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Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote

Judith Reed
DePaul University College of Law

SENSE AND NONSENSE: STANDING IN THE RACIAL DISTRICTING CASES AS A WINDOW ON THE SUPREME COURT'S VIEW OF THE RIGHT TO VOTE

*Judith Reed**

Congressional redistricting draws the lines within which battles for political power will be fought. It is no surprise, therefore, that the redistricting process has long been the subject of social debate and legal dispute. The Supreme Court has not been able to resolve this dispute, in part, because the Justices have conflicting interpretations of the right to vote. While some Justices view voting as an individual right, others maintain that voting is correctly perceived as group right. This lack of consensus regarding the definition of the right to vote has led to a confusing articulation of the harm implicated by recent districting cases, and of the identification of which citizens can seek redress for that harm. In this Article, the Author provides an overview of modern standing doctrine and focuses on the Court's application (or non-application) in districting cases of the requirement that plaintiffs show an injury-in-fact in order to have standing to sue. It is noted that in recent districting cases, the Court has allowed standing for the type of generalized grievance for which the Court has consistently denied standing in other areas of law. This deviation from established standing doctrine is often criticized as nonsensical. The Author however, argues that this new standing doctrine can only be explained and understood, when limited to voting cases, as reflective of the individual justices' interpretations of the right to vote. The Author concludes that the atypical standing doctrine articulated in the recent districting cases underscores the need for the Court to develop and employ a richer conception of the right to vote that encompasses the goal of achieving a politically fair system.

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* Assistant Professor of Law, DePaul University College of Law. I thank DePaul College of Law for its support of this project and Lani Guinier and Pamela Karlan for their insights and encouragement. Joanne Boy, Marty Moore, and Diane Ouchi provided helpful research assistance.

INTRODUCTION

Unlike the rain forests of the planet, the "political thicket,"[1] a much used metaphor for the Supreme Court's forays into questions of apportionment, has not grown less dense over time. Political apportionment and redistricting issues are brought before the Court with a frequency probably not foreseen when it first decided to enter the political thicket in *Baker v. Carr*.[2] Each succeeding decennial round of redistricting[3] brings with it spirited

1. This phrase was first used by Justice Frankfurter in Colegrove v. Green, 328 U.S. 549, 556 (1946) (denominating reapportionment cases as incapable of judicial resolution by virtue of their non-justiciability).

2. 369 U.S. 186 (1962) (holding equal protection challenges to reapportionment are justiciable by federal courts).

3. The Constitution requires that the numbers of persons represented by those elected to the House of Representatives be calculated by an "actual Enumeration . . . made within . . . every . . . ten Years." U.S. CONST. art. I, § 2. The number of representatives are then "apportioned" on the basis of one for every 30,000 persons, except that each state, regardless of population, is entitled to at least one representative. *See id.* Thus, the term "reapportionment" refers to the process of allocating congressional seats to each state based on population. As population shifts occur, a state may gain or lose the number of seats allocated to that state as a result of reapportionment. The term "redistricting" or "districting" refers to the actual line-drawing process that takes place to reflect the seat allocation and/or population shifts based on reappor-

challenges.[4] The 1990 Congressional redistricting proved to be no exception. Prior to the 1990 round of districting, statutory and constitutional challenges to redistricting raised two broad issues. One was whether a plan whose districts were not equally populated violated equal protection law.[5] The other dealt with the racial or political fairness of the districting plan.[6] In a line of three decisions beginning in 1993, *Shaw v. Reno*,[7] *Miller v. Johnson*,[8] and *Bush v. Vera*,[9] the Court announced and then refined a new cause of action. In *United States v. Hays*,[10] the Court determined who might bring this new districting claim, allowing persons who live in voting districts created in substantial part based on race the right to bring an equal protection challenge to their voting districts. This new claim could be brought without any showing that the plaintiffs were or might be injured in any way previously delimited by the Court as legally cognizable.[11] Such districts would then be subjected to strict scrutiny, requiring a constitutionally adequate justification for their creation.[12] Given the law on standing,[13] established voting rights,[14] and equal protection, plaintiffs who claimed neither that they were prevented from voting nor suffered any vote dilution, and who put forth no proof of any particularized injury at any stage of the litigation, should have been denied standing to bring these claims.

The Court disregarded existing standing law in this series of districting cases, and it did so in a way that was normatively differ-

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tionment and census data. The terms "reapportionment" and "districting" are often used interchangeably.

4. *See* Ronald E. Weber, *Redistricting and the Courts: Judicial Activism in the 1990s*, 23 AM. POL. Q. 205 (1995) (listing states that faced litigation during the 1990s). For an example of a "spirited challenge," see Richard Engstrom, *Councilmanic Redistricting Conflicts: The Dallas Experience*, 6 URBAN NEWS 1, 4–8 (1992).

5. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 577 (1964) (holding that congressional districts must be as "nearly of equal population as is practicable").

6. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 125 (1986) (holding claims of partisan gerrymandering justiciable); Busbee v. Smith, 459 U.S. 1166 (1983) (striking down Georgia's post-1980 reapportionment as intentionally discriminatory because the evidence showed that the plan consciously attempted to maximize the voting strength of White persons and minimize the voting strength of Blacks); United Jewish Org. of Williamsburgh v. Carey, 430 U.S. 144, 161 (1977) (holding constitutional use of racial criteria in a New York congressional districting plan that divided Brooklyn's Hasidic Jewish community to shore up a majority African American district).

7. 509 U.S. 630 (1993) [hereinafter *Shaw I*].

8. 515 U.S. 900 (1995).

9. 517 U.S. 952 (1996).

10. 515 U.S. 737 (1995).

11. *See infra* Part I.A.

12. *See Miller*, 515 U.S. at 920.

13. *See infra* Part I.A.

14. *See infra* Part II.

ent from prior voting rights decisions.[15] The Court created a special exception to previously articulated standing doctrine that is facially aberrational and nonsensical, but one that I argue, viewed from the Court's individual approach to voting rights, makes a great deal of sense. In this article, I examine the recent districting decisions through the prism of standing, and the way in which the Court's extraordinary departure from its own recent standing jurisprudence is informed by, and is consistent with, the various views of the right to vote held by the current justices.

Part I of this Article provides an overview of modern standing law and focuses on the Court's application (or non-application) in the recent districting cases of the requirement that plaintiffs show an injury-in-fact in order to have standing to sue. The Court's decisions have left it vulnerable to a number of criticisms, chief among them that the purported "analytically distinct claim"[16] brought by *Shaw* plaintiffs is just the sort of generalized grievance for which the Court has consistently denied standing.[17] In order to circumvent this criticism, the Court attempted to individualize the purported injury to fit within the parameters of standing law.[18]

Part II explores the current sitting justices' views on voting rights—the underpinning of the individualization of the *Shaw* claim. In this part, I conclude that the *Shaw* decisions, contrary to the hopeful rationale offered by Justice Stevens,[19] are not grounded in any sort of liberalized standing rule that might arguably benefit civil rights plaintiffs or plaintiffs in general. Rather, I argue that the Court's creation of a new and exceptional view of standing is limited to voting cases and stems from its crabbed notion of what voting means. The ease with which the Court turned a generalized grievance into an individual harm derived, in large part, from the Court's expansion of the individual rights branch of equal protection that became ascendant in the Court's consideration of affirmative action

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15. *See infra* Part I.B.

16. *Shaw I*, 509 U.S. 630, 652 (1993); *Miller*, 515 U.S. at 911 (1995).

17. *See infra* notes 37–43.

18. *See infra* Part I.B.2.

19. In Shaw v. Hunt, 517 U.S. 899 (1996) [hereinafter *Shaw II*], Justice Stevens posed a question in his dissenting opinion that highlighted the underlying tension in the court's ruling:

> [The Court] must either mean to take a broader view of the power of federal courts to entertain challenges to race-based governmental action than it has heretofore adopted . . . or to create a special exception to general jurisdictional limitations to plaintiffs such as those before us here. . . . I charitably assume the former to be the case.

Id. at 929 (Stevens, J., dissenting) (citations omitted).

cases.[20] That same prioritization of individual rights has become prevalent in the voting rights arena. While the Equal Protection Clause involves both group and individual rights,[21] the concept of group rights has at least facial attractiveness in antidiscrimination law because treatment of individual members of outsider groups is usually linked to membership in that group.[22] At the intersection of race and voting rights, the theme of group rights demands examination. In the *Shaw* cases, the Court, ignoring standing law and well-established vote dilution jurisprudence, made the wrong turn at this intersection. It defined a new right affecting political representation, determined who had standing to assert it, and cemented the individualization of that right in the process. I argue that such individualization of a quintessentially political claim is seemingly nonsensical because it is contrary to modern standing law, but if placed in the context of the Court's view of the right to vote, *Shaw* standing makes sense.

The *Shaw* cases reveal the Court's error on standing to be symptomatic of a deeper problem: the Court has yet to arrive at a coherent theory of the meaning of the right to vote. In Part III, I discuss the options facing the Court as the year 2000 approaches, bringing with it a new round of apportionment and districting. While the Court now has ample evidence that it should abandon the path it started down with *Shaw I* as unprincipled and lacking support in equal protection and voting rights jurisprudence, the Court is not likely to do so. Accordingly, I argue that the Court must develop and employ a richer conception of the right to vote that encompasses the goal of achieving a politically fair system. That system should not only protect the individual right to vote and guard against minority vote dilution, but also achieve adequate representation for all population groups.

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20. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (striking City's program setting aside 30% of construction contracts for minority contractors, for lack of factual justification referring to a "'personal right[]' to be treated with equal dignity and respect"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 n.52 (1977) (upholding challenge by white male applicant to State medical school's special admissions program, characterizing the wrong "the denial of [a] right to individualized consideration without regard to his race").

21. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, 1438 n.18, § 16-22, 1527-28 (2d ed. 1988); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

22. As the Supreme Court has explicitly recognized, "racial discrimination is by definition class discrimination." General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 (1982).

I. WHY *SHAW* DOES NOT MAKE SENSE: INDIVIDUALIZED INJURY IN A POLITICAL CONTEXT

Article III grants federal courts jurisdiction over "cases" and "controversies."[23] The case or controversy requirement prevents federal courts from dealing with "abstract, hypothetical or contingent questions."[24] Standing is one of a set of doctrines, such as justiciability, mootness, and ripeness, that limit the power of the judiciary.[25] The doctrine of standing addresses whether a particular person or party is the proper plaintiff to seek relief from the courts. It requires a court to determine "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[26] In theory, the standing inquiry focuses on the party attempting to present his claim; the actual issues to be litigated become secondary.[27] Whether courts adhere to this concept in actual practice has been debated.[28]

Placing limits on who can sue in federal court is thought to serve several important values. It may respect the separation of powers principle, prevent a flood of lawsuits, improve judicial decision-making by requiring a specific controversy, and serve fairness by ensuring that litigants raise only the rights they have.[29] The law of standing has long been criticized as incoherent and inconsistent—a way for a court to open and close doors to the courthouse at will, depending on whether it wants to reach the merits or resolve the issues raised.[30] Rather than ruling in a way that might have dispelled

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23. U.S. CONST. art. III, § 2.

24. TRIBE, *supra* note 21, § 3-9, at 73 (citing Alabama State Fed. of Labor v. McAdory, 312 U.S. 450, 461 (1945)).

25. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.1, 42–46 (2d ed. 1994).

26. Warth v. Seldin, 422 U.S. 490, 498 (1975).

27. TRIBE, *supra* note 21, § 3-14, at 107 (citing Flast v. Cohen, 392 U.S. 83, 99 (1968)).

28. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 226 (1988) ("One may see in some of the behavior, if not always in the language of the Court a recognition that standing questions are questions on the merits.").

29. CHEMERINSKY, *supra* note 25, § 2.3, at 55–56.

30. The Supreme Court itself has, on more than one occasion, "acknowledged . . . that 'the concept of Art. III' standing has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it.' " Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982)); *see also* Barlow v. Collins, 397 U.S. 159, 178 (1970) (Brennan, J., concurring in result and dissenting) (criticizing the Court's use of "standing to slam the courthouse door against plaintiffs"); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970) ("[g]eneralizations about standing to sue are largely worthless as such").

this widely held impression, the Court found in the *Shaw* cases standing that could only confirm that impression. Part I.A briefly describes the state of modern standing law. Part I.B relates the way in which the Court attempts to locate and revamp the possible bases for granting standing to the *Shaw* plaintiffs.

A. *Modern Standing Law*

The Court has, over time, articulated three requirements for standing to sue: injury-in-fact, causation, and redressability.[31] For standing purposes the injury must be both "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[32] A party also must show that there exists a causal connection between that injury and the challenged conduct.[33] Finally, a party must show a likelihood that the proven injury will be redressed by a favorable decision.[34]

1. Personal Injury-in-Fact

First articulated in *Association of Data Processing Service Organizations, Inc. v. Camp*,[35] the injury-in-fact requirement may be satisfied

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Commentators have expressed similar views. *See generally* CHEMERINSKY, *supra* note 25, § 2.3, at 54 (noting that "[s]tanding frequently has been identified by both justices and commentators as one of the most confused areas of the law"); TRIBE, *supra* note 21, § 3-14, at 107 (noting current standing law as "present[ing] substantial confusion at a number of points"). Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 233–34 (1990) (criticizing the court for answering the questions of "what parties should be allowed to participate in a case" and "what issues should they be allowed to raise . . . on a seemingly ad hoc basis" and "[a]s a result, the doctrines are in conflict and the resolution of article III issues is often unpredictable"); *see also* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1452 (1995) ("Doctrinal inconsistencies in the Supreme Court's law of standing are now so commonplace that they have become relatively uninteresting. And the insight that the Court manipulates the law of standing to advance judicial policy preferences has become more fatuous than scandalous.") (internal footnotes omitted); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1323 (1995) (describing standing as a way for the Court to "fend off challenges to governmental conduct that are brought primarily on an ideological basis"); Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) (criticizing the Court's decision in *Lujan* as misinterpreting the Constitution).

31. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992).

32. *Id.* at 560 (citations omitted).

33. *See* Simon v. Eastern Kentucky Welfare Rights, 426 U.S. 26, 41–42 (1976).

34. *See* Allen v. Wright, 468 U.S. 737, 752 (1984).

35. 397 U.S. 150 (1970). Prior to this articulation, the test was whether a plaintiff could show a "legal injury," which would permit suits by people affected by governmental action. *See* Sunstein, *supra* note 30, at 183–184.

by a party's alleging and showing that "he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' "[36] The injury must also be "distinct and palpable."[37]

The harm envisioned is one that is specific to the individual asserting the claim.[38] The Supreme Court has repeatedly held that a plaintiff may not ordinarily invoke the jurisdiction of the federal courts "when the harm asserted by plaintiff is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens . . . ."[39] A generalized grievance arises "where the plaintiffs sue solely as citizens concerned with having the government follow the law or as taxpayers interested in restraining allegedly illegal governmental expenditures."[40] Until recently, it had been thought that the limitation on generalized grievances was merely prudential in nature.[41] In *Lujan*, however, the Court emphasized that this ban was a constitutional rather than a prudential limitation.[42] In several

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36. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (citations omitted).

37. Warth v. Seldin, 422 U.S. 490, 501 (1975). *See also* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (stating that the "injury. . . must be concrete in both a qualitative and temporal sense").

38. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 819 (1997) (proclaiming that "a plaintiff's complaint must establish that he has a *'personal stake'* in the alleged dispute, and that the alleged injury suffered is particularized as to him") (emphasis added); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 n.1 (1992) (requiring that the plaintiff must have suffered a "particularized" injury, which means that "the injury must affect the plaintiff in a *personal and individual* way" to have standing) (emphasis added); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (stating that the party who invokes the court's authority "must show that he *personally has suffered* some actual or threatened injury as a result of the putatively illegal conduct of the defendant") (emphasis added).

39. *Warth*, 422 U.S. at 499 (citations omitted).

40. *Id.*; *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974) (holding that standing to sue may not be predicated on an interest of the kind which is held in common by all members of the public because of the necessarily abstract nature of injury all citizens share); U.S. v. Richardson, 418 U.S. 166, 173 (1974) (holding that a taxpayer may not use federal court as a forum in which to air his generalized grievances about conduct of government or allocation of power in the federal system); *Ex Parte* Levitt, 302 U.S. 633, 636 (1937) (holding that a private individual may not invoke judicial power to determine the validity of executive or legislative action without showing that he has sustained or is immediately in danger of sustaining, a direct injury as a result of the action, and it is not sufficient that the individual has merely a general interest common to all members of the public).

41. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968) (upholding taxpayer standing in First Amendment challenge of federal subsidies to parochial schools, emphasizing the prudential rather than constitutional character of the prohibition against generalized grievances); Frothingham v. Mellon, 262 U.S. 447 (1923) (rejecting a suit by taxpayer seeking to challenge financial grants to states under the Federal Maternity Act of 1921 as violative of the Tenth Amendment).

42. *See Lujan*, 504 U.S. at 573–74.

recent post-*Lujan* cases the Court has emphasized that it has every intention of requiring a precise showing from plaintiffs.[43] Even when the plaintiff has alleged a redressable injury sufficient to meet the requirements of Article III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to generalized grievances, pervasively shared and more appropriately addressed to the representative branches.[44] This is so even if denying standing to the plaintiffs before the Court means that the matter will not be heard.[45]

2. Redressability and Causation

A plaintiff must show more than an injury in fact; causation and redressability are distinct and separate requirements for standing.[46] In order for a federal court to hear a case, a plaintiff must prove that the defendant's conduct caused the injury and that a favorable outcome will likely remedy the harm suffered.[47]

The three elements of standing are an "irreducible minimum,"[48] and they cannot be waived.[49] Moreover, a plaintiff cannot ordinarily establish standing through mere allegations. As the Court recently emphasized, a plaintiff must demonstrate with probative evidence each element:

> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not

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43. *See, e.g.*, Department of Commerce v. United States House of Representatives, 119 S. Ct. 765, 772 (1999) (noting in a census case that the court has repeatedly required a plaintiff to allege personal injury fairly traceable to the plaintiff's); Clinton v. City of New York, 118 S. Ct. 2091, 2099 (1998) (recognizing the importance of respecting constitutional limits on the court's jurisdiction); Raines v. Byrd, 521 U.S. 811, 820–21 (1997) (putting aside the natural urge to proceed directly to the merits of the dispute because of the overriding and time-honored concern about keeping the judiciary's power within its proper constitutional sphere).

44. *See Warth*, 422 U.S. at 500.

45. *See Schlesinger*, 418 U.S. at 227 (quoting *Richardson*, 418 U.S. at 179).

46. *See* Allen v. Wright, 468 U.S. 737, 751 (1984).

47. *See* CHEMERINSKY, *supra* note 25, § 2.3.3, at 72–73 (stating that these requirements have been labeled "causation" and "redressability"); *see also* Northeastern Fla. Chapter of Assoc. Gen. Contractors of America v. Jacksonville, 508 U.S. 656, 664 (1993) (stating that causation and redressability are distinct hurdles in addition to demonstration of "injury-in-fact" to invoke a federal court's jurisdiction).

48. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

49. A court is obligated to raise the issue of standing *sua sponte* if the parties do not. *See, e.g.*, FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230–31 (1990); CHEMERINSKY, *supra* note 25, § 2.3.1, at 58 (stating that federal courts can raise standing on their own "[b]ecause standing is jurisdictional . . . and it may be challenged at any point in the federal court proceedings.").

> mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the manner and degree of evidence required at the successive stages of the litigation. [T]hose facts . . . must be "supported adequately by the *evidence* adduced at trial."[50]

The next section focuses on the Court's circumvention of its own standards in the racial districting cases. The Court often makes more than one attempt to articulate an injury, and these articulations are sometimes quite different from the plaintiffs' own descriptions. This section discusses the way in which the Court has manipulated the standing doctrine to allow plaintiffs in these cases to litigate claims that did not fit within previously announced categories of harm.

B. *Shaw Standing*

Section 2 of the Voting Rights Act prohibits the use of any voting practice or procedure that results in making it more difficult for racial or language minority groups "to participate in the political process and elect candidates of choice."[51] Section 5 of the Act requires that certain states and political subdivisions obtain prior authorization, or "preclearance," before implementing changes in prior practices or procedures affecting voting.[52] Each of the cases in

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50. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (emphasis added) (quoting Gladstone v. Village of Bellwood, 441 U.S. 91, 113 n.31 (1979)); *see also* Whitmore v. Arkansas, 495 U.S. 149, 156 (1995) (requiring that a "litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements [since a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.") (citations omitted).

