a rigid preference for mechanical proxies.

The irony is that the Court's failure to articulate an adequate set of mediating principles seems to stem from a felt need to adhere to a conventional individual-rights approach. That desire reflects the Court's fear of abandoning the familiar protections against judicial mistake and excess that accompany this well-established jurisprudential approach. Thus, while the best candidates for a mediating theory in the malapportionment cases embody the types of structural principles that the Court thinks are linked to discretionless decisionmaking, it turns out that an individual-rights approach *without* an adequate intermediary theory equally lends itself to judicial abuse.

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Part I describes the path not taken by the Court. It sketches four possible intermediary theories the Court might have used to apply the equality norm to malapportionment context. Part II discusses the path the Court took. It analyzes the Court's failure to adopt an adequate mediating principle in the malapportionment cases and examines the costs of minimalism: the flawed jurisprudence that resulted from the series of incompletely theorized agreements that

22. *See infra* Part III.B. Guy Charles has made a similar argument in his contribution to this Symposium. He argues that the Court's substantive theory of democracy, while not explicitly articulated by the Court, can be identified from the structure and context of the *Baker* opinion. Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103 *passim* (2002).

Baker spawned. Part III turns to the source of the Court's minimalist impulses in the malapportionment cases. It argues that one of the reasons the Court failed to offer an adequate intermediary theory in the malapportionment cases is that most, if not all, of the available alternatives would have forced the Court to deal explicitly with structural harms and group preferences, neither of which is easily squared with a conventional individual-rights approach. This Article concludes by identifying the link between the costs and causes of minimalism. The Court resorted to incompletely theorized agreements in order to avoid acknowledging the structural assumptions undergirding one person, one vote. It did so out of concern that a structural approach would lead to judicial excess and error. It is ironic, then, that the jurisprudence that resulted from its minimalist approach exemplified precisely the same flaws.

I. THE PATH NOT TAKEN

We often think of one person, one vote in terms of the doctrine's two bookends: *Baker v. Carr*,[23] in which the Court first held that malapportionment claims are justiciable, and *Karcher v. Daggett*,[24] which invalidated a redistricting plan due to tiny departures from absolute population equality. *Baker* does little to flesh out the right being vindicated; its primary concern is to overcome the justiciability hurdle erected by *Colegrove v. Green*.[25] And *Karcher* illustrates what seems to be the natural outgrowth of a deeply felt intuition that numerical equality matters. *Karcher* seems logically unassailable, if slightly formalistic in its approach.

This conventional perspective misses the debates that took place in the majority, concurring, and dissenting opinions rendered in the wake of *Baker*, in which the Justices were wrestling with the normative questions embedded in the path they had chosen. The non-minimalist opinions offered in cases like *Reynolds v. Sims*[26] and *Lucas v. Forty-Fourth General Assembly*[27] created the possibility—admittedly an elusive one—that the Court would eventually develop a rich theoretical justification for the one-person, one-vote rule.[28]

23. 369 U.S. 186 (1962).
24. 462 U.S. 725 (1983).
25. 328 U.S. 549 (1946).
26. 377 U.S. 533 (1964).
27. 377 U.S. 713 (1964).
28. I thus agree with Sunstein that *Reynolds v. Sims* moves in the direction of being "fairly deeply theorized," SUNSTEIN, *supra* note 2, at 17, for it at least begins to offer a theory of voting to justify recognition of the one-person, one-vote injury. *Baker*'s

The overarching principle in each case was, of course, equality. But as with other equal protection cases, members of the Court began to experiment with several mediating theories to explain how the equality norm articulated in *Baker v. Carr* should be applied in the context of malapportionment. Below I briefly describe four such theories: the lock-up theory, the group-based animus approach, the qualitative representation theory, and the expressive harm approach.[29] What links all of these theories is a structural conception of the harm rather than a focus upon individual rights. It is these shared traits that ensured these theories would never be embraced by the Supreme Court.[30]

Before turning to these arguments, I should offer two caveats. First, I do not intend to offer a psychoanalytic account of judicial decisionmaking. In analyzing possible alternatives available to the Court, I do not wish to suggest that its members were clearly presented with this menu of choices or consciously chose to disregard them. The analysis below is instead designed to show that the Court *could have* developed some type of mediating principle for applying the equality norm, as evidenced by the fact that some of its members were doing so. These theories sketched out below also are intended to provide illustrative examples of one of the main points of this Article—that an intermediary theory can cabin and guide judicial discretion, and that the Court's failure to theorize in this fashion mattered. For purposes of my overall critique of minimalism's costs, then, what matters is the absence of a mediating principle in the Court's malapportionment jurisprudence, not whether the Court adopted any of the specific theories I offer here.

Second, I do not mean to suggest that these theories offer a robust, fully developed conception of what equality should mean in a democracy. All of the theories I describe below concern a crucial but fairly narrow aspect of democratic participation—voting—and each theory would require significant development and analysis to offer a

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progeny, however, ultimately failed to live up to this promise. As I explain in greater detail later in this Article, *infra* text accompanying notes 59–68, the Court eventually abandoned its efforts to provide a robust theoretical justification for its decision and resorted either to atheoretical or minimally theorized decisions.

29. This list is by no means exclusive; it is designed merely to provide a sampling of some of the questions dividing the Court at the time. It does, however, roughly map on to the normative arguments offered in another contribution to this Symposium. *See* Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299 (2002).

30. *See infra* Part III.

complete and comprehensive theory of democracy.[31] Nonetheless, the theories described below would at least have been adequate, in the sense that they would be sufficiently robust to avoid the doctrinal pitfalls I discuss in Part II.[32] In short, the arguments offered below should be understood as a thought experiment of sorts: What would *Baker*'s jurisprudential world have looked like if the Court had at least *started* down the path of developing a robust theory of democratic participation and adopted mediating principles capable of giving some content to the term equality in the context of malapportionment?

A. The Lock-Up Theory

One possible theory emerging in *Baker*'s wake was the lock-up theory,[33] which posits that a democratic system cannot function if a majority (or, as in the malapportionment cases, an entrenched minority) uses its power over the redistricting process to prevent others from gaining a fair share of political power. This theory was first promulgated in *Baker* itself by Justices Douglas and Clark, whose concurrences expressed concern about "entrenched political regimes."[34] The district court in *Reynolds v. Sims* modeled its remedial plan on this view, redrawing district lines so as to "releas[e] the stranglehold on the legislature sufficiently so as to allow the newly elected body to enact a constitutionally valid" plan.[35] And the *Reynolds* majority itself averted to the "minority stranglehold on the

31. For example, theories regarding the aggregation of votes would tell us whether opportunities for "democratic participation" are equal only if democratic participation could be reduced to a single exercise, the act of voting. An expressive harm approach would be the appropriate means for defining democratic equality only if democracy served expressive values alone, for it offers no means for gauging whether substantive equality has been achieved. Developing a comprehensive theory of democracy is beyond the scope of this Article. For two recent efforts to do so, see GUINIER & TORRES, *supra* note 19, at 168–222; DENNIS F. THOMPSON, JUST ELECTIONS: DEMOCRATIC PRINCIPLES AND ELECTORAL PRACTICES IN THE UNITED STATES (forthcoming 2002).

32. Because I do not want to overstate the comprehensiveness of these theories, I generally refer to these mediating principles as "adequate" or "sufficiently robust."

33. For two recent attempts to develop this theory, see Issacharoff & Pildes, *supra* note 19, at 644–52; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 492–502 (1997). For an earlier articulation, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 120 (1980). For a vigorous critique of Issacharoff, Pildes, and Klarman, see Lowenstein, *supra* note 18, at 260–63.

34. Baker v. Carr, 369 U.S. 186, 248 (1962) (Douglas, J., concurring); *id.* at 258–59 (Clark, J., concurring).

35. Reynolds v. Sims, 377 U.S. 533, 543 (1964).

State Legislature" and the "frustration of the majority will."[36] The trio of Supreme Court decisions following on the heels of *Reynolds*—*Maryland Committee for Fair Representation v. Tawes*, *Roman v. Sincock*, and *WMCA, Inc. v. Lomenzo*—similarly raised concerns about minority lock-up and the vindication of majority rule.[37]

B. The Group-Based Animus Approach

A second potential mediating principle found in the early one-person, one-vote decisions is what I would term the "group-based animus approach." The Court was aware at the time of *Baker* that rural and urban residents voted differently.[38] Differences in voting patterns leave voters vulnerable to manipulation by self-interested legislators. When groups vote differently, changes in the manner in which votes are aggregated can affect the allocation of legislative power and, thus, substantive electoral outcomes.[39] Under these conditions, apportionment always offers an opportunity for intentional discrimination.

In the context of voting, however, "intent" is a slippery concept. The malapportionment cases present a common paradox in voting rights: the best reason for forbidding differential treatment—differences in voting patterns—is also the best reason for allowing it. What distinguishes redistricting cases from most traditional equal protection claims is that differences in group preferences can represent a legitimate basis for state action. Indeed, one of the main purposes of redistricting is to facilitate effective vote aggregation by grouping individuals together on the basis of shared interests,[40]

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36. *Id.* at 570, 576.

37. *See* Roman v. Sincock, 377 U.S. 695, 698 (1964) (describing the plaintiff's claim that it was impossible to alter the existing population scheme because "the existing legislative apportionment was frozen into the [state] [C]onstitution" and "the present legislature was dominated by legislators representing the two less populous counties"); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656, 674 n.19 (1964) (describing the "rural stranglehold" on the political process); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653–54 (1964) (expressing concern about a "built-in bias against voters living in the State's most populous counties").

38. Indeed, these cases were originally litigated as traditional equal protection claims based on the assumption that these two groups had different interests. *See WMCA*, 370 U.S. at 191 (stating that the complaint alleged "geographical discrimination"); *Baker*, 369 U.S. at 273 (Frankfurter, J., dissenting) (quoting the complaint as challenging a "purposeful and systematic plan to discriminate against a geographical class of persons").

39. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671–72 (2001).

40. *See id.* at 1677–79 (exploring these issues in greater depth); *see also id.* at 1677 n.46 (collecting numerous sources).

whether individuals self-identify along racial, socio-economic, or geographic lines.[41]

Because of these special attributes of districting, traditional equal protection rules—which are preoccupied with intentional efforts to distinguish among individuals—have little purchase in this context. If the use of a classification is deemed a proxy for intentional discrimination, many traditional districting values must be jettisoned.[42] Further, whenever a state intentionally groups voters to facilitate adequate representation, it necessarily undermines the political power of another group of voters. How, then, do we define legitimate efforts to achieve a fair distribution of political power within a polity and animus-based efforts to harm members of a particular group?

One strategy is to mandate equal population among districts, thereby creating what amounts to a prophylactic rule that prevents severe examples of group-based animus while allowing for appropriate nonanimus-based distinctions.[43] Under this approach, a state could create districts with some population deviations as long as they are not so severe as to create the inference of animus or prevent a particular group from fairly participating in the political process.[44]

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41. *See* Karlan & Levinson, *supra* note 19, at 1216–20 (discussing the ways in which voters align themselves and arguing that race represents an appropriate category of political alignment that the state may recognize).

42. In the words of two scholars, "if 'at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals,' then redistricting stabs at the heart of the Fourteenth Amendment every time." Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2292 (1998) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)). For further evidence of this claim, consider the difficulties the Court has encountered in identifying what "communities of interest" may be recognized in the *Shaw* line of cases. *Compare* Miller v. Johnson, 515 U.S. 900, 919–20 (1995) (adopting a narrow view of racial community), *with* Lawyer v. Dep't of Justice, 521 U.S. 567, 581–82 (1997) (offering a broader view of racial community).

43. For a general discussion of the role of prophylactic rules in constitutional adjudication, see David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988). For a thoughtful effort to cast *Shaw* as a prophylactic rule to allow for some race conscious districting while preventing excessive reliance on race, see Melissa L. Saunders, *Reconsidering* Shaw*: The* Miranda *of Race-Conscious Districting*, 109 YALE L.J. 1603 (2000).

44. One could envision a certain amount of flexibility built into this approach. For example, one might create a high bar for measuring population equality when the State is overpopulating districts containing sizeable populations of racial minorities out of a suspicion that any act that harms racial minorities probably stems from racial animus. If one takes a broader view of animus, one could do so simply based on the recognition that self-interested politicians will undermine the interests of racial minorities even when pursuing purely partisan aims, thereby exacerbating the effects of past discrimination. *See generally* J. MORGAN KOUSSER, COLORBLIND INJUSTICE AND THE UNDOING OF THE

As with the lock-up theory, one can find hints that the Court was thinking about the one-person, one-vote principle as a strategy for deterring group-based animus while allowing for appropriate differentiation among groups. These cases were initially litigated on a theory of group-based discrimination against urban voters.[45] Moreover, one of the few plans upheld by the Court was accepted because of the "consistency of application and the neutrality of effect of the nonpopulation" standards employed,[46] both criteria that would inform an animus-based inquiry. Similarly, some members of the Court took care to make room for the state to draw nonanimus-based distinctions among group members. For example, in *Baker*, Justice Douglas argued that equal protection does not require "universal equality" and emphasized that "there is room for weighting."[47] Justice Stewart likewise claimed that states should enjoy a " 'wide scope of discretion in enacting laws which affect some groups of citizens differently than others.' "[48] Further, some of the standards offered for measuring equality might have been premised on assumptions about the appropriateness of differentiating among voters. For example, one could imagine the "arbitrary and capricious"[49] standard as a rough proxy that allows for differential treatment among voters, provided the overall distribution of power is not so skewed as to signal animus.

SECOND RECONSTRUCTION (1999) (offering an excellent historical analysis of the many ways in which politicians manipulate and ignore the interests of racial minorities in pursuit of their own political ends). Concomitantly, the courts might adopt a more generous standard for apportionment plans that disadvantage voters on the basis of geography, depending on one's views of how often this type of discrimination occurs.

