California Law Review

Volume 84 | Issue 4 Article 8

July 1996

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Recommended Citation

Pamela S. Karlan and Daryl J. Levinson, *Why Voting is Different*, 84 Calif. L. Rev. 1201 (1996).

Link to publisher version (DOI)
https://doi.org/10.15779/Z389T59

Why Voting Is Different

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INTRODUCTION

In 1962, in *Baker v. Carr*,[1] Justice Brennan confidently asserted that "well developed and familiar" equal protection standards would govern judicial supervision of the reapportioument process. He was wroug. Over the next three decades, the Supreme Court developed a set of rules that were uniquely applicable to voting rights. First, the one-person, one-vote standard—with its chiasmal requirement that every avoidable population variance among districts be "necessary to achieve some legitimate goal"[2]—imposed a mathematical rigor on the redistrictiug process that no other species of equal protection law required. Second, political vote dilution doctrine allowed the governmeut purposefully to disadvantage a group defiued in terms of a constitutionally protected characteristic—its political affiliation—that otherwise would coustitute an illegitimate motivation.[3] Fmally, racial vote dilution doctrine focused

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Jim Blacksher, Mary Anne Case, John Harrison, and Sam Issacharoff gave us a number of helpful reactions to ideas in this article.

As our Article was going to press, the Supreme Court handed down this Term's reapportionment decisions, Bush v. Vera, 64 U.S.L.W. 4452 (Jnne 13, 1996) (No. 94-805), and Shaw v. Hunt, 64 U.S.L.W. 4437 (June 13, 1996) (No. 94-923) ("*Shaw II*"). Fortunately for us, if not for the coherence of legal doctrine or the political health of the country, our Article anticipated the morass into which the Court would plunge even more deeply. We have tried, to the extent possible given time and production constraints, to incorporate the decisions into our discussion, but a more complete analysis will have to await Professor Karlan's work in progress, tentatively entitled "Same Time/Next Year."

1. 369 U.S. 186, 226 (1962).

2. Karcher v. Daggett, 462 U.S. 725, 731 (1983). The *Karcher* test derives the "means" of its means-ends test from the strict scrutiny standard (necessary to the achievement of a compelling governmient purpose), *id.* at 740, and its "ends" from the far more lenient rational relation test (rationally related to the achievement of a legitimate government purpose). *Id.* at 730.

3. *See infra* text accompanying notes 35-36.

exclusively on group rights—the ability of a racially defined community "to participate in the political processes and to elect legislators of their choice"[4]—rather than addressing the rights of individual voters.[5] As a result, voting rights were administered by equal protection standards that differed markedly from those applied in other areas.

But in 1993, the Supreme Court abruptly changed course, attempting to merge the analysis governing race-conscious districting back into general-purpose equal protection doctrine. In *Shaw v. Reno* ("*Shaw I*"),[6] and last Term's decision in *Miller v. Johnson*,[7] the Court decoupled challenges to majority-nonwhite districts from the established apportionment principles, analyzing these challenges instead under the general equal protection framework governing racial discrimination.[8]

We believe that the Court's attempt to integrate voting rights law into its more general approach to affirmative action is both misguided and incoherent. Voting rights law developed along its separate path because government decisionmaking with respect to voting, at least in its functional sense of rationing and apportioning the power to govern,[9] *is* different from other governmental decisionmaking. The very tortuousness of the Court's attempts to shoehorn voting cases into its general equal protection framework underscores the folly of its expedition into a new, and particularly tangled, patch of the political thicket it first entered in *Baker*.

In this Article, we identify and explore three central distinctions between voting and the rest of equal protection law. First, the very purpose of apportionment is to treat voters as members of *groups*. Thus, the usual alternative to group-based treatment, individualized decisionmaking, is unavailable. Moreover, unlike most governmental decisions, the selection of particular district lines is amenable to no objective, neu-

4. White v. Regester, 412 U.S. 755, 766 (1973); *see also* Samuel Issacharoff, *Groups and the Right To Vote*, 44 EMORY L.J. 869, 882-84 (1995) (explaining why "any sophisticated right to genuinely meaningful electoral participation must be evaluated and measured as a group right").