51. *See* 42 U.S.C. § 1973(a)(b) (1994). The 1982 amendment to § 2 of the Act made clear that plaintiffs bringing suit under this statute were not required to prove intent to discriminate. *See* H.R. REP. NO. 97-227, at 29–30 (1981).

52. *See* 42 U.S.C. § 1973(c). Jurisdictions become "covered" pursuant to a formula set forth in § 4 of the Act. *See* 42 U.S.C. § 1973(b). Section 5 was enacted to counter the persistent ingenuity of many of the Southern states, who, once sued, would simply switch to new practices or implement new tests for voter registration. *See* H.R. REP. NO. 97-227 at 4; S. REP. NO. 97-417 at 6; *see also* South Carolina v. Katzenbach, 383 U.S. 301, 314, 335 (1966) (summarizing difficulties experienced by plaintiffs attempting to litigate voting rights claims and enforce court orders, because of evasive tactics utilized by defendants). The triggering formula looks to whether a state or political subdivision used a literacy test for voter registration as of specified dates, and whether voter registration or turnout fell below 50% of the voting age population in certain presidential elections. 42 U.S.C. § 1973(b). Entire states may be

the *Shaw* quartet[53] involved congressional districting and followed a similar pattern. The defendant states, North Carolina, Texas, Georgia and Louisiana, were among those jurisdictions required to submit any new districting arrangement to the United States Department of Justice before holding elections under such districting. Over the years, the Justice Department has taken an active stance with regard to its § 5 authority.[54] Perhaps the *Shaw* decisions were an inevitable product of the Department's vigorous use of this enforcement power,[55] along with the availability of increasingly sophisticated computer programming software.[56] For covered jurisdictions, Justice Department preclearance became a familiar ritual. A jurisdiction would submit its districting plan and supporting documentation to the Justice Department,[57] which is mandated by statute to take action within a specified time period.[58] When the Department

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covered, as is the case for Texas, Louisiana, and Georgia, or coverage may be limited to designated counties. Forty counties in North Carolina fall within the strictures of § 5. *See* 28 C.F.R. § 51, app. (1998) (Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended). When an entire state is not covered, any change that would affect the covered counties, such as a congressional districting plan, requires preclearance.

53. *See Shaw I*, 509 U.S. 630 (1993); United States v. Hays, 515 U.S. 737 (1995); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996).

54. Much of the success in integrating the halls of Congress is considered to be a result of the Voting Rights Act which is, "perhaps the single most effective civil rights bill ever passed." Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, *in* QUIET REVOLUTION IN THE SOUTH: THE VOTING RIGHTS ACT 1965–1990 378, 386 (Chandler Davidson et al. eds., 1994). The Justice Department is charged with enforcement of the Voting Rights Act, and § 5 was considered to be particularly important because it might "shift the advantage of time and inertia" from proven wrongdoers to the victims of discrimination. Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, *in* MINORITY VOTE DILUTION 167, 167–68 (Chandler Davidson ed., 1984) (describing the background of § 5 and providing statistics on early experience under § 5).

55. In the *Shaw* line of cases, the Court clearly expressed its view that the states' plans reflected too much the imprimatur of the Justice Department. *See, e.g.*, *Miller*, 515 U.S. at 909 (noting that states do not have "a compelling state interest in complying with whatever preclearance mandates the Justice Department issues").

56. Advanced geographical software, developed in the 1980s, allowed plan drafters to fine tune demographic data to a greater extent possible than in before. This meant that racial data, available at the census block level, enabled drafters to move around small segments of population groups. *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 255–256 (1993) [hereinafter Karlan, *All Over the Map*]. *See also Vera*, 517 U.S. at 961–962 (discussing the computer software program used to draw district lines and noting the presence of greater detail for racial data than other data, such as party registration and elctoral results of).

57. *See* 28 C.F.R. §§ 51.27, 51.28 (defining required and supplemental contents of submission).

58. The Justice Department has up to 60 days after receipt of all information relating to a submission to object to the jurisdiction's voting change or ask for addi-

refused to approve a plan, a jurisdiction often revised the plan to meet the Department's objections.[59] In three of the four *Shaw* cases, the Justice Department had rejected the state's original plan.[60] Plaintiffs subsequently challenged plans implemented following preclearance.

1. The Generalized Nature of the Purported Harms

The requirement of an individual plaintiff to present a particularized and concrete injury-in-fact should have posed a significant barrier to the *Shaw I* plaintiffs, who claimed neither a violation of equal protection nor vote dilution.[61] The plaintiffs asserted that North Carolina had violated "their constitutional right to participate in a 'color-blind electoral process.' "[62] After the Justice Department's

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tional information. *See* 28 C.F.R. §§ 51.37, 51.41. If there is no correspondence forthcoming from the Department after the expiration of the 60-day period, a jurisdiction may implement the change. *See* 28 C.F.R. § 51.42.

59. A jurisdiction may implement a voting change without obtaining Justice Department preclearance only by obtaining a declaratory judgment from the District Court for the District of Columbia. 28 C.F.R. § 51.10. Very few jurisdictions have exercised this option. *See, e.g.*, Busbee v. Smith, 549 F. Supp. 494, 497 (D.D.C. 1982) (three-judge court), *aff'd*, 459 U.S. 1166 (1983) (determining the State of Georgia could seek declaratory judgment from the District of Columbia District Court approving a districting plan under Section 5 of the Voting Rights Act). An oft-taken route is to engage in informal discussions with the reviewing government attorneys. *See, e.g.*, United Org. of Williamsburgh v. Carey, 430 U.S. 144, 152 (1977) (referring to meetings and conversations between New York's reapportionment committee and Justice Department officials regarding appropriate district demographics). *See, e.g.*, Drew S. Days, III, *Section 5 and the Role of the Justice Department*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE, 52, 60–61 (Bernard Grofman & Chandler Davidson eds., 1992) (explaining Department's reliance on "negotiations with submitting jurisdictions rather than on coercive measures" as necessary to balance competing concerns, *inter alia*, of local discretion, concerns of civil rights organizations with efficiency).

60. *See Miller*, 515 U.S. at 906–08 ("Twice spurned, the General Assembly set out to create three majority-minority districts to gain preclearance."); *United States v. Hays*, 515 U.S. 737, 740 (1995) (noting that preclearance was refused based on the state's failure to "demonstrate that its decision to not create a second majority-minority district was free of racially discriminatory purpose"); *Shaw I*, 509 U.S. 630, 635 (1993) (Attorney General's failure to preclear North Carolina's first attempt because of the state's unsubstantiated failure to create a second majority-minority district "to give effect to Black and Native American voting strength"). Texas managed to gain preclearance on its first attempt. *See Vera*, 517 U.S. at 957.

61. *See Shaw I*, 509 U.S. at 641 (noting that plaintiffs do not claim the plan "unconstitutionally 'diluted' White voting strength [since t]hey do not even claim to be White"); *see also Shaw II*, 517 U.S. 899, 921 (1996) (Stevens, J., dissenting) ("[P]laintiffs . . . do not claim that they have been shut out of the electoral process on account of race, or that their voting power has been diluted . . . .").

62. *Shaw I*, 509 U.S. at 642; *see also* Melvyn R. Durchslag, United States v. Hays: *An Essay on Standing to Challenge Majority-Minority Voting Districts*, 65 U. CIN. L. REV.

objection of North Carolina's initial redistricting plan, the state obtained preclearance for a revised plan containing two majority-Black districts.[63] The *Shaw I* plaintiffs challenged this plan, alleging that it was an unconstitutional racial gerrymander in violation of the United States Constitution and the Voting Rights Act.[64] The district court dismissed the action on the grounds that it lacked jurisdiction to grant the injunctive relief requested under the Voting Rights Act,[65] and that plaintiffs had failed to state a constitutional claim.[66] The Supreme Court reversed.

Recognizing that prior holdings did not preclude race-conscious decisionmaking in general, nor race-conscious apportionment in particular,[67] the Supreme Court reversed, recasting plaintiffs' novel claim. The plaintiffs' objection, according to the Court, went to "redistricting legislation that is . . . so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for the purposes of voting . . . ."[68] Such districting could be challenged under the Equal Protection Clause.[69] Although

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341, 359–64 (1997) (implying that had the Court limited injury requirements to a systemic one, such as a colorblind electoral process, it might have achieved some consistency in standing in some of the jury discrimination cases relied on by the Court).

63. As a result of the 1990 census, North Carolina was entitled to an additional congressional seat. The state's initial plan drew an objection from the Justice Department, because the plan contained only one district out of twelve where African Americans, who constituted 20% of the North Carolina's population, were a majority. *See Shaw I*, 509 U.S. at 633–34. In response, the legislature drew district 12, the now infamous I-85 district. *See id.* at 635–36 (describing district as "snakelike" and as one where a person "driv[ing] down the interstate with both car doors open [would] kill most of the people in the district"). The 12th district followed the route of the interstate highway in the north-central area of the state. Evidence showed that the district was drawn in this area of the state rather than in the south-central and southeastern area of the state, as suggested by the Department of Justice, in order to protect White Democratic incumbents. *See id.* at 674 (White, J., dissenting).

64. *See id.* at 637.

65. Plaintiffs' claim under the Voting Rights Act was a challenge to the Attorney General's decision to approve the plan. *See id.* at 637–638. That claim was dismissed because of the exclusive jurisdiction vested in the District Court for the District of Columbia to review decisions relating to preclearance and the immunity of the Attorney General's § 5 review decision pursuant to *Morris v. Gresette*, 432 U.S. 491 (1977). An earlier challenge to the precleared plan as a political gerrymander also failed. *See* Pope v. Blue, 809 F. Supp 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992).

66. *See Shaw I*, 509 U.S. at 638–639.

67. *See id.* at 642 (stating that "[t]his court has never held that race-conscious state decisionmaking is impermissible in all circumstances").

68. *Id.*

69. The court stated that:

> [A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as

the *Shaw I* plaintiffs had alleged no specific harms, the majority stepped in to fill this gap. In the Court's view, "reapportionment is one area in which appearances do matter."[70] A plan that Justice O'Connor described as "bear[ing] an uncomfortable resemblance to political apartheid"[71] might injure voters in three ways. First, the Court suggested that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group."[72] Second, a districting plan containing irregularly shaped minority districts "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[73] Third, such stereotyping could "exacerbate" patterns of racial bloc voting[74] and serve to "balkanize" the nation.[75]

The articulation of such harms produced no "precise theory of how these harms could come about," thus raising several unanswered questions.[76] First, were these proposed harms concrete enough to satisfy traditional standing requirements? Second, how might White voters—or, indeed, a voter of any race—be "stigmatized" by being placed in a district that, in reality, was quite integrated?[77] Third, how would a plaintiff connect an increase in racial bloc voting, if any, with the creation of particular districts, especially since proof of racially polarized voting would likely be

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> anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

Id. at 649.

70. *Id.* at 647.

71. *Id.*

72. *Id.* at 643. *But see* Miller v. Johnson, 515 U.S. 900, 931 n.1 (1995) (Stevens, J., dissenting) (dismissing this sort of injury as giving *Shaw* plaintiffs standing to sue, stating that, "White voters obviously lack standing to complain of the other injury the Court has recognized under *Shaw*: the stigma blacks supposedly suffer when assigned to a District because of their race") (citations omitted).

73. *Shaw I*, 509 U.S. at 650.

74. *See id.* at 647.

75. *See id.* at 656.

76. Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Cases*, 1 MICH. J. RACE & LAW 47, 53–54 (1996). *See also Miller*, 515 U.S. at 929 (Stevens, J., dissenting) (chiding the Court for its "fail[ure] to explain adequately what showing a plaintiff must make to establish standing to litigate the newly minted *Shaw* claim," and for not "coherently articulat[ing] what injury this cause of action is designed to redress").

77. *See* Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 94 [hereinafter Karlan, *Our Separatism*] (describing the challenged districts as "the most integrated . . . in the nation").

unavailable until after a few elections in the new district?[78] Finally, how might one measure whether these districts actually did "balkanize" the nation? In practice, answers to these questions would not be forthcoming, since plaintiffs in racial districting cases would not be required to prove *any* injury at all. In addition, the Court ultimately focused on only the second of the purported injuries—later reconstructed as a "representational harm."[79]

After *Shaw I*, the decision in *Miller v. Johnson*[80] served only to ensure that constitutional challenges to race-conscious districting would proliferate, as the Court removed any limiting principle that a "bizarre" shape might have provided. In *Miller*, the Court, despite its previous indication that a *Shaw* claim would likely only arise in the "exceptional cases" of "highly irregular districts,"[81] disavowed the importance of shape. According to the Court, *Shaw I* was "not meant to suggest that a district must be bizarre on its face before there is a constitutional violation."[82] The applicability of strict scrutiny would turn instead on whether racial considerations predominated over traditional districting principles, such as compactness, contiguity and respect for political subdivisions.[83] Shape, while relevant, was only "persuasive circumstantial evidence" that "race . . . was the legislature's dominant and controlling rationale in

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78. *See,* Thornbugh v. Gingles, 478 U.S. 30, 57 (1986)(holding that "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.").

79. *See infra* at notes 130–133 and accompanying text.

80. 515 U.S. 900 (1996). Georgia was awarded an additional congressional seat based on the 1990 census data that also indicated that African Americans comprised 27% of the total population. After having its plan rejected twice by the Justice Department for the failure of the state to create a third majority-minority district, the legislature created the challenged districting plan by shifting African American population centers. *See id.* at 906–908.

81. *Shaw I*, 509 U.S. at 646; *see also id.* at 685–86 (Souter, J., dissenting) (stating that "[i]t may be that the terms for pleading this cause of action will be met so rarely that this case will wind up an aberration"); T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting, Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588 (1993) (suggesting that one way to read *Shaw I* is as a signal from Court to states that they had gone too far in the use of race in districting, through use of an extreme case).

82. *Miller*, 515 U.S. at 912.

83. *Id.* at 916. Contiguity turns on whether one can travel to all parts of a district without leaving the district, while compactness tends to turn more on shape, and a respect for political subdivisions, looks to whether county, city or other boundaries have been unnecessarily divided. *See Miller*, 515 U.S. at 917. The *Miller* Court added another less-used criterion, respect for communities that share similar interests. *See* Richard L. Engstrom, Shaw, Miller *and the Districting Thicket*, 84 NAT'L CIVIC REV. 323, 325–330 (1995) (discussing the various criteria).

drawing its district lines."[84] This was true, the Court said, because the "essence of the equal protection claim recognized in *Shaw* [was] that the State has used race as a basis for separating voters into districts."[85]

Nor would the presence of other, non-racial motivations matter. For example, the Court in *Bush v. Vera*[86] held that strict scrutiny would apply to congressional districts drawn to accommodate an interest *both* in incumbent protection *and* in creating districts that offered electoral opportunity for African American and Hispanic populations.[87] Having decided years earlier that partisan gerrymandering might be unconstitutional, but only in limited circumstances,[88] the Court affirmed the district court's ruling striking down the three majority-minority districts in the Texas plan. In so doing, the Court accepted the district court's parsing of the competing interests of race, ethnicity, and politics in addition to the lower court's its concomitant finding that race either predominated

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84. *Miller*, 515 U.S. at 913. After Miller, proof of a racial motive would be sufficient, even where the offending district was "pleasing" in appearance. Georgia's 11th district (one of the three majority Black districts) "by comparison with other districts" was concededly "not . . . bizarre on its face." *Id.* at 917. The "predominance" of race might be determined to exist by virtue of the fact that the plan's drafters had subordinated traditional principles of districting to racial concerns.

This broad, imprecise definition raised at least two questions which the Court ignored. First, as the Court itself noted in *Shaw I*, traditional factors, such as compactness, are not constitutionally mandated. *See Shaw I*, 509 U.S. at 647. Second, in *Miller*, the Georgia legislature had, prior to drawing the districts, ranked the factors to be used. Ahead of "nondilution of minority voting strength" and compliance with the Voting Rights Act were the requirements of equipopulation and contiguity, but consideration of compactness and maintaining the integrity of political subdivisions were lower in the State's hierarchy. *See Miller*, 515 U.S. at 906. Thus, Georgia had made a determination that it was constitutionally permitted to make, and then acted on it. Yet, the majority held that a showing by plaintiffs that the "legislature subordinated traditional race-neutral districting principles, including . . . compactness, contiguity, respect for political subdivisions or communities . . . to racial considerations," sufficed to make out a prima facie case. *Id.* at 916.

85. *Id.* at 911; *cf.* DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995) (upholding deliberate creation of compact minority districts).

86. 517 U.S. 952 (1996).

87. Essentially, the evidence in *Vera* forced the Court to confront the potential incongruity of requiring majority-minority districts to conform to traditional districting principles, such as compactness and contiguity, while not holding majority White districts to the same standard. *See id.* at 975–76. The Texas plan included one especially strange district drawn precisely to protect an incumbent. *See id.* This raised the issue of whether incumbent protection ranks higher than avoidance of minority vote dilution. *See id.* at 969.

88. *See* Davis v. Bandemer, 478 U.S. 109, 132–133 (1986) (stating that "the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process").

over partisan interests or acted as a proxy to support those interests.[89]

By defining a new right and delineating injuries that might flow from a violation of this new right, the Court had let the proverbial genie out of the bottle. The Court's definition of an injury in *Shaw I* made it appear that there was an unlimited universe of possible plaintiffs, ranging from anyone within a given state to anyone in the continental United States. The purported harms identified by the Court arguably could be felt by, and therefore confer standing on, any United States citizen. A logical inference from finding an amorphous right to a color-blind electoral process was that any racial gerrymandering of a district would at least be a wrong to a state as a whole,[90] but perhaps to the country as a whole, since each state is represented in Congress.[91] This articulation of the harms made the *Shaw* plaintiffs' claims generalized grievances for which they should not have been granted standing had the Court followed its own precedent.[92]

For example, in a 1984 case, the Court had denied standing to the parents of Black public school children who challenged the failure of the Internal Revenue Service to ensure that White academies in several states were not receiving tax exemptions in violation of the Internal Revenue Code.[93] Whether plaintiffs' claim was interpreted as premised on a right to a government that enforces law or resting on an allegation that all members of a racial group suffered denigration when the government discriminates on the basis of

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89. *See Vera*, 517 U.S. at 969 (holding that the district court had "ample bases on which to conclude . . . that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering").

90. *Cf.* Colegrove v. Green, 328 U.S. 549, 552 (1946) (rejecting [dilution] claim, noting that the "wrong [was one] suffered by [the state] as a polity"). This is precisely how the *Shaw I* plaintiffs must have viewed their injury when they made the assertion that the districting plan "discriminates" against every voter in the state.

91. Of course, then standing in *Shaw* would be left without any real limiting principle; there would be no reason to deny standing to sue to any registered voter residing in the United States.

92. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); *Ex Parte* Levitt, 302 U.S. 633 (1937); CHEMERINSKY, *supra* note 25, § 2.3, at 89 (in each of the above cases, plaintiffs sued not because of any personalized injury to their own constitutional rights but rather as taxpayers or citizens objecting to alleged unconstitutional government action).

93. *See* Allen v. Wright, 468 U.S. 737, 755 (1984). The IRS was required to deny tax-exempt status under section 501(a) and (c) (3) to institutions that practiced racial discrimination. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983) (holding that nonprofit private schools that prescribe and enforce racially discriminatory admission standards on the basis of religious doctrine do not qualify as tax-exempt organizations under the Internal Revenue Code).

race,[94] Justice O'Connor, the author of *Shaw I*, concluded that it was insufficient to confer standing for two reasons. First, a holding that anyone could sue for a failure of the government to enforce the law amounted to a grant of "citizen standing," conferrable only by statute.[95] Second, if all members of the racial or ethnic group were injured, then no one person could claim a personal denial of equal treatment.[96] Thus, while the Court in *Allen* was concerned that a grant of standing on the basis of an "abstract stigmatic injury," would mean that "[a] Black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine,"[97] the *Shaw* Court expressed no similar unease with the prospect of limitless (usually White) plaintiffs.[98]

The *Shaw* plaintiffs themselves viewed their claim as one that encompassed more than a personal injury. They had alleged that the 1990 districting "abridged the rights of the plaintiffs and all other citizens and registered voters of North Carolina. . . . *Any registered voter*, . . . has standing to object."[99] In their interrogatory responses, plaintiffs paradoxically asserted that the districting plan "discriminates" against every voter in the state. They argued that "the State's [districting plan] discriminates against *all* voters, of whatever race," and that it "discriminate[d] against plaintiffs and *all* other voters in North Carolina."[100]

Such assertions highlighted a failure of proof that should have been a fatal flaw in the case. A discriminatory districting plan is a scheme—such as that in *Baker v. Carr*[101] or *Gomillion v. Lightfoot*[102]—

94. *See Allen*, 468 U.S. at 753–54.