45. *See supra* note 38 and accompanying text. As James Blacksher and Larry Menefee have argued, there is an irony if the Court entered the political thicket on these grounds. After all, the one-person, one-vote decisions, which were based on the dictates of the Civil Rights Amendments, largely benefited white suburbanites. And they were handed down at roughly the same time that the Supreme Court was doing little to aid the intended beneficiaries of the Fourteenth and Fifteenth Amendment, racial minorities, who suffered from significant animus-based efforts to dilute their votes. *See* James Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, *in* MINORITY VOTE DILUTION 203, 204, 230 (Chandler Davidson ed., 1984).

46. Brown v. Thompson, 462 U.S. 835, 845–46 (1983).

47. Baker v. Carr, 369 U.S. 186, 244–45 (1962) (Douglas, J., concurring).

48. *Id.* at 266 (Stewart, J., concurring) (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)); *see also* Gray v. Sanders, 372 U.S. 368, 386 (1962) (Stewart, J., dissenting) ("[A] State might rationally conclude that its general welfare was best served by apportioning more seats in the legislature to agricultural communities than to urban centers, lest the legitimate interests of the former be submerged in the stronger electoral voice of the latter.").

49. *See, e.g.*, *Baker*, 369 U.S. at 258 (Clark, J., concurring) (demanding only that the districting scheme exhibit "some rational design").

C. *The Qualitative Representation Theory*

A third theory for explaining what equality should mean in the context of voting is the qualitative representation theory. On this view, equality in voting requires that a state provide constitutionally effective representation to all voters.[50]

One can see hints of this aspirational approach in the early one-person, one-vote opinions. For example, *Reynolds* proclaims that

> representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.... Full and effective participation by all citizens requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.[51]

Like the group-based animus approach, this theory for applying the equality norm would likely take into account group differences and allow for differential treatment to facilitate the effective aggregation of preferences. But it would demand a far more robust theory of the democratic process. Courts would have to define what constitutes "effective representation," an endeavor that would require them to look beyond election day to the dynamics of the legislative process and representatives' day-to-day relationship with their constituents.

D. *The Expressive Harm Approach*

The expressive harm approach represents a fourth alternative for applying the equality norm in reapportionment cases. This theory posits that courts should pay attention to the social meaning conveyed by the population disparities in question, not the intention behind them.[52] On this view, the problem with a malapportioned districting

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50. This theory suggests the limits of Jonathan Still's categories, for even his broadest definition of equality is confined to assessing how many seats a group will elect in the legislature, not the quality of representation group members ultimately receive. *See* Still, *supra* note 19, at 384–85.

51. Reynolds v. Sims, 377 U.S. 533, 542 (1964).

52. For analyses of the expressive harm approach in the context of voting, see generally Ellen Katz, 99 MICH. L. REV. 491 (2000) (discussing the role of constitutive and expressive harms in *Rice v. Cayetano*, 528 U.S. 495 (2000)); Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989) (exploring expressive and constitutive values in the context of exclusionary voting rules); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After*

scheme is the message of inequality conveyed by districts of unequal size.

Here again, the early one-person, one-vote cases hint at this theory. From time to time, the Court gestured at the notion that population deviations signal a message of exclusion or disrespect. In *Reynolds*, for example, the Court observed that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."[53] *Gray v. Sanders* states that " 'the right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' "[54] Similarly, Justice Fortas's dissent in *Avery v. Midland* rests on an expressive theory of voting:

> Our cases hold that people who stand in the same relationship to their government cannot be treated differently by that government. To do so would mark them as inferior, implying inferiority in civil society, or inferiority as to their status in the community. It would be to treat them as if they were, somehow, less than people.[55]

Shaw v. Reno, 92 MICH. L. REV. 483 (1993) (linking the expressive harm theory to *Shaw v. Reno*); Saunders, *supra* note 43 (offering a *Miranda*-like defense of *Shaw*); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993) (linking a wide range of voting claims to the expressive harm theory). For general articles on expressive harms, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (providing a comprehensive account of expressive harms in constitutional analysis); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000) (further elaborating and developing an expressive harm approach); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998) (arguing that courts make judgments regarding the expressive dimensions of government action even when adjudicating claims about individual rights); Todd Rakoff, Washington v. Davis *and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63 (1994) (arguing for an objective standard for gauging intent that takes social meaning into account); Symposium, *The Expressive Dimension of Governmental Action: Philosophical and Legal Perspectives*, 60 MD. L. REV. 465 (2001) (featuring articles addressing whether the expressive content of state action ought to have legal significance).

53. *Reynolds*, 377 U.S. at 567; *see also id.* at 568 ("A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm."); *cf. Gray*, 372 U.S. at 379–80 ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters.").

54. *Gray*, 372 U.S. at 380 (internal citations omitted).

55. Avery v. Midland, 390 U.S. 474, 498 n.2 (1968) (Fortas, J., dissenting) (internal citations and quotations omitted); *see also* Winkler, *supra* note 52, at 375–76 (finding an expressive dimension in the one-person, one-vote doctrine). Even later Supreme Court decisions occasionally picked up on this theme:

> The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating her power to determine the outcome of an election, shortchanged if she may vote for only one representative when a citizen in a neighboring district, of equal population, votes for two.

Bd. of Estimate of New York v. Morris, 489 U.S. 688, 698 (1989).

In sum, the Supreme Court had at least four possible theories for translating the equality norm announced in *Baker*. The next Part examines the Court's failure to adopt any of them.

II. THE PATH TAKEN: THE COSTS OF MINIMALISM

Despite these early traces of a mediating theory for applying the equality principle to the malapportionment cases, each failed to catch hold. Some of these theories were rejected outright by the Court, as the lock-up principle was in *Lucas v. Forty-Fourth General Assemby*[56] and the group-based animus approach was in *Davis v. Mann*.[57] Others never developed into more than a rhetorical flourish in a Justice's opinion, as in the case of the expressive harm doctrine and the qualitative representation theory.[58]

What is more interesting is that the Court never offered an adequate alternative theory to replace them. Despite demands from its own members to offer a sufficiently robust theory for deciding what equality should mean in the reapportionment context,[59] the Court never did so.

The Court's strategy in the one-person, one-vote cases can be characterized in two ways. One can view the Court's approach as purely atheoretical decisionmaking; it simply abandoned earlier efforts to offer a theory to justify its holdings.[60] Instead, the Court gave us only fact-based decisions without a theory to justify them.

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56. 377 U.S. 713, 730–37 (1964) (dismissing the fact that a majority of voters in every region of the state had voted for the malapportioned scheme on the ground that the right in question was individual in nature).

57. 377 U.S. 678, 692 (1964) (dismissing the desire to "balance urban and rural power in the legislature" as "an explanation [that] lack[s] legal merit").

58. Interestingly, some of these theories seem to have been accepted in the context of *other* voting claims. For example, the lock-up theory does a good job of explaining the Supreme Court's partisan gerrymandering standard, *see infra* note 109 and accompanying text, and the expressive harm theory has been explicitly endorsed by some Supreme Court Justices in *Shaw*. *See infra* notes 196–99 and accompanying text.

59. *See, e.g.*, *Lucas*, 377 U.S. at 746 (Stewart, J., dissenting) ("We are not told how or why the vote of a person in a more populated legislative district is 'debased,' or how or why he is less a citizen, nor is the proposition self-evident."); Reynolds v. Sims, 377 U.S. 533, 621 (1964) (Harlan, J., dissenting) ("[T]he Court assumes, rather than supports, its conclusion."); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (Clark, J., dissenting) (accusing the Court of issuing an "*ipse dixit*"); *Gray*, 372 U.S. at 388 (Harlan, J., dissenting) (accusing the Court of ruling by "judicial fiat"); Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) ("Talk of 'debasement' or "dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a voter until there is first defined a standard of reference as to what a vote should be worth.").

60. *See* Lowenstein, *supra* note 18, at 249–50 (agreeing that the Court never endorsed a single theory in resolving the one-person, one-vote cases, although individual Justices endorsed various theories).

Alternatively, one can characterize *Baker*'s progeny as minimally theorized[61]—the Court adopted *some* mediating theory to justify its holdings, but it is a theory of the narrowest sort.[62] On the latter view, one might argue that the one-person, one-vote cases are concerned with "a significant deprivation of equal individual access to the political process"[63] due to dramatic differences in the weight accorded to individual votes. The Court's decisions might also be explained by the notion that equality requires that each representative serve an equal number of constituents.[64] Both theories are extraordinarily narrow and individualist in their focus, something that would make sense given the origins of the one-person, one-vote doctrine in the debates surrounding justiciability in *Colegrove v. Green* and *Baker*.[65]

Although I think both characterizations of the Supreme Court's decisions—as fact-based opinions without a theory or decisions offering a theory of the narrowest sort—are reasonable, I mildly favor the former. While the two narrow theories identified above certainly could provide a mediating theory for defining equality in the one-person, one-vote cases, the Court never explicitly articulated either theory, even in cases where their invocation would have offered the Court some refuge from the doctrinal difficulties described below.[66] Nor did the Court consistently adhere to either theory in practice.[67]

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61. *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 103–05 (1997) (arguing in a different context that many of the Supreme Court's tests for implementing constitutional norms reflect a "thin, minimalist conception of the democratic process").

62. I am indebted to Dick Fallon and Sam Issacharoff for suggesting different variants of this argument to me.

63. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1652 (1993).

64. *See* Judith Reed, *Sense and Nonsense: Standing in the Racial Redistricting Cases as Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 454–55 (1999) (identifying this issue as the source of the injury in one-person, one-vote cases and criticizing this view); Memorandum from Lani Guinier, to Harvard Law School Faculty, *Racial and Political Synecdoche: Issues of Representation*, (July 13, 2000) (on file with the North Carolina Law Review) (same). Such a mediating theory would, of course, offer an extraordinarily thin conception of voting and political participation. *See* Karcher v. Daggett, 462 U.S. 725, 774 (1983) (White, J., dissenting) ("[N]o one can seriously contend that such an inflexible insistence upon mathematical exactness will serve to promote 'fair and effective representation.' ").

65. For a discussion of this debate, see *infra* text accompanying notes 207–24.

66. For example, both mediating theories would have provided the Court with a ready answer when challenged with alternative theories of equality, such as the Banzhaf test, *see infra* Part II.A, and therefore could have avoided defining the harm in circular terms. Each might also have provided a limiting principle for the equality norm. Thus, if the Court were preoccupied with the weight of individual votes, it surely would have allowed for departures that fell below the margin of error in the census and thus reached a contrary result in *Karcher v. Daggett*, 462 U.S. 725 (1983). *See infra* note 67. Similarly, the

For purposes of this Article, however, it does not matter how these decisions are best characterized, for the critiques offered below equally apply. Thus, regardless of whether one views the one-person, one-vote cases as an example of atheoretical decisionmaking or an effort to implement a narrow (and largely unarticulated) theory of equality, *Baker*'s progeny may still be termed minimalist. To borrow Cass Sunstein's terminology, on either view the Court's decisions in the area of malapportionment have been shallow, not deep; they reflect "concrete judgments on particular cases, unaccompanied by abstract accounts about what accounts for those judgments."[68]

This Part argues that the Court's minimalist approach has had a significant effect on the development of *Baker*'s precepts.[69] Part II.A demonstrates that without an adequate mediating theory to flesh out the equality norm, the Court's description of the injury became circular, and it was unable to offer a tenable response to alternative descriptions of the harm offered in *Baker*'s wake. Part II.B demonstrates that the absence of a sufficiently robust intermediary theory made any pronouncement on subsidiary questions little more

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Court might have sensibly concluded that minor population deviations would not undermine the mediating value of equal constituent service and thus avoided equating any departure from mathematical equality with an equal protection injury. *See infra* Part II.C. Thus, whether one views *Baker*'s progeny as a set of cases without a mediating principle or as a line of decisions with a thin, but unarticulated, theory of voting equality, the critiques outlined below still apply.

67. As Sam Issacharoff points out, if the Court's theory of equality in the one-person, one-vote cases concerned dramatic differences in the weight accorded to individual votes, that theory would "ma[k]e some sense" given the "magnitude of the malapportionment in the early one-person, one-vote cases," but it is inconsistent with cases like *Karcher v. Daggett*, in which the deviations in question were smaller than the margin of error for the census, and with the Court's rhetoric regarding the fairness and effective participation. Samuel Issacharoff, *Introduction: The Structures of Democratic Politics*, 100 COLUM. L. REV. 593, 595–96 (2000); *see also* Issacharoff, *supra* note 63, at 1652, 1657–58 (arguing that "*Baker* and *Reynolds* drew the greatest strength from malapportionment claims so dramatic that it was possible to compute meaningful, even shocking, disparities in individual access to representation[,]" but concluding that this theory of equality cannot justify the "inconsequential" disparities challenged in *Karcher*). The constituent service theory of equality would similarly seem inconsistent with the Court's refusal to allow for departures from absolute equality to fulfill other traditional districting criteria, many of which are designed to *facilitate* the ability of representatives to service their constituents. *See infra* Part II.B.

68. SUNSTEIN, *supra* note 2, at 13.

69. Here I rely on examples of these trends rather than a full-length exegesis of every decision rendered by the Court. The doctrine did not, of course, develop in a linear fashion, and counterexamples exist. That is in part why I rely most heavily upon the later decisions of the Court; cases like *Karcher v. Daggett*, 462 U.S. 725 (1983), and *Board of Estimate of New York v. Morris*, 489 U.S. 688 (1989), represent applications of the one-person, one-vote doctrine in its maturity and thus seem a fair basis for criticism.

than an *ipse dixit*, thereby making it easier for the Court to flip its position on basic doctrinal questions. Part II.C argues that the Court's minimalist strategy prevented it from devising sensible limiting principles to the equipopulation rule. As a result, the Court concluded that only rigid, mathematical equality could satisfy *Baker*'s mandate. Each problem points up the potential costs of minimalism as a jurisprudential strategy.

