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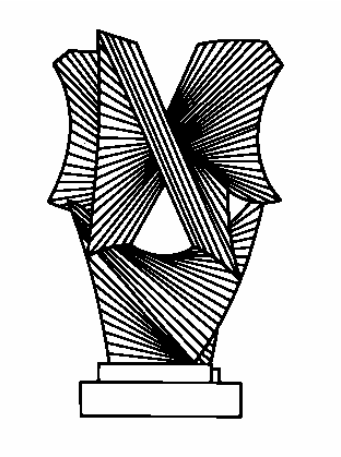

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Modern voting rights scholarship agrees on one thing: that voting rights are aggregate rights. The right to vote is important, of course, for a variety of individualistic reasons. It may be constitutive of citizenship, central to the inculcation of civic virtue, and so on. But scholarship today starts from the premise that the right to vote is meaningful in large part because it affords groups of persons the opportunity to join their voices together in order to exert force on the political process. On this account, the fairness of a legal rule affecting voting rights cannot be determined by focusing solely on an individual voter; a resolutely individualistic focus makes it impossible to determine how the rule affects the ability of groups of voters to exert political influence.

The aggregate nature of the right to vote presents special problems for any effort to evaluate voting rights claims. To the extent that voting rights are aggregate rights, one cannot evaluate voting rights claims, or the fairness of the electoral system, without establishing the boundaries of appropriate aggregation. The literature has recognized this fact, but it has failed to recognize the breadth of the aggregation dilemma. Its focus has been principally spatial, with the debate centered on when it is appropriate to aggregate across persons located in different places for purposes of evaluating the fairness (or

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constitutionality) of a voting rule.[1] So for example, a common question is whether the existence of a majority-minority electoral district in one part of a state is relevant to a voting rights claim brought by minority voters in a different part of that state. Missed by the scholarship, however, is the existence of another dimension altogether in which one could aggregate the collective treatment of individual voters for purposes of evaluating the fairness of a voting rule: the temporal dimension. That dimension raises the question of within what time period one should evaluate the fairness of a voting rule.

This Article explores the oft-overlooked temporal dimension of voting rights. While the temporal dimension goes largely unnoticed, it is often implicitly manipulated in the service of, or against, a particular voting rights claim. This year, for example, the temporal dimension is playing a critical but unacknowledged role in *Jackson v. Perry*,[2] the latest round of litigation before the Supreme Court concerning the constitutionality of Texas's mid-decade redistricting effort.[3] In that case, the Jackson plaintiffs have argued that the redistricting plan drawn up by the Republican controlled legislature unconstitutionally disadvantages Texas Democrats. The state has raised several defenses to this claim, but among them is the suggestion that the pro-Republican plan is constitutional because it merely compensates for the anti-Republican plan that was previously in place. The implicit argument is that inter-temporal representational trade-offs should be constitutionally permissible. Moreover, this is not a new argument. When the Supreme Court first considered the constitutionality of partisan gerrymanders in *Davis v. Bandemer*,[4] the plurality and dissent were implicitly divided over the appropriateness of inter-temporal representational trade-offs. Writing for the plurality, Justice White suggested that a loss in the current round of redistricting could be offset by gains in the next round. In dissent, Justice Powell strongly disagreed, arguing that the possibility of some future advantage was irrelevant to the constitutionality of the current disadvantage suffered by Indiana Democrats in that case. While their difference of opinion over the appropriate extent of temporal aggregation was potentially dispositive, the disagreement went undiscussed and the Court failed to acknowledge the temporal dimension of voting rights.

How should the Supreme Court treat the defendants' implicit argument in *Jackson v. Perry*? Once we identify the temporal dimension of voting rights, an obvious question arises: what is the appropriate time period within which to evaluate the fairness (or constitutionality) of a voting regulation? Was Justice White right in *Davis v. Bandemer*, or Justice Powell? Courts and commentators have sometimes implicitly adopted the position that a narrow temporal frame is required for evaluating voting rights claims, and that inter-

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[1] As Part I explains, contemporary debates about spatial aggregation often conflate two conceptually distinct dimensions of aggregation: a group dimension and an institutional dimension. *See infra* Part I.A, I.B. For a discussion of the significance of the institutional dimension, see Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 438-40.

[2] Supreme Court Docket No. 05-276.

[3] *Jackson v. Perry* was argued March 1, 2006. *See* Linda Greenhouse, *Justices Express Concern Over Aspects of Some Texas Redistricting*, N.Y. TIMES, Mar. 2, 2006, at A24. The case is before the Supreme Court for the second time. It was first before the Court two Terms ago, when the Supreme Court decided *Vieth v. Jubelirer*, another recent high profile partisan gerrymandering case. After the Court decided *Vieth* it remanded *Jackson v. Perry* for reconsideration in light of *Vieth*. *See* Jackson v. Perry, 543 U.S. 941 (2004). On remand, the three judge district court rejected all of the claims brought against the Texas's mid-decade redistricting. *See* Henderson v. Perry, 399 F. Supp. 2d 756 (2005). *Jackson v. Perry* is one of several consolidated appeals from that lower court opinion. *See* Jackson v. Perry, Docket No. 05-276; League of United Latin American Citizens v. Perry, Docket No. 05-204; Travis County v. Perry, Docket No. 05-254; GI Forum v. Perry, Docket No. 05-439.

[4] 478 U.S. 109 (1986).

temporal aggregation is improper. The intuitive appeal of this position is understandable: after all, it might seem odd to conclude that an injury to a voter in one election can be offset by some benefit to that voter (or some other voter) in a future election.

As this Article explains, however, this position is misguided. Any intuition we have about the inappropriateness of temporal aggregation of voting rights is likely driven by a kind of legislative assembly fetishism—that is, by the assumption that the composition of a legislative assembly should always mirror the composition of the electorate. But neither democratic theory nor our existing institutional arrangements provide a defense for that principle. Moreover, the other concerns we might have about the temporal dimension—that it would drive political actors to engage in extreme behavior in an early time period to make a later time period irrelevant, or that courts would be incompetent to deal with the additional complexity that the temporal dimension would bring to voting rights jurisprudence—turn out to be much less substantial than they initially may appear. Thus, once one accepts voting rights as aggregate rights, there is little reason always to reject aggregation in the temporal dimension.

Recognizing the temporal dimension of voting rights has important implications for a number of concrete disputes in voting rights theory and doctrine. First, it advances the theory of minority representation by expanding the available strategies for incorporating minority voices into state legislative assemblies, Congress, or any other democratic decisionmaking body. This theoretical contribution has an immediate doctrinal payoff, complicating the role that "proportionality" plays in modern Voting Rights Act jurisprudence. Second, recognizing the temporal dimension of voting rights provides a new perspective on the debates over partisan gerrymandering, as well as offering additional insights into the deep disagreements in modern scholarship over the appropriate role of competition in the electoral process. Third, the possibility of inter-temporal aggregation suggests a way of partially rehabilitating the much-maligned one person, one vote doctrine—while simultaneously suggesting a new critique of that rule.

The Article proceeds in three parts. Part I unpacks the aggregate nature of the right to vote and describes the temporal dimension of the right to vote. The Part then shows the way in which the temporal dimension has surreptitiously played an important role in voting rights jurisprudence, even while it has gone largely unrecognized by courts. Part II explains why it would be a mistake to categorically reject inter-temporal aggregation of voting rights. Part III the applies the insights of Parts I and II, exploring the consequences for voting rights theory and doctrine of recognizing the temporal dimension of voting rights.

I. TEMPORALITY IN VOTING THEORY AND DOCTRINE

This Part defines the temporal dimension of voting rights, explains its significance, and shows how the courts have consistently overlooked this aspect of the right to vote.

A. *Temporality in Theory*

To unpack the temporal dimension of voting rights, it is necessary first to understand the analytic structure of the right to vote. There is no unitary understanding of the right to vote—an unsurprising fact, given that there is no widespread agreement about why voting is

valuable or about what the concept of representation entails.[5] Bracketing these broader debates, however, theories of voting rights can be loosely grouped into two categories. The first category encompasses accounts that are "individualistic" in the sense that one can identify harms to the right to vote by examining only the treatment of an individual voter. For example, one might value an individual's right to vote on the ground that voting promotes civic virtue in those who vote.[6] On this account, a harm to the right to vote can be identified without looking beyond the treatment of an individual voter.

Of course, many theories of voting rights do not fit within this first category. It is widely accepted that the right to vote safeguards more than simply the right of an individual voter to cast a ballot. Voting rights are seen as important in large part because they enable groups of individuals to exert collective power in the political process.[7] A variety of theories suggest different ways in which one might safeguard this collective power—by preventing vote dilution,[8] preserving electoral competition,[9] and so on. These theories fall into a second category, under which harms to voting rights *cannot* be evaluated at the level of individual voters; instead, cognizable harms can be identified only by looking at the treatment of many voters. In this (limited) sense, these theories treat voting rights as aggregate rights.[10]

Modern voting rights scholarship has embraced the aggregate nature of voting rights.[11] But this scholarship has been inattentive to some important consequences that flow from this conception of voting rights. Once we recognize that voting rights are often conceptualized as aggregate rights, it becomes clear that we cannot evaluate voting rights claims without establishing the boundaries of appropriate aggregation.

There are at least three dimensions across which one might aggregate the costs and benefits of a particular voting rule in order to evaluate the rule's fairness—a group dimension, an institutional dimension, and a temporal dimension.[12] These three dimensions are captured by three questions that are crucial to evaluating the fairness of the rule: (1) How should we define the groups among and between which we measure fairness?; (2) How

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[5] For the seminal modern survey of the concept of representation, see HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION (1967).

[6] *See, e.g.*, J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861).

[7] *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000); GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS (1997); Andrew Gelman, Jonathan N. Katz, & Francis Tuerlinckx, *The Mathematics and Statistics of Voting Power*, 17 STATISTICAL SCIENCE 420 (2002).

[8] *See generally* MINORITY VOTE DILUTION (Chandler Davidson ed. 1984).

[9] S*ee generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (Harper 1942); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (Harvard 2003). *See also* Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L. Q. 685 (2004).

[10] In using the terms "individual right" and "aggregate right," I do not mean to engage the various debates about the structure of constitutional rights in particular or legal rights in general. *See generally* Mathew Adler, *Rights Against Rules: The Moral Structure of the Constitution*, 98 MICH. L. REV. 1 (1998). Rather, I use the term "aggregate right" only in a limited analytic sense – to indicate that the fairness of an electoral rule cannot be determined by focusing only on the treatment of the rights-claimant herself.

[11] *See, e.g.*, SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY (2d rev. ed. 2003); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29 (2004); Pamela S. Karlan, *The Rights to Vote: Some Pessimism about Formalism*, 71 TEX. L. REV. 1705 (1993).

[12] Here and throughout the Article, I deliberately use both the terms "fairness" and "costs and benefits" when describing the task of evaluating whether a particular voting rule is good or bad. I do this to emphasize that nothing in my analysis turns on the choice between utilitarian, Rawlsian, or other theories of ethics.

should we select the institutional frame within which we measure fairness; and (3) Across what period of time should we measure fairness?[13]

My focus here is on the temporal dimension. The following discussion situates that dimension within the broader analytic framework by describing in more detail each of the dimensions in which one might aggregate the right to vote when considering a voting rights claim, as well as the relationship between the different dimensions in which aggregation is possible.

1. *The Group Dimension*

First, one can aggregate the right to vote in the group dimension. Whether an electoral rule causes a cognizable harm often depends in part on how one defines the boundaries of the reference groups whose relative treatment should be compared. Voting rights jurisprudence and scholarship is obviously replete with comparisons of the treatment of different groups: racial groups are the focus of the minority vote dilution inquiry under the Voting Rights Act,[14] political groups are the focus of partisan gerrymandering jurisprudence, and so on. But simply separating voters along racial or political lines does not fully specify the appropriate group boundaries for analysis.

Consider the problem of minority vote dilution. Section 2 of the Voting Rights Act prohibits states from regulating elections "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[15] In the redistricting context, the Supreme Court has interpreted Section 2 to proscribe states from enacting redistricting plans that dilute the electoral strength of minority voters.[16] In order to determine whether a redistricting plan unfairly diminishes the voting

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[13] These different dimensions of aggregation are important for any theory of voting rights that is focused on the way in which an electoral rule (or set of rules) affects electoral dynamics. Theories of voting rights might be concerned with electoral dynamics in two different senses. First, a theory might focus on the way in which a legal rule will affect elections if we take voter preferences to be exogenously given, such that their behavior (at the individual level) does not change in response to changes to the system. Theories concerning minority vote dilution, partisan bias, and anticompetitive electoral effects are all concerned in part with such consequences. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964). Second, a theory might focus on the possibility that a legal regulation will affect the individual behavior of voters (over the short or long term) – that is, that voter preferences are endogenous to the legal rules in potentially bad ways. An example of such a theory is the argument that race-based redistricting is harmful because it sends unfortunate signals to representatives and voters about how they should behave. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993) (striking down a North Carolina district in part because of such a concern).