95. *See id.* at 754–55 (citations omitted).

96. *See id.* at 755.

97. *Id.* at 756. Justice Brennan notes that the majority's holding in this aspect resulted from a mischaracterization of the allegations in the complaint. Under Justice Brennan's reading of the complaint, the stigmatic claim was limited to "Black children attending public schools in districts that are currently desegregating yet contain discriminatory private schools benefiting from illegal tax exemptions." *Id.* at 770 n.3 (Brennan, J., dissenting).

98. This striking inconsistency by Justice O'Connor in the treatment of the Black plaintiffs in *Allen* and the White plaintiffs in *Shaw I* led one scholar to dub the two cases "photographic negatives" of each other. *See* Karlan, *All Over the Map supra* note 56, at 280.

99. Complaint at 12–13, Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. Aug. 7, 1992) (No. CIVA92-202-CIV-5BR) (emphasis added).

100. Plaintiffs' Responses to Defendant-Intervenors' First Set of Written Interrogatories at 21, Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. Aug. 7, 1992) (No. CIVA92-202-CIV-5BR) (emphasis added).

101. 369 U.S. 186 (1962) (holding plaintiff's claim of a denial of equal protection justiciable because of the state's failure to reapportion election seats, despite increasing population disparities).

which places one group of voters at a disadvantage compared to the remaining voters. It made no sense to assert that a districting plan imposed such a comparative disadvantage on all voters in a state. The complaints filed, although containing repeated and specific allegations of a constitutional violation, made no specific reference to any injury to the plaintiffs. By their own admission, the plaintiffs pursued their action not because of any specific injury, but rather because they wished to advance their ideologically-driven constitutional theory regarding the North Carolina districting plan.[103] The Court has noted on more than one occasion that standing does not rest on "the sincerity of [a party's] stated objectives [but rather on] possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct."[104] Consequently, the Court's first articulation of an injury sufficient to support standing fell short of the mark. As Justice Stevens noted, the Court was unable to articulate a coherent rationale for granting the *Shaw* plaintiffs the right to sue under the Equal Protection Clause.[105]

The *Shaw* line of decisions sparked a debate among legal scholars. Critics assailed the Court for its major departure from earlier

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102. 364 U.S. 339 (1960) (holding unconstitutional a manipulation of municipal boundaries to exclude Black citizens).

103. As one of the plaintiffs explained, "we . . . felt that this was an objectionable district on constitutional grounds and we thought we would strike a blow for what we thought was a righteous cause." Deposition of Melvin Shimm, Oct. 27, 1993, at 40, Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. Aug. 7, 1992) (No. CIVA92-202-CIV-5BR). *See also Shaw II*, 517 U.S. at 922 (1996) (Stevens, J., dissenting) (pointing out that what plaintiffs objected to was "not . . . any adverse consequence that [they], on account of their race, had suffered more than other persons, but rather [because] the State's failure to obey a constitutional command to legislate in a color-blind manner conveyed a message to voters across the State that 'there are two Black districts and ten White districts.' ") (citation omitted).

104. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 223 n.12, 225–226 (1974) (quoting Doremus v. Board of Educ., 342 U.S. 429, 435 (1952)). *See also* Whitmore v. Arkansas, 495 U.S. 149, 160 (1990) (denying standing to death row inmate to raise claim as a citizen to ensure that no death sentence was carried out in violation of the Eighth Amendment); Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (stating that a "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved'. . . .").

105. *See Shaw I*, 509 U.S. 630, 686 (1993). *See also* Miller v. Johnson, 515 U.S. 900, 929 (1996) (Stevens, J., dissenting) (finding an absence of a "legally cognizable injury"); United States v. Hays, 515 U.S. 734, 750 (1995) (Stevens, J., concurring in the judgment) ("The majority fails to explain coherently how a State discriminates invidiously by deliberately joining members of different races in the same district; why such placement amounts to an injury to members of any race; and, assuming it does, to whom.").

cases on standing and voting rights.[106] At its broadest, the critique most incisively articulated by Professor Pamela Karlan was that the plaintiffs in *Shaw I* could meet none of the three standing prongs that the Court had carefully established in earlier jurisprudence.[107] The Court had failed to articulate any cognizable injury, and the plaintiffs could not show that a favorable ruling would cure any purported injury, since even if the districts were redrawn, there was no guarantee that the same plaintiffs wouldn't again be subject to the same injury.[108] Finally, Karlan noted that the plaintiffs could not show causation, the third prong of standing, because there was no necessary correlation between the racial classification of voters and the defined resulting harm. The same harm would occur to one who lived in the district's geographical area at the time of the districting as to one who moved into district after the district was created, and who therefore could not have been personally classified by race.[109]

Other critics focused more closely on the injury component.[110] An injury that rested on the notion that any citizen has the right to a

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106. *See, e.g.*, James U. Blacksher, *Majority Black Districts,* Kiryas Joel, *and Other Challenges to American Nationalism*, 26 CUMB. L. REV. 407, 450 (1995–1996) [hereinafter Blacksher, *Majority Black Districts*] (noting that the majority in *Shaw*, *Miller*, and *Kiryas Joel* had to concede that there was a lack of harm to any "person or group of persons," and arguing that the "Article III questions about judicial authority are . . . [not answered by] the Court's attempted distinction between *Miller* and *United States v. Hays*"); David R. Dow, *The Equal Protection Clause and the Legislative Redistricting Cases—Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123, 1140 (1997) (positing that where the majority enacts legislation that allegedly harms members of the majority group a majority plaintiff suffers no "constitutionally cognizable injury"); Karlan, *All Over the Map*, *supra* note 56, at 278 (taking issue with the *Shaw* Court's "complete disregard" for standing doctrine and asking what injury gave plaintiffs standing to bring suit); Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. REV. 1, 9 (1995) (stating that the *Shaw* plaintiffs lacked elements considered essential to establish a valid Equal Protection claim).

107. *See* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 294–295 (1995–1996) [hereinafter Karlan, *Still Hazy*] (finding all three prongs of standing problematic as applied to the voting rights cases).

108. *See id.* at 293–294. There could be an injury, according to Karlan, only if the Court was prepared to define a cognizable injury in the districting context as "racial integration where Whites do not remain the predominant group." *Id.* at 293.

109. *See id.* at 294. *See also* Parker, *supra* note 106, at 18–20 (arguing that plaintiffs cannot show a link between the districting and the likelihood that elected candidates would represent only members of one race or that the districting exacerbates racial voting; nor could they demonstrate redressability because voters and candidates who might be elected from the challenged districts are not before the court).

110. *See, e.g.*, James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 HOW. L.J. 633, 634 (1996) (criticizing the Court for allowing gerrymandering on the basis of a panoply of reasons, but singling out and striking down race as a reason); Karlan, *All Over the Map*, *supra* note 56, at 278 (taking issue with the *Shaw* Court's "complete disregard" for standing doctrine and

government that obeys the law,[111] should have been, by definition, insufficient for standing in the Equal Protection context as the Court had previously reserved such broad standing only for Establishment Clause cases.[112] The vague, possibly widespread nature of the stated injury seemed to be a signature example of a generalized grievance.

Moreover, if one of the reasons that a generalized grievance should not be heard is that such matters were best left to the political process, surely this applied to a *Shaw* claim—an injury that was "political in the truest sense of the word."[113] There was, or should have been, a political solution available to race-conscious districting, particularly where those objecting to the districting were of the same race as a majority of the voters in the state and of a majority of the state legislature.[114] Indeed, Justice Stevens proposed a straightforward solution for the discontented potential *Shaw* plaintiffs: the

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asking what injury gave plaintiffs standing to bring suit); Karlan, *Our Separatism*, *supra* note 77, at 90–102 (castigating Court for being both "incoherent and doctrinally unstable," and using inflammatory arguments to avoid discussing the real issues of whether non-White voters have a voice in the political process); Parker, *supra* note 106, at 9(stating that plaintiffs in *Shaw* lacked elements considered essential to establish a valid Equal Protection claim because they made no claim of being injured by virtue of discrimination against a protected, identifiable class); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 324–326 (1997) (arguing that the *Shaw* cases represent a departure from traditional equal protection concerns, i.e., state action that has the effect of singling out certain persons or groups for special benefits or burdens without sufficient justification). *But see*, Katherine Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 324, 340–41 (1995–96) (seeing lack of standing as no defense to a racial gerrymander claim and implying that racial classification is harmful in *any* context).

111. *See* Karlan, *Still Hazy*, *supra* note 107, at 297 (noting that a "candid [C]ourt" might well have held it acceptable to sue to enforce the right to a government that obeys the Constitution).

112. *See Shaw II*, 517 U.S. 889, 923 (1996) (Stevens, J., dissenting) ("[W]e have permitted generalized claims of harm resulting from state sponsored messages to secure standing under the Establishment Clause"). Further, a broadly framed prohibition against governmental classification of individuals by race, taken literally, would render government census activities illegal. *See id.* at 925–926 (Stevens, J., dissenting); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1214 (1996) (noting that if it is the mere use of race that is the injury "a wide range of government activities—from juror collection questionnaires to police descriptions of fleeing suspects to much of the census—may also be presumptively unconstitutional.").

113. Dow, *supra* note 106, at 1146; *see also* Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 220, 227 (1974) ("Our system of government leaves many crucial decisions to the political processes.") (citing United States v. Richardson, 418 U.S. 166, 179 (1974)).

114. *See* Dow, *supra* note 106, at 1132–33. For Dow, the pertinent question is "whether it is coherent to allow a member of a political majority to raise a constitutional challenge to action undertaken by the majority of which she is a member." *Id.* He argues that the Court's undue focus on the standard of review post-Bakke has obscured this more important question. *See id.*

election of a legislature that would refuse to draft a race-conscious districting plan.[115] Similarly, Professor David Dow has proposed that where Whites are a "governing majority" they should lack standing to challenge legislative decisions that aim to and succeed in strengthening the political power of nonmajority groups.[116]

2. Individualizing the Injury

Initially, the Court ignored the standing issue entirely.[117] However, in subsequent cases, the Court strove to transform the *Shaw* injury into one that is congruent with its standing doctrine. The allusion to harms as potentially stigmatizing, balkanizing, and stereotyping[118] were of little help in particularizing and individualizing the injury.

One way to remove standing as an obstacle to hearing a case is to characterize the injury so that it fits within established parameters. Commentators have long critiqued the Court's practice in this regard, for it is in the very act of recharacterization that standing is most easily manipulated, since the characterization of an injury is emphatically a non-neutral judgment.[119] But how could a *Shaw* plaintiff show that she had been "singled out"[120] at all, much less on the basis of race? An assumption that voters are treated as "individuals" in a process that is designed to group people is questionable at best.

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115. *See* Bush v. Vera, 517 U.S. 952, 1013 n. 9 (1996) (Stevens, J., dissenting) (pointing out that use of the democratic process could "alleviate [plaintiffs'] injury").

116. Dow, *supra* note 106, at 1145–1148. Dow also argues that as a substantive matter, such a rule would be consistent with a functional view of the Equal Protection Clause. Thus, if a prime function of the Constitution is to allow Courts to intercede where a majority has acted to harm a minority, such a rule would effectuate this intended beneficiary concept. *Id.* at 1127.

117. In *Shaw I*, the Court gave little credence to consideration of whether plaintiffs had standing to bring their claim. Indeed, the very word "standing" does not appear anywhere in either the majority or dissenting opinions. Only Justice White mentioned that plaintiffs had not "alleged a cognizable injury." 509 U.S. 630, 659 (1993) (White, J., dissenting).

118. *See supra* text accompanying notes 66-71 (summarizing *Shaw I*).

119. *See, e.g.*, Fletcher, *supra* note 28, at 231 (arguing that "injury in fact" requirement cannot be applied in a non-normative way); Gene R. Nichol, *Rethinking Standing*, 72 CAL. L. REV. 68, 81–82 (1984) ("[D]etermination of which injuries may properly trigger the federal judicial power is hardly a neutral, value-free process.").

120. *Cf.* Raines v. Byrd, 521 U.S. 811, 821 (1997) (denying standing to Members of Congress alleging that a provision in the Line Item Veto Act violated Art. I of the Constitution on the ground that plaintiffs "have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies"). The Court went on to state that plaintiffs had not claimed that they have been deprived of something to which they *personally* are entitled . . .[r]ather, [their] claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete." *Id.*

Shaw plaintiffs would likely be unable to show that they had been placed in a particular district because of their race, as opposed to being placed there for other, non-racial reasons.[121] One non-racial reason might be to ensure that the districts were equally populated.[122] The persons so added to a district have been termed "filler people,"[123] to indicate that they are chosen not for their potential to aid the electoral control exercised by any particular group, but rather to round out the district's total population. Countering this proposition is the argument set forth by John Hart Ely, that filler people are put in *Shaw* districts because of their race, since they must belong to any group other than the racial or ethnic minority that is in the majority in the district.[124] Under this latter view, the injury may be seen as clear: the intentional assignment of a voter to a district where her vote won't count. The filler people so assigned have standing as individuals who have been disadvantaged because of race.[125] Indeed, for Ely the disadvantage suffered by such constituents goes beyond being represented by someone who ignores their interests. He goes further to attest that "[w]hite filler people have standing basically because they've been deprived of a meaningful shot at helping to elect a representative whose race is the same as theirs."[126] While that formulation of injury might be read into the *Shaw* claim as subtext, it is not one that the Court itself recognized.[127]

The Court seizes upon the potential injury it saw posed by the message sent to the elected official in a racially gerrymandered district in *United States v. Hays*.[128] In *Hays*, decided two years after *Shaw*

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121. As the Court recognizes, "[d]emonstrating the individualized harm . . . [might] not be easy in the racial gerrymandering context." United States v. Hays, 515 U.S. 737, 744 (1995).

122. *See* discussion of the one-person, one-vote requirement *infra* Part III.B.1.

123. This is the term used in Aleinikoff & Issacharoff, *supra* note 81, at 630–633 (noting that filler people may actually feel harmed because they are "essentialized" by a race-conscious districting plan and thus "denied their dignitary right to equal treatment and respect by having their welfare discounted"). *See also* Abigail Thernstrom, *More Notes From A Political Thicket*, 44 EMORY L.J. 911, 917 (1995) (regarding the White voters in a majority-minority district as being "included so as not to waste Black ballots by excessive 'packing' ").

124. *See* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 581–85 (1997).

125. *See id.* at 585, 594–95.

126. *Id.* at 594.

127. *See* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2290–2291 (1998) (pointing out that not only is Professor Ely's view of the injury not how the Court itself described it, but that it would fly in the face of much of the Court's language and be more restrictive, since his position would mean that only those persons who are of a minority population in a district can sue).

128. 515 U.S. 737, 745 (1995).

I, the Court was forced to confront the standing issue because defendants had raised the issue below, and the district court, with little discussion, had found standing.[129] Due to significant alteration of the districting plan following the *Shaw I* decision, the plaintiffs no longer resided in the newly created majority-minority congressional district. Since the district court had not addressed the standing issue in the context of the revised plan, the Supreme Court did.

The Court acknowledged that the "rule against generalized grievances applie[d] with as much force in the Equal Protection context."[130] Because of the need for a plaintiff to be "personally denied equal treatment," the Court rejected the suggestion that all State residents would have standing to sue.[131] As a way of accommodating the *Shaw* claim within its standing jurisprudence, and presumably to take care of the problem of a potentially unlimited universe of plaintiffs, the Court held that only residents of the challenged district may bring suit. Reviewing the catalogue of potential harms recited in *Shaw I*, the Court concluded that the harm is a "representational" one, and only voters in those districts might suffer these "special representational harms."[132] Only residents will have been denied equal treatment because of the reliance on racial criteria. Plaintiffs not residing in the district may sue only if they are able to make an evidentiary showing that they have been "personally classified by race."[133]

Perhaps in recognition of the problem that the *Shaw* claim creates—a claim that at best may be limited to residents of the State—the Court in *Hays* chose to distinguish between those who live in the majority-minority district and those who live outside it. Even this distinction, however, left the injury unclear,[134] and some commenta-

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129. *See* Hays v. Louisiana, 839 F. Supp. 1188, (W.D. La. 1993). Correcting what it saw as defendants' "belie[f] that only historically disadvantaged minorities have standing to attack state laws that segregate citizens on the basis of race[,]" the district court in *Hays* did not engage in any real analysis of standing law. *Id.* at 1192. It simply held that "[w]hite citizens thus clearly have standing to challenge redistricting plans under the Equal Protection Clause of the Fourteenth Amendment, just as do . . . citizens of any other race." *Id.*

130. *Hays*, 515 U.S. at 743.

131. *Id.* at 744.

132. *See id.* at 745.

133. *Id.*

134. *See, e.g.*, Issacharoff & Goldstein, *supra* note 76, at 63–64 (criticizing the Court for its continued failure to announce a coherent theory of standing, since it is difficult to distinguish between the harm suffered by a person on one side of a district line and that suffered by a person on the other, unless the first harm is being represented by an African American elected official, and that the *Hays* restriction misses the fact that in districting "a decision to include . . . is . . . also a decision to exclude . . . .").

tors saw this distinction as specious.[135] In its effort to give contour to *Shaw* standing, the Court had failed to tell us why a voter on one side of a district line was injured, while a voter on the other side of the line was not.[136] Indeed, the *Hays* plaintiffs themselves, none of whom resided in either of Louisiana's majority-minority districts, objected to the Court's limitation, noting that their complaint challenged the entire plan.[137]

3. No Proof of Injury

Even if one accepts the *Hays* articulation of injury as sufficient, there is still a final aspect of *Shaw* standing that does not make sense. At some point in the litigation, a plaintiff is expected to demonstrate that the putative injury has actually occurred or is likely to do so.[138] For example, in *Gladstone, Realtors v. Village of Bellwood*,[139] plaintiffs alleged that the defendants had injured them by denying them the right to seek housing of their own choice and live in an integrated neighborhood, as well as damaging the housing market, when they "steered" potential African American home owners into a "target area."[140] The Court recognized the injury of the plaintiffs living in the "target area," as well as the Village itself, yet specified that the plaintiffs would need to show on remand that "as alleged, petitioner's sales practices *actually* have begun to rob Bellwood of its racial balance and stability."[141]

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135. *See* Blacksher, *Majority Black Districts*, *supra* note 106, at 450 ("Article III questions about judicial authority are raised, which the Court's attempted distinction between *Miller* and *United States v. Hays* (voters who live in the challenged district have standing, while those outside the district do not) failed to answer." *See also* Issacharoff & Karlan, *supra* note 127, at 2276–2277 (arguing that instead of limiting the number of potential plaintiffs, the Court actually expanded the pool of potential plaintiffs). *But cf.* Saunders, *supra* note 110, at 321 (noting that *Hays* may not be as arbitrary as some suggest and that residence is used merely as an evidentiary presumption).

136. If the purported injury is the message sent by the state that race matters, residents of adjacent districts are in the same position. Distinguishing between them put the Court in the same position as it says the State actors are in. That is, engaging in demeaning stereotyping, by assuming that residents of the fourth district in Louisiana were harmed in ways that those in the fifth district were not. *See* Durchslag, *supra* note 62, at 353–54.

137. *See Hays*, 515 U.S. at 746.

138. *See* CHEMERINSKY, *supra* note 25, § 2.3, at 58.

139. 441 U.S. 91 (1979).

140. *Id.* at 95.

141. *Id.* at 111 (emphasis added). *See also* City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (denying standing for purposes of injunctive relief to a plaintiff who had been subjected to a chokehold during a routine traffic stop by the LAPD because he could not show that he would have had another encounter with the police or that

In examinign the issue of putative injury, the *Shaw* Court has apparently decided that an injury to White voters residing in a majority-minority district, bizarrely shaped or not, may be presumed. But while a federal court is now required to presume that White voters in an integrated *Shaw* district have suffered a representational harm, legislators may not presume that the African American voters in the district are likely to vote Democratic, lest they be accused of using "race as a proxy."[142]

Evidently, the analytical distinctiveness of the *Shaw* claim—mere creation of a district based predominantly on race—was to be carried over to normal evidentiary requirements as well. If the pruported injury is that the quality of representation for the White voter has suffered, a plaintiff should be required to come forward with proof that this has actually occurred. On the other hand, if the injury is that the plaintiff simply has reason to doubt the quality of her representation,[143] even if the quality never actually suffers, it is unlikely that one would ever be able to provide tangible evidence of this perceived harm. Undoubtedly this difficulty is attributable to the court's recognition of what have been termed "expressive harms."[144] Thus it suffices for a court to rely on a presumption of injury, even if based on no more than the mere statement of injured feelings sufficed by the voter because of the racial message sent by the state.[145] While plaintiffs might well prove that a "representational harm" has occurred,[146] no plaintiff was ever required to do so.