5. *See* United Jewish Orgs. v. Carey, 430 U.S. 144 (1977). For a discussion of the doctrinal differences between voting and other areas of equal protection law, see Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1126-31 (1989).

6. 113 S. Ct. 2816 (1993).

7. 115 S. Ct. 2475 (1995). We shall resist the premature temptation to start calling this case *Johnson II* simply because it is returning to the Supreme Court next Term. *See* Abrams v. Johnson, 64 U.S.L.W. 3778 (May 20, 1996) (No. 95-1425) (noting probable jurisdiction over an appeal from the district court's remedial plan following the Supreme Court's remand in *Miller*).

8. *See id.* at 2482-83, 2486; *Shaw I*, 113 S. Ct. at 2824-25. *See generally* James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 527 (1995) (arguing that the new, analytically distinct claim recognized in *Shaw I* is simply an application of general nondiscrimination law in the voting context).

9. For a more extensive discussion of the formal and functional aspects of voting, see Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 5-9 (1991).

tral, or merit-based criteria that provide judicially discoverable and manageable standards.

Second, the concept of race performs a different function in redistricting than it does in other areas of the law. With regard to most government decisions, race operates as an externally imposed category that has prompted discriminatory treatment by a majority in the past, and (sometimes) preferential treatment by a majority in the present. In the context of reapportionments however, race operates as a shorthand description of a bloc whose self-defined political interests set it apart from the majority.

Taken together, these two distinctions suggest that legislators will always use the politically predictive proxy of race in their attempts to create groups that will yield favorable electoral outcomes. Consequently, the legislature will always be "*aware* of race when it draws district lines;"[10] in reality, legislators always intend the racial compositions of the districts they draw. These inevitable and intentional uses of race render completely useless the conventional test for identifying equal protection violations. Limiting judicial intervention into political decisionmaking to cases of "intentional" race-conscious decisionmaking is impossible because *all* districting involves race.

Third, racial bloc voting provides a unique, if not unprecedented, justification for race consciousness in the districting process. From the end of Reconstruction until quite recently, many states openly maintained racially discriminatory election systems. Those states, like the states that maintained de jure segregated school systems, face an "affirmative duty to take whatever steps [may] be necessary"[11] to see that "racial discrimination [is] eliminated root and branch."[12] That affirmative duty includes an obligation to dampen ongoing racially polarized voting and to ensure that bloc voting does not continue to exclude nonwhite citizens from participating equally in the political process and electing candidates of their choice. Voting involves a distinctive blend of state action and constitutionally protected private choices.[13] Although states cannot prohibit racially polarized voting directly, race-conscious districting offers an effective technique for combating its effects. In short, the closest analogy to race-conscious districting is neither contemporary affirmative action programs, nor Jim Crow laws segregating public facilities, but a line of Supreme Court precedent that squarely endorses race consciousness: taking race into

10. *Shaw I*, 113 S. Ct. at 2826.

11. Green v. County Sch. Bd., 391 U.S. 430, 437 (1968).

12. *Id.* at 438.

13. See Morse v. Republican Party, 116 S. Ct. 1186 (1996) (addressing whether applying the preclearance provision of the Voting Rights Act to a political party violates the party members' First Amendment right to free association).

account in drawing electoral districts bears a far closer resemblance to the race-conscious pupil assignment policies that were designed to dismantle segregated schools in the wake of *Brown v. Board of Education*,[14] than it does to any other area of equal protection jurisprudence.

I
INDIVIDUALS VS. GROUPS

To understand why districting is different from other government decisions first requires understanding what districting involves. The very purpose of apportionment is to aggregate voters into groups for the purpose of electing representatives.[15] The "concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."[16] The only real question in apportionment is which characteristics will be used to sort voters among districts. Because politicians usually make the assignments,[17] and because the available information consists largely of census data and precinct-level election returns, apportionments always rely on a series of gross, if politically astute, generalizations about the likely voting behavior of demographically identifiable groups.