As I suggested above, of course, there are theories of voting injuries that are unconnected to electoral dynamics in either of the senses described above. Such accounts of voting rights are insensitive to the different potential dimensions of aggregation, because they are not concerned with the effects of a particular voting regulation on electoral dynamics. Some purpose-based theories of voting rights injuries are like this, because they are concerned only with the motivations of the governmental actors that produce the legal rule at issue (or the social meaning of that action), rather than with the rule's electoral consequences. *Cf., e.g.*, 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 (1993). Such theories are important, but they are not the focus of this Article.

[14] Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

[15] 42 U.S.C. § 1973 (2000).

[16] The precise contours of the concept of vote dilution are quite complex, somewhat confused, and currently contested by different members of the Court. *See, e.g.*, Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001); Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of*

strength of minority voters, of course, one must first decide which minority voters constitute the appropriate comparison group: All minority voters within a state? All minority voters within a particular political subdivision? All minority voters living within a reasonably compact area?[17]

There are a number of different ways we might choose to answer this question, depending on the injury we hope to identify. In the context of vote dilution claims under Section 2 of the Voting Rights Act, for example, the Supreme Court initially opted for something close to the third possibility. In *Thornburg v. Gingles*,[18] it suggested that the relevant group was a group of minority voters that was large enough and geographically compact enough for its members to constitute a majority of a single member district within the districting scheme under review.[19] This group marked the unit of analysis for the Court's vote dilution inquiry, and the Court suggested that an injury to such a group of minority voters could not be offset by a benefit to some other minority voters.

In subsequent cases, however, the Court has indicated that it might be willing to broaden the scope of a comparison group for purposes of evaluating Section 2 claims.[20] In *Johnson v. De Grandy*,[21] the Court indicated that the relevant group included all minority voters living in a major metropolitan area—Dade County—even though this county encompassed a number of single member districts.[22] Adopting this broader group definition, the Court offset the putative harm to a group of minority voters living in one hypothetical single member district against the putative benefit to a group of voters living elsewhere in Dade County.[23] But the Court continued to suggest that some local geographic constraints on the boundaries of the group might be appropriate. Justice Souter, writing for the majority, resisted the possibility of offsetting benefits to minority voters in Dade County against harms to minority voters located elsewhere in Florida.[24]

Retrogression, 3 ELECTION L.J. 21 (2004). For present purposes, however, most of this doctrinal detail and confusion can be ignored.

[17] And, of course, there are many other aspects to the question of how one defines the minority reference group. One must decide whether (or when) multi-ethnic coalitions of minority voters should be treated as a single group, when minority voters are sufficiently sociologically or politically cohesive to be treated as a single group, etc. *See, e.g.*, Nixon v. Kent County, 76 F.3d 1381 (6th Cir. 1996); LULAC v. Clements, 999 F.2d 831 (5th Cir 1994).

[18] 478 U.S. 30 (1986).

[19] *See id.*

[20] The doctrinal pressure on the Court's initial definition of the relevant group may have stemmed in part from the fact that the Court laid out the *Gingles* approach in a case concerned with vote dilution caused by a multimember district. *See Gingles*, 478 U.S. at 34-35, 46-48. The framework proved more difficult to apply to challenges to single-member districting arrangements, such as the one at issue in *Johnson v. De Grandy*. *See* 512 U.S. 997, 1012-13 (1994). In addition, the *Gingles* framework for evaluating vote dilution claims came under pressure because of changes in voting behavior and, in particular, the reduction of polarized voting in some parts of the country. For a discussion of these pressures, see Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Political Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

[21] 512 U.S. 997 (1994).

[22] *See id.* at 1006-09; *id.* at 1106-17 (using all of the minority voters in Dade County as the reference group for purposes of evaluating a vote dilution claim leveled against Florida's state legislative reapportionment); *but cf. id.* at (resisting the conclusion that it would *always* be permissible to permit the group boundaries to be drawn broadly to encompass several electoral districts).

[23] *See id.* at 1006-09.

[24] *See id.* at 1021-22.

Most recently, the Court has suggested that it might expand even further the boundaries of group aggregation in Section 2 litigation. In *Georgia v. Ashcroft*,[25] the Court suggested that the appropriate group for vote dilution purposes might be defined as all black voters in the state of Georgia.[26] Under this definition, a group of black voters might no longer be able to prove vote dilution by demonstrating unfairness at the level of a hypothetical single member district (that is, by demonstrating that they were a group large enough and geographically compact enough to constitute a majority of single member district).[27] Instead, the Court might evaluate the fairness of the electoral rule at issue using a broader group frame.

There are reasons one might prefer to define group boundaries narrowly or broadly. In the racial redistricting context, for example, the appropriate boundaries of minority groups may depend in part on whether one is more interested in descriptive or substantive representation—that is, whether one is interested in maximizing the election of *minority representatives*, or instead interested in maximizing the representation of *minority interests*.[28] The debate about the preferability of descriptive or substantive representation is a longstanding one, and I take no position on it here. My point here is simply that the identification of a cognizable harm will often turn crucially on the determination about how to aggregate the right to vote in the group dimension.

2. *The Institutional Dimension*

As between different groups of voters, harms and benefits can be aggregated across different institutional boundaries. In other words, it is not sufficient to select the boundaries of the relevant voter reference groups; one must also select an institutional perspective across which to make comparisons about the relative treatment of these groups. Without selecting an institutional "frame"[29] within which to compare group treatment, it is often impossible to decide what constitutes fair treatment across groups.[30]

Consider, for example, partisan gerrymandering claims in the federal congressional context. One could attempt to identify the existence of an impermissible partisan gerrymander from at least three different institutional perspectives: from the perspective of an individual electoral district; from the perspective of a single state's congressional

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[25] 539 U.S. 461 (2003).

[26] *See id.* at 479. *Georgia v. Ashcroft* involves a claim under Section 5 of the Voting Rights Act. *Id.* at 465. But Justice O'Connor, writing for the majority, relied heavily Section 2 case law in her analysis, *see id.* at 479-85, and subsequent cases have agreed that Ashcroft's analysis is relevant to Section 2 claims as well as Section 5 claims. *See, e.g.*, Metts v. Murphy, 347 F.3d 346 (2003).

[27] *See* Georgia v. Ashcroft, 539 U.S. at 479.

[28] For a richer description of the differences between descriptive and substantive representation, see PITKIN, *supra* note 5.

[29] I borrow the vocabulary of "frames" from Daryl Levinson. *See* Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L. J. 1311 (2001).

[30] Voting rights scholarship and jurisprudence has often conflated the institutional dimension of aggregation with the group dimension. In part, this may be due to the path of Section 2 vote dilution jurisprudence and its predominant role in much of the legal scholarship. When the *Gingles* hypothetical district framework for analysis was applied to review single member electoral districts, the group dimension and the institutional dimension both focused on single member districts. The group definition was grounded at the single member district level, because the *Gingles* test framed the relevant minority group as any group of minority voters that was large and compact enough so that its members constituted a majority of a single member district. Moreover, the institutional perspective was focused principally on single member districts. As the preceding section described, the group boundaries have expanded. But the institutional boundaries have expanded as well, obscuring the conceptual difference between the two.

delegation; or from the perspective of Congress as a whole.[31] This is true across a variety of harms that we might think partisan gerrymanders cause. For example, one potential concern about partisan gerrymanders is that they create bias in one party's favor.[32] In order to test for the existence of bias, one must decide whether the concern is partisan bias in an individual district, in a congressional delegation, or in Congress as a whole.[33] Another concern about partisan gerrymanders is that they depress electoral competition and entrench both parties.[34] As with bias, evaluating fairness-as-competitiveness requires specifying an institutional frame for analysis: should every district be competitive? Or should competition be measured at a higher institutional level? Regardless of the answer to this question, it is clear that the whether a cognizable injury exists will often depend on the institutional perspective from which one evaluates the challenged voting regulation.[35]

3. *The Temporal Dimension*

Finally, the harms and benefits of a voting rights regulation can be aggregated over time. Whether a voting regulation causes a cognizable injury often depends on how broadly one draws the temporal frame within which one evaluates the regulation. Imagine a hypothetical voting rule that burdens the voting rights of a group in time period 1, but then benefits that group in time period 2. If members of the group challenge that rule, a court's evaluation of the merits of the group's claim may turn on how broadly the court aggregates the right to vote in the temporal dimension. If the court selects a narrow temporal frame that includes only time period 1, it will conclude that the rule burdens the group's voting rights. But if the court selects a broader temporal frame that includes both time periods 1 and 2, it can offset the burden in period 1 against the benefit in period 2. Accordingly, the court may conclude that the plaintiffs have a viable voting rights claim if it selects the narrow temporal frame, but it may reject the plaintiffs' claim if it selects the broader temporal frame.

This hypothetical scenario plays out often in the actual facts of voting rights controversies. For example, a voting rights case before the Supreme Court this Term contains an implicit dispute about the appropriate temporal frame within which to evaluate the constitutionality of a partisan gerrymander. That case, *Jackson v. Perry*, concerns the constitutionality of the Republican led mid-decade revision of Texas's congressional districts.[36] Congressional districts are ordinarily redrawn only once each decade, shortly after

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[31] *See* Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, *supra* note 1, at 410-11.

[32] For a explanation of the concept of partisan bias, see, for example, GARY COX AND JONATHAN KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 32-34 (2002); Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Election*, 81 AM. POL. SCI. REV. 1251 (1987).

[33] This statement is true regardless of whether the relevant groups are defined as "all Democrats in the United States" and "all Republicans in the United States," or instead disaggregated into small units – such as state-level political party units. In the latter case, one would not offset a harm to Texas Democrats with a benefit to Michigan Democrats. Even with state-level party groups, however, the choice of a congress-wide institutional perspective yields different results than a congressional delegation-specific perspective. *See* Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, *supra* note 1, at 438-40.

[34] *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2001).

[35] There is a second way in which the institutional frame can be expanded. In addition to elevating the institutional level to include more districts within the frame, one could expand the *types* of voting rights regulations included within the institutional frame. So, for example, one could offset the gains that Georgia Democrats obtained through redistricting against the losses that they suffered by virtue of a voter identification rule that favored Republicans.

[36] *See* Jackson v. Perry, Supreme Court Docket No. 05-276 (argued March 1, 2006).

the release of the decennial census.[37] Though Texas's congressional districts were redrawn in 2001, Republican state officials spearheaded a second redistricting effort just two years later—in part on the ground that the second redistricting was a necessary corrective to a Democratic bias in the initial redistricting.[38] Before the Supreme Court, the state officials have argued that the first redistricting plan was biased in favor of Democrats,[39] while the challengers to the second redistricting plan have argued that the second plan is biased in favor of Republicans.[40] If those allegations are both accurate (and there is some truth to each), the case poses an important question about the temporal dimension of the right to vote: does it bolster the constitutionality of a pro-Republican partisan gerrymander if that gerrymander is designed in part to offset an immediately preceding partisan gerrymander that favored Democrats?

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In short, there are at least three dimensions in which the right to vote is an aggregate right: the group dimension, the institutional dimension, and the temporal dimension. Each dimension makes it possible to aggregate the cost and benefits of a voting rule across different voters (or, more precisely, groups of voters). In the group dimension, it is different persons situated within the same group; in the institutional dimension, it is different persons or groups located within the relevant institutional structure; and in the temporal dimension it is different persons or groups situated at different times (which, of course, could be the same person at two different times).

While it is helpful to separate out these different conceptual strands of the right to vote, it is also useful to recognize that the selection of group, institutional, and temporal frames are all interrelated. For example, selecting a wide group frame for evaluating a voting rights claim may require selecting a broader institutional frame. Consider, for example, the evaluation of a state's redistricting scheme. If one decides to define the relevant group as, say, "all Democrats in the state," then it will not be possible to define the relevant institutional frame as an individual district.[41] The design of any single district cannot fully determine the treatment of all Democrats in the state.[42]

B. *Temporality in Doctrine*

Courts have been inattentive to the temporal dimension of voting rights. While they have sporadically recognized the aggregative dimensions of voting rights, they have never expressly acknowledged the possibility of temporal aggregation. In a way, this is

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[37] The Supreme Court's one person, one vote jurisprudence effectively requires states to revise their district lines when new decennial census data becomes available. *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 462 n.2 (2003).