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all police officers engaged in the same conduct); Warth v. Seldin, 422 U.S. 490, 501–502 (1975) (holding that trial court has authority to require plaintiff to proffer facts that would support standing or suffer dismissal of the complaint). *Cf.* Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (relying on *Bellwood* to hold that equal housing opportunity organization would have standing to sue realty company accused of discrimination if "as broadly alleged, petitioners' steering practices *have* perceptibly impaired [their] ability to provide counseling and referral services for low and moderate-income homeseekers [because] there can be no question that the organization has suffered injury in fact") (emphasis added).

142. *See* Bush v. Vera, 517 U.S. 952, 968–69 (1996) (noting that it is acceptable to achieve partisan goals even where these have "racial implications," but where race is used as a proxy for political affiliations, a "racial stereotype . . . is in operation"). This was true, according to the Court, despite evidence that 97% of African American voters in and around Dallas vote Democratic. *See also id.* at 998 (Kennedy, J., concurring) (finding that "shift[ing] blocs of African American voters to districts of incumbent Democrats" constituted use of race as a proxy).

143. *See* Shaw v. Hunt, 861 F. Supp. 408, 424 (E.D.N.C. 1994).

144. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 485 (1993) (viewing *Shaw* as resting on a "distinctive conception of the kinds of harms against which the Constitution protects . . . [called] expressive harms, as opposed to more familiar, material harms").

145. *Cf.* Fletcher, *supra* note 28, at 231 (noting that "[t]here cannot be a merely factual determination whether a plaintiff has been injured except in the relatively

The incoherence of the Court's identification of the injury, even with the *Hays* gloss coupled with the apparent lack of a requirement that plaintiffs prove any actual injury, left the district court on the remand of *Shaw* struggling to apply *Shaw I* and the subsequent decisions. The district court noted that "[a]t first blush, it would appear that plaintiffs have not alleged, much less proved the sort of 'injury in fact required' " by standing law.[147] The district court concluded—correctly as it turned out—that the Supreme Court would find standing, despite the "abstract, theoretical, and merely speculative nature of the harms alleged."[148] The district court based this conclusion on its understanding that the Supreme Court had imposed the "liberal rule of standing developed in [*Regents of California v. Bakke*]" and other affirmative action decisions.[149]

The Court's refusal to mandate that plaintiffs raising a *Shaw* challenge to majority-minority districts actually prove the existence of any harm may be contrasted with the proof required in making out an Equal Protection claim and of African American and Hispanic plaintiffs claiming racial vote dilution. The Court had held that such plaintiffs must make a tri-partite threshold showing in *Thornburgh v. Gingles*.[150] First, plaintiffs must show that the minority population is

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trivial sense of determining whether the plaintiff is telling the truth about her sense of injury").

146. A plaintiff might show "first, [that] all or most Black voters support the same candidate, and, second, [that] the successful candidate ignore[d] the interests of her White constituents." Miller v. Johnson, 515 U.S. 900, 930 (1995) (Stevens, J., dissenting).

147. *Shaw*, 861 F. Supp. at 424.

148. *Id.*

149. *Id.* at 425. But the district court recognized the difficulty with even this formulation:

> It is not . . . obvious how this liberal rule of standing . . . challenging explicit racial classifications can be transposed to race-based districting[, since] . . . the cases in which the dignitary injury resulting from a racial classification has been found sufficient to confer Article III standing have involved the use of race to disadvantage members of a particular racial group relative to other persons in the distribution of some governmental benefit.

Id. See also Issacharoff & Goldstein, *supra* note 76, at 56 (noting that prior to *Shaw*, the Court had never struck down legislation without also identifying an injury); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1735 (1993) [hereinafter Karlan, *Pessimism About Formalism*] (explaining how the lower court in *Voinovich v. Quilter*, 507 U.S. 146 (1993) had essentially "Crosonized" the reapportionment process, by requiring that the drawing of "race-conscious 'safe districting' " be restricted to those situations when the failure to do so would itself violate the Voting Rights Act).

150. 478 U.S. 30 (1986); *see also* Growe v. Emison, 507 U.S. 25, 40–41 (1993) ("Unless these points are established, there neither has been a wrong nor can be a remedy."); *Voinovich*, 507 U.S. at 158 (holding that the *Gingles* preconditions apply

sufficiently large and geographically compact to make up a majority in a single-member district.[151] Second, plaintiffs must show that the minority population is politically cohesive.[152] Third, and crucial to their case, they must demonstrate the existence of racial bloc voting; a court may not presume its existence.[153]

In none of the *Shaw*-type cases had plaintiffs offered any evidence whatsoever that any of the purported harms articulated by the Court had occurred or that they would occur. If the harm was the potential for an increase in racial bloc voting, to meet their burden under *Shaw I*, plaintiffs would have to offer evidence that a challenged districting plan had increased the level of bloc voting.[154] Were plaintiffs in these cases to show that the representative elected from the majority-minority district actually "received" and acted on the particular "message" conveyed by a race-conscious district,[155] the plaintiffs might meet their burden of proof by showing that the representative ignored White voters in the district or failed to provide constituent services in an even-handed manner, thus showing a representational harm. The plaintiffs in these cases neither introduced nor claimed to have any evidence of specific injury. Notwithstanding these difficulties with such a claim by the end of

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and should be followed, but that they "cannot be applied mechanically without regard to the nature of the claim"). The Court in *Shaw I* reaffirms that "racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish" a § 2 violation." *Shaw I*, 509 U.S. 630, 653 (1993).

151. *See Gingles*, 478 U.S. at 50.

152. Where the intraracial voting results also show support for identical candidates and/or issues, cohesiveness is shown. *See id.* at 56.

153. *See id.* at 51. Proof that minority voters vote for minority candidates and non-minority voters for non-minority candidates will be sufficient to prove racial bloc voting. The Supreme Court has repeatedly asserted that the existence of racial bloc voting in a particular state or locality cannot be assumed, but must be demonstrated through the introduction of probative and persuasive evidence. *See Growe*, 507 U.S. at 42; *Voinovich*, 507 U.S. at 151; *see also Shaw I*, 509 U.S. at 653 (reaffirming principle that "racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish a § 2 violation") (citing *Growe*).

154. Proof of racial bloc voting is invariably based on evidence of the results in a series of elections over a number of years. In *Gingles*, for example, the plaintiffs introduced detailed evidence regarding the voting behavior of Blacks and Whites in six elections over the course of twelve years. *See Gingles*, 478 U.S. at 32. In *Shaw I*, plaintiffs acknowledged that racial bloc voting by both Blacks and Whites existed to a substantial degree even *before* the enactment of the legislation at issue. *See* Plaintiff's Responses to Defendant-Interviewers' First Set of Written Interrogatories, Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. Aug. 7, 1992) (No. CIVA92-202-CIV-5BR).

155. *See Shaw I*, 509 U.S. at 648.

the Court's 1996 term, it was ensconced in voting rights jurisprudence.[156]

As a result of the *Shaw* line of cases, a resident who showed that race was the predominant factor motivating the creation of her district could now make out a prima facie case of an equal protection violation, without showing any specific injury. White plaintiffs are presumptively injured when a democratically elected body takes race into account when drawing electoral districts to enable minority groups to participate in the political process and elect candidates of their choice.[157] The Court disregarded traditional standing principles

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156. The Court has now sustained several challenges to majority Black districts. *See* Silver v. Diaz, 118 S. Ct. 36 (1997) (mem.), *aff'g* 978 F. Supp. 96, 117 (E.D.N.Y. 1997) (affirming grant of summary judgment to plaintiffs based on district's odd shape, direct evidence that all districting criteria with exception of equal population were subordinated to racial concerns, and where the district was not shown to be narrowly tailored to meet concerns of § 2 or § 5); Abrams v. Johnson, 521 U.S. 74 (1997) (upholding district court's redistricting plan on remand of *Miller* that included only one African American majority district instead of the two majority-Black districts previously adopted by the Georgia state legislature); Moon v. Meadows, 521 U.S. 1113 (1997) (mem.), *aff'g* 952 F. Supp. 1141, 1150 (E.D. Va. 1997) (rejecting state's assertion that a minority congressional district was created to avoid a possible § 2 violation, where the district was not compact, not drawn in the area of a potential violation, and where there was insufficient evidence of the existence of a compact minority population and racial bloc voting); *Shaw II*, 517 U.S. at 918 (reversing district court's decision that minority districts were narrowly tailored to achieve a compelling state interest).

But the Supreme Court has summarily affirmed, without opinion, several lower court decisions approving race-conscious congressional and legislative plans. *See* King v. Illinois Bd. of Elections, 118 S. Ct. 877 (1998) (mem.), *aff'g* 979 F. Supp. 619 (N.D. Ill. 1997) (affirming approval of creation of race-conscious African American majority districts which avoided harm to potential Hispanic district where the district court found a compelling interest in remedying potential violations of § 2, concluding that the districts were narrowly tailored and that race was considered no more than reasonably necessary to fulfill its remedial purpose); Quilter v. Voinovich, 118 S. Ct. 1358 (1998) (mem.), *aff'g* 981 F. Supp. 1032 (N.D. Ohio 1997) (affirming lower court's approval of districts despite finding that race was a substantial factor but one that fit within traditional districting principles); DeWitt v. Wilson, 515 U.S. 1170 (1995) (mem.), *aff'g* 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (upholding the deliberate creation of compact minority districts by court-appointed special masters).

In *Lawyer v. Dept. of Justice*, 521 U.S. 567 (1997), the Court affirmed the district court's rejection of a challenge to a legislative redistricting settlement in Florida that reduced the Black voting age population from 45% to 36% in a state senate district. In *Hunt v. Cromartie*, 119 S. Ct. 1545 (1999), the Court reversed the district court's grant of summary judgment for plaintiffs who had brought yet another challenge to the constitutionality of North Carolina's District 12. While the Court viewed plaintiffs' circumstantial evidence as permitting an inference of racial motive, evidence of a "high correlation between race and party preference" precluded summary judgment on the disputed issue of the State's intent. *Id.* at *6.

157. *See* Miller v. Johnson, 515 U.S. 900, 929 (1995) (Stevens, J., dissenting) (criticizing the Court for "misapply[ing] the term 'gerrymander' . . . to condemn the efforts of a majority (Whites) to share its power with a minority (African Americans)").

when it embarked on a path that might very well make all majority-minority districts constitutionally suspect, based largely on presuming injury to (White) voters by virtue of their mere residence in a majority-minority district. By sheer dint of will rather than logic and reasoning based on precedent, the Court succeeded in individualizing what began as a claim of a right to a color-blind electoral process and ended as a claim of the right of a voter to be individually placed in a district, lest she be "classified" on the basis of race and suffer a—perceived and unproven—representational injury.

II. WHY *SHAW* DOES MAKE SENSE

Shaw standing and the confusion it engenders are symptomatic of a deeper problem: the Court has simply failed to articulate a coherent theory of the meaning of the right to vote. The Court's departure from established tenets of law reveals the Court's failure to address what should be its real concern in voting rights cases: whether non-White voters have a voice in the political process and consequently in the shaping of legislative policies.[158]

The results in the *Shaw* cases owe much to the views of the individual justices about democracy and voting. This section surveys the views of the right to vote expressed by currently sitting justices. I conclude that under the views of the *Shaw* majority, standing makes sense because the Court is able to view the right to vote as little more than an individual right to cast a ballot that is equally weighted and counted. The Court ignores aspects of the right to vote that involve group rights, particularly the right to influence the political process and to be actually represented.[159]

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158. *See* Karlan, *Our Separatism*, *supra* note 77, at 84, 92.

159. Professor Pamela Karlan provides a useful taxonomy of voting which may be helpful in consideration of the views of the sitting justices on the Court. Karlan envisions a taxonomy of voting that includes three different rights—participation, aggregation, and governance. *See* Karlan, *Pessimism About Formalism*, *supra* note 149, at 1707–19; *see also infra* note 173 and accompanying text (describing the first generation cases under the Voting Rights Act). The first right is, in many ways, symbolic; participation claims are protestations about gaining membership in a political community. These claims are primarily individual, involving challenges to barriers to full "civic inclusion." *See* Karlan, *Pessimism About Formalism*, *supra* note 149, at 1710 (defining civic inclusion as "a sense of connectedness to the community and of equal political dignity; greater readiness to acquiesce in governmental decisions; and hence broader consent and legitimacy"). Claims involving the second right—aggregation—are pressed by groups of citizens challenging electoral boundaries (such as gerrymandering) or structural rules within an election (such as majority-vote runoff requirements which might operate to favor a candidate who receives fewer popular votes than his opponent). *See id.* at 1713–14. Karlan's third concept is that of voting as governance, enabling a voter to engage in a continuing dialogue within the democratic process. Within this framework, a voter's concern is seen as transcending the

Before addressing the differences among the views of the sitting justices, it is important to note the commonalities among their views. Justice Ginsburg has identified four areas of agreement among the justices regarding the districting cases.[160] In general, the justices agree that these cases implicate federalism concerns, and the varied opinions express considerable sentiment against judicial intervention in what is essentially a political process.[161] The two groups of justices diverge, however, on the circumstances under which it is permissible for the judiciary to interfere with the state's choices in

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selection of one person at an election, in order to embrace concerns about the make-up and direction of the legislative body as a whole. *See id.* at 1716–18.

According to one scholar, the Court has consistently been most receptive to claims falling within the participation category. *See* James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 901–902, 906–907 (1997) (distinguishing between claims about protective democracy, which involve the notion of the right to vote as basic and preservative of other rights, and communitarian democracy, embodying issues of political inclusion, and arguing that the Court has shown consistent hostility to the former and preference for the latter). The Court has been least receptive to claims within Karlan's governance category. *See, e.g.*, Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) (denying Black county commissioners' claim that respective counties had violated § 5 of Voting Rights Act by failing to obtain preclearance for either resolution altering prior practice of allowing each commissioner full authority to determine how to spend funds allocated to his own road district or for unit system abolishing individual road districts and transferring responsibility for all road operations to county engineer appointed by commission).

The Court's willingness to consider claims within the aggregation branch of the right to vote has been mixed, depending on whether such a claim is made pursuant to the constitution or the Voting Rights Act. Such claims fared most successfully under the 1982 amendments to the Act, which made clear that dilution claims could be proven through an effects test. *See* 42 U.S.C. § 1973(a) (1994). *See also* Karlan, *Pessimism About Formalism*, *supra* note 149, at 1715 (noting that a focus on the racial aspect of racial vote dilution claims—rather than on the fundamental right aspect of voting—led the Court to rely on general equal protection doctrine in deciding these claims, with the result that the Court would invalidate a practice only when it was shown that the practice was developed or maintained with a specific purpose of diluting minority votes).

160. *See* Miller v. Johnson, 515 U.S. 900, 934–936 (1995) (Ginsburg, J., dissenting) (seeing Court agreement on: 1) recognition of presumed state competence in the area of districting, 2) the historical exclusion from the franchise of Black citizens, and 3) the fact that states may consider race in the context of a statutory command, or 4) in order to recognize communities of interest).

161. Members of both the majority and the dissent acknowledge the federalism concerns arising from interference by a federal court in the highly political business that is the duty of state government, whose competence in this arena should ordinarily not be questioned. *Compare, e.g.*, *Miller*, 515 U.S. at 936 (Ginsburg, J., dissenting) with *id.* at 915 (Kennedy, J., majority opinion) (reapportionment primarily the duty and responsibility of the state); Bush v. Vera, 517 U.S. 952, 984 (1996) (O'Connor, J., majority opinion) (stating that the courts opinion "reemphasize[s] the importance of the State's discretion in the redistricting process") with *id.* at 1037–38 (Stevens, J., dissenting) (cautioning against interference in the redistricting process).

districting. For the *Shaw* majority,[162] such interference is justified when there is an excessive and overt use of race in districting, regardless of whether there is any impact on the ability of any individual to vote or whether the complaining party is able to show group vote dilution.[163] By contrast, the *Shaw* dissenters[164] would defer to the legislature when its actions reflect a desire to enhance the ability of definable minority groups to participate in the political process.[165]

In examining these diverging views of the Court, I look to the opinions of the current sitting justices, with a particular focus on Justices O'Connor and Stevens.[166] One view, represented by the *Shaw* majority, adopts a formalistic view of voting, which may be termed "outcome-indifferent.' The *Shaw* dissenters, by contrast, endorse a functional view, one that is "outcome-regarding."

Those on the Court in the first group, including Justices Thomas, Kennedy, Scalia, and Chief Justice Rehnquist, see the right to vote as primarily, if not solely, an individual participatory right. The justices comprising the *Shaw* majority tend to infuse the political infrastructure with talismanic authority, elevating it over voting itself, which remains a formalistic individual act accompanying elections and related activity.[167] Voting under this view is divorced from the outcome of elections and does not link the voter to the political process or decisionmaking. In the end, these justices perceive voting as a right to be exercised by individuals in the abstract.[168] A member of the *Shaw* majority, Justice O'Connor would

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162. By this designation, I refer to Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Scalia, and Thomas. Justice O'Connor's separate concurrence, with her own majority opinion in *Vera,* may indicate a belated realization on her part that the pendulum has swung too far. *See Vera,* 517 U.S. at 993.

163. *See infra* Part II.A.

164. While the dissenters in *Shaw I* included Justices White, Blackmun, Stevens, and Souter, with regard to the current sitting justices, this category includes Justices Stevens, Ginsburg, Breyer, and Souter. Justices Ginburg and Breyer, appointed by President Clinton to replace Justices White and Blackmun, respectively, did not join the Court until after *Shaw I* was decided. Justice Ginsburg has been a vocal dissenter in the post-*Shaw* cases, and her views are discussed in this section rather than those of Justice White, although there is an area of agreement between these two justices on the issue of voting rights. *See Miller,* 515 U.S. at 946, n.11 (Ginsburg, J., dissenting) (indicating agreement with opinion written by Justice White in *UJO*).

165. *See infra* Part II.B.

166. I do not separately address the views of Chief Justice Rehnquist, or Justices Scalia, Souter and Breyer, insofar as their views parallel those other justices whose views are discussed herein.

167. *See, e.g.*, Kathryn Abrams, *Relationships or Representation in Voting Rights Act Jurisprudence*, 71 TEXAS L. REV. 1409, 1415 (1993) (criticizing the Court's decision in *Presley* for the majority's "tendency to see a single event [an election] as the culmination of political participation and the focus of voting rights efforts").

168. *See infra* Part II.A.1.

also more readily take cognizance of voting as an individual right. However, she alone among the *Shaw* majority is willing to acknowledge that voting may also implicate group rights.[169]

At the other end of the spectrum are those justices who share a functional view of voting, a view which involves a concern about the electoral process but is also broad enough to embrace a concern for the post-electoral influence of voters. These justices would entertain governance claims and would treat claims about race-conscious districting as being about aggregation–group, not just individual, claims about voting. Justice Stevens leads this group of justices, which includes Justices Ginsburg, Souter, and Breyer, in keeping with his vision of the importance of voting as representation, which necessarily includes a notion of group rights.

I turn now to more specific treatment of the prevailing voting rights theories among the justices.

A. *The Formalistic View: The Shaw Majority*

1. Voting as Ballot Access and Individual Rights

Of the sitting Justices, Justices Thomas and Scalia espouse quite possibly the most narrow view on voting. This is best illustrated by their expressed views on the Voting Rights Act. For these two justices, the only proper interpretation of the Act is the most literal one, which does not acknowledge the Act's larger goal of enabling minorities to particpate in the politcal process and elect candidates of choice. Thus, the right to vote is limited to the right to cast a ballot and have it counted.

These views are best expressed in a concurring opinion in *Holder v. Hall*,[170] where Justice Thomas proposed that the Court engage in "a systematic reassessment of our interpretation of § 2."[171] The *Holder* plaintiffs brought suit alleging that Bleckley County, Georgia had adopted and maintained a single-commissioner form of government in order to limit the political influence of Black citizens in the County, who made up approximately 20% of the eligible voting population.[172] The Supreme Court held that claims involving the

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169. *See infra* Part II.A.3.