A. *The Court's Inability To Define the Harm in One-Person, One-Vote Cases*

One result of the Court's minimalist approach is that its description of the one-person, one-vote injury became circular. Without an adequate mediating theory for explaining what equality should mean in the context of apportionment, the Court was reduced to asserting that population deviations cause an injury because they depart from the principle of one person, one vote. Its answer to any question about the nature of the harm was, to borrow Justice Harlan's phrase, the "tautology that 'equal' means 'equal.' "[70]

Consider, for example, the Court's inability to respond to an alternative conceptual framework describing equality—the Banzhaf test—in *Board of Estimate of New York v. Morris*.[71] The Banzhaf test assesses equality by measuring the power of an individual voter to affect the outcome of a governing body's vote. It does so by analyzing the power of each member of the governing body to cast a tie-breaking vote, and then calculating the power of an individual voter to cast a determining vote in the election for that member.[72] When the parties in *Board of Estimate* presented the Court with this new test for assessing equality, it was unable to explain why the population measure that it had chosen was superior. The Court merely asserted that

> the personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district of equal population, vote for two.[73]

70. Reynolds v. Sims, 377 U.S. 533, 590 (1964) (Harlan, J., dissenting).
71. 489 U.S. 688, 697–99 (1989).
72. *Id.*
73. *Id.* at 698.

Put another way, population inequality became both the measure of the harm and its normative justification.

The intermediary theories described above would at least have offered the Court a tool for analyzing this question. The expressive harm theory, for example, might have led the Court to dismiss Banzhaf's functional approach. Under this view of equality, what matters is the social meaning conveyed by the redistricting scheme. Whether or not population deviations measure inequality in a functional sense, the appearance of equality is what matters, and the Court's adoption of a simple, easily understood measure of equality seems defensible.

The more functional approaches described above—the lock-up approach, the group-based animus theory, and the qualitative representation theory—might have led the Court in a different direction. Even if the Court were disinclined to accept a model as complex as Banzhaf's, these theories might have pushed the Court to reconsider whether population deviations were the best means for measuring inequality. As the Court's remaining voting-rights jurisprudence moved into the second generation of legal challenges, it had become clear that districts of equal population could not guarantee equally weighted votes.[74] Population deviations in apportionment seemed relatively unimportant when compared to the power legislators wielded in districting, for legislators could significantly undermine the power of urban voters (or any other group) by maintaining perfectly apportioned districts while carefully drawing district lines to pack or fracture city dwellers.[75] As the Court

74. *See* Issacharoff, *supra* note 63, at 1650 (explaining that in the wake of *Baker*, "the instrumental aspect of the equipopulation rule lost its vitality as the one-person, one-vote rule became increasingly reified as the functional definition of what it meant for an electoral process to be politically fair"). The first generation of voting-rights claims dealt with direct and formal limitations on ballot access. The second generation of voting-rights claims dealt with efforts to undermine the voting power of racial minorities through the strategic drawing of district lines. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–94 (1991) (describing the need for and development of the second-generation voting claims); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of the Voting Rights Process*, 90 MICH. L. REV. 1833, 1839–40 (1992) (same).

75. *See, e.g.*, Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 750 n.12 (1964) (Stewart, J., dissenting) (noting that "with legislative districts of exactly equal voter population, 26% of the electorate (a bare majority of the voters in a bare majority of the districts) can ... elect a majority of the legislature"). *Karcher v. Daggett*, 462 U.S. 725 (1983), exemplifies this problem. In *Karcher*, the Court invalidated a districting plan because of minuscule population deviations but gave little heed to the obvious partisan gerrymander New Jersey had ignored. *See* Issacharoff, *supra* note 63, at 1653–58

itself observed in *Gaffney v. Cummings*, fair and effective "representation does not depend solely on mathematical equality among district populations," and "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement."[76] Thus, an intermediary theory that recognized the significance of aggregation and group affiliations in the political process might have pushed the Court toward a dilution measure in place of, or in addition to, a population deviation measure for defining inequality.[77]

One potential cost to minimalism, then, is that a narrow holding agreed upon by the Court in one case eventually can take on a normative force of its own. If one views *Baker*'s progeny as decisions without a theoretical anchor, then the Court's avoidance of theory did not stop subsequent Justices from reading one into the cases. Judges, deeply steeped in the legal culture, naturally look to prior cases to discern the normative justification for their holdings. If the holding is all there is to the decision, it may be treated as a normative justification rather than merely a fact-specific, judicially agreed-upon outcome. Thus, because the Court eschewed a mediating theory and confined itself to narrowly defined outcomes in the early malapportionment cases, the outcomes themselves took on undue influence. Equal population became a normative principle justifying recognition of the harm, not just the result mandated by the Court's prior holdings. As a result, the Court's discussion of the one-person, one-vote injury became circular, and it was unable to cope with alternative definitions of inequality.

If one adopts the alternative view that the one-person, one-vote cases are anchored in *some* theory, just an extraordinarily thin one,[78]

(describing this problem); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1608 (1999) (same). *Karcher* thus vindicates Justice Powell's concern that "exclusive or primary reliance on 'one person, one vote' can betray the constitutional promise of fair and effective representation by enabling a legislature to engage intentionally in clearly discriminatory gerrymandering." Davis v. Bandemer, 478 U.S. 109, 168 (1986) (Powell, J., concurring in part and dissenting in part).

76. Gaffney v. Cummings, 412 U.S. 735, 748–49 (1973).

77. The Court's early opinions seemed to conceive of the injury in terms of dilution, *see, e.g.*, *Reynolds*, 377 U.S. at 555, although that term was not yet a developed term of art. Moreover, in at least one case the Court concedes that while "fair and effective representation may be destroyed by gross population variations among districts . . . such representation does not depend solely on mathematical equality among district populations." *Gaffney*, 412 U.S. at 748–49.

78. *See supra* text accompanying notes 62–65.

then we would tell the story in a slightly different way. On this view, the Court was unable to respond to competing definitions of equality exemplified by the Banzhaf test because it began with such a narrow, individualist theory of equality in the first place. By articulating too thin a theory of equality in the early cases, the Court effectively prevented itself from developing a more robust approach in subsequent cases. The problem with the one-person, one-vote cases, then, is not the absence of a mediating theory; it is that the mediating theory chosen was not robust enough to deal with the doctrinal puzzles that would eventually emerge from the equipopulation rule chosen by the Court.[79]

Both variants of the minimalist approach—atheoretical decisionmaking or minimal theorizing—can result in the same problem: an extraordinarily narrow view of equality is frozen into the canon, often with nonsensical results. But the juxtaposition of these two stories raises the question whether one ought to equate fact-specific agreements with minimally theorized decisions.[80] If we think of the early one-person, one-vote cases as fact-specific agreements that eschew a justificatory theory, then it would certainly be possible to develop an appropriate mediating theory as the case law developed. The problem is that the courts are unused to such an approach and give the basic terms of the initial agreements—the fact-specific holdings—undue normative weight, as I describe above.[81] If, however, we think of the early one-person, one-vote cases as "minimally theorized agreements"—decisions relying upon the narrowest theory available to justify the outcome—then the problem with the *Baker* line is that the early decisions' reliance upon a narrow theory prevented the Court from developing a more robust theory as the case law developed. In *both* instances, judicial habits may lead to unexpected consequences, for a minimalist approach—when filtered through a deeply ingrained judicial tendency to look to prior

79. *See* Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173, 1180 (1999) (arguing that in the one-person, one-vote cases, "the Warren Court opinions turned to the individual rights-compelling state interest standard to break the restraints of the political question doctrine . . . [b]ut in doing so, the Warren Court locked into place conceptual tools that soon proved insufficient for the next generation of cases"). As Sam Issacharoff has pointed out to me, we should not be surprised that the Court felt little pressure to articulate a sophisticated theory to justify its intervention in the early one-person, one-vote cases because the disparities initially challenged were so extreme that a wide variety of theories would suffice, even rational basis scrutiny. *See* E-mail from Samuel Issacharoff to Heather Gerken (Jan. 23, 2002) (on file with the North Carolina Law Review).

80. I am indebted to Sam Issacharoff for raising this point.

81. *See supra* text accompanying notes 77–78.

precedent for reasons to guide future decisions—may end up undermining the flexibility that minimalism is designed to encourage.[82]

B. The Court's Inability to Maintain Doctrinal Consistency

Another problem stemming from the Court's failure to adopt an adequate intermediary theory is doctrinal inconsistency. Consider, for example, the Court's switch on the question whether traditional districting criteria—compactness, preserving communities of interest, or keeping political subdivisions intact—could justify departures from absolute population equality for congressional apportionment. In the wake of *Baker*, parties sought permission from the Court to deviate from a strict equipopulation standard to achieve these other redistricting goals. A request for an exception to a legal rule is, of course, quite common. In order to decide whether to grant such an exception, however, a court must consult the reasons for the rule to determine whether the exception would be consistent with the rule.

The problem for the Court in the malapportionment cases, however, is that it had never adequately articulated the reasons behind the rule, so it was not possible for the Court to assess whether these departures would be consistent with the notion of "equality." It is not surprising, then, that the Court reached diametrically opposite conclusions about the same question. In *Kirkpatrick v. Preisler*,[83] the Court rejected the state's effort to defend population deviations in congressional districting plans as necessary to achieve other districting criteria.[84] All, said the Court, must be sacrificed to the equality mandate. In *Karcher v. Daggett*,[85] in contrast, the Court announced—again, with little explanation—that a list of legislative policies that "might justify some variance" in congressional districts included the same criteria rejected in *Kirkpatrick*.[86]

A similar switch took place within four years of *Kirkpatrick*. In 1973, *Mahan v. Howell*[87] abandoned *Kirkpatrick*'s hard-line approach and granted states considerable leeway in departing from the one-

82. *See* SUNSTEIN, *supra* note 2, at 4 (describing minimalism's attractive features). This critique, of course, raises concerns about minimalism in practice, not in theory. Were courts to abandon their jurisprudential habits, they would not look to prior decisions for mediating theories and would, indeed, enjoy the benefits of the doctrinal flexibility Sunstein identifies as one of minimalism's benefits.

83. 394 U.S. 526 (1969).

84. *Id.* at 533–36.

85. 462 U.S 725 (1983).

86. *Id.* at 740.

87. 410 U.S. 315 (1973).

person, one-vote rule. *Mahan* justified this departure on the ground that the challenged plan was a *state* reapportionment plan, not a congressional one.[88] While that distinction is now well established in the case law, if not widely endorsed by commentators,[89] it should have seemed odd at the time given that, until *Mahan*, the Court articulated the standards for state and congressional redistricting in similar terms.[90] Moreover, the three malapportionment cases decided between *Kirkpatrick* and *Mahan* drew no such distinctions and relied upon the two lines of decisions as if they were interchangeable.[91]

Even if one thinks these switches were due entirely to changes in the Court's personnel, the absence of an intermediate theory likely facilitated them.[92] Either doctrinal choice in this situation—no

88. *Id.* at 324.

89. Most scholars think this justification is unpersuasive. *See, e.g.*, Issacharoff, *supra* note 63, at 1651 (terming the distinction between state and congressional districting "artificial"); Daniel Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 17 n.48 (1985) (terming the Court's "official explanation" for the distinction between the two "no explanation at all").

90. While *Mahan* characterized *Kirkpatrick* as mandating absolute population equality for congressional districts, in fact both *Kirkpatrick* and *Mahan* articulated the same basic test. *Compare Kirkpatrick*, 394 U.S. at 530–31 ("[T]he 'as nearly as practicable' standard requires that the *State make a good-faith effort to achieve precise mathematical equality*. Unless population variances among congressional districts are shown to have resulted despite such effort, *the State must justify each variance*, no matter how small.") (citation omitted) (emphasis added), *with Mahan*, 410 U.S. at 324–25 ("We reaffirm [*Reynolds*'s] holding that 'the Equal Protection Clause requires that a State make an *honest and good faith* effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable.* We likewise reaffirm its conclusion that '[s]o long as the divergences from a strict population standard are based on *legitimate considerations incident to the effectuation of a rational state policy*, some deviations from the equal-population principle are constitutionally permissible . . . .") (citation omitted) (emphasis added).

91. *See* Abate v. Mundt, 403 U.S. 182, 183–87 (1971) (making no mention of different standards for state and federal apportionment); Ely v. Klahr, 403 U.S. 108, 111 (1971) (citing *Kirkpatrick* and *Wells*, two cases involving *federal* plans, in invalidating a state plan); Hadley v. Junior Coll. Dist., 397 U.S. 50, 54 n.7 (1970) (articulating the requirements of one person, one vote and citing precedent regarding state and federal standards without distinguishing between the two).

92. I do not mean to overstate this point or suggest that a mediating theory would have guaranteed judicial consistency. As Dan Lowenstein has pointed out, the notion that only "jurisprudence guided by political theory . . . leads to 'principled' results because the theory—not the political preferences of individual judges—will determine the outcome of cases" is belied by "the remarkable consistency with which the theory favored by a particular scholar yields results in accord with the scholar's political ideology." Lowenstein, *supra* note 18, at 253. Nonetheless, I do think a mediating theory plays some role in promoting judicial consistency. First, such theories provide some guidance to judges who do not have strong preferences on the question. Here, for example, one leaves these cases with the impression that the Court simply did not know how to resolve these

deviation allowed, or deviation allowed to fulfill traditional districting criteria—seemed equally plausible given how abstractly the Court had defined the constitutional norm. Indeed, without an adequate mediating theory justifying the equal population rule, it was difficult to assess whether and when an exception to the rule would be appropriate. In each of these cases, the Court had nothing to do but pronounce.

One of the intermediary theories described above would have provided guidance to the Court or at least enabled it to offer more than an *ipse dixit* to justify its choice. For example, the lock-up and group-based animus approaches are premised on the assumption that groups matter, that states *ought* to take into account regional differences, communities of interest, and existing channels of representation. Provided that the state had not used these values to conceal discrimination or unduly undermine the ability of some citizens to aggregate their votes, these redistricting values would have been celebrated, not shunned. Had the Court instead adopted an expressive harm approach, it would have wrestled with the question whether fulfillment of traditional districting objectives could temper the message of inequality conveyed by population deviations among districts, as some have suggested is the case in *Shaw*.[93]

Here, then, is another potential cost to incompletely or minimally theorized agreements. A sufficiently robust mediating theory can constrain judicial discretion as much as license it. Its absence makes it more difficult for the Court to achieve doctrinal consistency because it deprives members of the Court of a common baseline for determining when exceptions to a previously announced doctrinal rule are appropriate.[94]

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questions, not that it was implementing some strongly felt desire to achieve a certain result. Second, even when judges are, consciously or unconsciously, trying to implement their preferred result, a mediating theory can make that task more difficult because it at least creates a shared baseline for arguing about that result.