[38] *See* Adam B. Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004); State Appellee's Brief, Jackson v. Perry (No. 05-276) (filed feb. 1, 2006); Reply Brief of Jackson Appellants at 2-4 Jackson v. Perry (No. 05-276) (filed Feb. 22, 2006) (arguing that the state's "corrective partisanship" argument must fail).

[39] *See* State Appellee's Brief, Jackson v. Perry (No. 05-276).

[40] *See* Brief for Jackson Appellants, Jackson v. Perry (No. 05-276) (filed Jan. 10, 2006); Reply Brief for Jackson Appellants at 6, Jackson v. Perry (No. 05-276).

[41] This interrelationship may help explain why courts and commentators have often conflated the group and institutional dimensions of voting rights aggregation. *See supra* note 30.

[42] The temporal dimension is similarly inter-related with the group dimension. If one defines the group dimension in the above example as "all Democrats affected by the redistricting plan," then it would not be possible to fix the temporal frame around a single election cycle, because the plan will likely last throughout the decade.

unsurprising. Even with respect to aggregation in the group dimension—the dimension most widely recognized in the literature—the Supreme Court has been stingy. Over the years it has sometimes resisted aggregation in the group dimension.[43] In recent years the Court has trended towards recognizing the aggregative nature of voting rights.[44] But this increasing awareness of the aggregative aspects of voting rights has not led the Court to think systematically about the different dimensions across which one might evaluate voting rights claims. In particular, the Court has consistently overlooked the possibility of temporal aggregation.

Despite the fact that the Court has never considered the temporal dimension of voting rights, Justices have often implicitly made use of this dimension in resolving cases. More specifically, individual Justices often implicitly shrink or expand the temporal frame of a voting rights claim—either permitting or disallowing aggregation along the temporal dimension—in the service of a particular conclusion about the constitutionality of a voting rights regulation. These Justices never acknowledge (or likely even realize) that their approaches entail contestable conclusions about the appropriateness of aggregating voting rights across time. Instead, narrow or broad temporal frames lie in the background of an individual Justice's, or the Court's, reasoning—doing analytic work without scrutiny of the assumptions underlying the selection of the frame.

To highlight the way in which different members of the Court implicitly adopt divergent temporal frames, consider the following two examples from the central domains of voting rights jurisprudence: partisan gerrymandering doctrine, which concerns claims that the arrangement of electoral districts unfairly disadvantages voters on the basis of partisan affiliation; and the doctrine of vote dilution under the Voting rights Act, which concerns claims that a districting scheme unfairly disadvantages voters on the basis of race or ethnicity.

1. *Partisan Gerrymandering Jurisprudence*

The Supreme Court's partisan gerrymandering jurisprudence provides a powerful illustration of how the Court's implicit temporal frame can be decisive in resolving a constitutional voting rights claim. For several decades the Court has struggled over the question of when, if ever, partisan gerrymanders might violate the Constitution. When the Court first considered this question directly, it fractured badly, with the disagreements between the Justices stemming in part from their having selected different temporal frames within which to evaluate the constitutionality of the alleged partisan gerrymander. Moreover, recent Supreme Court case law concerning the constitutionality of partisan gerrymanders demonstrates that this lack of consensus over the appropriate degree of temporal aggregation continues.

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[43] *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997 (1994) (refusing to consider the statewide strength of African American voters, and instead limiting aggregation to voters in and around Miami-Dade county); *see also supra* text accompanying notes 20-24. Of course, I do not mean to suggest that the Court should necessarily have approached the issue in *De Grandy* from a statewide perspective. *See supra* text accompanying note 28 (explaining that the appropriate boundaries of group aggregation depends on one's underlying theory of vote dilution).

[44] *See supra* text accompanying notes 25-27 (discussing *Georgia v. Ashcroft*). National trade-offs, however, continue to go largely unrecognized. *See* Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, *supra* note 31, at 414-18.

While concerns about partisan gerrymandering have influenced constitutional voting rights jurisprudence for nearly four decades, prior to 1986 the Court had never directly evaluated a claim that a putative partisan gerrymander violated the Constitution. That year, the Court finally confronted such a claim in *Davis v. Bandemer*.[45] *Bandemer*'s basic holding is fairly straightforward: a majority of the Court concluded that constitutional challenges to partisan gerrymanders are justiciable but rejected the specific claims brought by the *Bandemer* plaintiffs.[46] The Justices were deeply divided over both of these conclusions,[47] however, and their disagreement turned in part on their (implicitly) adopting different degrees of temporal aggregation.

The competing opinions by Justices White and Powell capture this disagreement over the appropriate temporal frame. Both Justices agreed that partisan gerrymandering claims should be justiciable. But Justice White authored the plurality opinion rejecting the plaintiffs' specific claims,[48] while Justice Powell wrote a dissenting opinion arguing that the Indiana redistricting plan at issue in *Bandemer* was unconstitutional.[49]

In rejecting the plaintiffs' claims, Justice White stretched all three dimensions of potential voting rights aggregation. He expanded the relevant group to include all Democratic voters in the state, even though the Court during this period generally showed great reluctance to frame the relevant group in such broad terms.[50] He expanded the institutional frame beyond elections themselves to include other kinds of influence on the state political process as a whole.[51]

Most important for present purposes, Justice White broadened the temporal frame well beyond a single election cycle. He wrote that plaintiffs could prove unconstitutional discrimination only by showing that "the electoral system is arranged in a manner that will *consistently degrade* a voter's or a group of voters' influence on the political process as a whole."[52] Elaborating on this standard, White emphasized that it required the "continued frustration"[53] of the will of the voters and rejected reliance "on a single election to prove

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

[46] *See id.* at 143.

[47] *See id.* at 118-27 (White, J., delivering the opinion of the Court with respect to justiciability); *id.* at 127-43 (White, J., delivering a plurality opinion with respect to the rejection of the plaintiffs' partisan gerrymandering claim); *id.* at 144 (O'Connor, J., Burger, CJ., and Rehnquist, J., concurring in the judgment but concluding that the case should not be justiciable); *id.* at 161 (Powell, J. and Stevens, J., concurring in the justiciability judgment but dissenting from Justice White's rejection of the plaintiffs' claims).

[48] *Id.* at 127-43.

[49] *Id.* at 161.

[50] *Compare Bandemer*, 478 U.S. at 127 ("[W]e agree with the District Court that the claim made by the appellees in this case is a claim that the 1981 reapportionment discriminates against Democrats on a statewide basis . . . not Democratic voters in particular districts . . . .") *with* Thornburg v. Gingles, 478 U.S. 30 (1986) (using a hypothetical single district approach to evaluate minority vote dilution claims under Section 2 of the Voting Rights Act).

[51] *See* 478 U.S. at 131-32. White suggested that "the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates [and] their opportunity to register and vote" were each an important aspect of this broader notion of influence over the "political process as a whole." *Id.* at 132. In considering forms of influence other than the winning of elections, White's approach is somewhat related to the approach recently taken by Justice O'Connor in *Georgia v. Ashcroft*. *See* 539 U.S. 461 (2003).

[52] 478 U.S. at 132 (emphasis added).

[53] *Id.* at 133.

unconstitutional discrimination."[54] The plaintiffs, he concluded, had failed to demonstrate such continued frustration:

> Nor was there any finding that the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980s or that the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census. Without findings of this nature, the District Court erred in concluding that the 1981 Act violated the Equal Protection Clause.[55]

In so concluding, Just White stretched the temporal frame to include not only the remaining elections in the 1980s, but to include the next decennial reapportionment as well. His holding suggests that any losses suffered by Illinois Democrats in the 1980s by virtue of the Republican-controlled redistricting could (and should) be offset against any gains they might make in the next round of redistricting.

Dissenting in part, Justice Powell rejected the plurality's holding and concluded that Indiana's reapportionment scheme violated the Equal Protection Clause.[56] Powell disagreed with the plurality's conclusion for a number of reasons,[57] but his disagreement stemmed in part from his rejection of the plurality's requiring a threshold showing that the system will "consistently degrade" voter's or group of voters' influence. Powell did not think that Indiana Democrats had to suffer losses over several election cycles in order to make out a constitutional infringement of their right to vote.[58] Implicitly, he rejected the possibility of aggregating the treatment of voters across several election cycles.

To be clear, I do not mean to suggest that the competing standards adopted by Justice White and Justice Powell over the appropriate temporal frame turned only on their conclusions about how voting rights should be aggregated in the temporal dimension. Their dispute was partly about their conceptual and normative views on voting rights, but it was also partly evidentiary. Justice White's suggestion that the plaintiffs' claims failed for wont of evidence about continued defeats over time is not only a conclusion about the permissibility of tradeoffs among voters across time. It also likely reflects White's evidentiary concerns. Time crops up in two distinctive roles in the partisan gerrymandering cases. First, it plays a conceptual and normative role. In this role, benefits to a group of voters in period 2 offsets concern about harms to a (similar) group of voters in period 1. The aggregation of benefits and harms across the two periods reflects the temporal dimension of voting rights that is this Article's focus. Second, time sometimes plays an evidentiary role in partisan gerrymandering doctrine. In that role, the lack of success of a group of voters in period 2 is relevant to the

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[54] *Id.* at 135. *Accord id.* at 139-40 ("[E]qual protection violations may be found only where a history (actual or projected) of disproportionate results appears in conjunction with similar indicia [of law of political power]. The mere lack of control of the General Assembly after a single election does not rise to the requisite level.").

[55] *Id.* at 135-36; *see also id.* at 159 (O'Connor, concurring in the judgment) (characterizing Justice White's plurality holding as concluding "that foreseeable, disproportionate *long-term* election results suffice to prove a constitutional violation" (emphasis in original)).

[56] *Id.* at 161.

[57] Powell's approach to the problem of partisan gerrymandering in *Bandemer* is somewhat related to Justice Steven's approach in *Karcher v. Daggert* and *Vieth*. In part, therefore, Powell may be disagreeing with the plurality because he shares Stevens's view that the constitutional injury flows directly from the impermissible purpose (objective, in Stevens's mind) motivating the law. Because such a purpose-based account of injury focuses solely on the legislative assembly that enacts the rule at issue, rather than on the electoral consequences of that rule, the possibility of aggregation is irrelevant to the injury inquiry.

[58] *See* 478 U.S. at 171 n.10 (Powell, J., concurring in part and dissenting in part).

proof of an injury that is actually fully realized in period 1. In other words, continuing losses across several election cycles simply helps confirm that the partisan gerrymander, and not other potential causal factors, are responsible for the voter losses observed in the first period.[59] Justice White's opinion appears to intertwine these two uses of time, requiring long term political impotence both because he is skeptical about the evidentiary value of a single set of election returns and because he believes that the potential costs and benefits of a legislative redistricting should be evaluated across a longer time period.

The disagreement over temporal aggregation in *Bandemer* can also be seen in the Supreme Court's most recent partisan gerrymandering case, *Vieth v. Jubelirer*.[60] *Vieth* concerned a challenge by Pennsylvania Democrats to that state's congressional redistricting plan, which had been drawn by a Republican-controlled legislature.[61] In *Vieth*, the Court revisited for the first time since *Bandemer* the question whether partisan gerrymandering claims should be justiciable. Again the Court was deeply divided over the question (though five Justices continued to support *Bandemer*'s conclusion that such claims can be justiciable).[62] And again the different standards proposed to evaluate the constitutionality of the redistricting scheme at issue contained different implicit temporal frames.

The plaintiffs in *Vieth* proposed a constitutional standard for identifying unconstitutional partisan gerrymanders that contained an narrow, single-election-specific focus—in other words, a standard that implicitly rejected temporal aggregation. The plaintiffs argued that the Pennsylvania redistricting scheme created a constitutional injury if it was drawn with the intent, and had the effect, of denying a majority of the state's voters in any election the ability to elect a majority of state's congressional delegation.[63] This measure of constitutional injury precludes the possibility of temporal aggregation across more than one election cycle. If a majority of voters suffer defeat in a single election because of a redistricting plan, they have suffered a constitutional injury. On the plaintiffs' account, a benefit to that majority of voters in the next election cycle could not offset this injury for constitutional analysis.