170. 512 U.S. 874 (1994) (Thomas, J., concurring).

171. *Id.* at 876 (claiming that the size of a governing body is not subject to challenge under § 2).

172. *See id.* at 876–77. Bleckley County was in the minority of counties in Georgia using a single commissioner system; most counties had multimember commissioners. *See id.* at 877. In 1986, the county electorate rejected a change where it would be governed by a multimember commission, five of whose members were elected from single-member districts with the chair elected at large. *See id.* at 877. The district

size of a governing body did not come within the purview of the statute. While conceding that § 2 jurisprudence suggested that claims of the *Holder* plaintiffs fit within the dilution model, Justice Thomas favored limiting claims under § 2 to what have been termed "first generation claims."[173] Under this view claims about ballot access are the sum total of the purview of the Voting Rights Act.[174] The *Holder* claims would not be covered, and neither would "challenges to allegedly dilutive election methods that [the Court had] considered within the scope of the Act in the past" fit within "the terms 'standard, practice, or procedure' that can be derived from the text of the Act."[175] Justice Thomas termed the dilution cases "a disastrous

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court rejected the constitutional claim because plaintiffs had failed to prove intent. *See id.* at 878. It also rejected the statutory claim because plaintiffs had not satisfied all three *Gingles* preconditions. *See id.* at 879. The district court found that the proof supported the first *Gingles* precondition that the Black population was compact and substantial enough to make up a majority of one district, but that the evidence did not show racial bloc voting and political cohesiveness of the Black population. *See id.* at 878–79. The Eleventh Circuit reversed, finding that all three preconditions had been met. *See id.* at 879.

173. *See, e.g.*, Lani Guinier, *The Triumph of Tokenism*, 89 MICH. L. REV. 1077, 1093 n.75 (1991) (defining first generation cases as those focusing on the individual right to participate). Such claims would include overt disenfranchisement and challenges to voter registration barriers or impediments to exercise of the franchise. *See, e.g.*, Gain v. United States, 238 U.S. 347 (1915) (striking grandfather clauses which excluded Black voters); Smith v. Allwright, 321 U.S. 649 (1944) (invalidating White primaries from which Black voters were excluded); United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965) (striking literacy tests); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking poll taxes).

Second generation claims focus on minority vote dilution. *See* Guinier, *supra*, at 1093–94. Such dilution might be accomplished, for example, by the use of at-large districts in which a minority group may be submerged in the population or by arbitrarily splitting or "packing" a group of cohesive African American voters, thereby limiting that group's electoral power. *See* Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, *in* MINORITY VOTE DILUTION 85, 86–99 (Chandler Davidson ed., 1984) (describing racial gerrymandering techniques). An extreme example that is presented by *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where the City of Tuskeegee redrew its boundaries to exclude virtually all Black voters.

Finally, third generation claims are those directed toward gerrymandering from within a legislative body. *See* Guinier, *supra*, at 1127; *see also* Presley v. Etowah County, 502 U.S. 491 (1992) (rejecting challenge under Voting Rights Act to reduction in power of elected commissioners after election of first Black commissioner).

174. Justice Thomas views § 2 as encompassing "only state enactments that limit citizens' access to the ballot." *Holder*, 512 U.S. at 893 (1994) (Thomas, J. concurring) (agreeing with majority that the size of a governing body was not subject to statutory challenge).

175. *Id. But cf.* Chisom v. Roemer, 501 U.S. 380, 407–10 (1991) (Scalia, J., dissenting) (pointing out that, § 2, as interpreted in *Gingles*, encompasses two separate types of claims: 1) a non-dilution participatory claim, including claims of denial of right to vote, i.e., racial discrimination in voter registration, 2) and an electoral claim, i.e., vote dilution). *See* 42 U.S.C. § 1973(b) (1994) ("A violation ... is established if [members of a protected class] have less opportunity than other members of the

misadventure in judicial policymaking," that have "immersed the federal courts in a hopeless project of weighing questions of political theory . . ." and had "encourage[d] federal courts to segregate voters into racially designated districts to ensure minority electoral success."[176] Subscribing to language from *Shaw I*, Justice Thomas saw the Court as having "collaborated in what may aptly be term[ed] the racial 'balkaniz[ation]' of the Nation."[177]

Under Justice Thomas' view, application of the Act to dilution claims converted the Act into:

> a device for regulating, rationing, and apportioning political power among racial and ethnic groups. In the process, we have read the Act essentially as a grant of authority to the federal judiciary to develop theories on basic principles of representative government, for it is only a resort to political theory that can enable a court to determine which electoral systems provide the "fairest" levels of representation or the most "effective" or "undiluted" votes to minorities.[178]

In one sense, Justice Thomas was right. By virtue of the shameful exclusion of Black citizens from the right to vote, perpetrated and maintained by the very political entities Justice Thomas believes the courts have usurped, the judiciary was being called upon to "select[] . . . a theory for defining the fully 'effective' vote at bottom, a theory for defining effective participation in representative government."[179]

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electorate to participate in the political process and to elect representatives of their choice.").

176. *Holder*, 512 U.S. at 892 (Thomas, J., concurring)

177. *Id. See also Shaw I*, 509 U.S. at 657 (1993).

178. *Holder*, 512 U.S. at 893 (Thomas, J., concurring).

179. *Id.* at 897. Justice Thomas is critical of the preference for single-member districts both as a "benchmark" by which to measure dilution and as a remedial mechanism for curing the dilution resulting from at-large or multimember districts, seeing this, too, as a political choice. *See Id.* at 898–99 (referring to Justice Harlan's question in *Allen v. State Board of Elections*, 393 U.S. 544, 586 (1991), of "whether a group's votes should be considered to be more 'effective' when they provide influence over a greater number of seats, or control over a lesser number of seats"). *Cf.* Pamela S. Karlan, *Maps & Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 175 (1989) [hereinafter Karlan, *Maps & Misreadings*] (stating that "the history of constitutional protections against racial vote dilution" reflects a commitment to a broader measure of political access and civic inclusion). *See also Holder*, 512 U.S. at 900 (Thomas, J., concurring) (noting that a better "theory of effective political participation [might be one] that would accord greater importance to voters' ability to influence, rather than control, elections . . . especially in a two-party system such as ours, [where] the influence of a

The problem is that the Court has failed to promulgate any coherent theory; yet the *Shaw* cases raise the question of whether the Court will allow the states to do so.

For Justice Thomas, although there are "an infinite number of theories of effective suffrage, representation, and the proper apportionment of political power,"[180] an "effective" vote is simply one that is "duly cast and counted."[181] Justice Thomas' reading of the statutory language of the Voting Rights Act[182] led him to conclude that the "most natural reading" of § 2(b) is the "opportunity . . . to participate in the political process and to elect representatives of their choice," is a formalistic one.[183] An unimpeded opportunity to register to vote and cast a ballot suffices.[184] The problem for Justice Thomas with an interpretation which includes claims of dilution—an interpretation he concedes is entirely plausible—is that it requires courts to engage in political theorizing, choosing from a "dizzying array of concepts of political equality."[185] Another difficulty for Justice Thomas is the tension between a focus on electoral outcomes and the statutory disclaimer of an entitlement to proportional representation.[186] This tension arises from the use of a hypothetical sort of

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potential 'swing' group of voters composing 10% to 20% of the electorate in a given district can be considerable") (citation omitted).

180. For example, Justice Thomas refers to proportional representation, the creation of "influence districts," and the *Bandemer* concept of "virtual representation," or the simplest solution of merely accepting that, in a majoritarian system, minorities frequently lose. *See Holder*, 512 U.S. at 900-01 nn.7–9. Influence districts, those with more than 35% minority population, may still not translate into political fairness where voting is racially polarized. *See* LANI GUINIER, TYRANNY OF THE MAJORITY 86–90 (1994).

181. *Holder*, 512 U.S. at 901 (Thomas, J., concurring) ("I do not pretend to have provided the most sophisticated account of the various possibilities; but such matters of political theory are beyond the ordinary sphere of federal judges.").

182. *See id.* at 918–19 (Thomas, J., concurring) (discussing §§ 2 and 14(b) of the Act). The 1982 amendments to the Voting Rights Act did not alter Justice Thomas' views. In *City of Mobile v. Bolden*, 446 U.S. 55, 55 (1980), the Court held that the Voting Rights Act did no more than codify the Fifteenth Amendment's prohibition of "denial or abridgement of the right to vote," requiring plaintiffs to show intent to prove a statutory violation. One of the stated goals of the 1982 amendment to the Act was to overrule this decision. *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1348 (1983). But for Justice Thomas, a corollary of this fact was that there was no corresponding indication that Congress intended to alter the "understanding that § 2 protects a concept of the 'right to vote' that does not extend to prohibit vote dilution, [or] it likely would have addressed that aspect of *Bolden* explicitly as well." *Holder*, 512 U.S. at 921 n.22 (Thomas, J., concurring).

183. *See id.* at 923–24; 42 U.S.C. § 1973(b) (1994).

184. *See Holder*, 512 U.S. at 925 (Thomas, J., concurring).

185. *Id.*

186. *See id.* at 927–28. The last sentence of § 2(b) states both that the Act "provide[s] . . . no right to proportional representation," and that evidence of a

proportional representation as one reliable benchmark by which to assess a potential statutory violation.[187] Finally, Justice Thomas reads the Act's preclearance provision as focusing on the individual voter and access to the voting booth even more than § 2.[188] For Justice Thomas, the language of the statute is clear, and it is only the Court's reliance on the Act's legislative history that has led to the current state of affairs.[189]

Justice Thomas is similarly critical of the Court's "[f]ar more pernicious . . . willingness to accept . . . the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well."[190] According to Justice Thomas, requiring that plaintiffs alleging vote dilution under the Act prove political cohesion has no mitigating effect because of the ease of this showing.[191] One answer to the problems of finding a benchmark, properly applying it, and avoiding the deliberate creation of majority-minority districts is to limit statutory claims to voter registration and violations of one-person, one-vote. Another answer

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violation might include "[t]he extent to which members of the protected class have been elected to office." 42 U.S.C. § 1971 (1994).

187. But Justice Thomas reads the statute as removing this benchmark from consideration:

> By declaring that the section provides no right to proportional representation, § 2(b) necessarily commands that the existence or absence of proportional electoral results should not become the deciding factor in assessing § 2 claims. But in doing so, § 2(b) removes from consideration the most logical ratio for assessing a claim of vote dilution. To resolve a dilution claim under § 2, therefore, a court either must arbitrarily select a different ratio to represent the "undiluted" norm, a ratio that would have less intuitive appeal than direct proportionality, or it must effectively apply a proportionality test in direct contravention of the text of the Act—hence the "inherent tension" between the text of the Act and vote dilution claims. Given that § 2 nowhere speaks in terms of "dilution," an explicit disclaimer removing from the field of play the most natural deciding principle in dilution cases is surely a strong signal that such claims do not fall within the ambit of the Act.

Id. at 927–28. *But see* Johnson v. Grandy, 512 U.S. 997, 1000 (1994) (holding that achieving proportional representation does not preclude a successful dilution claim).

188. *See Holder*, 512 U.S. at 930.

189. *See id.* at 935, (citing Thornburgh v. Gingles, 478 U.S. 30, 84 (1986)).

190. *Holder*, 512 U.S. at 903.

191. *See id.* at 903–04. This showing is facilitated by judicial acceptance of a "bivariate regression analysis . . . that measures merely the correlation between race and candidate preference and that does not directly control for other factors—to become the norm for determining cohesion in vote dilution cases." *Id.* at 904 n.13. *See also Gingles*, 478 U.S. at 74 (stating that racially polarized voting can be shown by finding a correlation between the race of voters and the selection of certain candidates, and causation or intent to discriminate need not be proven).

that seems to have a certain appeal for Justice Thomas and several commentators is to rely on alternative voting systems, such as cumulative or preference voting.[192]

Justices Thomas and Scalia would subject virtually all majority-minority districts to strict scrutiny because of their joint rejection of voting as a group right[193] and expressed distaste for claims of dilution. A majority-minority district escapes strict scrutiny only when a majority-minority district is created "in spite of," and not "because of," the race of its population.[194] When a district is created because of race, "traditional race-neutral districting principles are necessarily subordinated (and race necessarily predominates), . . . [t]he resulting redistricting must be viewed as a racial gerrymander."[195] This conclusion is a logical corollary of the view expressed in affirmative action cases that any use of race is suspect.[196] Justices Thomas and Scalia would apply this standard across the entire spectrum of cases involving the intentional use of race by the government—including districting.[197]

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192. *See Holder*, 512 U.S. at 909–10 nn.15–17. *See also, e.g.*, Edward Still, Alternatives to Single-Member Districts, in Minority Vote Dilution 249 (Chandler Davidson, ed. 1984).

193. Notwithstanding his view that voting is limited to an individual right, Justice Scalia has rejected the notion that specific members of a state legislature may act to bind the legislature in settlement of litigation. *See* Lawyer v. Department of Justice, 520 U.S. 567, 583–90 (1997) (Scalia, J., dissenting). In *Lawyer*, a majority of the Court affirmed the district court's approval of a settlement of a *Shaw* challenge to a Florida legislative districting, agreed to by the Speaker of the House and President of the Senate and certain intervenors, but objected to by plaintiff and an individual legislator. *See id.* at 575–80.

194. *See* Bush v. Vera, 517 U.S. 952, 1001 (1996) (Thomas, J., concurring). Justice Thomas disagreed with Justice O'Connor's assertion that not all majority-minority districts should be scrutinized under *Shaw* standards and believed that strict scrutiny should apply to all governmental classifications based on race. *See id.* at 999–1001 (Thomas, J., concurring).

195. *Id.* at 1001.

196. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) (asserting vigorously that all governmental racial classifications must be strictly scrutinized).

197. *See Vera*, 517 U.S. at 1000–02. Justices Scalia and Thomas see a perfect correlation between the districting cases and the affirmative action cases. For them strict scrutiny is triggered whenever race is a motivation. As Justice Stevens points out, as a practical matter, "it will be rare indeed for a State to stumble across a district in which the minority population is both large enough and segregated enough to allow majority-minority districts to be created with at most a 'mere awareness' that the placement of the lines will create such a district." *Id.* at 1009 n.8 (Stevens, J., dissenting). *But see Shaw II*, 517 U.S. 899, 941 (1996) (Stevens, J., dissenting) (stating that the affirmative action analogy is not appropriate for considering the constitutionality of race-based districting).

2. The Possibility of a Secondary and Limited Group Right

Justice Kennedy, like the others in the *Shaw* majority, subscribes to an individual norm, although he accords some grudging recognition to group interests.[198] Nonetheless, along with Justices Thomas and Scalia he does not acknowledge that racial or ethnic groups could be one of those interest groups: "redistricting usually implicates a political calculus in which various interests compete for recognition, but it does not follow that individuals of the same race share a single political interest."[199] Thus, the use of race to make a districting decision becomes the use of "race as a proxy." Kennedy's willingness to recognize ethnicity as a basis for a community of interest turns on the residential segregation of the minority group.[200] Moreover, although Justice Kennedy has raised questions about the constitutionality of § 2,[201] he agrees that a state may engage in race-based districting to cure an "anticipated" § 2 violation, but may do so only "as reasonably necessary."[202] He refuses to take what he terms a "shortsighted and unauthorized view of the Voting Rights Act," to "invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."[203] Even minority vote dilution is seen only in terms of an individual right, for "the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs [not] to the minority as a group [but] to its individual members."[204]

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198. *See* Holder v. Hall, 512 U.S. 874, 920 (1994) (Thomas, J., concurring).

199. Miller v. Johnson, 515 U.S. 900, 914 (1995).

200. *See id.* at 919–20. Justice Kennedy is more solicitous of the rights of candidates than those of politically cohesive voters: "Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race." *Id.* at 927.

201. *See* Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (noting that majority's holding that § 2 of the Voting Rights Act covers judicial elections does not "address[] the question [of] whether § 2 of the [amended act as interpreted] . . . is consistent with the requirements of the United States Constitution") (citation omitted).

202. *See Vera*, 517 U.S. at 996 (Kennedy, J., concurring); *see also id.* at 998–99 ("disagree[ing] with the apparent suggestion in Justice O'Connor's separate concurrence that a court should conduct a second predominant-factor inquiry in deciding whether a district was narrowly tailored").

203. *Miller*, 515 U.S. at 928.

204. *Shaw II*, 517 U.S. 899, 917 (1996). Chief Justice Rehnquist, writing for the *Shaw II* majority, states:

> If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' The vote-dilution injuries suf-

3. Majoritarianism, the Individual, and the Political System as Paramount

For Justice O'Connor, the author of *Shaw I* and *Vera*, it would appear that the political process and districting itself are of paramount importance, rather than its ability to serve the function of allocating power or giving voters a voice in government. Justice O'Connor is also squarely in the camp of those who view voting primarily, if not solely, as an individual right, with certain exceptions discussed below.

Since Justice O'Connor is a former state legislator, perhaps it should not be surprising that she is acutely conscious of districting as an "inherently political" process in which the courts generally should not interfere.[205] While Justice O'Connor would not find political gerrymandering claims justiciable,[206] she strains to recognize an analytically distinct claim based on a right to a "colorblind electoral process" in *Shaw I*.[207] Her belief in the importance of the process is underscored by her expressed fidelity to the two-party system,[208] and her philosophy that "reapportionment is one area in which appearances do matter."[209] This latter belief led her to engage in overheated rhetoric, condemning a plan that used race coupled with a "disregard[] [for] traditional districting principles such as compactness, contiguity, and respect for political subdivisions" as suspect, and "bear[ing] an uncomfortable resemblance to political apartheid."[210] In this legislative domain of districting, Justice O'Connor sees the creation of minority districts as placing a government in the position of engaging in impermissible racial stereotyping.[211]

> fered by these persons are not remedied by creating a safe majority-Black district somewhere else in the State.

Id. at 917 (citation omitted).

205. *See* Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring) (stating that "the legislative business of apportionment is fundamentally a political affair").

206. *See Bandemer*, 478 U.S. at 144.

207. *See Shaw I*, 509 U.S. 630, 641–42 (1993). However, this "right" goes unmentioned in the post-*Shaw I* line of cases.

208. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); *see also Bandemer*, 478 U.S. at 144–145 (attributing the strength of the United States government to the two-party system).

209. *Shaw I*, 509 U.S. at 647.

210. *Id.*

211. *See id.*

In *Timmons v. Twin Cities Area New Party*,[212] Justice O'Connor joined the majority opinion upholding a prohibition on multiparty candidacies. The Minnesota statute at issue prohibited candidates from running in a primary as a "majority party" candidate as well as running for office by nominating petition, the method for fielding "minor" party candidates.[213] Such "fusion candidacies" thereby ran on two ballot positions. The *Timmons* majority viewed the burden on the Party's First and Fourteenth Amendment right of association as "not severe" and justified by certain valid state interests.[214] One of those interests was the "strong interest in the stability of [the States'] systems."[215] While a state could not ban third parties, it was free to "enact reasonable election regulations that may, in practice, favor the traditional two-party system," based on a decision that "political stability is best served through a healthy two-party system."[216]

Thus, for Justice O'Connor, whether independent voters are discriminated against,[217] or other voters are deprived of the option of voting for a third party candidate or at least the opportunity to be informed about and perhaps assist in the strengthening of a new party,[218] is less important than honoring the ultimate legislative goal of maintaining a two-party system.[219]

That the political system should be majoritarian in all its aspects—for example, by favoring majority parties by statutory

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212. 520 U.S. 351 (1997).

213. *See id.* at 353–54 n.3.

214. *See id.* at 356.

215. *Id.* at 366.

216. *Id.* at 367.

217. *Cf. Timmons*, 520 U.S. at 379–80 (Stevens, J., dissenting) (characterizing the statute as discriminating against independent voters and minor parties in order to preserve the majorities' positions of power).

218. *See id.* at 379–80 (Stevens, J., dissenting) (characterizing ban on fusion candidacies as interfering with third party's ability to inform voters of its message); *see also id.* at 381 n.11 (stating that multiple party nominations may "foster[] more competition, participation, and representation in American politics"). *But cf.* Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring) ("[T]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level").

219. For Justice O'Connor, there is

> little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government[, and that] [t]he preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.