93. *See* Pildes & Niemi, *supra* note 52, at 508–09.

94. Sunstein himself does not argue that minimalism cabins judicial discretion, at least in this classic sense. While he links minimalism to some traditional practices designed to promote judicial restraint, he classifies both sets of practices under the broader rubric of principles "designed to limit the occasions for judicial interference with political processes." SUNSTEIN, *supra* note 2, at 39. Thus, as Sunstein himself remarks, "minimalism can be characterized as a form of 'judicial restraint,' but certainly not an ordinary form." *Id.* at x. In Sunstein's view, minimalism promotes judicial restraint because it prevents courts from resolving highly contested questions, thereby allowing "continued space for democratic reflection." *Id.* at x, 28–32.

C. *The Inevitability of* Karcher*'s Rigid, Mathematical Approach*

A final potential vice of minimalism, at least in the context of malapportionment cases, is that it can lead to the type of inflexible rules that minimalism is supposed to avoid.[95] Indeed, the absence of an adequate intermediary theory all but guaranteed that *Baker*'s progeny would demand absolute population equality in redistricting (or, to the extent that flexibility was allowed, as with state apportionment, it ensured that the limiting principle the Court offered would be unpersuasive).[96]

Mechanical standards like the equipopulation rule are valuable because they are easily administered. The problem in the malapportionment cases is that the Court applied the rule in unthinkingly broad terms, without regard to context. It thus became "the sole arbiter of political fairness"[97] and lacked a sensible limiting principle.

Without an adequate theory to explain why equality matters in the context of apportionment, population equality became an end unto itself rather than a means for achieving a well-functioning democracy.[98] In the Court's early malapportionment decisions, the equipopulation rule was sometimes understood as a means to an end rather than an end unto itself. In *Kirkpatrick*, for example, the Court argued that the equipopulation principle represented a means "to *prevent* debasement of voting power and diminution of access to elected representatives."[99] By the time *Karcher* was decided, however, the means/end distinction had been all but eviscerated. Population equality was equated with the end it once served: " 'equal

95. *But see* Lowenstein, *supra* note 18, at 258 (making the opposite argument).

96. *See supra* note 89.

97. Issacharoff, *supra* note 63, at 1651.

98. In criticizing this aspect of the Court's one-person, one-vote jurisprudence, Michael McConnell argues that it was the "logic of the equal protection argument, and the need for judicially manageable standards," that "drove the Court to more and more radical insistence on precise mathematical equality." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 108 (2000). While I agree with McConnell that the Court has made a mistake by not thinking about these cases in more structural terms, *id.* at 108, I disagree with him to the extent that he claims that this flaw in the malapportionment cases is "entirely a product of conceptualizing this issue as one of equal protection." *Id.* at 114. As the analysis below suggests, had the Court adopted an adequate mediating theory, it could have come up with sensible limits to the equipopulation rule. *See infra* text accompanying notes 109–14.

99. Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) (emphasis added). Elsewhere in the opinion, however, the Court described equal population as an end unto itself, "the basic premise of the constitutional command." *Id.* at 533.

representation.' "[100] Population equality, not equal representation or a well-functioning political system, was thus termed "the paramount *objective* of [congressional] apportionment,"[101] "the basic premise" of the malapportionment doctrine,[102] and "a value in itself."[103]

As a result, it became difficult to offer a limiting principle for the equal population rule. The Court was unable to explain whether and when variations in populations would be acceptable.[104] That is unsurprising. If population equality is an end unto itself, one cannot argue that the broader democratic aims that the rule might have been designed to serve should limit the requirement's reach. Any other districting goal is destined to be classified as a "secondary objective[]."[105]

Because the Court lacked the means to discern a limiting principle for the rule it adopted, the Court was forced to make the unconvincing claim we see in *Karcher*—that anything but perfect numerical equality "would subtly erode the Constitution's ideal of equal representation."[106] The slippery slope argument discussed in *Karcher*—"if we accept [a 0.7% deviation as de minimis,] how are we to regard deviations of 0.8%, 0.95%, 1% or 1.1%?"[107]—could not be defeated. Similarly, the Court could not justify engaging in

100. Karcher v. Daggett, 462 U.S. 725, 730 (1983) (announcing that the standard for apportionment is " 'equal representation for equal numbers of people' "); *see also id.* at 731 ("[A]ny standard other than population equality ... would subtly erode the Constitution's ideal of equal representation."); *id.* at 732 (arguing that population deviations necessarily represented "something less than equality").

101. *Id.* at 732–33 (emphasis added); *see also* Brown v. Thomson, 462 U.S. 835, 842 (1983) (describing population equality as a districting "objective" rather than a means to an end).

102. *Karcher*, 462 U.S. at 732.

103. Bd. of Estimate of New York v. Morris, 489 U.S. 688, 698 (1989). At times Justice White's opinion for the Court in *Board of Estimate* hints at the notion that population equality represents a means to an end rather than an end unto itself, *see id.* at 693–94, but the opinion eventually returns to the assumption that population equality "is a value in itself" and declines to endorse any potential limits upon the equality mandate. *Id.* at 698.

104. This observation not only holds true for the mathematical rigidity of the Court's measure of inequality, but also its inability to explain which governmental structures should be governed by that rule. For an in-depth analysis of the Court's failure to give adequate consideration to the different models of democracy offered by local governmental structures in the malapportionment cases, see Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993).

105. *Karcher*, 462 U.S. at 739; *see also id.* (classifying political considerations as belonging "to the second level of judicial inquiry"); *id.* at 730–33 (classifying other redistricting goals as "secondary"); *Brown*, 462 U.S. at 842 (same).

106. *Karcher*, 462 U.S. at 731.

107. *Id.* at 732.

contextual, case-by-case assessments. It had little choice but to adhere rigidly to the mechanical rule.[108]

Had the Court adopted one of the intermediary theories outlined in Part I, a limiting principle would have been discernable. Under the lock-up theory, for example, population equality is a means for preventing one group from holding a disproportionate share of power. That theory would lead to a different definition of equality than *Karcher*'s, perhaps something resembling the standard articulated in the partisan gerrymandering cases.[109] It also would have allowed for exceptions to the rule, depending on the factual context.[110]

Similarly, if the expressive harm theory were the Court's mediating principle, we would end up with a less rigid rule than the one announced in *Karcher*. The premise of *Karcher* was that precise numerical equality was necessary because the state would take advantage of any opportunity to "discriminate" against disfavored citizens. Thus, if the Court allowed for a five percent deviation, the bad actor state would automatically adopt a five percent deviation,[111] and the Court wished "to open no avenue for subterfuge."[112] If the objective social meaning of the state's actions mattered, not its intent, the slippery slope argument employed in *Karcher* would not be available and some basis would exist for adopting a limiting principle for judicial intervention.

Finally, as noted above, if the Court adopted either the group-based animus approach or the qualitative representation theory, population equality would have been tolerated, even encouraged, to

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108. *See* Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL'Y 119, 127 (2000) (reaching a similar conclusion).

109. In order to establish partisan gerrymandering, one must show intentional and consistent degradation of voter influence when examined against the political process as a whole. Davis v. Bandemer, 478 U.S. 109, 132 (1986).

110. For example, the lock-up approach would have suspended the equal population requirement in a case like *Lucas*, in which malapportionment was approved under a statewide referendum with substantial majorities favoring malapportionment in every region. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 717–18 (1964); *supra* note 56. There seemed to have been little danger of lock-up in *Lucas*, as the majority was evidently capable of changing the rules that undermined its power but chose not to do so, presumably to vindicate other legitimate interests. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 10–15 (2d ed. 2001).

111. *See Karcher*, 462 U.S. at 731 ("If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality."); *see also* Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) (expressing similar concerns about the motives and strategies of state legislators).

112. *Kirkpatrick*, 394 U.S. at 535.

the extent it facilitated the effective aggregation of votes.[113] The former might examine this question using rough numerical proxies, akin to Section 2's proportionality approach.[114] The latter would consider the aggregative aspects of voting but would also require contextual assessments not only of the election process, but of what takes place after election day. Neither, however, would move toward the simplistic view of equality that underlies *Karcher*.

Here, then, is an unexpected consequence of a minimalist approach. Although minimalism is intended to avoid rigid rules,[115] it can sometimes have the perverse effects of encouraging them. If one thinks of the one-person, one-vote cases simply as lacking a mediating theory, then atheoretical decisionmaking deprives the Court of a mediating principle to justify a more flexible approach. If one thinks of these cases as embodying the narrowest theory capable of justifying the results in the Court's early decisions, then the Court lacks a sufficiently robust theory to adapt to the new doctrinal questions that inevitably arise in the wake of any ruling.

Karcher's rigidity thus calls into question whether Sunstein is right to pair two maximalist habits—"broad rules and abstract theories."[116] The absence of a sufficiently robust intermediary theory in the malapportionment cases pushed the Court toward a rigid *per se* rule for defining equality.[117] That *per se* rule, in turn, deprived the Court of the discretion to make nuanced judgments regarding application of the equality norm. The one-person, one-vote principle became a blunderbuss precisely because the Court lacked a sufficiently sophisticated normative theory to make contextual judgments about the health of the political process and to place sensible limits upon the reach of the one-person, one-vote principle. Minimalist theorizing, in short, helped ensure that the one-person,

113. *See supra* text accompanying notes 38–51.

114. *See* Johnson v. DeGrandy, 512 U.S. 997, 1000 (1994) (holding that no violation of § 2 can be found when "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters respective shares in the voting-age population").

115. SUNSTEIN, *supra* note 2, at 8–10.

116. *Id.* at 9.

117. As Sam Issacharoff has pointed out, "the logic of judicial review" also "pushed the equipopulation principle to the fore." Issacharoff, *supra* note 63, at 1651. As I have written elsewhere, *see* Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FLA. ST. U. L. REV. 407, 417–23 (2001), I agree with Issacharoff that bright-line rules—which create the appearance of neutrality and conceal the complex normative judgments embedded within them—are especially attractive to judges intervening in the messy world of political claims. *See* Issacharoff, *supra* note 63, at 1648–50.

one-vote cases would violate another tenet of minimalism—that courts should avoid rendering decisions that are "wide" in their application.[118]

In this respect, the one-person, one-vote cases offer an interesting perspective on the debate about administrability that has dominated voting-rights jurisprudence since the Court first set forth into the political thicket.[119] John Hart Ely famously quipped that "administrability is [the doctrine's] long suit, and the more troublesome question is what else it has to recommend it."[120] Surely the Court felt hard-pressed to develop an easily administered standard in implementing *Baker* given the questions raised by the *Baker* dissenters about the justiciability of the underlying claim and the courts' competence to resolve it.[121] The bright-line rule adopted by the Court provided an answer to critics who worried about undue judicial interference in the political process.

The one-person, one-vote cases at least call that assumption into question. To be sure, bright-line rules and mechanical proxies limit judicial discretion; they make it harder for judges to implement their own preferences when applying the law, a value we should not underestimate when judges get involved with the political process. But bright-line rules may also result in more *widespread* judicial interference in the political process than broad theories because only the latter offer grounds for discerning sensible limiting principles and making contextual judgments regarding application of the equality norm. Put differently, if *per se* rules limit judicial discretion, they limit courts' discretion *not* to intervene as much as they limit their ability to act. Conceivably, there might have been less judicial intervention in apportionment claims had the Court developed one or more of the theories discussed in Part I.

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I do not mean to suggest that theory is an all-purpose solution to judicial excess. A theory is useful in this respect only if it can be meaningfully linked to the concrete facts of a given case. Here,

118. SUNSTEIN, *supra* note 2, at 10.

119. For a discussion of the origins of that debate in *Colegrove v. Green* and *Baker v. Carr*, see *infra* text accompanying notes 207–24. I am indebted to Sam Issacharoff for raising this point.

120. ELY, supra note 33, at 121.

121. *See infra* text accompanying notes 208–09, 214; *see also* Issacharoff, *supra* note 63, at 1657–58 (arguing that *Karcher* exposed the shortcomings of the one-person, one-vote doctrine because the administrability of the doctrine became "the reason for the adamant preservation of the rule when the Court could no longer give it a functional justification").

Sunstein's concern with abstraction and vague philosophy[122] is especially well-taken. If the theories the Courts employs are so nebulous and vague that they provide no guidance to other courts, they are probably more harmful than bright-line, easily administered rules because they can license wide-ranging judicial intervention without offering meaningful principles to guide and cabin judicial discretion. That is precisely why courts, lawyers, and academics must develop sensible intermediary principles capable of translating broad abstractions like "equality" into the nitty-gritty details of judicial decisions.[123]

I also do not mean to suggest that each of the intermediary theories would have answered every question raised by the one-person, one-vote cases,[124] nor do I mean to suggest that the Court was confined to choosing one theory instead of a set of overlapping theories.[125] But an adequate intermediary theory at least would have provided a shared basis to start thinking about these questions and offered a compass for the Court to chart a more sensible doctrinal course. *Baker*'s progeny thus suggests that the minimalist strategy

122. *See supra* text accompanying notes 15–16.

123. *See supra* text accompanying notes 14–18.

124. For example, with the possible exception of the expressive harm principle, these theories do not immediately signal an answer to the question in *Burns v. Richardson*, 384 U.S. 73 (1966), in which the Court wrestled with the question whether registered voter data provided an appropriate baseline for measuring inequality. The Court has yet to specify what population data should be employed to measure a one-person, one-vote violation. *See* Chen v. City of Houston, 532 U.S. 1046, 1046 (2001) (Thomas, J., dissenting from denial of certiorari) (chastising the Court for failing to resolve whether legislatures must use total population or citizen voting-age population data in assessing malapportionment claims on the ground that "as long as we sustain the one-person, one-vote principle, we have an obligation to explain to the States and localities what it actually means"). One of the contributions to this Symposium provides an in-depth analysis of this question. *See* Levinson, *supra* note 6, at 1282. For other efforts to resolve this question by examining the underlying theory of the one-person, one-vote cases, see generally the debate between Judge Kozinski and the majority in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), and Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis To Form Political Districts*, 17 HARV. J.L. & PUB. POL'Y 521 (1994).