Justice Breyer's dissenting opinion in his *Vieth* comes closest to adopting the plaintiffs' proposed standard.[64] But the standard he suggested differs in one crucial respect: it appears to contemplate at least some aggregation of the right to vote across the temporal dimension. Dissenting from the Court's rejection of the plaintiffs' claims, Breyer wrote that federal courts should police partisan gerrymanders to prevent "unjustified entrenchment."[65] Breyer defined entrenchment as "a situation in which a party that enjoys minority support among

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[59] *See, e.g.*, 478 U.S. at 140-41 (suggesting that the disagreement between Justice White and Powell is also in part evidentiary).

[60] 541 U.S. 267 (2004).

[61] *See id.* at 272.

[62] *See Vieth*, 124 S. Ct. 1769, 1795 (Kennedy concurring); *id.* at 1799 (Stevens dissenting); *id.* at 1815 (Souter, joined by Ginsburg, dissenting); *id.* at 1822 (Breyer dissenting). I should note that there is some ambiguity in Justice Kennedy's opinion, which is the reason that I say above that five justices agree that partisan gerrymandering claims "can be" justiciable. Kennedy concurred in the Court's dismissal of the plaintiffs' claims, but wrote separately that he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *See id.* at 1795 (Kennedy, J., concurring in the judgment).

[63] *See Vieth*, 541 U.S. at 284-87; Brief for Appellants, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580).

[64] The plurality opinion, authored by Justice Scalia, concluded that partisan gerrymandering claims should not justiciable. For that reason, the plurality did not reach the merits of the plaintiffs' claims. *See Vieth*, 124 S. Ct. at 1792.

[65] 541 U.S. at 360.

the populace has nonetheless contrived to take, *and hold*, legislative power."[66] At first glance, this test for identifying unconstitutional partisan gerrymanders sounds much like the plaintiffs' test. Both make reference to a majority of voters failing to capture a majority of the relevant legislative seats on account of the redistricting plan. But Breyer's invocation of the concept of entrenchment, as well as his definition of that term, suggests that it encompasses only situations in which a redistricting scheme will submerge the majority's preferences across more than one election cycle. If the problem is self-correcting—if a majority will for any reason be able to reassert its preferences in the next election cycle—then there is no need for judicial intervention. In fact, Breyer goes so far to suggest, as did Justice White in Bandemer, that if the majority party is able to undo or offset the harm caused by a partisan gerrymandering "in the next round of districting," there may be no cognizable constitutional injury that courts should attempt to remedy.[67]

In short, the temporal dimension of voting rights often does substantial work in the Supreme Court's partisan gerrymandering jurisprudence. But disagreements about the appropriate temporal frame for evaluating gerrymandering claims go entirely undiscussed.

2. *Vote Dilution Jurisprudence*

Minority vote dilution jurisprudence provides another instance in which Supreme Court doctrine entails implicit judgments about the temporal dimension of voting rights that go unnoticed, even by the justices themselves.

Consider, for example, the modern doctrinal framework for evaluating vote dilution claims under Section 2 of the Voting Rights Act.[68] That framework makes something called

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[66] 124 S. Ct. at 1825 (Breyer, J., dissenting) (emphasis added).

[67] As was the case with Justice White in Bandemer, time also plays an evidentiary role for Justice Breyer. Consider the examples of "unjustified entrenchment" that Justice Breyer provided in his opinion. In one example he suggested that, in the absence of any significant departures by a state from traditional redistricting norms, plaintiffs would have to demonstrate that "a majority party has *twice* failed to obtain a majority of the relevant legislative seats in elections" in order to make out "a claim of unconstitutional entrenchment." 124 S. Ct. at 1828. In a second example, however, he indicated that, where a state has redrawn districts more than once in a decennial redistricting cycle and departed "radically from previous traditional boundary-drawing criteria," plaintiffs may prove unjustified entrenchment by marshalling statistical evidence that the majority party *will likely fail* to obtain a majority of the relevant seats – a showing well short of a demonstration that the party has failed to obtain a majority in two consecutive election cycles. *See id.* While one example requires proof across several election cycles and the other does not, this is surely because Breyer believes, as an evidentiary matter, that the presence of mid-decade redistricting and other factors are evidentiary substitutes, in the search for unjustified entrenchment, for defeats across several elections. *See id.* at 1828 ("The scenarios fall along a continuum: The more permanently entrenched the minority's hold on power becomes, the less evidence courts will need that the minority engaged in gerrymandering to achieve the desired result.").

[68] To make out a vote dilution claim, plaintiffs must first satisfy three preconditions – typically known as the *Gingles* factors because they were first articulated by the Court in *Thornburg v. Gingles*. *See* 478 U.S. 30, 50-51 (1986); *see also* Growe v. Emison, 507 U.S. 25, 40 (1993) (holding that a claim of vote dilution in a single-member district requires proof of the *Gingles* preconditions). First, they must demonstrate the existence of a sufficiently large and geographically compact group of minority voters; second, they must show that the group of minority voters is politically cohesive; and third, they must prove that white voters typically vote as a bloc to defeat the candidates preferred by the minority voters. While proof of these threshold conditions is necessary to make out a vote dilution claim, it is not sufficient. *See* Johnson v. De Grandy, 512 U.S. 997, 1011-12 (1994). Once the threshold is crossed, courts engage in a "totality of the circumstances" balancing to determine whether vote dilution has occurred. It is important to note, however, that as an empirical matter courts generally conclude that vote dilution exists when plaintiffs prove the existence of the three *Gingles* conditions. *See* ELLEN KATZ, DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDS UNDER SECTION 2 OF THE

"proportionality" a potential affirmative defense to a Section 2 claim. When the Court introduced the proportionality defense in *Johnson v. De Grandy*,[69] it defined the concept in a way that depends crucially on the adoption of a narrow temporal frame within which to evaluate claims brought under Section 2 of the Voting Rights Act. Under the Court's definition, proportionality exists whenever a redistricting scheme creates "majority-minority districts in substantial proportion to the minority's share of voting-age population."[70] Proof of proportionality gives rise to a potential defense to a Section 2 claim, the Court concluded, because it constitutes powerful evidence that minority voters have a fair share of political opportunity.[71] In this conclusion lies a crucial assumption: that a fair share of voting power is best measured by examining only the *current* success of minority voters under a redistricting scheme. If the scheme guarantees that minority voters' population mirrors their potential for success in the upcoming election, fairness is assured.[72] The *De Grandy* Court suggested that past electoral opportunity is entirely irrelevant to the proportionality determination. But why? The temporal frame need not be drawn narrowly to include only the present potential for success. And if the minority voters' Section 2 claim were viewed through this broader temporal lens, the fact that the minority voters' population mirrored their control of districts in the upcoming election cycle would be insufficient to disprove minority voters' vote dilution claim.

In other words, the Court's proportionality inquiry elides the following question: over what time frame should proportionality be required? Should plaintiffs be able to point to a lack of proportionality over time as evidence that the current plan is not sufficient, even if the plan achieves proportionality with respect to the next set of elections? Or on the flip side, should defendants be able to raise the proportionality (or supra-proportionality) in past election cycles as a defense to a plaintiff's claim that the current districting plan will not lead to proportionality in upcoming election cycles? As in partisan gerrymandering jurisprudence, these questions concerning the temporal dimension of voting rights have gone unasked and unanalyzed.

VOTING RIGHTS ACT SINCE 1982 (2005). The only significant exception to this regularity is that courts often reject Section 2 claims (even when the *Gingles* conditions exist) where proportionality is present. *See id.*

[69] 512 U.S. 997 (1994)

[70] *Id.* at 1013; *see also id.* at 1014 n.11 (comparing the "number of majority-minority voting districts to minority members' share of the relevant population"). Note that the Court's definition of proportionality represents a careful attempt to avoid the prohibition on proportional representation set forth in Section 2 of the VRA. Writing for the Court, Justice Souter contended that "[t]he concept [of proportionality in *De Grandy*] is distinct from the subject of the proportional representation clause of § 2, which provides that 'nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.' This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Id.* at 1014 n.11 (internal citations omitted).

[71] *Id.* at 1013-14.

[72] Lower courts have followed the Court's lead. Since *De Grandy*, courts that have found proportionality have fairly consistently rejected plaintiffs' claims of vote dilution. *See* KATZ, *supra* note 68. One might think that the Voting Rights Act itself mandates use of a narrow temporal frame because the Act targets a particular "standard, practice, or procedure" related to voting – which might suggest that the effect of past standards, practices, or procedures is irrelevant. But the Court does consider historical evidence more generally as part of the vote dilution inquiry; it just does not suggest that such evidence is relevant to the "proportionality" determination. Moreover, if the Act were read to require a focus only on the effects of the challenged practice, such a focus would not necessarily dictate a narrow temporal frame. Indeed, it might seem to require courts to employ a temporal frame that encompassed the life-span of the practice.

II. POTENTIAL OBJECTIONS TO INTER-TEMPORAL AGGREGATION

Part I demonstrated that, so long as we see voting rights as aggregate rights, there is a puzzle about why we would ignore the possibility of temporal aggregation. And the puzzle is particularly relevant because it turns out that the Supreme Court sometimes *does* (implicitly) aggregate votes across the temporal dimension when considering voting rights claims. So how should we evaluate the Court's efforts in those cases? Should we applaud the Court for stretching the temporal frame, for the same reasons that legal scholars often urge the Court to abandon its sometimes-individualistic approach in voting rights cases and expand the group or institutional frames?

There may be good reasons, both theoretical and evidentiary, to reject the expansion of the temporal frame in particular voting rights contexts and with respect to certain kinds of voting rights claims. But as Part II explains, it is hard to see a basis for categorically rejecting the possibility of temporal aggregation in the voting rights context—so long as one agrees that the right to vote is in part an aggregate right. Once we accept that aggregation among group members or across institutional subdivisions is sometimes appropriate when we evaluate the fairness of a voting rights regulation, there is no good reason to always reject such aggregation over time. To demonstrate this, Part II advances and ultimately rejects several potential reasons for treating inter-temporal aggregation as exceptional. In rejecting those reasons, the Part highlights the fundamental conceptual similarity between the temporal dimension and the other two.[73]

A. *Assembly Fetishism*

One reason we might reject inter-temporal tradeoffs in voting rights contexts is that such tradeoffs will inevitably affect the composition of a legislative assembly in a way that trade-offs along the group or institutional dimensions of voting rights need not. In this way, the temporal dimension of voting rights is different than the group or institutional dimension.

We can expand the group or institutional frame within which we evaluate the fairness of a voting rule without altering the overall composition of a particular legislative assembly. Consider, for example, the Section 2 claims at issue in *Johnson v. De Grandy*, which I discussed above.[74] In evaluating these claims, the Court permitted trade-offs to be made among African-American voters in different parts of Dade county. It rejected, however, the possibility of expanding the scope of group aggregation to include all African American voters in the state.[75] Even had the Court accepted this possibility, however, expanding the

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[73] As I explained above, the central conceptual similarity is that each dimension requires that one accept the possibility of identifying representational injuries by examining the treatment of two or more people, rather than by locating all injuries in the treatment of a single individual voter. The two or more persons whose combined treatment is assessed may be different because they have different identities (which is relevant to the group dimension), because they are located within different parts of the system of representation (which is relevant to the institutional dimension), or because they are located at different points in time (which is relevant to the temporal dimension). Despite these differences between the persons, there is consensus within the literature that it is sometimes appropriate to identify injuries by aggregating across the persons. The aim of Part II is simply to show that aggregation in the temporal dimension is not different in kind than the other types of aggregation.

[74] *See supra* text accompanying notes 20-24.

[75] *See* Johnson v. De Grandy, 512 U.S. 997, 1021-22 (1994).

group frame need not have affected the composition of the state legislature. If one of the majority-black districts in Dade county were eliminated and replaced with a new majority-black district drawn in the northwest part of Florida, the overall composition of the legislature would not change. By this I do not mean to suggest that drawing a majority-black congressional district in northwestern Florida will necessarily produce a legislative assembly that is functionally identical to the legislature produced by instead drawing that majority-black district in the southern part of the state. Black voters across the state are obviously not entirely homogeneous. But to the extent that African-American voters in Florida are considered to have sufficiently common interests to treat them as a single group for vote dilution purposes—the essential premise that supports circumscribing the boundaries of the group at a statewide level, as opposed to a more local one—intra-group tradeoffs will by definition not meaningfully affect the representation of black voters in the legislature.