Bandemer, 478 U.S. at 144–45 (O'Connor, J., concurring).

enactments, tolerating or encouraging partisan gerrymandering, and being "colorblind,"—is consistent with a position that would privilege the political system over the voters within it, and thereby would restrict voting rights largely to the realm of individual rights.[220] Justice O'Connor sees this latter proposition as supported by the Constitution, as well as Supreme Court precedents, particularly with the *Reynolds* line of cases.[221] Her position, as expressed in *Bandemer* is unequivocal: "[N]o group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment."[222] Henceforth, for Justice O'Connor and the justices joining her, certain racial gerrymanders will be deemed state legislation classifying citizens by race, and subject to strict scrutiny.[223] On the other hand, challenges to multimember and at-large districting, where plaintiffs are required to show that such districting has the purpose and effect of diluting the minority group's voting strength, may be treated differently from *Shaw* claims, because, in her view, these arrangements "do not classify voters on the basis of race."[224]

While Justice O'Connor holds the individualistic view and abjures any political group claim, she would recognize some racial group claims. Even here she finds it important to link this claim to individual voters:

> [W]here a racial minority group is characterized by "the traditional indicia of suspectness" and is vulnerable to exclusion from the political process, *individual* voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering. As a matter of past history and present reality, there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the *individual* rights of its members to vote and to participate in the political process. In these circumstances, the stronger nexus between *individual* rights and group interests, and the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination, suffice to render racial gerrymandering claims justiciable. Even so, the *indi-*

220. *See generally Timmons*, 520 U.S. at 367.

221. *See infra* notes 265–772 and accompanying text (discussing one-person, one-vote).

222. 478 U.S. at 147.

223. *See id.* at 151.

224. *Shaw I*, 509 U.S. 630, 649 (1993).

> *vidual's* right is infringed only if the racial minority group can prove that it has "essentially been shut out of the political process."[225]

Section 2 of the Voting Rights Act provides Justice O'Connor with a measure of comfort in casting some support for racial group claims. Thus, she is explicit in her assumption that § 2 is constitutional.[226] Therefore, when specific conditions are met,[227] she would allow states to rely on their obligation under the Act to create majority-minority districts as a permissible compelling state interest.[228] At the same time, she would require states to reconcile the "national commitment to racial equality" with the "complementary commitment of [the Court's] Fourteenth Amendment jurisprudence to eliminate the unjustified use of racial stereotypes."[229] Justice O'Connor proposes that states consider race in the districting process within "a workable framework for the achievement of these twin goals."[230] Within this framework, states must, first and foremost, adhere to traditional districting principles or risk strict scrutiny.[231] Although states may draw majority-minority districts when they have a "strong basis in evidence for concluding that the *Gingles* factors are present,"[232] in the post-*Shaw* world they have little leeway in *how* they may draw such districts.[233]

Thus, even when Justice O'Connor is willing to consider a racial group's interest as worthy and appropriate for consideration, satisfaction of the racial group's concern will be hemmed in by requirements that meet her other, higher-rated concerns. These con-

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225. *Bandemer*, 478 U.S. at 151–52 (O'Connor, J., concurring) (emphasis added) (citations omitted).

226. *See* Bush v. Vera, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (suggesting that "states [should be allowed] to assume the constitutionality of § 2 of the Voting Rights Act, including the 1982 amendments").

227. Justice O'Connor refers to the *Gingles* factors, *see supra* notes 150-153 and accompanying text.

228. *See Bush*, 517 U.S. at 992.

229. *Id.* at 993.

230. *Id.*

231. *See id.* at 993–94 (stating that "[o]nly if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race [will] strict scrutiny apply" and that "districts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, *for predominantly racial reasons*, are unconstitutional") (emphasis in original).

232. *Id.* at 994

233. *See id.* at 983 ("Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions.") (emphasis in original).

cerns are for the political process itself and for individuals who are not required to show any injury, but who may claim a right to a colorblind electoral process and be protected against speculative harms. On the other hand members of minority racial and ethnic groups must prove specified harms and make a specified threshold showing.[234]

B. *The Functional View: The Shaw Dissenters*

1. Racial Groups as Political Groups

The *Shaw* dissenters recognize race and ethnicity as salient indicia of political identity. Both Justice Ginsburg and Justice Souter show a strong appreciation for the collective character of voting. As Justice Ginsburg points out in her dissenting opinion in *Miller*, at least one source of the Court's error is due to its reliance on "the relevance of race in contexts distinctly unlike apportionment."[235]

For Justice Ginsburg, it is no leap from a recognition of group rights to see that "ethnicity defines some of these groups [as] a political reality."[236] Justice Ginsburg reads the *Shaw I* majority opinion as permitting "state legislatures [to] recognize communities that

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234. Justice O'Connor disclaims any consideration of differential treatment:

> The standard would be no different if a legislature had drawn the boundaries to favor some other ethnic group; certainly the standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against Blacks.

Miller v. Johnson, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring) (emphasis in original). This assertion lacks some credibility. *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 280–81 (highlighting Justice O'Connor's inconsistent position in agreeing in *Bandemar*, 478 U.S. at 132, that disappointed Democratice voters in districts drawn to ensure a Republican victory may be "deemed to be adequately represented by the winning candidate," but unwilling to draw same inference for White voters in a *Shaw* district with a (probably Black) elected representative, presuming a lack of responsiveness by the latter).

235. *Id.* at 945 (Ginsburg, J., dissenting); *see also Shaw II*, 517 U.S. 899, 941 (1996) (Stevens, J., dissenting) (criticizing "the majority's implicit equation of the intentional consideration of race in order to comply with the Voting Rights Act with intentional racial discrimination"); *Vera*, 517 U.S. at 1051 n.5 (Souter, J., dissenting) (noting important distinctions in the consideration of race in varying contexts).

236. *Miller*, 515 U.S. at 947 (Ginsburg, J., dissenting); *see also* MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN AMERICAN POLITICS 75–84 (1994) (positing that a perception of "linked fate" reinforces a group racial identity that may be related to racial subordination and may cross class lines and influence political choices).

have a particular racial or ethnic makeup . . . in order to account for interests common to or shared by the persons grouped together."[237] She would have upheld Georgia's eleventh district because it was clear that "race did not crowd out all other factors."[238] Justice Ginsburg rejects the *Miller* majority's characterization of the eleventh district as having no community of interest, because the population, although majority Black, was comprised of "fractured political, social, and economic interests."[239] In her view, the fact of diversity in socio-economic status among the residents of the eleventh district did not mean that there was not a "community of interest" that could permissibly be recognized by the state in its districting plan. This was so because "ethnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life."[240] Nor is official recognition of this fact a recent phenomenon. As Justice Ginsburg notes, "[t]o accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines."[241] She adds that, contrary to the views of the majority, "[t]he creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation."[242]

Justice Ginsburg's view of the group nature of voting, particularly with regard to racial or ethnic groups, is also reinforced by history. The "rank discrimination against African Americans, as citizens and voters" provides support for judicial intervention in voting rights claims.[243] There was no other available method for the court to correct discrimination by state legislatures in their enactments of various discriminatory devices, such as the White primary, poll taxes, and grandfather clauses.[244] Thus, a legislature's use of race in the districting process is sufficiently justified by this history of

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237. *Id.* at 935.

238. *Id.* at 940. Justice Ginsburg noted that in contrast to the shape of North Carolina's I-85 district, Georgia's eleventh district "reflects significant consideration of 'traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial reasons.'" *Id.* (citations omitted).

239. *Id.* at 919 (citing report of plaintiff's expert witness).

240. *Id.* at 944 (Ginsburg, J., dissenting).

241. *Id.*

242. *Id.* at 945. *See also id.* at 931 n.1 (Stevens, J., dissenting) (emphasizing that Whites lack standing to assert "the stigma Blacks supposedly suffer when assigned to a district because of their race").

243. *See id.* at 934.

244. *See id.* at 937 (focusing on the lack of opportunity for "self-correction [by] disenfranchised Blacks [who] had no electoral influence, hence no muscle to lobby the legislature for change").

discriminatory voting practices, the shared interests of racial groups, and the inability of those minority groups to exact demands from the legislature. Groups of White voters and groups of Black voters simply are not similarly situated in the concessions they may wrest from a majority-White legislature. After all,

> [s]pecial circumstances justify vigilant judicial inspection to protect minority voters—circumstances that do not apply to majority voters. A history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the law-making forum . . . . The majority, by definition, encounters no such blockage. White voters . . . do not lack means to exert strong pressure on their state legislators. The force of their numbers is itself a powerful determiner of what the legislature will do that does not coincide with perceived majority interests.[245]

2. The Importance of Politically Cohesive Groups

Justice Stevens, alone among the current justices, has consistently exhibited an understanding that voting encompasses both a group component as well as an individual one imbued with the *Reynolds* concept of "fair and effective representation."[246] At the same time, Justice Stevens adopts a similarly broad view of the workings of the political system.

Justice Stevens began articulating his concept of an expansive scope for application of the Equal Protection Clause in the voting rights context more than twenty-five years ago in *Cousins v. City Council of Chicago*.[247] Justice Stevens, then a Circuit Judge, agreed with the majority's conclusion that the City Council made certain decisions based on race and that district court findings to the con-

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245. *Id.* at 948 (citations omitted) ("[F]ederal constraints imposed by the Voting Rights Act . . . do not leave majority voters in need of extraordinary solicitude."). *Cf.* Davis v. Bandemer, 478 U.S. 109, 152 (1986) (O'Connor, J., dissenting) (arguing that political gerrymandering is a "self-limiting exercise" requiring no judicial oversight).

246. *Reynolds v. Sims*, 377 U.S. 533, 565 (1965).

247. 466 F.2d 830, 847–61 (7th Cir. 1972), *cert. denied*, 409 U.S. 893 (1972) (Stevens, J., dissenting). *Cousins* presented a claim that the 1970 redistricting of the Chicago city council's 50 wards diluted the votes of African American and Latin American voters, as well as political independents. On appeal, the Seventh Circuit reversed the district court's judgment for the City, holding that, while plaintiffs race was considered in the drawing of the ward lines, their evidence had not "so clearly established that the ward boundaries were the product of purposeful discrimination as to permit [the appellate court]" to make that finding. *Id.* at 843. The Court remanded the matter for a new trial on the claims of racial gerrymandering. *See id.* at 843–44.

trary were clearly erroneous. However, Justice Stevens, unlike the majority, would have affirmed the District Court's holding.[248] In large part, Justice Stevens' reasoned that Chicago's asserted justification for the plan—incumbent protection—should have been assessed under different standards than the majority applied.[249] Under Justice Stevens' view, the same Equal Protection standard applied to both racial and political gerrymandering,[250] and the dilution claims of both the political independents and those of the Black and Hispanic plaintiffs would have fared differently. Unlike members of the majority, Justice Stevens would have found the claims of both groups justiciable.[251] In deciding the racial vote dilution claims, Justice Stevens would have looked at objective indicia of legislative purpose to determine whether it was to "segregate or disadvantage a definable group."[252] A review of the evidence led Justice Stevens to conclude that affirming the district court's decision was justified, because the plan did not violate the requirement of equal population and was neither a "flagrant gerrymander[]" in the *Gomillion*

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248. *See id.* at 848.

249. The evidence showed that a principal aim in drafting the plan was the preservation of incumbents. *See id.* at 844. The majority concluded that in some cases this goal may have been accomplished with at least an "awareness" of race. *See also id.* at 839 (citing to conflicting testimony as to whether leading alderman specifically mentioned race when stating, in regard to certain majority-Black neighborhoods, that "We have to save those two young guys. They can't run in those wards. Those wards are all Black and there is nowhere for them to live.").

250. *See id.* at 847. Justice Stevens found support for this view in a number of Supreme Court pronouncements. For example, the Supreme Court had made reference to "racial or economic discrimination," Whitcomb v. Chavis, 403 U.S. 124, 149 (1971), and had specifically reserved any question of claims involving the dilution of "racial or political elements of the voting population." Fortson v. Dorsey, 379 U.S. 433, 439 (1965). Particularly significant for Justice Stevens was the *Whitcomb* Court's critique of the district court's holding that "any group with distinctive interests must be represented . . . if it is numerous enough to command at least one seat and [is geographically compact]." *Cousins*, 466 F.2d at 849. The implication for Justice Stevens of this broad proposition in *Whitcomb* was:

> This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization . . . who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas.

Id. at 849 n.12.

251. *See id.* at 847.

252. *Id.* at 859.

sense,[253] nor shown to have been drafted with an intent to discriminate on the basis of race.[254] According to Justice Stevens' view, the council's goal of protecting incumbents was permissible and the adverse effect on plaintiffs merely incidental to achieving that goal.[255]

Justice Stevens began by noting that the objective of a gerrymander was to ensure that those holding political power at the time of the districting could shore up that power against challenges by those with less power. In short, the gerrymander was a "means by which the 'ins' seek to maximize their advantage over the 'outs.'"[256] It did not matter whether the "outs" were defined by racial or ethnic characteristics or by partisan or other interests. For Justice Stevens, it is the group's cohesive interest that is important: when an identifiable group coalesces around an issue or candidate, the group should be accorded representation. Under this view, the composition of the group is irrelevant—it simply does not matter whether the group is racial, ethnic or political.[257] Rather, "it is the parallel character of the voting of members of the group—rather than the source of their common interests—that motivates the gerrymander."[258]

Another rationale for a uniform method of evaluating all gerrymanders was that Equal Protection tenets otherwise would be applied differently to racial as opposed to ethnic groups,[259] and thus,

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253. Gomillion v. Lightfoot, 364 U.S. 339 (1960) (reversing dismissal of claim by City of Tuskeegee voters challenging the exclusion of virtually all African American voters through gerrymandering).

254. *See Cousins*, 466 F.2d at 861. In applying this standard, Justice Stevens would have concluded that the City's justification of attempting to retain prior ward lines was an acceptable one under an intent norm, even where a result was to dilute votes of various racial and ethnic groups. *Id.* at 860. To do otherwise would mean applying a different constitutional standard to racial gerrymandering. *Cf.* Rogers v. Lodge, 458 U.S. 613, 651 (1982) (Stevens, J., dissenting) ("A constitutional standard that gave special protection to political groups identified by racial characteristics would be inconsistent with the basic tenet of the Equal Protection Clause.")

255. *See Cousins*, 466 F.2d at 861 ("[A]dverse impact on the plaintiffs was in the nature of a by-product of [a] basic plan" to retain "old ward boundaries to the extent that [the council] could do so").

256. *Id.* at 847.

257. "[T]he motivation for the gerrymander is a function of the political strength of the group at which it is directed, . . . the kind of characteristic—whether religious, economic, or ethnic—that gives the group political cohesion [is irrelevant]." *Id.* at 852.

258. *Id.*

259. Justice Stevens reasoned that:

> As a matter of principle, invidious discrimination against Americans of Polish, German, or Italian ancestry is just as indefensible as discrimination against Americans of African ancestry. It seems equally clear that such discrimination against Catholics, Jews, Protestants or Mormons is in the same category. Unquestionably the same rules

it could "be demonstrated that political groups are also entitled to equal treatment."[260] But one-person, one-vote may also protect groups. The fact that "political affiliation" could not justify an "[a]bridgment of an individual's right to participate in the electoral process, either by denying him the opportunity to vote, or by counting his vote as worth only a fraction of the vote of another citizen,"[261] was further support for Justice Stevens' conclusion that there should be no distinction in the treatment of gerrymandering claims, whether the basis was ethnic, racial or political. Finally, Justice Stevens took into account the fact that different ethnic and racial groups might very well share similar political interests.[262]

Underpinning Justice Stevens' premise of the application of identical analyses to all types of gerrymanders is his understanding of the group nature of voting rights. The one-person, one-vote principle has the individual as its primary focus,[263] and, as Justice Stevens noted, "[a]lmost all of the Supreme Court decisions in the field of voting rights are concerned with discrimination which directly affects the individual right."[264] Nonetheless, the very existence of the gerrymander confirms the reality of cohesive groups: it is "discrimination . . . directed primarily at a cognizable group and, therefore, only indirectly at its members."[265] Nor would individual plaintiffs claiming dilution have to show a direct personal injury to

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> must be applied to the classification of voters on grounds of national origin, ethnicity, or religion, as race.

Id. at 850. *See also Miller v. Johnson*, 515 U.S. 900, 928–929 (1995) (O'Connor, J., concurring) (suggesting that even after *Shaw I*, Black voters will be treated no differently than those of other ethnic groups); *Cousins*, 466 F.2d at 852 ("[A]n interpretation of the Constitution which afforded one kind of political protection to Blacks and another kind to members of other identifiable groups would itself be invidious."); *Rogers*, 458 U.S. at 652 ("[A]ll minority groups are equally entitled to constitutional protection against the misuse of the majority's political power . . . .").

260. *Cousins*, 466 F.2d at 850.

261. *Id.* at 851 (footnotes omitted).

262. *See id.* ("[T]he practical politician will try to predict the blue collar vote, the Black vote, the Jewish vote, the suburban vote, the Polish vote, and many others. Such predictions are realistic reflections of the fact that various components of the body politic share common interests . . . ."). *See also Rogers*, 458 U.S. at 651–52 (Stevens, J., dissenting) ("Whenever identifiable groups in our society are disadvantaged, they will share common political interests and tend to vote as a bloc. In this respect, racial groups are like other political groups.").

263. *See* Karcher v. Daggett, 462 U.S. 725, 747 n.6 (1983) (stating that the primary focus of the one-person, one-vote principle is on individual rights, but it can also serve to identify gerrymanders).

264. *Cousins*, 466 F.2d at 850–51 (Stevens, Cir. J., dissenting).

265. *Id.* at 855. *See also id.* at 851 n. 17 ("The gerrymander . . . is aimed at groups of citizens and is intended to diminish the likelihood that their candidates will be elected.").

sue.[266] For Justice Stevens, protection of the group right to vote requires more than the important principle of equal population. That standard should also be "supplement[ed]" by a consideration of whether the plan has a "significant adverse impact on an identifiable political group, whether the plan has objective indicia of irregularity, and then, whether the State is able to produce convincing evidence that the plan nevertheless serves neutral legitimate interests of the community as a whole."[267]

For Justice Stevens, recognition of a group right to vote is necessary to achieve representation:

> The concept of "representation" necessarily applies to groups: groups of voters elect representatives, individual voters do not. Gross 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. Thus, the fact that individual voters in heavily populated districts are free to cast their ballot has no bearing on a claim of malapportionment.[268]

While acknowledging that no group has a right to proportional representation, Justice Stevens recognizes that in a "representative democracy, meaningful participation by minority groups in the electoral process is essential to ensure that representative bodies are

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266. The group right served as a basis for standing for the *Cousins* majority. Rejecting the district court's conclusion that standing depended on the assertion of an "injury or impairment of an individual right," the appellate court recognized the injury suffered as a group right:

> [T]he interest involved in the racial or ethnic gerrymandering claim is not limited to one's interest as a voter in a ward, but includes the interest of a Black or Puerto Rican plaintiff as a resident of the city that the voting strength of his group is not diminished by invidious discrimination. Such interest is impaired, if plaintiffs' assertions have merit, even though the particular plaintiff is in a ward where his group is in the majority.

Id. at 845.

267. *Karcher*, 462 U.S. at 751.

268. Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part) (emphasis in original); *see also Shaw I*, 509 U.S. 630, 682 (1993) (Souter, J., dissenting).

responsive to the entire electorate."[269] In the end, it is only the aggregation of the votes cast by individual voters that impacts elections outcomes.[270]

For Justice Stevens, merely removing restrictions on the right to cast a ballot and the legislative creation of equally populated districts only begins the process of representation.[271] Furthering the goal of effective representation requires a recognition of the distributive function of the political process. Indeed, if gerrymandering is about the allocation of power, then it is appropriate to allow legislatures to use their discretion to distribute power fairly, as the Court did in *Gaffney*.[272] A corollary principle would direct courts to scrutinize only those legislative attempts to do the opposite. Slavish adherence

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269. Rogers v. Lodge, 458 U.S. 613, 640 n.21 (1982) (Stevens, J., dissenting); *see also Karcher*, 462 U.S. at 752 ("[M]ere numerical equality is not a sufficient guarantee of equal representation").

270. *See Bandemer*, 478 U.S. at 169–70 n.7 (Powell, J., concurring in part and dissenting in part) (criticizing the "apparent[] belie[f] that effects on election results are of little import, as long as the losers have some access to their representatives," and pointing out that "[t]hough effects on election results do not suffice to establish an unconstitutional gerrymander, they certainly are relevant to such a claim, and they may suffice to show that the claimants have been injured by the redistricting they challenge").

271. *See, e.g.*, Presley v. Etowah County Comm'n, 502 U.S. 491, 521 (1992) (Stevens, J., dissenting) (comparing third generation challenge to changes in decisionmaking authority enacted after election of the first Black candidates to the challenges to "gerrymandering boundary lines or switching elections from a district to an at-large basis.").