125. In calling for the Court to adopt a mediating principle, I do not mean to suggest that the Court needs to develop a single, unified theory of democracy of voting to resolve all cases. I suspect that a set of overlapping theories reflecting a wide range of democratic values may better serve the Court in adjudicating the many types of claims that arise in this context. In this sense, I agree with those scholars who argue that the Court should be cautious about enshrining a single, narrow theory of politics in the Constitution. *See* Charles, *supra* note 22, *passim*; Michael A. Fitts, *The Hazards of Legal Fine-Tuning*, 32 LOY. L.A. L. REV. 1121, 1123, 1134–35 (1999); Lowenstein, *supra* note 18, at 264. Lowenstein and I disagree, however, as to whether it would be useful for the Court to articulate and flesh out *any* theory or set of theories when it resolves cases involving democratic rights. *See supra* note 18.

sometimes has pragmatic costs that have not yet been identified elsewhere, all of which have led to the accusation that *Karcher*, drafted when the doctrine had matured for two decades, represents "the *Lochner* of the voting-rights field."[126]

III. THE CAUSES OF THE COURT'S MINIMALIST STRATEGY IN VOTING CASES

The failure to provide adequate mediating principles does not just plague the one-person, one-vote cases. As I have written elsewhere, the same trend can be identified in the context of Section 2, the most recent iteration of the *Shaw* line, and possibly *Bush v. Gore*.[127] In each of these instances, we see the same problems evident in *Karcher*: a circular description of the harm; an application of the guiding principle (often equality) with little reflection upon the normative premises underlying that principle or the ways in which different contexts might favor alternative definitions of equality; and a preference for mechanical rules and abstract pronouncements that enable a court to avoid—or, rather, mistakenly *think* it is avoiding—the difficult normative questions that an intermediary theory would help address.

The most interesting question is: Why? Given the potential institutional and doctrinal costs of minimalism, why does the Court so often follow this all-too-familiar path in voting-rights cases?

One answer is that these questions are hard.[128] Development of a mediating theory for defining equality in apportionment cases would require the Court to wrestle with difficult questions about the political process: Are the preferences of rural voters and urban voters different, and should the Court recognize this fact? To what extent ought a majoritarian system recognize minority voices? How does one gauge the social meaning of an apportionment plan? It is not surprising that members of the Court not only shy away from making these judgments,[129] but sometimes pride themselves upon their agnosticism toward democratic theory.[130]

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126. Pildes, *supra* note 108, at 127.

127. *See* Gerken, *supra* note 117, at 413–414.

128. *See* Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1725 (1993).

129. As Justice Frankfurter noted:

> Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergences among particular local groups,

This Part proposes an additional explanation for why the Court often relies on a minimalist approach in voting cases: the Court's discomfort with the unique nature of voting claims. Hard questions about the application of equality norms permeate equal protection law. Evaluating the message a particular action conveys, deciding how one "fairly" divides up social goods, and determining what constitutes invidious discrimination—these are all questions that must be resolved in most discrimination cases.

What makes voting-rights cases distinct is that they take place in the context of the political process. Because of the way that process works, groups—and the political structures through which their preferences are aggregated—matter. An individual's best chance of making her voice heard is by aggregating her vote with like-minded voters. Any framework that ignores these concerns misses a significant part of the story.[131]

For this reason, the most likely candidates for mediating theories in many voting cases are structural in nature. By "structural theory," I mean one designed to "regulate the institutional arrangements within which politics is conducted"[132] rather than to prevent

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communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, ... and a host of others.... *[T]hese are not factors that lend themselves to evaluations of a nature that are the staple of judicial determinations.*

Baker v. Carr, 369 U.S. 186, 323–24 (1962) (Frankfurter, J., dissenting) (emphasis added).

130. *See, e.g.*, Holder v. Hall, 512 U.S. 874, 893–94 (1994) (Thomas, J., concurring) (arguing that courts should not recognize a harm that requires "resort to political theory" and a "theory of the 'effective' vote"); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 748 (1964) (Stewart, J., dissenting) (criticizing the majority opinion because "it imports and forever freezes one theory of political thought into our Constitution"); Reynolds v. Sims, 377 U.S. 533, 590 (1964) (Harlan, J., dissenting) (accusing the Court of relying on "political ideology," not constitutional analysis); *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting) (warning against courts "choos[ing] among ... competing theories of political philosophy"). For a discussion of the Court's claims of agnosticism, see Gerken, *supra* note 117, at 414–415.

131. For a similar conclusion and a historical analysis of the relevance of groups to the Fifteenth Amendment, see Vikram D. Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998).

132. Karlan, *supra* note 21, at 1346; *see also* Issacharoff & Pildes, *supra* note 19, at 645 (contrasting "individualistic conceptions of harm" with "questions about the essential political structures of governance"); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999) (noting the movement in election law scholarship "away from a largely rights-based, individual-centered view of politics, to a more pragmatic and structural view of politics as a matter of institutional arrangements"). For a debate on whether it is appropriate for courts to adopt a structural approach to voting cases, compare Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1600–03 (1999) (arguing against a structural approach), and CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 168–211 (2001) (suggesting that the Court must

traditional individual harms. To be sure, individual rights can be derived from structural principles[133] and structural principles can be recast as individual rights.[134] But a structural theory addresses harms that are, at bottom, injuries to the polity; it is designed to produce a healthy, well-functioning democracy.[135] A structural theory thus departs from a conventional individual-rights framework, for an injury to the polity is often difficult to recast as a concrete injury, let alone a discrete individual harm.

Further, in the context of voting, a structural theory will usually embody some judgments regarding the means by which one institutional structure—the electoral system—aggregates votes. These judgments, in turn, will require decisions regarding how voters should be grouped. Thus, a structural theory for explaining what equality means in voting-rights cases will differ from an individual-rights approach in a *second* way. It will address the institutional treatment of groups of voters, regardless of how those groups are defined.

The malapportionment cases implicitly embrace this type of structural approach, with its focus on nondiscrete harms and group identity. It is therefore not surprising that the mediating theories identified in Part I are basically structural accounts of voting. Because the salience of political structures and group dynamics to these theories makes the Court uncomfortable, the Court has shied away from explicitly endorsing any of them, preferring instead to offer minimally theorized agreements that do not make these concerns explicit. While the Court purports to be applying a

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carefully define when it will intervene in cases involving "the structure of democratic institutions and processes"), *with* Pildes, *supra* note 75, at 1611–15 (supporting a structural approach). For an analysis of the relationship between structural analysis and individual rights outside of the voting-rights context, see Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

133. *See* Tribe, *supra* note 132, at 143–55 (describing the derivation of the individual right to travel from constitutional structure).

134. I argue that the Court has done so in the voting context. *See infra* text accompanying notes 188–95.

135. *See* Fredrick Shauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1814–16 (1999). Precisely for this reason some commentators argue that the Courts should not be making such judgments. *See, e.g.*, EISGRUBER, *supra* note 132, at 169–72 (arguing that courts are ill-adept at making "comprehensive judgments about the fairness of the political system as a whole"). This Article does not address these issues in depth because the Court has effectively resolved the question by venturing into the political thicket. Indeed, as I argue below, in adjudicating the malapportionment cases, the Court is necessarily making these types of judgments, whether or not it is well-equipped to do so. *See infra* Part III.B.

conventional individual-rights approach, however, its decisions necessarily incorporate judgments about political structures and groups. Minimalism, then, has allowed the Court to implement a structural approach without acknowledging that it has taken such a step.

Part III.A makes two points. First, many voting claims are inherently structural and demand attention to an individual's decision to affiliate along group lines. Second, the structural, group-based aspects of certain voting claims make it difficult to fit them within a conventional individual-rights framework. Part III.B links this problem to the issues discussed in Parts I and II: the Court's failure to adopt an adequate intermediary theory in the wake of *Baker*. It argues that, despite their seemingly individualistic underpinnings, one-person, one-vote claims hinge upon assumptions about how the political system should aggregate group preferences. This Part therefore posits that the Court's failure to adopt an appropriate intermediary theory stems, at least in part, from the Court's discomfort with the structural and group-based underpinnings of malapportionment claims. Part III.C buttresses this causal claim by offering concrete examples of the Court's discomfort with the structural, group-based aspects of one-person, one-vote claims and by identifying the strategies the Court has adopted to avoid dealing with these concerns. This Article concludes by speculating that these avoidance strategies reflect the Court's deep-seated concerns about its competence to make structural judgments about the political process and its fear of exercising power without the types of constraints it has developed in dealing with conventional individual rights.

A. Structural Claims Do Not Fit Easily Within a Conventional Individual Rights Framework

1. The Salience of Groups and Political Structures to Voting Claims

One of the primary difficulties the Court has encountered in fleshing out what equality means in the voting-rights context is that a structural approach is needed for a full understanding of equal protection. Because much of an individual's political power hinges upon her ability to aggregate her vote with like-minded voters, a strictly individual-rights approach—which focuses entirely upon the treatment of a single person—captures just a subset of the

discrimination that can take place.[136] In the context of race, for example, it is not enough to guarantee every racial minority the right to cast a ballot that is counted. That is because, when members of racial groups vote differently, a state can disempower racial minorities through the careful drawing of district lines—scattering or packing members of a group so they cannot aggregate their votes effectively. Accordingly, even when all individuals have equal access to the polls, a state can "dilute" the vote of racial minorities by manipulating the structures through which those votes are aggregated.[137] Thus, as long as we agree that equality means that fifty-one percent of the people should not decide things one hundred percent of the time,[138] equal protection requires us to worry about vote dilution.

Recognition of an aggregative harm like dilution requires attention not only to political structures, but a sensitivity to the role groups play within them. Dilution cannot take place unless groups—however they are defined—vote differently.[139] If, for example, whites and African Americans prefer the same candidates and policies, we would not worry about dilution.

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136. Jonathan Still classifies this anemic view of equality as "universal equal suffrage"—which he describes as " 'one person, one vote' in a literal sense"—and the "equal shares" theory, which means that "each person's share" of representation "is the number of legislators divided by the total number of voters." Still, *supra* note 19, at 378–79. As Still explains, neither view "relates the votes that are cast to the outcome of the election," a fact that makes it a "peculiar . . . criterion for determining the presence or absence of political equality" because it does not take into account whether "all votes have the same impact on the outcome of the election." *Id.* at 379; *see also* Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 210, 218 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) (making a similar argument); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 266–67 (1985) (same).

137. *See* Gerken, *supra* note 39, at 1671–73.

138. As Michael Klarman has observed, "majority rule can take a variety of forms—including, specifically, for present purposes, a majority's enjoying all of the political power or simply a majority of it." Klarman, *supra* note 33, at 525.

139. If voting is not polarized, then a member of a given group of voters cannot claim dilution because no one is consistently voting against her preferences. In the absence of polarized voting, such a voter is no different from a person whose last name begins with a "G." She may be an electoral minority, but there is no danger that people with last names beginning with other letters of the alphabet will take advantage of their numbers and consistently outvote her preferences.

2. Structural Claims Do Not Function Like Conventional Individual Rights Claims

As I have explored in greater detail elsewhere, the salience of political structures and groups to voting claims makes it difficult to fit them into a conventional individual rights framework.[140] That is because an equal protection claim challenging how votes are aggregated necessarily hinges upon the treatment of other group members (whether "group" is defined by geography, race, political affiliation, or some other criterion).[141] No individual can claim that her vote has been diluted unless other members of her group have been treated unfairly. In this sense, dilution claims resemble segregation claims; one cannot tell whether an individual has been segregated unless one knows whether other members of her group have been distributed fairly through the challenged school system or housing program.[142]

For this reason, while in the usual discrimination case one looks to the individual to assess whether she has been harmed, one cannot do so in assessing an aggregation claim like dilution. At least in the context of a territorial-based, winner-take-all system, some voters are always "harmed" in the sense that they cannot elect a candidate of choice, so looking to the treatment of an individual voter tells us little. Instead, the key to evaluating fairness in districting is deciding whether that voter's inability to aggregate her vote effectively is due to the distributional effects inherent in any winner-take-all, territorial-based districting scheme (where some members of every group are unable to elect a candidate of choice) or a skew against members of her group.[143] *That* question can be evaluated only by examining the treatment of the group as a whole.[144] If the group as a whole can aggregate its votes as effectively as any other group, there is no skew, and the individual voter cannot raise an aggregation claim. If the group as a whole cannot aggregate its vote effectively, then an individual voter—arguably even an individual voter who can elect a candidate of choice in her own district[145]—may bring a claim of dilution. Thus, in contrast to conventional individual claims, a

140. *See generally* Gerken, *supra* note 39 (arguing that vote dilution claims present a special type of injury, one more suited to an aggregate rights approach than a conventional individual rights approach).

141. *See id.* at 1681–89.

142. *See id.* at 1684.

143. *See id.* 1683–86.

144. *Id.*

145. *Id.* at 1683–86, 1725–26.

structural challenge requires an examination of the districting plan as a whole, not the treatment of individual voters.

This type of structural analysis of equality also tolerates, even encourages, trade-offs in the political process that would be unthinkable in a conventional individual-rights scheme.[146] For example, we do not worry when a group member in one district is unable to elect her candidate of choice if members of the group as a whole can aggregate their votes effectively.[147] Indeed, under a structural approach, we would expect legislators deliberately to inflict this "harm" on individuals—intentionally place some voters in a district knowing that they will be consistently outvoted[148]—in order to help members of a different group aggregate their votes more effectively, thereby achieving a fair result overall. Thus, individual harms are disregarded in the name of group treatment in a way that is hard to reconcile with conventional notions of individual rights.[149]

Because of the unusual nature of claims challenging the structures by which votes are aggregated, the bread-and-butter doctrines of a conventional individual-rights framework—standing, class definition, remedy—are difficult to apply. For example, in a jurisprudence that incorporates a structural definition of equality, individual standing hinges upon the treatment of other group members. Further, the harm that falls on the individual is

146. *See id.* at 1703–11.