In contrast, inter-temporal tradeoffs will almost always affect the composition of the legislative assembly. Consider the potential inter-temporal tradeoff implicit in Justice White's *Bandemer* opinion.[76] His opinion suggested that a harm to Democratic voters caused by the 1980 round of redistricting in Indiana could be offset by a benefit to them in the next round of decennial redistricting. Accepting this tradeoff necessarily affects the composition of the state legislature in each decennial period. During the first period the composition of the legislature is weighted more heavily in favor of the Republican party than it otherwise would have been. And during the second period the opposite will be true: the composition of the legislature will by hypothesis by more heavily weighted in favor of the Democratic party than it otherwise would have been.[77]

This suggests a potential reason why we might treat the temporal dimension of voting rights differently than the group or institutional dimensions. Perhaps it is appropriate to treat the right to vote as an aggregate right only to the extent that doing so does not change the composition of the legislative assembly. Changing the balance of power in the legislature, one might contend, would impermissibly permit legislative outputs to be altered so that the balance of power did not actually mirror constituent preferences.

The intuition that the composition of a legislative assembly should always mirror the preferences of the electorate is a common one. It undergirds some of the critiques of Justice White's opinion in *Bandemer*, and it is an implicit premise of the plaintiffs' legal theory in the *Vieth v. Jubelirer*, the partisan gerrymandering case decided by the Supreme Court two Terms ago.[78] But despite being quite common, the intuition is surprisingly difficult to defend.

For one thing, it is not at all clear what it means for the composition of the legislative assembly to mirror constituent preferences. While the concept of mirroring sounds neutral, defining the concept actually requires making a contesible judgment about what function

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[76] *See* Davis v. Bandemer, 478 U.S. 109 (1986).

[77] Note that Justice White actually suggests something slightly different and more complicated. He seems to indicate that the Democratic voters' claim should fail if they might receive an *equitable* distribution of legislative power in the next redistricting, rather than if they receive a *preferential* distribution. In other words, he seems to be suggesting that the average level of unfairness over time is insufficient to make out a constitutional claim if unfavorable treatment in period one is combined with equitable treatment in period two. For expositional simplicity I use an example with equivalent harms and benefits in the two different periods.

[78] The plaintiffs in *Vieth* argued that a redistricting scheme constitutes an unconstitutional partisan gerrymander if it prevents the party preferred by a majority of the state electorate from capturing a majority of the state's congressional seats in an election. This theory, which we might call election-cycle majoritarian – implicitly presumes that the failure of the majority party to capture a majority of the state's seats cannot be offset by future electoral benefit to that party.

should describe the relationship between voter preferences and the composition of the legislative assembly. Proportional representation is one potential candidate for this function: under such a system, a group would receive a fraction of legislative seats equivalent to the fraction of electoral support that the group garnered. But this is a highly controversial definition of the concept of mirroring. The single-member-district electoral system used in the United States is designed *not* to produce proportional representation,[79] and the Supreme Court has repeatedly refused to read a requirement of proportional representation into the Constitution.[80]

Even if we could agree on a colloquial sense of what "mirroring" means, the claim that mirroring in each election is required for electoral fairness is contradicted by current practice in the United States. Existing institutional features of our democracy prevent our legislative assemblies from mirroring constituent preferences in each election. The Senate is a classic example here. The Constitution provides for the staggered election of Senators.[81] Only one-third of the Senate's seats are contested in each national election.[82] Imagine that, for some time, a majority of voters in 30 states prefers to have (and has voted to put) Republican representatives in the Senate. The Senate would be composed of 60 Republican senators (two from each of the 30 states favoring Republicans) and 40 Democratic senators. Now suppose that, quite suddenly, the preferences of voters around the country shift so that a majority of voters in 30 states prefers to have Democratic representatives in the Senate. After the next election cycle, will the Senate reflect this change in preferences and now be composed of 60 Democratic and 40 Republican senators? It is extremely unlikely, given that only one-third of the seats in the Senate are contested in each election cycle. Rather than reflecting these new preferences after the next national election, it would likely take three national elections for the composition of the Senate to catch up to the sudden shift in the electorate's preferences.[83]

Of course, the fact that current American practice does not comport with a requirement that legislative composition always mirror constituent preferences after each election is not sufficient to show that such a requirement is undesirable. Perhaps the structure of the Senate is flawed. Some have suggested this, contending that the Senate's current structure is an unjustified relic of the original constitutional compromise.[84] These critics usually focus on the fact that the Constitution gives two Senators to each state—a feature, they complain, that makes it possible for the Senate to be controlled by a minority of the Nation's voters.[85]

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[79] Single member district, first-past-the-post elections typically build a "winners' bonus" into the electoral system. This bonus generally ensures that the party that captures a majority of the popular vote will win a larger majority of legislative seats. (It also typically ensures that no more than two major parties emerge as serious electoral contenders.) By augmenting the legislative power of electoral majorities, single-member-districted elections are sometimes thought to help create more stable governing coalitions. *See generally* GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS (1997).

[80] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 288 (2004) (plurality op.). *Cf.* Johnson v. De Grandy, 512 U.S. 997, 1014 n.11 (1994).

[81] *See* U.S. CONST. art. I, § 3.

[82] *Id.*

[83] Of course, this feature of the Senate begs the closely related question of why it is appropriate to fix Senator's terms at six years, rather than some shorter time period. But this provides additional support for the position that the meaning of "mirroring" is importantly ambiguous.

[84] *See, e.g.*, Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J. L. & POLITICS 21 (1997).

[85] *Id.*

But the same critique could be leveled against the Constitution's provision for staggered Senate elections, which also makes it possible for a (current) minority to control the Senate.

The specific argument that the Senate's structure is flawed, and the more general argument that legislative composition should always mirror voter preferences, both touch on a central question in democratic theory. The question is: how rapidly do we want the institutions of lawmaking to respond to fluctuations in constituent preferences? Do we want the composition of those institutions to change rapidly when the electorate's preferences change? Or do we want to smooth out such responses? Unsurprisingly, there is no obvious answer to this question, and different democracies have adopted different approaches. As Bruce Ackerman has noted, Westminster systems[86] and separation of power systems[87] stand in stark opposition with respect to this foundational question.[88] Westminster systems often respond very quickly to shifts in the electorate. Such systems consolidate lawmaking power in a single institution—the parliament.[89] If a majority of the electorate does not support the governing coalition in parliament, it can often force early elections to put in place a new governing coalition.[90] That new coalition, which reflects the preferences expressed by the national constituency in the election, has the power to implement very different policies than its immediate successor.[91]

In contrast, separation of powers systems often prevent such rapid fluctuations in policymaking by requiring majorities in several consecutive national elections to agree before a new legislative agenda can be enacted into law. In the United States, for example, there are three central veto points in the lawmaking process: the House of Representatives, the Senate, and the Presidency.[92] Each of these must agree to a policy agenda for that agenda to become law (absent veto-proof majorities in the House and Senate).[93] Moreover, because the membership of these three institutions is determined on different election cycles,[94] the

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[86] Under Britain's Westminster system, "two parties compete in the electorate, and the one gaining a majority in parliament forms a government." Terry M. Moe & Michael Cladwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL AND THEORETICAL ECON., 171, 177 (1994). Britain's Westminster system represents perhaps the purest form of parliamentary democracy.

[87] In a separation of powers system, governmental authority is divided among competing institutions. In the United States's presidential system, for example, both the President and the Congress have an independent electoral mandate. The legislative assembly does not select the president, as is the case in most parliamentary systems, *see* Arend Lijphart, *Presidentialism and Majoritarian Democracy: Theoretical Observations*, in THE FAILURE OF PRESIDENTIAL DEMOCRACY 92-93 (Juan J. Linz & Arturo Valenzuela, eds. 1994); and the president lacks the power to dissolve the legislature and call for elections, as is the case in most parliamentary systems, *see id.*; *see also* Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in THE FAILURE OF PRESIDENTIAL DEMOCRACY, at 6.

[88] *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

[89] *See* Linz, , *supra* note 87, at 5.

[90] *Cf.* Alfred Stepan & Cindy Skach, *Presidentialism and Parliamentarism in Comparative Perspective*, in THE FAILURE OF PRESIDENTIAL DEMOCRACY, *supra* note 87, at 120 (noting that, in a parliamentary system, "the executive power (normally in conjunction with the head of state) has the capacity to dissolve the legislature and call for elections").

[91] *See* Moe & Caldwell, *supra* note 86, at 177 ("Through cohesive voting on policy, the governing party [in a Westminster system] is . . . in a position to pass its own program at will. Similarly, should the other party gain majority status down the road, it would be able to pass its own program at will, and, if it wants, to subvert or destroy everything the first party has put into place.").

[92] *See* U.S. CONST. art. I, sec. 7 ("Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States . . . .").

[93] *See id.*

[94] *See* U.S. CONST. art. I, sec. 2; U.S. CONST. art. I, sec. 3; U.S. CONST. art. II, sec. 1.

lawmaking system will generally respond more slowly to shifts in electoral preferences. The Republicans in 1994 were able to ride a national wave of electoral support to sweep into power in the House of Representatives for the first time in nearly half a century.[95] But the separation of powers structure of lawmaking in the United States withheld from the Republican party the power to enact its most-preferred legislative agenda. Part of the reason was that 1994 was not a presidential election year, so it was structurally impossible to replace Bill Clinton (absent impeachment, of course).

Selecting the optimal amount of stability and responsiveness in a democracy entails difficult normative and empirical judgments.[96] It depends in part, for example, on whether someone is committed to democracy in its more deliberative or pluralistic formulation.[97] Given that the evaluation of stability and responsiveness depends on such foundational issues concerning how democracies should and do function, it is unsurprising that there is no widespread agreement about what constitutes the right degree of stability. Some, including Ackerman, believe that we would be better served by somewhat greater responsiveness and advocate adopting at least some of the features of the Westminster system.[98] Others, including Steven Calabresi, argue that the framers of our Constitution got things just about right, and that the United State's existing separation of powers system is optimal.[99]

My point here is not to resolve these deep disagreements about the proper role of stability in democracy. Rather, I mean only to point out that there is no obviously right resolution to the debates. And given that fact, it would be wrong to claim that legislative composition should always directly mirror constituent preferences. Thus, opposition to inter-temporal tradeoffs in voting rights contexts cannot be grounded on the claim that permitting such tradeoffs would impermissibly permit the composition of a legislative assembly to diverge from the preferences of the electorate.

B. *The Enforceability of Bargains*

A somewhat related reason why one might think that the possibility of inter-temporal representational trade-offs should be rejected is that one might worry that such trade-offs would inevitably be unenforceable or lead to disastrous dynamic consequences.

Consider again Justice White's opinion in *Davis v. Bandemer*. In that opinion, White implicitly suggested that it would be permissible to trade a representational disadvantage to Indiana Democrats in the 1980s for a possible representational advantage to them in the

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[95] *See* Dan Balz, *A Historic Republican Triumph: GOP Captures Congress*, N.Y. TIMES, Nov. 9, 1994, at A1.

[96] Note that I am not using "stability" to refer to the stability of a democracy in the macro sense – that is, to the question whether the democracy is replaced by a dictatorship or otherwise fails. As some scholars have argued, however, there may be counter-intuitive connections between stability in this more macro sense and the sort of stability that is the focus of this section. *See, e.g.*, Nicholas Miller, *Pluralism and Social Choices*, 77 AM. POL. SCI. REV. 734 (1984).

[97] For example, Nicholas Miller has argued in favor of cycling – a kind of instability – on pluralist grounds. *See* Miller, *supra* note 96. For other discussions of the role of stability and alternation, see, for example, Adam Przeworski, *Self-Government in Out Times* (unpublished manuscript 2006).

[98] *See* Ackerman, *supra* note 88; *see also* DANIEL LAZARE, THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY (1996).

[99] *See* Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMM. 51 (2001).

following decade.[100] But what if that representational advantage never came to pass? If Republicans ended up controlling the 1990 round of redistricting, then this bargain would go unfulfilled, and White's expansion of the temporal frame would seem like a mistake. That, in part, was the concern of the dissenters and many of the critics of *Bandemer*—and it is not a crazy concern, given that the Republicans were more likely to control the 1990 round of redistricting precisely because they had disadvantaged Democrats in the 1980 round.[101]

Enforcing such trade-offs might initially seem easier with respect to the group or institutional dimensions of voting rights. For example, permitting trade-offs in *Bandemer* among Democrats in different parts of Indiana does not pose the same dilemma. If a reviewing court decided to permit the redistricting authorities to trade augmented strength for Democrats in the northern part of the state for diminished strength in the southern part, there would be no concern about enforcing that compromise, because it would be embodied in a single redistricting plan. In other words, simultaneity would eliminate one difficulty with enforcement.