The list of potential criteria for creating voting groups is exceedingly long. It includes immutable characteristics such as sex and race, relatively stable traits such as religion, residence, and socioeconomic status, and easily changeable attributes such as party affiliation. Even such essentially momentary considerations as support for a particular politician can play a role. Our tradition of geographically-based districts eliminates some possibilities. For example, the complete residential integration of the two sexes essentially forecloses the possibility of

14. 347 U.S. 483 (1954).

15. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 588 (1993); Pamela S. Karlan, *The Rights To Vote: Some Realism About Formalism*, 71 TEX. L. REV. 1705, 1712-13 (1993). The unique role reversal of the districting process has been artfully described by Alex Aleinikoff and Sam Issacharoff: "In a democratic society, the purpose of voting is to allow the electors to select their governors. Once a decade, however, that process is inverted, and the governors and their political agents are permitted to select their electors." Aleinikoff & Issacharoff, *supra*, at 588.

16. Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part). In *Shaw II*, the Court stated that a claim of racial vote dilution belongs to individual voters rather than "to the minority as a group," 64 U.S.L.W. at 4443, but while it is of course true that individual voters (or groups that acquire their standing by virtue of the standing of their members) are the plaintiffs in vote dilution cases, it is also true that only a group of voters can suffer dilution from districting. A lone voter cannot. *See* Karlan, *supra* note 15, at 1713.

17. In some jurisdictions, as a result of either statutory requirements or partisan deadlock, ostensibly nonpartisan bodies draw district lines. *See* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1688-95 (1993). The one explicitly race-conscious apportionment that the Supreme Court has upheld in the face of a wrongful districting challenge, California's 1992 plan, was developed by court-appointed Special Masters. *See* DeWitt v. Wilson, 115 S. Ct. 2637 (1995), *aff'd* 856 F. Supp. 1409 (E.D. Cal. 1994).

districts whose gender breakdown differs dramatically from the male-female ratio in the jurisdiction as a whole.[18] And constitutional constraints such as the one-person, one-vote rule further limit the set of acceptable apportionments. For instance, if Democrats constitute 58 percent of the electorate and Republicans constitute 42 percent in a state with ten congressional seats, even the most partisan Republican gerrymander cannot achieve more than an 8-2 Republican majority.[19] But even once these constraints are satisfied, a plethora of possible apportionments remains.

The key point, notwithstanding the Court's repeated paeans to "traditional districting principles,"[20] is that "[d]istrict lines are rarely neutral phenomena,"[21] and that traditional districting principles, if there are any, never dictate or compel any particular configuration. *Miller*'s list of exemplary traditional principles—"compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests"[22]—is more notable for what it omits or coufuses than for what it includes. Partisan advantage and incumbent protection are always predominant in politicians' minds. Indeed, most districts are drawn to favor particular politicians, or at least to favor particular political parties.[23] As for compactness and contiguity, the last time Congress

18. *See* MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 904-12 (1994) (discussing what a "Voting Rights Act for Women" would look like and the problems involved in devising one).

19. *See* DOUGLAS J. AMY, REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES 40 (1993).

20. *See, e.g., Shaw II*, 64 U.S.L.W. at 4439; Bush v. Vera, 64 U.S.L.W. 4452, 4454 (June 13, 1996) (No. 94-805) (opinion of O'Connor, J.); Miller v. Johnson, 115 S. Ct. 2475, 2488-89 (1995); Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993).

21. Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

22. 115 S. Ct. at 2488.

23. In *Vera*, the Court's attempt to deal with the predominance of partisan and incumbency factors degenerated into chaos. Justice O'Connor, writing for herself, Chief Justice Rehnquist, and Justice Kennedy, recognized that it would have been possible to draw a "relatively compact" plurality black district in Dallas and that incumbency concerns explained the rejection of that district, 64 U.S.L.W. at 4457 (opinion of O'Connor, J.), but she affirmed the district court's conclusion that race "had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering," *id.* In Justice O'Connor's separate concurrence with herself, she reiterated her view that while Texas might have had "a strong basis" to believe that deliberate creation of a majority-minority district was "appropriate," *id.* at 4465 (O'Counor, J., concurring), the shape of the district actually drawn reflected an unconstitutionally predominant use of race. Justices Thomas and Scalia, the necessary fourth and fifth votes for the outcomes, implicitly rejected the entire enterprise of asking about traditional principles: for them, if race played any role then the districts were presumptively unconstitutional, regardless of how or why they were drawn. *Id.* at 4466 (Thomas, J., concurring in the judgment). By contrast, the dissenters argned that "Texas' entire map is a political, not a racial gerrymander," and thus that race was not the predominant factor in its creation, *id.* at 4467 (Stevens, J., dissenting); *see also id.* at 4485, 4487 (Souter, J, dissenting) (explaining the confluence of race, partisanship, and incumbency).