272. *See* Gaffney v. Cummings, 412 U.S. 735, 754 (1973) (stating that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so"). As Justice Stevens has stated, the decision of whether to apply strict scrutiny to a legislative decision should turn on a number of factors that recognize the group nature of the right to vote:

> When the state action (i) has neither the intent nor effect of harming any particular group, (ii) is not designed to give effect to irrational prejudices held by its citizens but to break them down, and (iii) uses race as a classification because race is "relevant" to the benign goal of the classification . . . we need not view the action with the typically fatal skepticism that we have used to strike down the most pernicious forms of state behavior.

Bush v. Vera, 517 U.S. 952, 1010 (1996) (Stevens, J., dissenting) (citations omitted). In another dissent, Justice Stevens stated:

> The duty to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group. That duty, however, is not violated when the majority acts to facilitate the election of a member of a group that lacks such power . . . .

Shaw I, 509 U.S. at 678 (Stevens, J., dissenting).

to the equal population principle would not necessarily prevent the latter nor encourage the former. In Justice Stevens' view, while violation of the one-person, one-vote principle has "a more direct impact on the right to vote," it is the gerrymander that intentionally minimizes "representation of racial or political groups," which is a "far greater potential threat to equality of representation."[273] By contrast, when the state attempts to rectify prior discrimination or take into account the fact that groups may be differently situated with regard to their ability to use the political system to accomplish collective goals, it is assisting voters in obtaining fair and effective representation.

Post-*Shaw*, however, the prospects for participation by all groups will not be equivalent. *Shaw* districts are appropriate under Justice Stevens' perspective because the creation of such districts achieves a sharing of power. Under the *Shaw* cases, states are prohibited from making such political decisions. As Justice Stevens explains:

> [u]naffected by the new racial jurisprudence, majority-White communities will be able to participate in the districting process by requesting that they be placed into certain districts, divided between districts in an effort to maximize representation, or grouped with more distant communities that might nonetheless match their interests better than communities next door. By contrast, none of this political maneuvering will be permissible for majority-minority districts . . . .[274]

Justice Stevens, adhering to a more even-handed approach, would assess all gerrymandering, political and racial, under the same standards. For him, the impact of gerrymandering on the ability of any cohesive minority group to gain representation is the same, regardless of the character of the group. This conclusion reflects both his vision of voting as a group right and his recognition that racial groups are one of the groups for whom protection is clearly envisioned.

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273. Cousins v. City Council of Chicago, 466 F.2d 830, 850 n.17 (1972) (Stevens, Cir. J., dissenting) (quoting Wells v. Rockefeller, 394 U.S. 542, 555 (1969) (White, J., dissenting)).

274. *Vera*, 517 U.S. at 1036 (Stevens, J., dissenting).

C. *The Court's Alignment and the Definition of Injury*

For the justices who see the right to vote as solely individual, both the harm and the relevance of the non-voting cases they rely on are clear. The right to drink from a water fountain, use a public park, serve on a jury, or attend schools that are not segregated,[275] signal that African Americans are not second-class citizens. These rights, along with the right to register to vote and cast a ballot without hindrance, are symbolic. There is, for these justices, a natural and logical connection between voting and a doctrine of color-blind, neutral individualism. The more a justice embraces the right to vote as an individual one, the more voting is viewed as symbolic, passively signifying the voter's membership in a political community with a one-time act performed periodically. This view of voting requires no inquiry into the results or outcomes of participation, thus ignoring whether minority voters are actually able to elect their candidates of choice.

The outcome-regarding justices, however, treat the racial gerrymandering cases as more about the aggregative component of the right to vote. In other words, they are more concerned with apportionment as it affects voting rather than voting as merely a symbolic, one-time event. These justices factor in the group nature of voting. A *Shaw* plaintiff thus suffers no injury because apportionment and districting are about accounting for the sum of voters' characteristics; these characteristics may include the race of the voter, in acknowledgement of the continuing salience of race in American society.[276] Apportionment is primarily about grouping people. When politicians construct districts—and all districting is ultimately gerrymandering—it is fair to take into account all pertinent characteristics. Just as states may take into account political considerations to create either a politically fair (or unfair) plan,[277] they may also attempt to construct a racially fair plan. This group of justices has been identified as "racial pluralists" who view "the risk of shutting out or diluting cognizable social constituencies as the primary evil to be avoided in the redistricting process."[278] Therefore, these justices do not find standing for individual plaintiffs who are unable to point to, much less prove, any dilution or other disadvantage to the racial or ethnic group to which they might belong.

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275. See cases cited within *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

276. *See* Deborah Waire Post, *The Salience of Race*, 15 TOURO L. REV. 351, 367 (1999) (rejecting the popular conception that race lacks salience in contemporary society).

277. *See Gaffney*, 412 U.S. at 735 (1973).

278. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY, LEGAL STRUCTURE OF THE POLITICAL PROCESS 593 (1998).

III. THE NEED FOR A MORE COHERENT THEORY OF VOTING AND DEMOCRACY

Given that the Court has left states, particularly those subject to the preclearance requirements of the Voting Rights Act, in a difficult and confusing position, what lies ahead for districting in 2000? It may be possible for states to live with *Shaw*. Those states that are subject to preclearance requirements and those with significant minority populations that still have the will—or at least are subject to pressure from interested members of the legislative body—may still attempt to construct carefully majority-minority districts. These states now know what kind of record might support the drawing of such districts. Thus, states may find it useful to look more closely at party registration data, document the existence of racial bloc voting, and focus on communities of interest contemporaneously with the actual districting.[279]

The Court also has some options to improve the current situation. The most straightforward course of action would be to abandon the *Shaw* construct as a failed experiment, as Justice Stevens has proposed.[280] It is not likely, however, that the Court will reverse on *Shaw*. Alternatively, a return to a pre-*Miller* standard would allow the lower courts to use shape as a factor to limit the *Shaw* cause of action to the most extreme instances of racial gerrymandering. More fundamentally, the Court needs to develop a theory of representation that allows it to decide cases involving voting rights on a more principled basis.

The essence of traditional Western democracy is popular sovereignty or consent of the governed.[281] This "consent" is given to elected or appointed representatives who engage in political activity that coalesces in government. One question provoked by an arrangement of indirect governance involves the concept of "representation." Political scientists and philosophers have grappled with the threshold question of what constitutes representation. An

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279. *See* Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461, 475–86 (1997) (discussing and explaining how communities of interest may be identified using objective, subjective, and empirical methods).

280. *See Bush v. Vera*, 517 U.S. 952, 1005 (1996) (Stevens, J., dissenting) ("Though we travel ever farther from it with each passing decision, I would return to the well-traveled path that we left in *Shaw I*."). *But see id.* at 985 (referring to a need to adhere to *stare decisis*).

281. *See* MERIAM-WEBSTER'S COLLEGIATE DICTIONARY 307 (10th ed. 1995) (defining "democracy" to mean "government by the people"; "rule of the majority"; or "a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections").

in-depth discussion of democratic theory, or theories of representation, is well beyond the scope of this article. This section outlines some of the classic theories along with more modern formulations.

A. *Representation and Political Equality*

1. Types of Representation

Theorists have recognized at least three formal types of representation: delegate, descriptive, and symbolic.[282] The delegate model denotes a person who, while not acting upon specific instructions for each endeavor, acts generally in accord with the goals of the persons for whom they represent.[283] This delegate may act as a "spokesperson" for entities like an agent acts for a principal.[284] Alternatively, this type may act more independently as a "trustee" who does what is best for the constituency and the national interest.[285] A descriptive representative refers to one who is seen as having characteristics similar to the persons represented,[286] such that the body of

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282. *See* A. H. BIRCH, REPRESENTATION 15–18 (1971).

283. *See id.* at 15–16; *see also* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60–61, 74 (1967) (noting that the delegate model provides a representative who appears to mirror the constituency may offer the advantage of enabling the constituency to feel that it knows how the representative will act).

284. *See* BIRCH, *supra* note 282, at 15–16. The "principal" in a democracy may be thought of as the constituency. *See* ROBERT G. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 31 (1968). The delegate might "figuratively" poll a constituency before any legislative vote, and act according to this understanding of the majority sentiment. *See id.* Alternatively, a representative might act in accordance with his view of what is good for the people. *See id.* at 32; *see also* PITKIN, *supra* note 283, at 141. Edmund Burke, on the other hand, favored a "trustee" model. *See id.* at 129.

Pitkin uses the term "authorization theorist," derived from Rousseau and advanced by Thomas Hobbes, to describe the independence that arises by virtue of a "social contract," offering members of society a refuge from anarchy in return for conferral of authority on some government. *See id.* at 113. The delegate model of the "authorization theorists" may fit within two quite different categories. The first view states that where the "representative is free, the represented [are] bound." *Id.* at 55, 58–9. In the second view, the accountability view, the representative must answer for her actions. *Id.* at 55. The argument favoring accountability of representation is that holding the representative responsible for her actions will lead to "responsiveness" to her constituents. *Id.* at 57.

285. *See* PITKIN, *supra* note 283, at 147. As alternatives within the delegate model, a representative may act upon explicit instructions from voters, pursuant to a "mandate" from which there should be little, if any, departure. *Id.* at 146. In between the poles of the "mandate-independence" controversy, might fall the representative who uses some discretion, asking for constituent input only when a new issue arises or who does what she thinks her constituents want until she receives new instructions. *See id.*

286. *See* BIRCH, *supra* note 282, at 16–17.

representatives might be a "mirror" or microcosm of the groups represented.[287] Certainly, one value of this representation might be that representatives, in furthering their own private interests, might end up furthering those of the general population.[288] The third variant, symbolic representation, is thought to serve as an "embodiment of a . . . category of persons"[289] in much the same way that Uncle Sam or the American flag represents the United States, or the Union Jack personifies England. Symbolic representatives are considered to be the least likely of the three types to be responsive to the constituency.[290] Symbolic representation differs from descriptive in the evocative connotation of the former, which functions by calling forth a set of attitudes and beliefs. The latter simply presupposes the importance of the representative's resemblance to the constituent.[291] While neither descriptive nor symbolic representation has been adopted as a formal theory, the long history of *de jure* and then *de facto* racial segregation in the United States has contributed to a mistrust of representatives who do not reflect the racial or ethnic composition of the electorate. Thus, many voters have sought some variant of descriptive representation. Similarly, to the extent that interest representation has occurred, it has resulted, even accidentally, from the geographical aspect of districting.[292]

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287. *Id.* Perhaps this is the parallel of the sentiment expressed by President Clinton, when he remarked on several occasions that he would strive to appoint a Cabinet that "looked like America."

288. This was the rationale presented by philosophers Jeremy Bentham and John Stuart Mill. *See* BIRCH, *supra* note 282, at 55. Such a view of representation might often be conjoined with varied notions of suffrage. *See, e.g., id.* at 61. Criticism of this view has focused on both practical and theoretical problems. Some practical problems were thought to be the difficulty in obtaining a representative body that was an actual microcosm, considering the frequency with which politicians come from lawyering or other elite classes. The true "citizen" politician is a rarity. Another practical problem was the difficulty of measuring the "intensity" of feeling that the general population has with regard to the issues to be decided. Acting on any measure of intensity might require acting at odds with the feeling of the body as a whole. *See id.* at 57–59. Pitkin directs her criticism of descriptive representation at its limiting nature, for it means "being like you, not acting for you." PITKIN, *supra* note 283, at 113. Moreover, it leaves little room for responsiveness, which is important for those whom Pitkin designates as accountability theorists. *See id.* at 58.

289. BIRCH, *supra* note 282, at 17.

290. *See id.* at 125. Birch sees responsiveness as more likely residing in the delegate model and only moderately in the microcosm and elective types.

291. *See* PITKIN, *supra* note 283, at 111.

292. *See* H. B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 99 (1960); *see also* Karlan, *Maps & Misreadings*, *supra* note 179, at 177 (noting that because of racial segregation, geography may serve as a proxy for interest).

2. Representation of Persons or Interests

Another way to compare types of representation is to look at whether it is the representative's duty to act on behalf of persons or interests. Under an interest theory, the representative's obligation might lie with the representation of "unattached interests" or of people with identified interests.[293] Where the focus is on the representation of interests, responsiveness to constituents is unimportant and not necessary, except for some congruence between the actions of the representative and the general notion of popular will is expected.[294] For Edmund Burke, it was unimportant whether these interests were represented proportionally; for others, proportionality is the penultimate factor.[295] Although interests are not wholly ignored under the individual model,[296] the *Shaw* majority's view reflects the general rejection in the United States of interest representation in favor of a view of representation in terms of individual persons.[297] The Court appeared to formally adopt this view in *Reynolds* when it stated that "[l]egislators are elected by voters, not farms or cities or economic interests."[298]

According to H. B. Mayo, the essentials of democratic theory include "legislators who are legitimated or authorized to enact public

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293. Edmund Burke, for example, was a proponent of representation as representing unattached interests, while the representation of persons with interests was a product of Mill and other liberal political theorists. *See* PITKIN, *supra* note 283, at 168. Under Burke's view, responsiveness to an electorate is not only unimportant, but rather, it is inconsistent. *See id.* at 170. The representative must have the freedom to make decisions that will serve the interests of those he represents, but must coordinate those interests with the national interest. *See id.* Others who espoused some form of emphasis of interest representation include John Calhoun and James Madison. *See* BIRCH, *supra* note 282, at 72.

294. This view would seem to be at odds with some notions of representation as including responsiveness. *See* BIRCH, *supra* note 282, at 106.

295. *See* Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1501–1502 (1998) (contrasting views of Burke with those of theorists like John Adams who thought that, "equal interests among the people should have equal interests in the representative body") (footnote omitted).

296. *See* MAYO, *supra* note 292, at 97; PITKIN, *supra* note 283, at 190–91. A philosophy of liberalism is generally seen as focused on the representation of persons rather than interests, for it sees the constituents as people with interests and conceives of interests as pluralistic. *See* PITKIN, *supra* note 283, at 191. The individual is paramount in political liberalism, and interest is therefore personal, not free-floating and unattached as it was for Burke. *See id.* at 178, 205–6.

297. American colonists favored delegates whose views would be shaped by the results of frequent elections, preventing them from acquiring too much independence, and who would represent "sectional interests." *See* BIRCH, *supra* note 282, at 43; *See also* MAYO, *supra* note 292, at 103, 166.

298. Reynolds v. Sims, 377 U.S. 533, 562 (1964). *See also id.* at 580 ("Citizens, not history or economic interests, cast votes. . . . People, not land or trees or pastures, vote.")

policies, . . . who are subject or responsible to popular control at free elections," and who use majority rule for decisionmaking within the legislative body.[299] Regardless of the type of representation chosen by Western democracies, and the American system in particular, the use of periodic elections is a frequent feature. Elections, in theory, manifest the popular will, the interests of the people by whose consent representatives govern, and may either ratify or repudiate a representative's actions. Elections may also serve as barometers of accountability and responsiveness, if these are considered important to the electorate. Therefore, elections ideally provide a primary source of authorization, as well as a means of holding a representative accountable.[300]

If elections are key to representation, they should be considered reliable only when based on political equality. Reapportionment and districting act as preludes to conducting elections. If the goal is really the representation of the population, and electoral systems are integral to accomplishing that goal, then those electoral systems must go as far as possible to achieve political equality.

B. *De-Privileging the One-Person, One-Vote Model*

1. The Reapportionment Decisions

Legislatures engaged in districting are faced with a number of requirements. Common among these requirements are compactness, contiguity, and the preservation of political subdivision boundaries and communities of interest.[301] In addition to these traditional districting principles, states must also avoid minority vote dilution to comply with the Voting Rights Act and the Fifteenth Amendment.[302] Finally, there is the goal of incumbent protection, not a formal criterion, but one that is often paramount in the minds of legislators.[303]

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299. *See* MAYO, *supra* note 292, at 103, 166.

300. *See id.* If the goal is descriptive or symbolic representation, elections have a purpose here as well. *See* PITKIN, *supra* note 283, at 75, 106–08.

301. *See generally*, Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985) (discussing each of these redistricting requirements in greater detail). *See also*, Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733–34 (1998) (cataloging seven constraints imposed by federal law); Pildes & Niemi, *supra* note 144, at 527–29 (reviewing regimes of twenty-five states regarding compactness).

302. Post-*Shaw*, legislators in states with significant minority group populations now find themselves torn between attempting to comply with the Voting Rights Act on the one hand, and Supreme Court pronouncements on the other. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 1037 (1996) (Stevens, J., dissenting) (also noting this conflict).

303. *See* Kristen Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymanderer*, 74 TEX. L. REV. 913, 925–28 (1993) (arguing that redistricting is defined more by the

All these criteria are, however, subordinate to the equal population requirement of one-person, one-vote.[304]

The 1962 decision in *Baker v. Carr*,[305] holding reapportionment claims justiciable, started a revolution that immediately gained momentum.[306] In *Wesberry v. Saunders*,[307] the Court relied on Article I, Section 2 of the Constitution to find an equal population standard in the clause's requirement that congressional representatives "be chosen . . . by the People of the several States."[308] This phrase was interpreted to mean that the "fundamental principle of representative government is equal representation for equal numbers of people."[309] Each congressional district was to, "as nearly as practicable," have the same number of people.[310]

In the next group of cases, the Court addressed state legislative reapportionment.[311] The conflict at the center of these cases was the

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self interest driving its participants than by the democratic ideals that require it); *see also* James Dao, *Two (Many) Choices for 2000 Census*, N.Y. TIMES, Feb. 7, 1999, at D4 (wryly describing redistricting as "incumbent protection"). *But cf.* Davis v. Bandemer, 478 U.S. 109, 125 (1986) (holding political gerrymandering justiciable under Equal Protection Clause). Legislative elections held near the end of the decade, therefore, are usually viewed as most crucial because the winners play a major role in redistricting.

304. *See* Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1607 (1993) [hereinafter Guinier, *The Emperor's Clothes*] (noting that mandating "absolute population equality . . . [means] that equipopulous districts are more important than districts that preserve communities or leave neighborhoods intact"). The justification for this primacy is not altogether clear. The *Reynolds* Court located the right to an "equally weighted vote" in the Fourteenth Amendment, which makes no mention of the right to vote, while a later amendment, the Fifteenth, is explicit in its command that this right not be denied or infringed because of race. Arguably, interpretation of the Fourteenth Amendment should be informed by the intent of the Fifteenth. *See, e.g.*, Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1280–81 (1992) (arguing that the radical change embodied in the Fourteenth Amendment requires a reinterpretation of earlier amendments).

305. 369 U.S. 186 (1992). In *Baker v. Carr*, the plaintiffs alleged that, by means of a 1901 statute, Tennessee arbitrarily and capriciously apportioned the seats in the General Assembly among the state's 95 counties, and due to a failure to reapportion them despite substantial growth and redistribution of the state's population, "they suffered a debasement of their votes" and were thereby "denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment." *See id.* at 192–93.

306. Within a short time after the decision in *Baker* being announced, at least 47 reapportionment suits were filed in 34 states. *See* GERALD ROSENBERG, THE HOLLOW HOPE 295 (1991).

307. 376 U.S. 1 (1964).

308. U.S. CONST. art. I, § 2.

309. *Id.* at 56.

310. *Id.* at 21.

311. *See, e.g.*, Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm.

domination of rural over urban districts. Ever larger imbalances in the population size of state districts had resulted from legislative failure to redistrict for many years as population migrated from rural to urban areas.[312] Voters in heavily populated urban districts brought suit alleging that the legislature's failure to reapportion itself had resulted in severely malapportioned districts that violated their Fourteenth Amendment rights.[313] For example, the plaintiffs in *Reynolds v. Sims* argued that the inaction of the legislature had left them at the mercy of a "rural strangle hold."[314]

The decisions in *Reynolds* and its companion cases, along with *Wesberry*, solidified the principle of one-person, one-vote, making it a rallying cry akin to "taxation without representation." In the cases that followed *Reynolds*, the Court extended the equal population principle to a variety of other governmental entities.[315] The Court relaxed the strict principle of population equality required for congressional districting.[316]

In addition to announcing an equal population requirement for state legislative districts, the *Reynolds* court raised issues of representation and the scope of the right to vote. The Court, as discussed in Part III.A., has more clearly formed ideas on the latter than on the former. In *Reynolds*, the Court indicated that the constitutionally protected right of suffrage was individual in nature.[317] It also viewed the right to vote as having several different connotations, including

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for Fair Representation v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

312. *See* ROSENBERG, *supra* note 306, at 292–94.