But the problem of enforcing tradeoffs is not unique to the temporal dimension of voting rights. In certain contexts, it may be difficult to enforce bargains in the group and institutional dimensions as well. Congressional redistricting is one such context. As I have argued elsewhere, the dominant theories about why partisan gerrymanders are harmful suggest that congressional gerrymanders should be evaluated at the level of Congress as a whole.[102] On these accounts, a pro-Democratic partisan gerrymander in California might be offset by a pro-Republican gerrymander in Texas. Like inter-temporal tradeoffs, however, these intra-institutional (across different congressional delegations) and intra-group (across Democrats in Texas and California) bargains could be difficult to enforce, precisely because they cannot be captured in a single state's redistricting plan.

Moreover, there are ways to overcome the problem of enforcing inter-temporal representational bargains. One obvious solution is to entrench, or formally guarantee, the alternation of representational advantage. (I discuss in the next Part one way that this might be done for redistricting.)[103] Another possible solution is that one might discount the potential representational advantage in the later time period to compensate for the uncertainty about whether that benefit would ever be realized.

Even if we were to guarantee formal alternation of representational advantage, however, there is still a potential concern. We might worry that permitting one party to have an advantage in period 1 would create incentives for them to do things that rendered the formal alternation functionally worthless. So, to take an extreme example, if the party given the representational advantage in period one could use that additional control of the government to essentially wipe out the competing party—say, by passing a statute outlawing all political parties other than the one in control of the government—then the provisions guaranteeing the other party an advantage in a later time period would be meaningless. Though such an extreme scenario is unlikely to come to pass in the United States,[104] it highlights a concern

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[100] *See* Davis v. Bandemer, 478 U.S. 109 (1986). *Cf. supra* text accompanying notes 52-55 (explaining that White's opinion embodies this implicit conclusion).

[101] For a more detailed explanation of the endogeneity inherent in state legislative redistricting, see infra text accompanying note 133.

[102] *See* Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, *supra* note 1.

[103] *See infra* text accompanying note 133.

[104] There are, of course, many historical examples in which a party in power outlawed or otherwise legally crippled opposition parties. *See, e.g.*, [the example of Germany during Hitler's control].

about the way in which structured alternation over time can, in certain circumstances, create incentives for parties to be more extreme.

This possibility is not a reason to categorically reject inter-temporal representational trade-offs. Formal alternation might also induce parties to moderate their behavior because of fear of retaliation in future periods.[105] Which impulse will dominate depends on a host of factors, including the motivations and time horizons of the relevant political actors. But there is no *a priori* reason to expect that alternation will drive parties to extremes. Thus, while one should consider these factors when deciding how to treat the temporal dimension of voting rights in a particular context—for example, in the context of deciding whether it would be a good idea to rotate redistricting authority between the major political parties[106]—these consequences do not justify the conclusion that courts or democratic designers should never permit inter-temporal representational trade-offs.

C. *Evaluating Aggregation and Judicial Competence*

Perhaps the reason to reject inter-temporal aggregation of the right to vote—at least for purposes of voting rights doctrine—has more to do with the limits of judicial capacity. Maybe courts should resolutely reject such inter-temporal comparisons on the ground that engaging in such comparisons is simply too difficult. This, one might argue, is what makes the temporal dimension of voting rights different than the group or institutional dimensions.

Expanding the temporal frame within which one evaluates a voting rule does make the task of evaluating the rule somewhat more difficult. In situations where the time frame extends into the future, it is not possible to evaluate the fairness of the voting regulation without either delaying review or making predictions about the future consequences of the rule. This difficulty does not, however, support the conclusion that courts should always adopt a narrow, single-election temporal frame when they evaluate voting rights claims. For one thing, this complication crops only if courts attempt to include some future election within the evaluative frame. So at most, this difficulty would suggest that courts should only consider stretching the temporal frame into the past.

Moreover, the fact that stretching the temporal frame would require courts to make predictions is far from an insurmountable obstacle. At least as early as *Davis v. Bandemer*, the Supreme Court recognized that courts are capable of evaluating the fairness of voting rules by making predictions about the future effect of those rules. Writing for a plurality, Justice White implicitly concluded that choosing a broader temporal frame would not preclude immediate review because projected election results could support a constitutional claim, "even where *no* election has yet been held under the challenged districting."[107]

Furthermore, similar practical problems can also arise if courts select a broad group or institutional frame. Consider a partisan gerrymandering challenge to state's congressional redistricting scheme. As I noted above, current accounts of the harm caused by partisan gerrymanders suggest that the harm should be measured at the institutional level of Congress

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[105] *Cf.* Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003) (arguing that political competitors that are risk averse and care about future payoffs may agree to external constraints on the power they can exercise while in control of the government – in the article's case, constraints imposed by an independent judiciary).

[106] The possibility of rotating redistricting authority is discussed below in Part III.

[107] 478 U.S. at 140 n.17 (emphasis in original).

as a whole.[108] But this Congress-wide institutional frame makes it impossible for a court reviewing one state's congressional redistricting scheme to determine whether or not a cognizable injury exists. The injury can be identified only by examining the joint product of all fifty states' congressional redistricting plans.[109] This does not mean that courts should refuse to use a congressional-level institutional frame when considering partisan gerrymandering claims.[110] It does mean, however, that practical problems of evaluation are not unique to the temporal dimension of voting rights.

Treating the right to a vote as an aggregate right creates a host of practical problems for courts attempting to ensure electoral fairness. This is part of the reason that the Supreme Court has often resisted group and institutional aggregation. But it is not a reason to treat the temporal dimension of voting rights differently than the other group or institutional dimensions.

D. *The Problem of Entry and Exit*

The preceding discussion has omitted one other potentially significant difference between the temporal dimension of the right to vote and the institutional and group dimensions. This difference stems from the fact that membership in the polity is not fixed—that is, that people enter and exit the polity over time. But this distinction should not lead us to reject the possibility of inter-temporal aggregation out of hand.

In the institutional and group dimensions, it may always seem possible to justify intra-group or cross-institutional representational trades with respect to every individual voter. For example, consider the possibility of expanding, from state delegations to the Congress as a whole, the institutional frame for evaluating congressional partisan gerrymanders. Expanding the institutional frame in this fashion would mean that a pro-Republican gerrymander in, say, Texas, might be offset by a pro-Democrat gerrymander in another state, say Michigan. It might seem impossible to justify this broader institutional frame with respect to every individual voter. After all, one might contend, Democratic voters in Texas are disadvantaged by Texas's plan. It might be permissible to offset their disadvantage with a corresponding advantage to Democratic voters in Michigan, the argument would continue, but those Texas Democrats are worse off than they were before.

But this is not quite right. One defense of aggregate rights theory is that those Texas Democrats are *not* meaningfully disadvantaged. They may not have had the power they otherwise might have to elect Democrats from Texas to Congress, the argument goes, but their interests will be "virtually" represented in Congress by those additional Democrats elected from Michigan. The concept of virtual representation therefore formally preserves representational equality—even at the level of individual voters. Now, of course, the concept of virtual representation is clearly an oversimplification. Democrats in Texas and Michigan are not the same, and representation is not purely interest-based.[111] But to accept the possibility that voting rights can be analyzed as aggregate rights, one must accept this

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[108] *See supra* n.99 and accompanying text.

[109] *See* Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, *supra* note 1.

[110] To the contrary, it is possible for courts to develop strategies for policing congressional partisan gerrymandering even while adopting this broader institutional frame. *See id.* at 444-50.

[111] For example, to the extent that representation is in part about constituent service rather than legislative agenda, electing Democrats from Michigan will not perfectly serve Democratic voters in Texas.

simplification in some circumstances. Rejecting it entirely would limit one to conceptualizing voting rights as purely individual rights.

While it may always seem possible to preserve representational equality at the level of an individual voter when one expands the group or institutional frame, it may seem implausible to do so when one expands the temporal frame. The reason for this difference is simple: the polity is not a closed set over time. People enter and exit the polity over time when they are born, when they die, and when they move.[112] The people who enter or leave the polity will, by definition, not be present on both sides of any inter-temporal representational trade. So if the system is structured to advantage a particular member of the polity in period 1 and disadvantage that member in period 2, it might seem that the member receives an unfair advantage if she exits the polity after period 1. She would have received the advantage, but not the offsetting disadvantage. Thus, if one expands the temporal dimension beyond one election cycle, it will not always be possible to justify inter-temporal representational tradeoffs with respect to every voter or member of the polity.[113]

Despite the surface plausibility of this argument, I do not think that it should lead us to reject, as unacceptable, any inter-temporal aggregation of the right to vote. For one thing, the above argument trades implicitly on a corollary to the idea of legislative assembly fetishism—here, the idea that idea that an individual voter is necessarily disadvantaged if her particularistic interests and preferences are not reflected in the current composition of the legislative assembly.[114] This implicit assumption drives the intuition that the person has been "disadvantaged" in period one and then "advantaged" in period two.

That is not to say that the intuition is meritless. While it would be a mistake (for the reasons I explained above) to require systems of representation to strive for a perfect mirroring of public opinion, that does not mean that *any* relationship between representatives and those represented is acceptable. Nevertheless, it does suggest that the inter-temporal trade-off is not so different in kind than trade-offs in the other dimensions. Virtual representation is a concept we use as shorthand for the conclusion, in any particular case, that group or institutional aggregation adequately preserves each individual's representational interests. But the concept does not reflect some inherent reality; rather, it is just a way of capturing a judgment reached on other grounds about when it is appropriate to see one person's interests or preferences as adequately reflected by another person. And if one adopts a purely individualistic conception of representational rights, the idea of virtual representation will no doubt seem unsatisfying. The Texas and Michigan Democrats in the above example are not the same persons, and so the hypothetical necessarily entails some inter-personal representational trades.

This returns us to the starting premise of the Article. Both the temporal dimension of aggregation and the other dimensions require that one reject purely individualistic conceptions of representation. There remains the difficult question, of course, about when it is appropriate to aggregate the consequences of an electoral rule across two or more different individuals. Whether it is appropriate may turn on a number of factors, including

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[112] Of course, birth and death are the relevant markers of entry and exit only on one understanding of the polity. If one conceptualizes the polity slightly differently – as, for example, all eligible voters – different events will lead to entry into or exit from the polity.

[113] When I speak of justification here, I mean the same sort of justification that I described with respect to the institutional and group dimensions – the possibility of preserving individual representational equality. I explain below that this particular form of justification is largely illusory and thus not particularly important.

[114] *See supra* Part II.A.

the relationship—sociological, political, or otherwise—between the relevant individuals, the empirical realities of the system of representation in which one is operating, and the normative commitments that one seeks to advance through that system of representation. The point is just that these are not decisions that are only required when one tries to select a temporal frame for analysis.

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In short, there are a number of reasons why we might be concerned about inter-temporal representational trade-offs or comparisons. But none of these reasons are sufficient to justify rejecting altogether aggregation in the temporal dimension of voting rights.

This does not mean that the fairness or constitutionality of a voting rule should always be evaluated within a broad temporal frame. In fact, the above discussion provides some clues about the circumstances in which we are more or less likely to be comfortable with a particular temporal framing of a voting rights problem. For example, the fact of entry and exit emphasizes that aggregation across decades-long temporal frames will almost inevitably be inappropriate, even if aggregation across shorter time frames such a few election cycles is perfectly sensible. Similarly, it would likely be a mistake to endorse broad temporal aggregation if, in a particular situation, there was strong evidence that doing so would lead the winners in the first time period to permanently cripple the losers.

More generally, it is important to recognize that the acceptability of inter-temporal aggregation in any given case will depend crucially on our underlying theory about what the right to vote is designed to vindicate in that context—or, in other words, what harms we are trying to prevent.[115] It also depends on questions concerning the institution(s) responsible for enforcing the right to vote.[116] But by explaining why there are no categorical justifications for rejecting inter-temporal aggregation, my aim is simply to encourage deliberate consideration of the reasons why we might prefer broad or narrow temporal frames in different voting rights contexts. The temporal frame within which we evaluate voting rights claims should not be established arbitrarily. Moreover, there is little reason to think that we should always use a single-election-cycle temporal frame and reject a more expansive one.

III. THE CONSEQUENCES OF VOTING RIGHTS' TEMPORAL DIMENSION

If we accept the possibility of temporal aggregation in the voting rights context, what concrete consequences follow? Part III suggests that highlighting the temporal dimension of voting rights can shed productive light on a number of contemporary debates in voting rights theory and doctrine. It does not necessarily counsel a radical reshaping of election law. But it does suggest some potential reforms and help sharpen some prominent debates concerning representation and judicial intervention in politics.[117]

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[115] In an earlier paper, I explained that this is true with respect to institutional aggregation as well. *See* Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, *supra* note 31 (demonstrating that most conventional accounts of partisan gerrymandering injury entailed a broad, legislature-wide institutional frame for evaluating putative congressional gerrymanders; a congressional delegation-specific institutional frame could not capture the injury).