147. Justice Blackmun acknowledged this dilemma indirectly when he warned that the Court's one-person, one-vote jurisprudence tended to ignore the fact that:

> [d]etails of districting are interrelated and it is not helpful to look at isolated aspects of a statewide apportionment plan in order to determine whether a racial or other improperly motivated gerrymander has taken place. Districts that favor a minority group in one part of the State may be counterbalanced by favorable districts elsewhere.

Connor v. Finch, 431 U.S. 407, 427 (1977) (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 428 (Blackmun, J., concurring in part and concurring in the judgment) (stating that "piecemeal review of an apportionment plan may well be misleading" when disparate effect is the only claim).

148. Two scholars have termed such individuals "filler people" and speculated that these are the victims of the *Shaw* injury. *See* Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588, 601 (1993).

149. *See* Gerken, *supra* note 39, at 1717–43. Sandy Levinson takes a different view, arguing that proportional representation measures are actually a manifestation of a strong view of individual rights, and asserting that only "structural concerns" can limit this principle. *See* Levinson, *supra* note 136, at 271–76.

undifferentiated among members of the group.[150] Both notions are arguably in tension with conventional standing doctrine.[151]

Moreover, because the key to the injury is effective aggregation, a court might well reach the counterintuitive conclusion that the class of voters injured in a case involving aggregation should include individuals who are able to elect a candidate of choice in their own district—people who seem to suffer no concrete injury.[152] After all, if members of their group cannot aggregate their votes effectively, then the representative elected by this subset of the class will not have as many allies as she otherwise would in working to achieve the group's substantive agenda. These voters therefore cannot aggregate their voting power effectively at the legislative level, even if they can elect their candidate of choice within their own district.[153]

The remedy in aggregation cases is similarly hard to square with our traditional view of individual rights. For example, the remedy in a racial vote-dilution case—the redrawing of district lines—will never ensure that every racial minority lives in a district where she is capable of electing a candidate of choice. Instead, some of the voters whose injuries are "remedied" will remain in districts where they are consistently outvoted.[154]

Finally, as noted above, these types of structural harms depend, in large part, on assessing whether an individual can aggregate her vote with like-minded voters. Recognition of the link between group membership and individual preferences, however, is difficult to reconcile with the antiessentialism principle, which posits that courts should not make assumptions about an individual's preferences based on her group identity.[155] This principle, which is closely linked to individualist tenets, raises questions about the natural outgrowths of a structural approach to voting: the classification of individuals based on group affiliation rather than individual voting patterns, and the deliberate placement of individuals in districts where they cannot

150. *See* Gerken, *supra* note 39, at 1687–89.

151. Pam Karlan has also argued that current voting doctrine is difficult to square with traditional standing analysis, although she gets there via a different analytical route. She argues that because the Court has chosen "the atomized individual as the building block for legislative districting[,] .... [V]irtually *every* apportionment produces some legally cognizable injury to a virtually limitless class of plaintiffs." Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1718–19 (1999).

152. *See id.* at 1721–24.

153. *See id.*

154. *See id.* at 1714–24.

155. *See* Aleinikoff & Issacharoff, *supra* note 148, at 615. *See generally* Bernard Williams, *The Idea of Equality*, *in* MORAL CONCEPTS 153 (Joel Feinberg ed., 1969) (offering a general defense of the antiessentialism principle).

elect a candidate of choice in order to achieve a fair distribution of power among groups.[156]

B. *The Court's Failure To Adopt an Intermediary Theory For Malapportionment Claims*

1. One-Person, One-Vote Claims as Structural Claims

Here, then, is one possible explanation for the Court's failure to adopt an adequate intermediary theory in the one-person, one-vote cases. Malapportionment claims are structural claims.[157] Like other types of dilution claims, they arise when all voters have equal access to the ballot but the political system is structured in such a way as to prevent the effective aggregation of certain votes.[158] While we might care about malapportioned districts for reasons other than aggregation,[159] we *must* consider the possibility that population disparities will be used to dilute votes, an injury that can be measured only in the aggregate. In the words of Justice Powell,

> [g]ross population disparities violate the mandate of equal representation by denying voters residing in heavily populated districts, *as a group*, the opportunity to elect the number of representatives to which their voting strength otherwise would entitle them. While population disparities do dilute the weight of individual votes, *their discriminatory effect is felt only when those individual votes are combined.*[160]

Malapportionment claims thus bear all of the hallmarks of structural claims. For example, an individual's injury in a malapportionment case hinges upon the treatment of other people—those who reside in her district.[161] A voter is injured by

156. For the Court, concerns about essentialization are particularly more acute for aggregation claims involving race. *See* Gerken, *supra* note 39, at 1727–35; Karlan & Levinson, *supra* note 19, at 1216–20.

157. *See* Issacharoff, *supra* note 63, at 1644–45 (discussing the problem of diluting minority votes through multimember election systems).

158. Gerken, *supra* note 39, at 1737; *see also* Barbara Y. Philips, *Reconsidering* Reynolds v. Sims: *The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 HOW. L.J. 561, 567 (1995) (drawing a similar conclusion).

159. For example, we might be concerned on expressive harm grounds. *See supra* text accompanying notes 52–55.

160. Davis v. Bandemer, 478 U.S. 109, 167 (Powell, J., concurring in part and dissenting in part) (second emphasis added); *see also* Amar & Brownstein, *supra* note 131, at 972–76 (tracing the group-based aspects of the one-person, one-vote claims); Richard Briffault, *Race and Representation After* Miller v. Johnson, 1995 U. CHI. LEGAL F. 23, 27–30, 60–63 (discussing the vote dilution doctrine).

161. Gerken, *supra* note 39, at 1737–38.

malapportionment whenever she cannot aggregate her voting power effectively at the legislative level, even if she is able to elect a candidate of choice in her own district.[162] Conversely, a voter residing in a districting scheme with equal district populations—where all members of her group have been treated fairly—cannot claim injury even if the voter herself cannot elect a candidate of choice. That is because, as with other aggregation claims, proof of injury requires a showing of skew against members of the group (defined here as residents of the district in question). Finally, the remedy for one-person, one-vote claims—equalizing population—will not guarantee any individual voter the ability to elect a candidate of choice, yet every voter's injury is deemed "remedied" by the new districting scheme. That is because courts determine fairness not by examining the state's treatment of a particular voter, but by examining whether the districting scheme, overall, fairly distributes political power among residents of different districts.

Further, as with other types of dilution claims, group identification matters in malapportionment cases. The only relevant difference between one-person, one-vote claims and traditional dilution claims is that groups are defined along geographic rather than racial lines. But the voter's injury is nonetheless evaluated based on her group identity (here, membership in a geographically defined group), not her individual voting preferences, thereby running us into the essentialization dilemma identified above.[163]

2. Counterargument

One might respond to these arguments by asserting that the Court could and did resolve one-person, one-vote claims without adopting a structural account of voting. On this view, while the Court could have adopted a structural approach that took aggregation into account, it chose instead a purely individualist model of voting rights to resolve malapportionment claims and thereby ducked all of the problems associated with adopting a structural approach.[164]

What this response fails to consider is that, at least as the doctrine currently stands, one-person, one-vote cases are necessarily premised on a theory of aggregation, whether or not the Court chooses to acknowledge this fact. One person, one vote rests upon

162. *See* Karlan, *supra* note 128, at 1717 (offering the same analysis in defining the harm in malapportionment cases). It should be noted, however, that Karlan classifies this claim as a "governance claim" rather an "aggregation claim." *Id.* at 1717–18.

163. *See supra* text accompanying notes 155–56.

164. I am grateful to Bill Stuntz for bringing this argument to my attention.

the assumption that territorial-based districting represents a constitutionally acceptable means of districting.[165] A territorial-based scheme, however, necessarily incorporates a structural theory regarding the way votes should be aggregated. When a state chooses to employ territorial-based districting, it rejects the notion that an equally weighted vote for every individual is all that matters. Such a scheme is premised on the view that a system in which fifty-one percent of the people win all of the time is not the embodiment of "equality."[166] The state therefore systematically undervalues the weight of some individual votes—those who make up the fifty-one percent majority and could therefore control all elections under a popular vote or in a system of random districting—and overvalues the votes of others by ensuring their effective aggregation.[167] Indeed, single-member districts were first employed to facilitate the aggregation of minority votes during the first half of the nineteenth century,[168] and this goal remains a fundamental principle guiding redistricting today.[169] The goal of a territorial-based scheme is "equality," but it is equality defined in structural terms—fair treatment of all groups, including electoral minorities—rather than equality defined in purely individualist terms.

If the one-person, one-vote rule were designed to vindicate a purely individualist definition of equality, it would forbid the use of single-member districts and mandate a system in which every individual vote is counted in the same way. That is precisely why Justice Stewart had trouble figuring out "why the Court's constitutional rule does not require the abolition of districts and the

165. *See* Holder v. Hall, 512 U.S. 874, 909 (1994) (Thomas, J., dissenting) ("[T]he decision to rely on single-member geographic districts as a mechanism for conducting elections is merely a political choice.").

166. *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 756–57 (1964) (Stewart, J., dissenting) (emphasizing the need to ensure adequate representation of electoral minorities to avoid the danger that legislators will ignore them entirely and thus their votes will be "diluted" in a meaningful sense); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1634 n.172 (1993) (arguing that semiproportional voting systems represent groups and individuals better than winner-take-all systems); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1483 n.251 (1991) (proposing that the baseline for measuring fairness is proportionality, not winner-take-all).

167. As Richard Pildes has explained, "the very theory of districted elections . . . is that democratic institutions are best designed by . . . fragmenting majoritarian domination. Districted elections empower local minorities who would otherwise be swallowed up in a system not self-consciously designed to ensure some representation of their interests." Pildes, *supra* note 108, at 124.

168. *Id.* at 126–28.

169. Gerken, *supra* note 39, at 1680–81.

holding of all elections at large."[170] For these reasons, the one-person, one-vote principle—even when articulated in the anodyne terms of *Karcher*—necessarily embodies assumptions about the way political structures should aggregate votes.[171]

Finally, to reconcile the one-person, one-vote claims with a subsidiary aspect of a conventional individualist approach—the Court's antiessentialism principle—one might argue that geography is a neutral means of grouping voters, one that does not require redistricters to make assumptions about individuals' identities based upon their group membership. The problem with this argument is that, whether or not geography is a better criterion for grouping voters than race, socio-economic status, or political affiliation, the choice to adopt a territorial-based scheme for aggregating votes nonetheless reflects a judgment about which group affiliations matter, as James Gardner's contribution to this Symposium makes clear.[172] Legislators do not district along territorial lines by chance; they assume that individuals who live in the same area will share similar interests. Indeed, not only do redistricters assume that geography helps define certain types of group affiliations, but they often employ it as a proxy for *other* types of group affiliations. For example, the post-Founding generation adopted a territorial-based scheme to

170. *Lucas*, 377 U.S. at 751 (Stewart, J., dissenting).

171. One might respond that a system of territorial-based districting can be designed in purely individualist terms. On this view, territorial-based districting is preferable to at-large voting because it makes representation more manageable by ensuring that each representative has a smaller group of individuals to service. While this argument works in theory, it is inconsistent with the historical origins of the practice as well as the way that districting is conducted today. Moreover, even if this were the normative justification for territorial-based districting, such a system would still have structural effects. That is because, unless voters are distributed randomly throughout the state, any districting plan will systematically underweight or overweight the votes of some types of voters. The only way to avoid this group-based skew would be postcard districting (creating districts through the random distribution of voters rather than geography).

172. *See* James Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237 *passim* (2002). Gardner's essay also highlights a point this Article neglects: while one person, one vote accepted territorial-based identities to *some* extent, the doctrine also sets limits upon how much regional identities should matter. *Id.* at 1241–42. Thus, Gardner explains that the Court's refusal to adopt a one-community, one-vote approach moved us away from a territorial-based community identity toward a more national, individualistic conception of political identity. *Id.* Richard Ford's work has pushed these questions in a different direction by demonstrating that geography itself is not a neutral concept but is intimately connected to issues of race. *See generally* Richard T. Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997) (contrasting the constitutional treatment of territorial defined political subdivisions); Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (arguing that "political spaces" are often racially identified).

accommodate *economic* groups that would have been shut out of the political process in an at-large system.[173] Territorial-based districting itself, then, presumes "acceptance of the idea of legislative representation of regional needs and interests."[174]

3. The Court's Rejection of Intermediary Theories That Are Premised on a Structural Approach

If one accepts the view that one-person, one-vote claims are structural claims requiring sensitivity to group preferences, this view goes a long way toward explaining the Court's failure to adopt one of the intermediary theories described above. After all, any sensible theory for explaining how to apply the equality norm in the context of malapportionment would likely make explicit the structural premises underlying the doctrine.

For example, three of the most obvious candidates available to the Court in the immediate wake of *Baker*—the lock-up approach, the group-based animus approach, and the qualitative representation theory—are structural in nature. They are premised on the assumption, articulated by Justice Stewart, that "[r]epresentative government is a process of accommodating group interests through democratic institutional arrangements."[175] These theories are largely concerned with the structures by which preferences are aggregated, not the treatment of individual voters. They are all premised on the assumption that groups—here, geographically defined groups—matter in the context of voting. And they would allow—even encourage—the type of trade-offs between groups and individuals that would raise eyebrows in the context of conventional individual rights.[176] For these reasons, adoption of any such theory likely would force the Court to acknowledge the inherent tension between the one-person, one-vote injury and the conventional approaches to standing, remedies, class, and essentialism that have long been associated with an individual-rights framework.[177]

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173. Pildes, *supra* note 108, at 123–24.

174. *Lucas*, 377 U.S. at 750 (Stewart, J., dissenting).

175. *Id.* at 749 (Stewart, J., dissenting); *see also id.* at 751 (Stewart, J., dissenting) ("[T]hroughout our history the apportionments of State Legislatures have reflected the strongly felt American tradition that the public interest is composed of many diverse interests, and that in the long run it can be better expressed by a medley of component voices than by the majority's monolithic command.").

176. *See supra* text accompanying notes 146–49.