313. *See Reynolds*, 377 U.S. at 543.

314. *Id.*

315. *See, e.g.*, Hadley v. Junior College Dist., 397 U.S. 50 (1970) (holding equal population applicable to elections of trustees to a junior college, on the ground that the these officials performed governmental functions and were elected from districts); Avery v. Midland County, 390 U.S. 474 (1968) (extending *Reynolds* rule to local governmental units having general governmental powers over an entire geographic area).

316. In Brown v. Thompson, 462 U.S. 835, 842 (1983), the Court held that population disparities of 10% or less in state legislative districts would be tolerated. Congressional districts, however, would be held to a precise standard of population equality, with the requirement that the state had the burden to justify any population deviations. *See id.* at 842. For example a state might show that "divergences from a strict population standard [were] based on legitimate considerations incident to the effectuation of a rational state policy . . . ." *Reynolds*, 377 U.S. at 579. While the Court has approved a plan with a deviation as high as 16.4% in Mahan v. Howell, 411 U.S. 922, 922 (1973), 10% seems to be presumptively constitutional. *See* White v. Regester, 412 U.S. 755, 776–77 (1973) (Brennan, J., dissenting) (not requiring any justification).

317. *See Reynolds*, 377 U.S. at 561.

protection from vote dilution.[318] Malapportioned or unequally populated districts would be the source of this debasement.

While *Reynolds* held that a "fundamental principle of repsentative [sic] government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence,"[319] it also introduced a concept that it left undefined: "fair and effective representation."[320] The Court saw this as "concededly the basic aim of legislative reapportionment."[321] Although *Reynolds* was rich in rhetoric about fair, equal, and effective representation, the opinion contained little discussion of how to achieve this goal, beyond crafting districts of equal population. For example, the Court stated that the Equal Protection Clause "guarantee[s] the opportunity for equal participation by all voters" and "democratic ideals of equality and majority rule."[322] But the Court did not explain how to assess a vote's "effectiveness" or what type of districting would count as "fair." Later, the Court delved more deeply into racial gerrymandering to decide that the Constitution required more than simply meeting the goal of population equality.[323] But beyond articulating a prohibition of intentional minority vote dilution and, later, certain forms of partisan gerrymandering, the Court did not state whether an analysis of "fair" representation was to begin and end with numbers, or whether it might encompass whether the population was actually

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318. First, it encompassed more than merely casting a ballot. The Court had emphasized in its earlier holdings that violations of the Fifteenth amendment included the right to have "one's ballot counted," *see id.* at 554 (quoting United States v. Mosley, 238 U.S. 383 (1915)), protected from destruction or alteration and not "diluted by ballot-box stuffing." *See id.* at 554–55. Alternatively, a denial of the right to vote could be accomplished by the use of tactics such as "racially based" gerrymandering (citing Gomillion v. Lightfoot, 364 U.S. 399 (1960)), or the use of White primaries. *See Reynolds*, 377 U.S. at 554–55. Finally, restriction of suffrage could be accomplished "by a debasement or dilution of the weight of a citizen's vote, just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 560–61.

319. *Id.* at 561.

320. *Id.* at 565.

321. *Id.* at 566.

322. *Id.*

323. *See* Gaffney v. Cummings, 412 U.S. 735, 751 (1973) (stating that "[a] districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population' ") (citations omitted); *see also* Beer v. United States, 425 U.S. 130, 141 (1976) (establishing that the Voting Rights Act does not permit the implementation of a reapportionment plan that would "lead to a retrogression in the position of a racial minorities with respect to their effective exercise of electoral franchise."); United Jewish Org. of Williamsburgh v. Carey, 430 U.S. 144, 161 (1977) (accord).

being "represented."[324] Was the reference to an entitlement to "fair and effective representation" mere rhetorical surplus or was the Court affirmatively indicating that there was some right beyond casting an equally weighted ballot? As one commentator has noted, by avoiding the reversal of political question doctrine, questions of gerrymandering and interpretation of the Guaranty Clause, and by using the Equal Protection Clause, the "Court did not develop a full theory of representative government."[325] The *Shaw* decisions continue the Court's imprisonment within a view of voting as an empty formalistic mechanism for political equality.

2. The Limitation of the Principle of Population Equality

The *Reynolds* Court concluded that the one-person, one-vote principle was part and parcel of fair and effective representation, but the equal population principle may stand in the way of achieving actual representation. While the equal population standard works as a rule of procedural fairness and is congruent with the widely embraced principle of universal suffrage, it does not necessarily lead to political equality and representation.[326] It is problematic because it misdirects the focus of reapportionment in at least two ways. First, it overemphasizes the individualistic aspect of the right to vote at the expense of concern for group representation and collective interests. Second, it enhances a focus on the narrower service aspect of representation, rather than broader participatory aspects.

Some commonly-voiced critiques of formal equality are similarly applicable to the reification of the formalistic one-person, one-vote requirement. Critical race theorists have faulted formal equality for its focus on individualism, because, among other things, it im-

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324. One electoral law scholar has taken the position that "fair and effective representation" is nothing more than "the representation that results from elections in which all votes are weighted equally." DANIEL HAYS LOWENSTEIN, *Bandemer's Gap: Gerrymandering and Equal Protection*, *in* POLITICAL GERRYMANDERING AND THE COURTS 64, 73 (Bernard Grofman ed., 1990). Lowenstein rejects any interpretation of the phrase that would require measurable influence by voters "on the composition or the product of the legislature." *Id.*

325. ROYCE HANSON, THE POLITICAL THICKET REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY 116 (1966).

326. *See* DIXON, *supra* note 284, at 587 (terming it a "symbol of aspiration for fairness, for avoidance of complexity, for intelligibility in our representational process"); Guinier, *The Emperor's Clothes*, *supra* note 304, at 1595–96 (noting that it is viewed as "politically fair," since it evokes symbolic essence of democracy and is an "attempt to equalize the purely formal opportunity to cast a ballot"). Under circumstances "where [the] rights of citizenship equally enjoyed one-person, one-vote provides a good measure of popular control over public policy." Andrew Levine, *Electoral Power, Group Power and Democracy*, *in* MAJORITIES AND MINORITIES (John W. Chapman & Alan Wertheimer eds., 1990) 256–57.

pedes the dismantling of structural inequality.[327] Formal equality can be seen as resting on a notion of symmetry, so that any difference in treatment between two individuals is regarded as suspect. Certainly one flaw in an ahistorical, symmetrical approach lies in its failure to recognize that two individuals who *appear* to be similarly situated in the eyes of the law may be quite dissimilar once systemic and historical discrimination is taken into account. Rejection of the symmetrical approach in voting would allow the Court to more easily substitute "disadvantage" for difference, with the result that redistricting litigation would be limited to those instances where a plaintiff group is disadvantaged by the legislative plan, thereby allowing state and municipal governments to craft inclusive plans designed to redress handicaps suffered by an identifiable minority.

So long as districts are equally populated, each resident is deemed to be equally represented. Professors Karlan and Ortiz have termed one-person, one-vote a constitutional "tragedy"[328] that has had unintended consequences. They point out that the doctrine's appeal lies in its power to change entrenched control by rural districts, its simplicity that enables citizen understanding of the doctrine, ease of its application by the courts, and the notion that it would allow more effective public action by avoiding the problem of special interests.[329] But one-person, one-vote did not prevent gerrymandering or automatically lead to political fairness. Indeed, accommodation of one-person, one-vote meant that other constraints on gerrymandering, such as preservation of the political and geographical boundaries, gave way, and technological developments made population manipulation even easier.[330] Any at-large district

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327. *See generally* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (arguing that focussing only on achieving formal equality will legitimize thoughts of racial superiority); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (arguing that society does not need to treat women and men as formally equal, rather, women's unique characteristics should be recognized and valued equally with uniquely male traits) ; Charles R. Lawrence III, Book Review, *"Justice" or "Just Us": Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983) (asserting that continuing to focus on school desegregation will only encourage people to the erroneously belief that if formal equality has been achieved then the *only* explanation for poor minority achievement is genetic inferiority).

328. *See* Pamela S. Karlan and Daniel R. Ortiz, *Constitutional Farce*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 180, 183–86 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

329. *See id.* at 184–85.

330. *See id.* at 185; *see also* Bandemer v. United States, 478 U.S. 109, 168 (1986) (Powell, J., dissenting) (stating that "[a]dvances in computer technology achieved since the doctrine [of one-person, one-vote] was announced have drastically reduced its deterrent value by permitting political cartographers to draw districts of equal population that intentionally discriminate against cognizable groups of voters.").

could meet the population requirement, yet be so configured to defeat a racial minority group's chance of exercising any electoral power.[331]

A racially homogeneous society might be well served by the doctrine, since the *Shaw* decisions do not impede taking into account certain other unifying features. But as the persistence of racially polarized voting shows, the racial dynamic in American society requires more.[332]

The primacy of equal population has reinforced the preeminence of representation of individual interests, displacing a focus on the question of whether the interests of politically cohesive groups are represented which might go farther toward a goal of full representation.[333] Indeed, it may displace the concerns of the very group for whom the Fourteenth and Fifteenth Amendments were enacted, because the constraints of equal population prevent drawing a district where minority voters may elect a candidate of their choice.[334] An assessment of political fairness cannot, nor should it, avoid a focus on groups. Not only do electoral choices made by an individual voter matter most when her vote is counted or aggregated with

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331. *See* Karlan, *Still Hazy, supra* note 107.

332. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 153, quoting Frank Goodman:

> Race prejudice divides groups that have much in common (Blacks and poor Whites) and united groups (White, rich and poor) that have little else in common than their antagonism for the racial minority Race prejudice, in short, provides the 'majority of the whole' with that 'common motive to invade the rights of other citizens' that Madison believed improbable in a pluralistic society.'

Id. See also Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1889 (1992) (commenting that "[r]ace is the perfect cue" for "moving broad masses to act in a disciplined fashion"). Republican strategist Lee Atwater's use of television commercials featuring Willie Horton, a Black prisoner paroled under a plan approved by then Democratic Massachusetts Governor Michael Dukakis during the 1988 presidential campaign is one recent example of the efficacy of such a cue.

333. The *Reynolds* opinion makes reference to the individual nature of the right to vote. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561–562 (1964) ("[T]he rights impaired are individual and personal . . . the right to vote is personal.") (citing United States v. Bathgate, 246 U.S. 220, 227 (1918)). *But cf.* DIXON, *supra* note 284, at 272–73 (noting that "[h]ow the group fares in the electoral struggle and its prospects for achieving a 'fair share of the seats' may be more important questions from the standpoint of representation than the question of whether district population has been equalized" within a specified percentage deviation).

334. *See* Richard Briffault, 1995 U. CHI. LEGAL F. 23, 43 (pointing out how the one-person, one-vote requirement limits the ability of government to achieve other goals).

those cast by others in her district,[335] but concern about how to aggregate population groups is at the core of districting.[336] It is highly unlikely that an individual voter, even one who is able to cast an unimpeded vote and have it counted, but who is unable to have her vote "aggregated" with like-minded individual voters, can have any impact on the electoral process and achieve representation of her interests. Aggregation or dilution claims necessarily implicate group, rather than individual rights, and representation in a heterogeneous society requires recognition of group rights.[337] Indeed, the vote dilution cases under the Voting Rights Act underscored the importance of discovering how "cognizable groups of voters fared," requiring a focus on electoral outcomes to evaluate the fairness of the political process[338] in order to decide whether the votes of Black citizens, as a group, had been "minimized or canceled out."[339]

In addition to ensuring that the focus will remain on the individualized component of voting, the equal population principle of *Reynolds*—and now *Shaw*-inspired conception of individual voters as being personally classified when placed in districts. This is particularly true where representation encompasses a citizen's ability to exert post-electoral influence on governmental policy-making. Instead, equal population ends up being about service.[340] In complying

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335. *See* Lani Guinier, *(E)racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 126–127 (1994) (finding three separate rights and noting that as one moves from access to influencing legislative policy, voting is no longer purely individual in nature); *id.* at 122–23 ("Representative democracy is neither exclusively individual nor discrete but is relational and inherently group-based."); Karlan, *Pessimism About Formalism*, *supra* note 149, at 1707 (describing the right to vote as combining features of participation, aggregation, and governance).

336. This is because "[t]he concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not." Davis v. Bandemer, 478 U.S. 109, 167 (1986)(Powell, J., concurring in part and dissenting in part); *see also* Guinier, *The Emperor's Clothes*, *supra* note 304, at 1599, 1605 (describing the "process of geographic districting [as] collect[ing] people into units of representation by virtue of certain group characteristics or assumptions about shared characteristics within geographic communities").

337. *See* Guinier, *The Emperor's Clothes*, *supra* note 304, at 1591–92; IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 184–85 (1990). These authors urge overt recognition of racial groups as necessary for the empowerment of such groups and achieving fairness in the political process.

338. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1859 (1992).

339. Whitcomb v. Chavis, 403 U.S. 124, 143 (1971). *But cf.* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (referring to dilution of an "individual's right to vote"). *See also* Lani Guinier, *The Triumph of Tokenism*, 89 MICH. L. REV. 1077, 1097 (1991) (noting that "[b]lack electoral success, which apparently defined undilution, became the statutory metaphor for equal political opportunity").

340. Constituent servicing is, of course, part of a representative's job, and one that is valued by persons living in the district. Moreover, it is likely that the smaller the governing body, the more important the issue becomes. Even on a statewide level,

with one-person, one-vote, states determine first the total population of the area using census data, and then allocate the population so that each district fits within the allowable parameters.[341] The focus of the equal population standard is on total population, which may vary considerably from the number of eligible, registered, or actual voters contained in that population.[342] Thus, one-person, one-vote does not necessarily equalize the number of persons who are in a position to elect candidates or have an effect on the outcome of an election.[343] At least one federal judge has argued that the Supreme Court's one-person, one-vote jurisprudence supports both a principle of equal representation and of equal voting power.[344] The former is served by the use of the total population, while "electoral equality" would better be served by apportioning on the basis of eligible voters.[345]

Guinier argues that the representation offered by the equal population standard is limited to ensuring that each person in the district has "equal access" to her representative.[346] If representation is viewed primarily as a "personal relationship" between the representative and constituent,[347] equally populated districts place the voter

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many voters may evaluate their representatives based almost entirely on the services and "pork" delivered. This might well have been the case for former New York Senator, Al D'Amato, better known by his sobriquet "Senator Pothole." *See* Stephen J. Sabbeth, *New Hope for Two-Party System*, N.Y. TIMES, Dec. 20, 1998, at LI26.

341. The "ideal" district size is calculated by dividing the total population by the number of districts. The variance or deviation of each district from this figure is then determined and summed. The result must fit within the permitted restrictions.

342. For minority populations these differentials gave rise to the so-called 65 percent rule, designed to compensate for the youth of the minority population, as well as lower registration and turnout rates, as compared to the non-minority population. *See* United Jewish Org. of Williamsburgh v. Carey, 430 U.S. 144, 164 (1977); *see generally* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 120 (1992) (discussing the history and limitations of the 65 percent rule).

343. *See Reynolds*, 377 U.S. at 565 (noting that full and effective representation in the political processes of states is achieved by qualified voters through elections); Garza v. Los Angeles County Bd. of Supervisors, 918 F.2d 763, 780–81 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (Kozinski, J., dissenting in part and concurring in part).

344. *See Garza*, 918 F.2d at 784–86 (Kozinski, J., dissenting in part and concurring in part) (arguing that the principle of electoral equality is better served by apportioning by eligible voters rather than by population, since it is that segment of the district population that wields political power and better fits with a view of voting as an individual right).

345. *See id.* at 783.

346. *See* Guinier, *The Emperor's Clothes*, *supra* note 304, at 1599–1600 (contrasting the "top-down view of representation," emphasizing a representative's role in providing benefits to her constituency, with the "bottom-up view of representation," emphasizing political participation as collective activity by voters).

347. *See id.* at 1610.

in an equal position to make demands, so that each voter will get an appropriate fractional share of a representative or an opportunity to gain a fair share of government benefits.[348] Voters are represented without regard to whether they voted for the representative or even exercised the right to vote at all.[349] Moreover, even those who are disenfranchised by operation of law, such as children and convicted felons, are represented under this account.[350]

Thus, despite its resonance as a slogan, one-person, one-vote has nothing to do with voting and everything to do with being "represented" in the passive tense. Pursuant to one-person, one-vote, "representation" has come to be viewed simply as service. Districts must be approximately equal in size so that any given representative will not be required to service more people than another representative in a neighboring district, and any given citizen will have an equal share of her representative's time without regard to how, or even whether, she voted. Missing from this vision of politics is a theory of democracy participation where voters go to the polls to influence public policy.[351]

CONCLUSION

The Court protests that it does not want to impose a theory of democracy; but in effect it is doing just that. It has now told the states that they are not permitted to construct districts that enhance the ability of excluded racial and language minority groups to participate in the political process. Similarly, it has now told racial and

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348. *See* DIXON, *supra* note 284, at 502 (positing that which population base is appropriate may depend on whether "legislators are viewed as lobbyists for governmental service for their areas" or whether the "legislator [is viewed] as [a] representative of the conscious political viewpoints of his constituency"). For the former, total population may be appropriate, while for the latter use of narrower base may be better, as it avoids distorting factors such as non-voting absentee military and student populations. For minority communities, however, the need for government services may be greater than that of other communities, and thus total population may be the relevant measure.

349. Of course, the adequacy of the representation for all constituents is more apt to occur where the district is homogeneous, presenting similar needs and interests. *See* Guinier, *The Emperor's Clothes*, *supra* note 304, at 1611.

350. *See id.* at 1609, 1639–40 (stating that those seeking this sort of representation need do nothing more than move into the district); *cf.* Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463 (1998) (advocating true representation for children through proxy voting by parents).

351. *See* Guinier, *The Emperor's Clothes*, *supra* note 304, at 1620–21 ("[R]epresentation . . . ideally recognizes the importance of influencing public policy decisions on behalf of constituency interests. . . . Accordingly, we cannot define political fairness merely as electoral fairness that guarantees nonbiased conditions of voting eligibility and equally counted votes.").

ethnic minorities that they may not be part of the "pull, haul and trade" of the political process.[352] The focus on voting as an individual exercise leads the majority to conclude that only under very stringent circumstances may a state take steps to acknowledge a quintessentially group right. Further, a view of voting as an individual rather than a group right adversely affects not only a group of people who have been treated as members of a disadvantaged minority rather than as individuals, but also all individuals who seek to participate to advance a political policy agenda—a goal that requires the empowerment of groups.

The *Hays* definition of who may raise a *Shaw* claim reflects the view that voting does not involve interlocking events whose end goal is effective representation of voters, resting on the Court's individualistic, symbolic, and ultimately passive view of voting. In this way, standing doctrine–which itself has a strong individualistic strain requiring a particularized injury to an individual–and voting rights doctrine are congruent. For the majority, voting simply means that qualified voters will cast a ballot that is counted equally with all others cast in the same election, and that those voters *and all who live in that same election district* will have a right to access a representative who is elected. Under the majority's parochial view, one is entitled to constituent services simply by residing within a particular area of land. Thus, granting standing to plaintiffs raising a *Shaw* claim based solely on their residence within the challenged district both reflects and reinforces the majority's voting rights doctrine. If voters exist in a district, they somehow enjoy democracy, and therefore they have standing to sue. The presumption that an African American representative won't give attention to White voters who live in the district is unacceptable to the *Shaw* majority. The problem is that service is only a portion of what representation is about: voting and democracy as responsive bureaucracy. The Court honors a symbolic right to cast a ballot and a right to get equal attention from a representative, but ignores the right to elect candidates of one's choice and to participate in a way that counts and gains representation.

The long-term exclusion of discrete and insular groups, whose consent is therefore not relevant, undermines the legitimacy of government, ultimately contributing to cynicism on the part of the electorate and lack of accountability by elected officials, thereby, harming not just minority voters but the citizenry as a whole. Without a better defined theory of democracy or an appreciation of representation issues and the problems jurisdictions face, the Court

352. *See* Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994) (discussing obligation of minority groups to avoid reliance on safe districts but rather to find "common political ground" by trying to form coalitions with other groups).

has condemned itself to *ad hoc* decisionmaking because it lacks a framework. Consequently, decisions concerning arguments about the political process will always have potential for the inconsistency that results from the absence of a structured legal theory. The Court's resolution of standing in the *Shaw* cases demonstrates more than a unique view of standing. It shows the Court's desperate need for a more coherent theory of voting and democracy.