[116] *See id.* at 440-51.

[117] At this point, it might be tempting to generalize from the right to vote to other rights, and to suggest that the discussion in the Article provides a framework for thinking through the wide variety of questions in constitutional or legal theory that have some temporal component. This set of issues is a large one. It includes questions about the appropriate boundaries of affirmative action and reparations, which are sometimes

A. *The Voting Rights Act and Second-Order Diversity*

Recognizing the temporal dimension of representation has a number of potential implications for the Voting Rights Act. And beyond the ambit of the Voting Rights Act itself, the temporal dimension has important consequences for the ways in which majoritarian democracies might incorporate minority voices.

Expanding the temporal frame within which courts evaluate Voting Rights Act claims would undermine at least one important piece of modern vote dilution doctrine. As I explained in Part I, proving vote dilution under Section 2 of the VRA requires that plaintiffs satisfy three preconditions: (1) that minority voters are sufficiently compact and numerous, (2) that minority voters are political cohesive, and (3) that white voters generally vote as a bloc to defeat minority-preferred candidates.[118] But proof of these preconditions is not sufficient, and the Supreme Court has held that evidence of present "proportionality" may be enough to defeat a vote dilution claim.[119]

Seen through a broader temporal lens, present proportionality seems insufficient to defeat a vote dilution claim. After all, if the claim is that minority voting strength has been diluted over the course of a period that includes some past election cycles, it does not defeat the claim to point out that there is no dilution in the current election cycle. Or, to put it differently, it is misleading to suggest that minority voters would be getting more than their "fair share" if the application of the Voting Rights Act led to supra-proportionality in the current election cycle.

More generally, recognizing the temporal dimension of voting rights can expand the potential strategies available for promoting diversity in democracy in a way that might suggest a rethinking of the foundational premises underlying vote dilution doctrine. As Heather Gerken has recently argued, there are a number of ways in which we might provide for the representation of minority voices in a democratic system.[120] Gerken has suggested that it is useful to contrast two strategies—what she refers to as first-order diversity and second-order diversity.[121] On her account, first-order diversity is achieved when the composition of a democratic decisionmaking body mirrors the demographic characteristics of the population.[122] For disaggregated decisionmaking bodies like juries, however, she notes that there is another available strategy for incorporating minority voices. Rather than have each jury's composition mirror the population's composition, one could permit individual juries to deviate from proportionality. Taken together, the composition of all juries would

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conceptualized as inter-temporal transfers; about the status of temporary deprivations of property in Takings law; and so on. While this Article does have implications for problems presented by temporality throughout law, however, one would have to exercise care in applying to other arenas the arguments I make here. Accepting inter-temporal aggregation in voting rights contexts does not compel the conclusion that one should accept it in other arenas of constitutional law. The right to vote's analytic structure as an aggregate right is important to much of the analysis above. And while there is no escaping the aggregate nature of the right to vote without abandoning nearly all of voting theory, the status of other constitutional rights as aggregate rights may be more controversial.

[118] *See supra* note 68.

[119] For a fuller explanation of what the Court means by "proportionality," see supra text accompanying notes 69-72.

[120] Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).

[121] *See id.* at 1102-03.

[122] *See id.* at 1102-03, 1106-08.

still mirror the population's composition,[123] but any individual jury might have a smaller or larger number of the relevant minority group than proportionality would suggest. Gerken describes this as second-order diversity.[124]

Gerken focuses centrally on juries in her discussion for an obvious reason: only disaggregated decisionmaking bodies present the possibility of creating second-order diversity.[125] This is because the theory is grounded in the idea of creating diversity between separate decisionmaking bodies that make up a larger democratic process, rather than on creating diversity only within one particular decisionmaking body. Thus the theory, while a powerful one, appears on her account to be limited to situations in which we have already decided to use disaggregated decisionmaking bodies.

Identifying the temporal dimension of voting rights, however, makes it possible to generalize the theory of second-order diversity. While the theory works only in the context of disaggregated decisionmaking bodies, appreciating representation's temporal dimension highlights the fact that any existing democratic decisionmaking body can be disaggregated across time. Temporal disaggregation would therefore allow us to create second-order diversity in a state legislature, in Congress, or in any other democratic institution.

To see this more clearly, consider vote dilution jurisprudence. In Gerken's terms, Section 2 of the Voting Rights Act principally promotes first-order racial diversity in legislative assemblies. Where minority voters can satisfy the requirements of Section 2, the Act requires states to draw electoral districts that increase the likelihood that minority voters will be able to elect candidates of their choice—which, in many situations, will mean the election of more racial minorities to the legislative assembly.[126] The possibility of temporal disaggregation makes clear that this is not the only strategy available to enhance minority representation. One could also introduce second-order diversity into the temporal dimension of minority representation. On this strategy, one would structure the legislative system so that the likely representational strength of racial groups diverged from their overall demographic strength over time, with minority voters sometimes fairing better, and sometimes worse, than they would under the current system of promoting first-order diversity.[127]

Whether or not it would be a good idea to accommodate minority interests in state legislative assemblies or Congress by creating second-order diversity, rather than first-order, is an extremely difficult question.[128] Gerken has canvassed many of the potential benefits and

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[123] Gerken does not actually incorporate this requirement of mirroring-in-the-aggregate into her definition of second order diversity, but it seems to be an implicit constraint in much of her discussion.

[124] *See id.* at 1108-09.

[125] *See id.*

[126] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986); *see also* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS (1993).

[127] In this way, one might re-cast some of Lani Guinier's claims about cycling and turn-taking in democracy as arguments about temporal second-order diversity. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994). Reconceptualizing her argument in this fashion undermines a central critique leveled against her theory: that her argument was somehow profoundly anti-democratic. Understanding the temporal dimension of the right to vote shows that cycling or turn-taking can be, on certain conditions, perfectly consistent with a fairly conventional understanding of majoritarian democracy.

[128] Of course, it is important to remember that we already have some (non-racial) second-order diversity built into the national legislative system. As explained above, the Senate's structure of staggered elections

costs of second-order diversity, and much of her analysis could apply just as much to *temporal* second-order diversity as it does to the sort of *institutional* second-order diversity that is the focus of her work.[129] Here, the important point is only that recognizing the temporal dimension of voting rights reveals that the strategy of second-order diversification need not be confined to juries, electoral districts, or the like. These are not the only disaggregated democratic decisionmaking bodies. To the contrary, all democratic institutions can be viewed as disaggregated bodies.

B. *Partisan Gerrymandering and Anti-competition Theory*

As the discussion in Part I suggested, the choice of a temporal frame can often be dispositive in partisan gerrymandering litigation. The claims before the Supreme Court this Term in *Jackson v. Perry*[130] illustrate that point. Although neither party has argued that the case turns in part on picking an appropriate temporal frame, both the petitioners and respondents devote considerable energy to debating the relationship between the mid-decade Republican redistricting and the initial post-census redistricting plan—which the state says unfairly favored Democrats.[131] Underlying this debate is a deep disagreement about whether it is permissible to enact a pro-Republican plan in order to offset an earlier plan that favored Democrats. Unfortunately, that question is never squarely presented to the Court.

Beyond this general point, there are a number of additional ways in which the temporal dimension of voting rights bears on partisan gerrymandering litigation and scholarship. First, the possibility of inter-temporal representational trades suggests a new way to handle proof problems in partisan gerrymandering litigation and hints at additional institutional strategies for reforming the redistricting process. Second, recognizing the temporal dimension reinforces the differences between state legislative gerrymanders and federal congressional gerrymanders. Third, it sharpens the ongoing debate about redistricting and electoral competition.

Inter-temporal representational aggregation could be used to alleviate some of the problems of proving partisan gerrymandering claims. This is important, because difficulties of proof have been a central reason that courts have shied away from seriously scrutinizing partisan gerrymandering claims.[132] Courts have had a tough time predicting whether a newly enacted districting plan will impermissibly favor one party or the other. This prediction problem has seemed unavoidable. After all, if a court waited for a decade of evidence about a plan's effects, it would then be too late to do anything, because it would be time for a new round of redistricting. Expanding the temporal frame suggests a way out of this dilemma: courts could hold over states the threat of correcting for partisan unfairness in the next round of redistricting. A court might say something like the following: if Democrats can demonstrate at the end of the decade that existing districting plan has been biased in favor of Republicans throughout the decade, the court will revise the state's subsequent redistricting plan to correct for that unfairness.

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introduces a kind of second-order diversity into the composition of the Senate. *See supra* text accompanying notes 81-83.

[129] *See* Gerken, *supra* note 121, at 1103-04 (surveying the benefits of second-order diversity).

[130] Docket No. 05-276.

[131] *See supra* notes 38-40 and accompanying text.

[132] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 277-281 (2004); c*f.* Peter Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987) (arguing that courts should refuse to adjudicate partisan gerrymandering claims because of these evidentiary problems).

While courts might also have difficulty making appropriate ex post corrections—in part because the correction itself would require predictions about the effect of the new redistricting plan—expanding the temporal frame in this fashion suggests other, more process-based remedial possibilities. For example, if Republicans are able to demonstrate at the close of a decade that the existing redistricting scheme has unfairly favored Democrats, a court could give Republicans control over the subsequent redistricting as a remedy. And this remedial possibility suggests a more general reform of the redistricting process that has gone unconsidered: the possibility of alternating redistricting authority between the major parties across redistricting cycles.

The possibility of cycling control between the parties emphasizes one way in which state legislative partisan gerrymandering and congressional partisan gerrymandering present potentially different problems. These two types of gerrymanders are generally thought to pose the same problems and be subject to the same solutions. If one cares only about redistricting fairness across a temporal frame that stretches broadly over more than one redistricting cycle, however, congressional gerrymanders begin to look like much less of a threat to fairness than state legislative gerrymanders. A congressional gerrymander in one decade might be offset by an opposing gerrymander the next time around. But such cycling is much less likely to occur in the state legislative redistricting context, because the state process contains more endogeneity. In the state legislative process legislators are drawing *their own* seats, so having control over the redistricting process in the first period makes it more likely that one will have control in the next period.[133] Congressional redistricting lacks this direct connection. To be sure, there are ties between the state legislators who draw congressional districts and the members of Congress who stand to benefit from them. But the attenuation of this connection makes the cycling of control more likely.

More generally, the preceding discussion highlights a point that often gets obscured in the voting rights literature: that competition- and entrenchment-based theories of judicial intervention in the political process are importantly different. These two theories are often conflated in the literature. For example, consider the ongoing debate about incumbent-protecting gerrymanders and the competitiveness of congressional elections. Some legal scholars, including Sam Issacharoff, have suggested that the large margins of victory that are common in congressional campaigns are evidence that the process is anticompetitive.[134] Other legal scholars have criticized these claims, arguing that the competition data is much more ambiguous. Nate Persily, for example, has pointed to some empirical work suggesting that an incumbent's margin of victory in one election may not be strongly correlated with the likelihood that the incumbent will win in the next election cycle.[135] This, he claims, is evidence that the process is in fact appropriately competitive. In a sense both Issacharoff's and Persily's claims are right—because each is working with an unspecified, but conflicting conception of the temporal dimension of voting rights. Issacharoff is correct that incumbents' margins of victory is evidence of a lack of competition—if we define competition by reference to the level of contestation in a particular election (as evidenced by the final vote spread between the candidates or some other measure). And Persily is correct that the unpredictability of an individual incumbent's level of success across election cycles is

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[133] This point connects to the concern I noted in Part II.B. about the enforceability of inter-temporal representational bargains.

[134] *See* Issacharoff, *supra* note 34.

[135] *See* Nathanial Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence To Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 659-60 (2002).

evidence of the presence of competition—if we define competition by reference to the level of contestation in the system across a longer time frame.

The criticisms of the competition-based theory of judicial intervention in the political process have mostly missed this important ambiguity in the theory. Rick Hasen, Bruce Cain, and others have criticized anticompetition accounts on the ground that those accounts fail to specify the baseline level of competition.[136] As I have noted elsewhere, I think that these criticisms miss the mark to a certain extent, in part because they suggest that any theory must be fully specified in order to be useful.[137] But in a sense, the criticisms are too generous to the anticompetition account. The critics suggest that the problem with the theory is that it lacks a competition baseline. In fact, however, it lacks *several* baselines. It lacks a temporal baseline (and, for that matter, an institutional baseline)[138] in addition to a competition level baseline.