177. *See supra* Part III.A.2. The qualitative representation theory would be structural in an additional sense. Because it promotes equality by guaranteeing adequate representation to all individuals, it would look not just to the structure through which

While the expressive harm approach[178] is not "structural" in the same sense as the other three theories described in Part I, it nonetheless retains certain structural features that place it in tension with a conventional individual-rights analysis.[179] As with the aggregation theories outlined above, an expressive harm inquiry does not focus on individual injury; rather, it is concerned with the broader social meaning of the choices the state makes in organizing itself.[180] In that sense, the expressive harm manifests itself in the aggregate; it is what Justice Frankfurter would term "a wrong suffered by [the state] as a polity."[181]

Because the expressive harm is, in this loose sense, structural, it is difficult to identify the concrete injury an expressive message inflicts upon an individual. The harm is either too nebulous to be captured in conventional legal terms or undifferentiated among members of the group or the polity as a whole. In the aggregate, however, the harm is more readily identifiable and arguably more concrete. For example, while it is difficult to explain why an individual voter feels "that much less a citizen" when she learns that she lives in an overpopulated district, it is easier to accept the possibility that consistent malapportionment will gradually erode public confidence in the political system and representative government.[182] Indeed, as Roy Schotland has argued in this Symposium and as Judge Abner Mikva has asserted elsewhere,

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votes are aggregated, but to the structures mediating the relationship between constituents and their representatives. It would, in effect, examine the democratic process with a wide angle lens, looking to any structural defect that inhibited the development of a robust, interactive relationship between voters and those who represent them.

178. *See supra* text accompanying notes 52–55.

179. *See* Gerken, *supra* note 39, at 1739–40.

180. *See* Richard H. Pildes, *Is Voting Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. (forthcoming 2002).

181. Colegrove v. Green, 328 U.S. 549, 552 (1946).

182. *Cf.* Pildes, *supra* note 108, at 134–36 (explaining how expressive harms relate to broader concerns about the proper functioning of government). In this sense, the harm in malapportionment cases resembles the injury in those due process cases in which the failure to provide adequate process did not change the ultimate result. As *Carey v. Piphus*, 435 U.S. 247 (1978), makes clear, it is often difficult to explain how an individual has been concretely harmed by the failure to accord her adequate process where the end result would have been the same. Nonetheless, the Court has awarded nominal damages even when a conventional individual harm cannot be established on the ground that "the law recognizes the importance to organized society that those rights be scrupulously observed." *Id.* at 266. Put another way, while the due process injury to the individual may be difficult to discern, one can envision the long-term harm to society that may occur when due process is consistently ignored.

before *Baker* malapportionment severely undermined the legitimacy and vigor of state government in the eyes of many Americans.[183]

If this analysis is correct, then an expressive harm approach would be no more attractive to the Court than the other alternatives sketched out above. It retains a focus on broad structural concerns rather than conventional individual injury. As with those theories, injury can be identified only in the aggregate, and the harm is neither concrete nor discrete. An expressive harm approach thus departs from a conventional individual-rights framework in many of the same ways as the three aggregation theories identified above.

In sum, many, if not all, of the likely mediating principles for applying the equality norm to malapportionment claims embody a structural approach. These approaches were thus precisely the types of mid-level intermediary theories that the Court, deeply enmeshed in the tradition of individual rights, was least likely to adopt.[184]

C. The Court's Reluctance To Adopt a Structural Approach

1. Evidence of the Court's Discomfort with a Structural Approach

One need not rely solely on the fact that the intermediary theories described above are in tension with a conventional individual-rights approach to conclude that their structural underpinnings have deterred the Court from embracing them. Quite a bit of evidence in the Supreme Court's malapportionment cases supports this causal link, much of which I have already touched upon. For example, the Court's resort to abstraction and vague individualist principles in describing the one-person, one-vote injury provides an obvious example of its discomfort with a structural approach. Each time the Court is confronted with an effort to cast malapportionment claims in structural terms, it either explicitly rejects the argument as inconsistent with individualist principles[185] or defines the right so abstractly that it effectively avoids dealing with such arguments.[186]

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183. Roy Schotland, *The Limits of Being "Present at the Creation,"* 80 N.C. L. REV. 1505, 1512 n.26 (2002) (discussing Judge Abner Mikva's comments).

184. *See* Issacharoff & Pildes, *supra* note 19, at 644–48.

185. In *Chapman v. Meier*, 420 U.S. 1, 24 (1975), for example, the Court insisted that "citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group," fending off efforts to link one person, one vote to a theory of vote aggregation without reflecting on the possibility that geography, like race, represented a basis for forming a group identity. Similarly, in *Karcher v. Daggett*, 462 U.S. 725, 752 (1983), the Court insisted that malapportionment claims are conventional individual rights claims because "[a] voter may challenge an apportionment scheme on the ground that it gives his vote less weight than that of other voters; for that purpose, it does

not matter whether the plaintiff is combined with or separated from others who might share his group affiliation." To make clear the true source of its discomfort with this effort to link malapportionment claims to an aggregation theory, the Court emphasized that *Baker* and its progeny protected "individuals" and affected "groups only indirectly at best." *Id.* That theme was echoed by Justice O'Connor, and then-Justice Rehnquist in *Davis v. Bandemer*, 478 U.S. 109, 149 (1986) (O'Connor, J., concurring), in which they distinguished one-person, one-vote claims from partisan gerrymandering claims on the ground that "[t]he right asserted in *Baker v. Carr* was an individual right to a vote," whereas the "rights asserted in this case are *group* rights to an equal share of political power and representation."

The Court's antiessentialist impulses—also closely linked to its preference for an individualist approach—have also come to the fore in the malapportionment cases. The most famous example is Justice Warren's aphorism that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." Reynolds v. Sims, 377 U.S. 533, 562 (1964); *see also id.* at 579–80 ("[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes."); Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964) ("Our Constitution leaves no room for classification of people . . . .").

186. Consider again the Court's response in *Board of Estimate of New York v. Morris*, 489 U.S. 688 (1989), to the Banzhaf test as a means for gauging whether a voter can aggregate her vote effectively. The Court responded to this structural theory, which was explicitly premised on assumptions about the importance of effective aggregation at the legislative level, by invoking the language of individualism. Instead of debating whether the equipopulation rule chosen by the Court better addressed the problem of aggregation than Banzhaf's approach, the Court simply rejected his test on the ground that "[t]he personal right to vote" is "a value in itself," and population inequalities "shortchange[]" the individual. *Id.* at 698. Similarly, later in the opinion, the Court rejected an expert witness's testimony, which focused on the political power enjoyed by geographically aligned groups (that is, the power enjoyed by each borough representative), because his argument was "inconsistent with our insistence that equal protection analysis in this context focuses on representation of people, not political or economic interests." *Id.* at 699 n.5.

Reynolds v. Sims, 377 U.S. 533 (1964), provides another example of the Court's reliance on individualist rhetoric to avoid making explicit the structural judgments underlying one person, one vote. *See* Issacharoff, *supra* note 63, at 1652 (terming the *Reynolds* Court's effort to "treat[] the one-person, one-vote rule as . . . the definition of equal individual rights in the political arena" a mistake because it "obscured [the] critical point" that individuals would also "claim[] rights to effective use of the franchise based on group identities"). In *Reynolds*, the Court was forced to concede that the malapportionment cases might require a court to "restructur[e] . . . the geographical distribution of seats in a state legislature." *Reynolds*, 377 U.S. at 561. It buried that concession about the structural nature of the remedy within a lengthy tribute to the individualist underpinnings of the right impaired. Thus, the Court wrote, a malapportionment claim " 'involves one of the basic civil rights of man,' " a right that is "individual and personal in nature." *Id.* at 561–62 (quoting Skinner v. Oklahoma, 516 U.S. 535, 536 (1942)).

Similarly, in *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964), when the Court was squarely presented with a defense based on the lock-up theory, the Court immediately reverted to abstraction and individualist rhetoric. Despite evidence that a majority of Colorado's citizens had voted to grant minority voters greater voice in the legislature, the *Lucas* Court declined to stay its hand because "individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a

Similarly, the Court's preference for a rigid, mechanical rule in applying the one-person, one-vote doctrine has helped it avoid—or, rather, *think* it is avoiding—the normative landmines at stake.[187] The Court often employs rough proxies to adjudicate voting cases, and rightfully so. But usually the Court develops the normative premises behind the rough proxy before announcing it. In the malapportionment cases, in contrast, the Court has offered little explanation to justify the proxy it has chosen. Yet despite the absence of a strong normative foundation, the mechanical test plays a more prominent role in malapportionment cases than any similar test in the context of voting. Its rigid application constitutes the bulk of the Court's analysis in every case, even in instances when the doctrinal question presented demands a return to the test's normative underpinnings to assess whether its application is warranted. The Court thereby avoids articulating the mediating principle it is employing and thus avoids explicitly discussing its structural underpinnings.

Interestingly, yet another common avoidance strategy employed by the Court is to import structural principles about how votes should be aggregated, *sub silentio*, into an individual-rights framework.[188]

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nonjudicial remedy." *Id.* at 736. In order to emphasize the individualist underpinnings of the one-person, one-vote claim, the Court relied upon a classic individual-rights case—a decision involving a challenge to a flag-saluting requirement—for the proposition that " '[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' " *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

187. *Karcher v. Daggett*, 462 U.S. 725 (1983), provides a good example of how this avoidance strategy works in practice. At first glance, the opinion in *Karcher* seems straightforward. The Court begins its legal analysis by announcing that "equal representation" means "equal numbers of people," *Id.* at 730 (internal citations omitted), and the bulk of the case is devoted to a rote application of that rule. Yet the doctrinal question presented in *Karcher* was whether the facts of that case justified a departure from the mechanical rule. To make that assessment in the usual case, the Court would articulate the normative premises of the rule and evaluate whether they held true in the case before it. *Karcher* did not.

188. *See* Issacharoff & Pildes, *supra* note 19, at 645 (noting the courts' "awkward attempts to fold difficult questions of democratic politics and judicial review into the conventional regime of rights-based constitutional and statutory law"); Pildes, *supra* note 75, at 1606 (offering other examples of judicial attempts to "assimilate[]" structural claims "into the pre-existing structure of conventional constitutional rights adjudication"). Lani Guinier and Pam Karlan have argued that Justice Brennan was self-consciously importing structural concerns into the one-person, one-vote cases. They conclude that "[a]lthough the Justice spoke in the language of individual and personal rights, his ultimate goal was a political system in which voters enjoyed equal opportunities to share political power by participating fully in the political process broadly understood." Guinier & Karlan, *supra* note 136, at 214.

The one-person, one-vote claims provide a good example of this strategy, as do vote dilution claims and certain jury discrimination claims. All of these claims are best understood as importing certain assumptions about how the democratic process should function into an individual-rights framework.[189]

When the Court attempts to import structural concerns into an individual-rights framework, we end up with a hybrid right, which I have elsewhere termed an "aggregate right."[190] An aggregate right bears some resemblance to a conventional individual right. For example, it is often possible to recast the structural harm in concrete terms and to identify a discrete set of individuals injured by violation of the structural principle in question. Nonetheless, because the injury remains, at bottom, a structural harm, an aggregate right cannot be fully reconciled with conventional approaches to standing, class certification, and remedies. Thus, for these hybrid rights we may see the Court measuring individual injury and assessing remedies in group terms—doctrinal strategies that are inconsistent with a conventional individualist approach but represent perfectly sensible strategies for a structural approach.[191]

Aggregate rights, then, are a compromise of sorts. They represent an effort to take into account structural assumptions about the aggregation of votes without abandoning the trappings of an individual-rights framework. But, like all compromises, they are unsatisfying. The individual-rights focus may get in the way of fully vindicating the structural principle justifying recognition of the

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Outside of the voting context, Laurence Tribe has described the right to travel in similar terms, noting that this individual right imports structural assumptions regarding "how the federal system matches people with territorially-based state jurisdictions and of how the political community to which each state government must account is determined." Tribe, *supra* note 132, at 143. According to Tribe,

> the right to travel ... was a convenient way to describe more than simply a personal right not to be treated as an enemy in the states through which the traveler passed, but a structural norm about the limits of what states could threaten to withhold from those of their citizens who chose to exit, or from those citizens of their sister states who chose to enter.

Id. at 147–49; *see also id.* at 154–55 (stating that *Saenz* "involved the elaboration of a structural principle of equal citizenship more than the protection of an individual right of interstate movement").

189. *See* Gerken, *supra* note 39, at 1727 (suggesting that the structural underpinnings of dilution claims help explain the Court's inability to squeeze them into a conventional individual-rights framework); Heather K. Gerken, *Juries as Democratic Institutions* (forthcoming 2002) (making a similar argument regarding jury discrimination claims).

190. *See* Gerken, *supra* note 39, at 1667.

191. *Id.* at 1689–91.

harm.[192] And the rights in question function differently in important ways from conventional individual rights and therefore cannot be squeezed into the Court's traditional doctrinal frameworks.[193]

What is most interesting about aggregate rights for these purposes, however, is the fact that the Court does not acknowledge the crucial differences between aggregate rights and conventional individual rights. As shown above, the Court has explicitly declined to do so in the malapportionment cases,[194] and it has similarly refused to do so in the context of vote-dilution claims, even when squarely presented with evidence of the tension between the two approaches.[195] These cases suggest that the Court is both hostile to structural arguments and clings to the security afforded by a conventional individual-rights approach.

It is interesting to consider how the *Shaw* doctrine fits with this general trend. At least in the early days of *Shaw*, some of the *Shaw* majority's members explicitly endorsed an expressive harm theory.[196] Moreover, as Pam Karlan has argued,[197] *Shaw* and its progeny vindicate a claim that is structural in roughly the same sense that expressive harms are structural;[198] rather than dealing with conventional individual harms, these cases are preoccupied with "our system of representative democracy."[199] Perhaps we should view *Shaw* as an indication that the Court stands ready to embrace a structural approach in voting.

This conclusion is undermined by what the Court has done since these early flirtations with a structural approach. First, the Court never acknowledged the structural nature of the injury, even while embracing the expressive harm theory. To the contrary, the Court attempted to apply the expressive harm doctrine as if it concerned a traditional individual harm. For example, the Court has tried to limit standing to assert *Shaw* claims to a discrete set of individuals even

192. *See* Pildes, *supra* note 75, at 1606 (arguing that the Court's conventional approach "inappropriately atomizes or disaggregates the issues at stake in 'political rights' cases").

193. *See* Gerken, *supra* note 39, at 1717–21 (discussing the relationship between individual rights and aggregate rights in the voting context); *see also* Issacharoff & Pildes, *supra* note 19, at 645 (describing the "unsatisfying discourse about individual entitlements and the quality of counterpoised state interests" in voting rights).

194. *See supra* Part III.C.

195. *See* Gerken, *supra* note 39, at 1689–743.

196. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 980–81 (1996) (plurality opinion); Shaw v. Reno, 509 U.S. 630, 648 (1993).

197. *See* Karlan, *supra* note 21, at 1364; Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, CUMB. L. REV. 287, 296–97 (1996).

198. *See supra* text accompanying notes 178–83.

199. *Shaw*, 509 U.S. at 650.

though it cannot offer a coherent justification for doing so.[200] Here again, we see the Court trying to squeeze what is, at bottom, a structural injury into a conventional individual-rights framework.

Second, as the tensions between the structural underpinnings of the expressive harm approach and the tenets of a conventional individual-rights framework became more apparent, as with the standing debate,[201] the Court has gradually moved *Shaw* away from an expressive harm approach and toward a more conventional—and, not coincidentally, more individualist—conception of the harm by defining the *Shaw* injury as the right not to be subject to a racial classification.[202] Thus, even when the Court takes a small step toward recognizing the structural nature of a voting claim, it quickly reverts to the safety afforded by conventional individual-rights analysis.

In sum, when presented with evidence of the differences between a structural approach and a conventional individual-rights framework, the Court always seems to hew to the individual-rights approach, often ignoring the doctrinal problems it has created and the normative questions it has elided. The many strategies the Court has used to dodge the structural implications of the one-person, one-vote cases provide one example. The Court's insistence upon applying traditional individual-rights doctrines to structural harms without recognizing their hybrid status is another.[203] Both suggest that the Court's preference for minimalism in the malapportionment cases stems from a reluctance to embrace a structural theory of voting.

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200. In *Hays v. Louisiana*, 515 U.S. 737, 744–45 (1995), the Supreme Court held that only those who resided in the challenged majority-minority district had standing to raise a *Shaw* claim. As a number of commentators have explained, however, if the injury in *Shaw* is an expressive harm, then all voters in the districting scheme should be equally affected by the injury and thus all would enjoy standing. *See* Issacharoff & Karlan, *supra* note 42, at 2286; Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2539 n.122 (1997). Thus, the Court has resisted the diffuse, non-discrete nature of the expressive harm that reflects its structural nature. *See supra* text accompanying notes 182–84.

201. The structural nature of the expressive harm approach presumably explains why the Court has encountered so much difficulty in reconciling the *Shaw* doctrine with conventional individualist principles like standing. Indeed, numerous commentators have wrestled unsuccessfully with this problem, and none has yet to offer a consistent theory explaining the Court's approach to standing in *Shaw*. *See, e.g.*, John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 576–95 (1997); Issacharoff & Karlan, *supra* note 42, at 2276–92; Karlan & Levinson, *supra* note 19, at 1226; Saunders, *supra* note 43, at 1614; Note, *Expressive Harms and Standing* 112 HARV. L. REV. 1313, 1316–20, 1325–30 (1999).

202. *See* Gerken, *supra* note 39, at 1692–94.

203. *See id.* at 1698–743.

2. Possible Reasons for the Court's Reluctance To Adopt a Structural Approach

One final question remains: How do we explain the Court's marked resistance to structural theories? The most likely explanation for the Court's adherence to a conventional individual-rights approach is that it fears the untrammeled exercise of judicial power in the political arena.[204] At least in theory, one benefit of an individual-rights framework is that it embodies a set of limitations upon judicial power.[205] Indeed, many of the doctrines that do not fit easily with a structural approach—standing, class limitations, conventional remedial principles—are doctrines designed to cabin the reach of judicial power. Further, in adjudicating countless individual-rights cases, the Court has developed a reasonably coherent set of principles to guide its decisionmaking, principles that it can draw upon whenever it encounters a new variant of an individual claim. Unless and until scholars and lawyers offer the Court a new set of limiting principles—a different set of mechanisms for cabining courts' discretion and avoiding judicial error—the Court may prefer the awkward compromise of purporting to apply individualist principles in this context. At least that strategy seems to offer the security of a tried and true system for limiting judicial power,[206] even if it undermines the coherence of the Court's decisions and makes it harder to vindicate many types of voting claims.

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204. For a recent take on these issues, see EISGRUBER, *supra* note 132, at 168–204. Laurence Tribe draws a similar conclusion from the Court's constitutional jurisprudence as a whole. *See* Tribe, *supra* note 132, at 137 (noting and critiquing the widely held view that "the Court skates closest to illegitimacy when it infers personal rights from the texture and tenor of the Constitution, locating those rights more in structure and in the spaces between the lines than in any actual lines of text or in any specific and well-established tradition"). In Tribe's view, the Court is most likely to infer individual rights from structural arrangements when the source of those rights derive from the doctrines that form the bread-and-butter of "structural" constitutional analysis—what Tribe terms "the institutional and territorial organization of the system of separated and divided powers"—separation of powers, federalism, the relationship among the states, and the like. *Id.* at 140–42.

205. I will not rehash the extensive literature regarding whether such doctrines truly cabin judicial discretion other than to note that Mark Tushnet's contribution to this Symposium should at least raise the question whether these doctrines are fully capable of doing so. *See* Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002). It does seem fair to maintain, however, that judges generally *believe* that these doctrines cabin their discretion, which is all that is necessary to accept the premise of the argument I am making here.

206. *See* Cain, *supra* note 132, at 1600 (warning that "the structural approach leads inevitably to intrusive judicial involvement in states' political arrangements"). *But see* Issacharoff & Pildes, *supra* note 19, at 654–60 (making contrary argument).

One piece of evidence supporting this speculation brings us back to *Baker* itself: the battle over the justiciability questions raised in *Colegrove v. Green*.[207] *Colegrove*'s dire warnings about judicial entry into the political thicket were premised, at least in part, upon fears that the structural approach embodied in the Republican Form of Government Clause[208] offered no judicially manageable standards.[209] Those concerns have deep roots in the Court's jurisprudence, dating back at least to *Giles v. Harris*,[210] in which the Supreme Court declined to remedy blatant racial discrimination on the ground that political rights were nonjusticiable.[211] And notice how the members of the *Baker* majority responded to the concerns articulated in *Colegrove*. They defended against these claims by arguing that the Court was vindicating individual rights, not the structural concerns behind the Republican Form of Government Clause.[212] When vindicating individual rights, the *Baker* majority pointed out to its brethren, the Court need not fear judicial excess or error because a well-developed system existed for adjudicating such claims.

Consider, for example, the standing discussion in *Baker*.[213] Standing is, of course, a familiar tool for cabining judicial discretion. In order to defend against *Colegrove*'s assertion that malapportionment was "not a private wrong, but a wrong suffered by [the state] as a polity"[214]—a nebulous claim that the Court lacked standards to resolve—the *Baker* majority repeatedly emphasized the individualist underpinnings of the harm it was recognizing. It insisted that the parties had "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends."[215]

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207. 328 U.S. 549 (1946).

208. U.S. CONST. art. IV, § 4. As Michael McConnell writes, "[t]he essential difference between the Equal Protection Clause and the Republican Form of Government Clause is that the Equal Protection Clause is based on a theory of individual rights.... The Republican Form of Government Clause is a structural or institutional guarantee...." McConnell, *supra* note 98, at 107.

209. Baker v. Carr, 369 U.S. 186, 223–26 (1962).

210. 189 U.S. 475 (1903).

211. Indeed, *Colegrove* cites *Giles* for this proposition. *Colgrove*, 328 U.S. at 552. For a general discussion of *Giles v. Harris*, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000) (attempting to return *Giles* to the constitutional canon).

212. Justice Frankfurter discusses this legal dodge in his dissent to *Baker*, 369 U.S. at 299–300 (Frankfurther, J., dissenting).

213. Another good example of this strategy can be found in the passages from *Reynolds*. *See supra* text and notes 185–86.

214. *Colegrove*, 328 U.S. at 552.

215. *Baker*, 369 U.S. at 204.

It emphasized that these were "voters who allege facts showing disadvantage *to themselves as individuals.*"[216] It also refused to address plaintiffs' own claim that they represented "all other voters,"[217] a standard more consistent with the type of standing rule we would see for claims involving a structural harm.[218] In case the Court's emphasis on the concreteness of the harms to the plaintiff were insufficient, it resorted to the high-blown language of individual rights to explain why it was *not* adjudicating "a claim of the right possessed by every citizen to require that the government be administered according to the law," which would involve intrusive judicial action and few manageable standards.[219] In the words of the *Baker* majority, " 'the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' "[220] As this debate about judicial capabilities and power continued in *Reynolds*,[221] *Wesberry*,[222] and *Lucas*,[223] the Justices in the *Baker* majority continued to employ similar arguments, thereby cementing the Court's attachment to an individualist conception of malapportionment claims.[224]

The success of the Court's strategy in fending off *Colegrove*'s justiciability challenge suggests that an individual-rights framework provided some security to Justices nervous about entering the

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216. *Id.* at 206 (emphasis added); *see also id.* at 207 ("These appellants seek relief in order to protect or vindicate an interest *of their own.*") (emphasis added).

217. *Id.* at 205 n.24.

218. *See supra* text accompanying notes 135, 142–50.

219. *Baker*, 369 U.S. at 208 (internal quotations omitted).

220. *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

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

222. Wesberry v. Sanders, 376 U.S. 1 (1964). For example, in responding to the *Colegrove* claim in *Wesberry*, the Court states that judicial intervention is appropriate here because of the "power of courts to protect the constitutional rights of *individuals* from legislative destruction." *Id.* at 6 (emphasis added). The Court similarly invokes individualist language later by claiming, with little support, that "[t]he House of Representatives . . . was to represent the people as individuals." *Id.* at 14.

223. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964). For example, in response to the argument that a nonjudicial remedy existed in *Lucas*, the Court declined to stay its hand on the ground that "individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy.... An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate...." *Id.* at 736.

224. *See* Guinier & Karlan, *supra* note 136, at 210 (arguing that the choice of equal protection rather than the Guarantee Clause as the source of the right "situated apportionment claims within an individual rights framework"); Issacharoff & Pildes, *supra* note 79, at 1180 (linking the individualist strains of *Reynolds* to the Supreme Court's efforts to distance the malapportionment cases from the Guarantee Clause); Lowenstein, *supra* note 18, at 250–51 (same); McConnell, *supra* note 98, at 107 (same).

political thicket. Perhaps such an approach offers nothing more than a familiar intellectual framework. Perhaps the Court thought that an individual-rights framework provided a well-developed set of protections against judicial excess. Whatever the reason, the appeal of that framework continues today, and we should expect the Court to be quite cautious in adopting the structural arguments that are often proposed by academics in the field.

CONCLUSION

This Article points up the complicated relationship between minimalism's costs and its causes in voting cases. The Court's failure to adopt an appropriate intermediary theory for explaining what equality should mean in the one-person, one-vote cases stems, at least in part, from the structural nature of the underlying claim. Malapportionment claims—like many other voting claims—incorporate assumptions about the way political structures should aggregate votes, and most sensible intermediary theories would be keyed to these assumptions.

Rather than make these assumptions an explicit part of its equal protection jurisprudence in the malapportionment cases, the Court has chosen not to endorse an adequate intermediary theory for the malapportionment cases. It has instead offered a set of incompletely theorized agreements rendered on a case-by-case basis, or, at best, adopted a highly individualist theory of equality that is too thin to deal with the conceptual puzzles *Baker* raised.

The *Baker* line thus provides a case study for evaluating Sunstein's descriptive account of minimalism. It highlights potential pitfalls to the minimalist approach not yet explored by other commentators. One need not adhere to a highly philosophical, top-down approach to lawyering to conclude that theory has a role to play in judicial decisionmaking. From a pragmatic perspective, incompletely or minimally theorized agreements may deprive courts of the opportunity to articulate mediating principles that can cabin judicial discretion, render doctrine more coherent, and avoid the trap of inflexible rules or mechanically applied proxies. These cases thus confirm Sunstein's own conclusion that minimalism does not represent an appropriate strategy for every line of decisions and supplement the criteria Sunstein has offered for predicting when minimalism is unlikely to succeed.[225]

225. SUNSTEIN, *supra* note 2, at 50, 57–58, 262–63. Sunstein argues that courts should avoid minimalism when judges are confident in a solution's merits, when the solution

At bottom, the problem with the Court's adoption of a minimalist approach in the *Baker* line is that minimalism works only when the Court can choose an outcome without choosing a mediating theory. This is not a set of cases in which the Court could make pronouncements about "outcomes" which did not "reflect[] rules or theories laid down in advance."[226] Whether or not this strategy is available to the Court in other areas, as Sunstein maintains, in the one-person, one-vote cases the Court could not avoid making certain structural assumptions about the right to vote and the aggregation of groups when it rendered its decisions.

The Court's avoidance strategy—its failure to adopt any mediating theory that might make those structural, group-based assumptions more explicit—did not save it from making theoretical judgments about the nature of the right to vote each time it handed down a decision. It merely ensured inconsistent and incoherent judicial outcomes.

In this respect, the causes of minimalism in the malapportionment cases are intimately related to the resulting costs. If, as this Article speculates, the Court has chosen a minimalist course because it prefers the protections afforded by a conventional individual-rights approach—well-established doctrines designed to cabin and guide judicial discretion—then the Court's strategy has led to an ironic result. That is because an individual-rights approach *without* an adequate intermediary theory lends itself equally to judicial abuse: significant doctrinal flips; the application of a rigid formula for equality without an adequate justification for its adoption; and a jurisprudence that conceals, but does not eliminate, the structural assumptions behind it. All of these problems are evident in *Baker*'s progeny, and all raise the question whether the minimalist game in voting cases is worth the candle.

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reduces uncertainty, when advance planning is important, and when the solution supports democratic goals. *Id.*

226. *Id.* at 9. Sunstein himself anticipates this possibility, as I have noted previously. *See supra note* 17.