Whether one selects a narrow or broad temporal frame for evaluating competition depends in part on the theory underlying the anti-competition account. Issacharoff's reliance on single-election-cycle data suggests that the theory is concerned principally with the level of contestation in any given election. But the justifications for judicial intervention that Issacharoff and Rick Pildes have suggested underlie the anti-competition theory may not square with this narrow focus. In their writings, Pildes and Issacharoff have grounded the theory in the notion that courts should intervene to prevent lock-ups in the political process—that is, arrangements that lead to the unjustified entrenchment of political power.[139] If entrenchment is the concern, however, than the level of competitiveness in any particular election cycle is of somewhat limited relevance. Election-cycle competitiveness might be evidence of a longer term entrenchment but, as the data relied on by Persily indicates, it might not be. To make sense of the existing debates in the scholarship therefore, it is crucial that theories of election-cycle competition be distinguished from theories about longer-term entrenchment effects. Drawing out the temporal dimension of voting rights clarifies this important distinction.

C. *One Person, One Vote Doctrine*

The possibility of inter-temporal representational aggregation suggests a new defense of a central criticism of the one person, one vote doctrine. It also suggests a new critique.

The one person, one vote doctrine establishes an equipopulation requirement for electoral districts. Created by the Supreme Court in *Reynolds v. Sims*[140] and its progeny, the doctrine today requires the revision of electoral districts after the release of each new census in order to equalize the population across districts.[141] The doctrine applies to federal, state, and local legislative districts.[142] But the Court has applied the doctrine with the most force in

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[136] *See, e.g.*, RICHARD L. HASEN, THE SURPEME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE (2003); Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589 (1999).

[137] *See* Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, *supra* note 1, at 423 n.48; *see also* Richard H. Pildes, *A Theory of Political Competition*, 85 VA. L. REV. 1605 (1998).

[138] *See* Cox, *supra* note 1, at 423-24.

[139] *See* Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lock-ups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); *see also* Pildes, *The Constitutionalization of Democratic Politics*, *supra* note 11.

[140] 377 U.S. 533 (1964).

[141] *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461 (2003).

[142] *See* Reynolds v. Sims, 377 U.S. 533 (1964) (applying the one person, one vote principle to state legislative districting); Wesberry v. Sanders, 376 U.S. 1 (1964) (applying the one person, one vote principle to

the federal congressional context.[143] In order to pass constitutional muster, congressional districts must be drawn to be precisely equipopulous according to the census figures; a difference of a few people across districts is sufficient to render a redistricting plan unconstitutional.[144]

The one person, one vote doctrine has been criticized on a number of grounds, and there are several reasons why the equipopulation principle might be theoretically unsatisfying.[145] Even for enthusiasts of the principle, however, the one person, one vote doctrine contains a seemingly significant defect: that doctrine simply does not guarantee equipopulous districts in every election. The one person, one vote doctrine requires only that states revise their district lines after the release of each decennial census.[146] Once states do this, they can continue to use those district lines throughout the remainder of the decade—even though the electorate is far from static. As the Court recently noted: "When the decennial census numbers are released, states must redistrict to account for any changes or shifts in population. But before the new census, states operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned."[147]

For those who like the equipopulation requirement in principle, this seems unfortunate. Perhaps the difficulties of administration make closer adherence to the principle impossible. From the perspective of the principle itself, however, it would seem that it would be better to revise district lines every election cycle in order to correct for population discrepancies. In fact, some have suggested that the sporadic application of the equipopulation principle renders it incoherent.

Recognizing the temporal dimension of voting rights undermines this common criticism. The equipopulation requirement can be perfectly coherent in principle even if it does not guarantee precise population equality in each election. Expanding the temporal frame within which one evaluates a districting scheme for compliance with the equipopulation requirement can rehabilitate the principle. If one were to adopt a decade-long

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federal congressional districting); Avery v. Midland County, 390 U.S. 474 (1968) (applying the one person, one vote principle to local government structures).

[143] *Compare* Karcher v. Daggert, 462 U.S. 725 (1983) *with* Gaffney v. Cummings, 412 U.S. 735 (1973). *See also Reynolds*, 377 U.S. at 578 (noting that "somewhat more flexibility [with respect to the precision of population equality] may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting"); HERBERT ET AL., THE REALISTS' GUIDE TO REDISTRICTING: AVOIDING THE PITFALLS 1-12 (2000).

[144] *See, e.g.*, Karcher v. Daggert, 462 U.S. 725 (1983); Vieth v. Pennsylvania, 195 F. Supp. 2d 672, 678 (M.D. Pa. 2002) (invalidating Pennsylvania's post-2000 census redistricting plan on the ground that the plan included congressional districts the population of which differed by a few persons).

[145] *See, e.g.*, Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002); Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213 (2003).

[146] Even this statement is a slight oversimplification. *Reynolds v. Sim*'s initial suggestion that regular redistricting was required has evolved over time into a judicial rule that existing redistricting plans become unconstitutional upon the release of new decennial census data. *See* Georgia v. Ashcroft, 539 U.S. 461, 488 n.2 (2003). Still, the Court has never affirmatively required that states revise district lines *immediately following* the release of each new census. And at least one state does not redistrict until two years after the release of the census. *See* Maine Const, Art IV, pt 1, § 2 ("The Legislature which convenes in 1983 and every 10th year thereafter shall cause the State to be divided into districts for the choice of one Representative for each district."); *id.* Art IV, pt 2, § 2 ("The Legislature which shall convene in the year 1983 and every tenth year thereafter shall cause the State to be divided into districts for the choice of a Senator from each district, using the same method as provided in Article IV, Part First, Section 2 for apportionment of Representative Districts.").

[147] Georgia v. Ashcroft, 539 U.S. 461, 488 n.2 (2003).

temporal frame, for example, it would be unproblematic that a set of districts did not have equal populations in any particular election. Instead, what would matter was that the each district in the set had the same average population over the course of the decade. A district could diverge from this mean in any given election, so long as the deviation was offset over the balance of the decade.

To make this point clear, imagine a state with three electoral districts and 300 voters. In this hypothetical state, the districts are equipopulous at any given time if they each have 100 voters. Under the common understanding of the equipopulation principle, the principle is violated whenever any of the districts has a greater or lesser number of voters in it. Were courts to expand the temporal frame across which they tested for violations of the equipopulation principle, however, the districts would not need to have the same population at every point in time. Rather, they need only have the same *average* population over time. One district could, without causing concern, have fewer voters than the average at the outset of the relevant period and more at the period's conclusion.

Thus, the possibility of aggregation in the temporal dimension of voting rights provides a partial response to a common criticism of the one person, one vote principle.[148] The response, however, suggests a new critique of the principle's implementation. The problem may not be that districts deviate over time from the initial state in which they are equipopulous. Instead, the problem may be that the doctrine, as currently constructed, does nothing to ensure that the population deviations cancel out over time. If the deviations do not cancel out over time, then even if we expand the temporal frame the equipopulation principle will be violated.

In the current system, deviations from population equality are very unlikely to wash out over time. Instead, such deviations will systematically favor areas with shrinking populations and disfavor growth areas. At the outset of each decade, state equalize the populations of their legislative districts. Over the course of the decade, the population of individual districts diverge from their initial equality. But a district is extremely unlikely to fluctuate around its initial population over the course of the decade. It is much more likely to steadily increase or decrease in population, depending on the demographic trends in the area. If the district covers a section of Detroit's western suburbs it will grow;[149] if it covers a section of downtown Detroit, however, it will likely shrink.[150] The differential growth rate between Detroit and its suburbs will lead electoral districts in the city to be consistently under-populated compared to the districts in the suburbs, even if those districts are drawn to be equipopulous at the outset of the decade. And because Detroit's districts will be under-populated, fewer voters will control the election of a representative—precisely the advantage that the Court purported to be combating in one person, one vote cases.[151]

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[148] This explanation does not, of course, answer the question whether we should want to permit inter-temporal tradeoffs of voting rights in the one person, one vote context or not. Nor does it explain how wide the temporal frame should be if we do want to accept some such tradeoffs. In part, these questions are particularly hard to answer for the equipopulation principle because the principle's theoretical foundations are somewhat scattered and weak. *See supra* note 145. If we had a stronger sense of exactly what the principle was designed to accomplish, it would be easier to figure out whether the principle's purposes would be promoted by expanding the temporal frame within which courts evaluated one person, one vote claims.

[149] See Censusscope.org (showing that Oakland County, which includes several suburbs immediately to the west of Detroit, grew by 10.2% between 1990 and 2000).

[150] See Censusscope.org (showing that Wayne County, Michigan, which is encompasses Detroit, shrunk by 2.39% between 1990 and 2000).

[151] *See* Reynolds v. Sims, 377 U.S. 533, 562-63 (1964).

There is a way to overcome this different critique of the one person, one vote doctrine: the doctrine could be refashioned in order to make it much more likely that deviations from population equality would cancel out over the decennial period. One way to ameliorate the problem would be to change the census data used during decennial redistricting. States redistrict today on the basis of current population figures.[152] Redistricting instead on the basis of projected population figures would help overcome the problem of having some districts that are consistently under- or over-populated, on average, over the decade. If states used projected mid-decade figures, a district's population change in the first half of the decade would tend to cancel out its change in the second half (assuming population was changing at a reasonably constant rate). A district in Detroit drawn to be equipopulous in the middle of the decade would initially be over-populated and later become under-populated, rather than consistently being under-populated.[153]

Some other countries that use districted elections already rely on projected population figures in just this way. Australia has a seven year redistricting cycle and, like the United States, an equipopulation requirement.[154] When electoral districts in Australia are fashioned at the outset of the districting cycle, they are drawn on the basis of what the population is projected to be three-and-a-half years hence—at the mid-point of the districting plan's life.[155] Australia's experience provides some evidence that the fix suggested above could be more than merely theoretical.[156]

In short, therefore, taking explicit account of the temporal dimension of voting rights provides a way to reconcile the one person, one vote doctrine's principle of equipopulous districts with a rule that requires redistricting only once ever decade. At the same time, this reconciliation suggests that the current redistricting process should be modified to better comport with the principle.

CONCLUSION

The aggregate nature of the right to vote—though widely recognized—remains surprisingly underspecified. As a result, courts and commentators have often missed

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[152] To be more precise, states redistrict following the release of the decennial census data on the basis of that data. *See supra* note 146; Cox, *supra* note 38, at 778 n.102. The census data is provided to states for redistricting purposes no later than April 1 of the year following the census, *see* is The Census Act, 13 U.S.C. § 141(c) (2000), which means that the population data is already slightly out-of-date when states use it to draw district lines.

[153] If projected population data was unavailable for some reason or otherwise objectionable, there are other ways to compensate for the deviation. One possibility is compensating for population growth after the fact rather than before. A district that is overpopulated by x voters at the end of the decade could be redrawn following the census to be under-populated by x/2 voters. Over time, this would represent an ex post mechanism for correcting for population deviations.

[154] *See* AUSTRALIAN POLITICS AND GOVERNMENT: THE COMMONWEALTH, THE STATES AND THE TERRITORIES (Jeremy Moon & Campbell Sharman eds. 2003); *see also* JOHN C. COURTNEY, COMMISSIONED RIDINGS: DESIGNING CANADA'S ELECTORAL DISTRICTS 57-73 (2001) (discussing Austria's redistricting system); Richard L. Engstrom, *Revising Constituency Boundaries in the United States and Australia: It Couldn't be More Different* (unpublished manuscript).

[155] *See id.*

[156] For a discussion of the accuracy of the population estimates used by Australia for redistricting purposes, see Andrew Howe, *Assessing the Accuracy of Australia's Small-Area Population Estimates*, 16 J. AUSTRALIAN POP. ESTIMATES 47 (1999); Martin Bell & Jim Skinner, *Forecast Accuracy of Australia's Subnational Population Projections*, 9 J. AUSTRALIAN POP. ESTIMATES 207 (1992).

important dilemmas and opportunities when evaluating voting rights claims or thinking about the design of democratic institutions.

This Article aims to specify more completely the conceptual structure of the right to vote. Disaggregating and unpacking three different dimensions of that right, the Article demonstrates that issues of inter-temporality are an unavoidable feature of voting rights disputes. Although I do not mean to suggest that we should immediately adopt broad temporal frames for evaluating the fairness of all voting rules, it is clearly the case that we should often evaluate such rules through a wider-angled temporal lens than we currently employ. Voting theorists of all stripes—competition theorists, vote dilution theorists, etc.—should take seriously the centrality of the temporal dimension of voting rights, irrespective of their own normative account of the electoral system.

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