squarely addressed the matter, it intentionally *rejected* compactness and contiguity as criteria for congressional districting.[24]

Moreover, the very notion of "traditional" in the field of reapportionment smacks of those ersatz "First Annual . . ." events. Between 1900 and 1964, when the Supreme Court imposed the one-person, one-vote rule and its correlative requirement of decennial redistricting, most states did very little reapportionment and therefore developed no "traditional" districting criteria.[25] Any widely used districting principles are the product of, at most, three or four reapportionment cycles, each cycle strongly influenced by changing judicially imposed criteria.

Finally, race itself is as traditional as districting principles come. Districting has customarily focused on "the competing claims of political, religious, *ethnic*, *racial*, occupational, and socioeconomic

24. *See* Wood v. Broom, 287 U.S. 1, 7 (1932) ("It was manifestly the intention of the Congress not to re-enact the provision as to compactness, contiguity, and equality in population with respect to [congressional] districts to be created pursuant to the reapportionment under the Act of 1929."). That Act, like the current, permanent apportionment statute, 2 U.S.C. §§ 2a, 2c (1988), does not contain a compactness or contiguity requirement.

Moreover, many states omit factors like compactness and contiguity from their list of legal requirements for state legislative districting. *See Shaw II*, 64 U.S.L.W. at 4447-48 (Stevens, J., dissenting) (discussing the absence of any state-law compactness requirement in North Carolina); *see generally* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. REV. 77, 177-83 (1985) (listing each state's requirements).

Finally, in a variety of contexts, federal courts have recoguized that jurisdictions are entitled to subordinate compactness (and even contiguity) to other permissible state interests. *See, e.g.*, White v. Weiser, 412 U.S. 783, 791-97 (1973) (holding that a state's policy goals, including its desire to protect incumbents, are entitled to substantial deference in the reapportionment process and thus that compactness and other traditional districting principles "do not override" the legislature's policy choices); Cook v. Luckett, 735 F.2d 912, 915, 918-19, 921 (5th Cir. 1984) (approving a county's use of "bizarrely shaped" districts because such districts may reflect "just the sort of give-and-take between citizens and their elected officials that federal courts are unable to achieve" and because "[a]pportionments that work no selective disenfranchisement but are merely unwise do not violate the equal protection standards that have developed since Reynolds v. Sims," 377 U.S. 533 (1964)); Gingles v. Edmisten, 590 F. Supp. 345, 379, 382 (E.D.N.C. 1984) (approving a state's proposed remedial districts in a § 2 proceeding even though the plaintiffs' proposed remedy "contain[ed] districts which, on the whole, [were] significantly more regular in shape than [were] their counterparts in the state's plan," since the state was entitled to serve its "primary concern to protect incumbents"), *aff'd in part, rev'd in part sub nom.* Thornburg v. Gingles, 478 U.S. 30 (1986); Dillard v. Town of Louisville, 730 F. Supp. 1546 (M.D. Ala. 1990) (approving a municipality's use of noncontiguous districts). If race is sometimes a *permissible* criterion for districting—and Justice O'Connor's position in *Shaw* and *Miller*, as well as in Voinovich v. Quilter, 113 S. Ct. 1149, 1156-57 (1993), seems to suggest it is—then the Court needs to explain more fully why only this criterion can never subordinate the otherwise dispensable interest in compactness.

25. Perversely, one of the criteria the *Miller* Court identified as "traditional"—the use of political subdivision boundaries—reflects precisely the concept of representation repudiated by *Reynolds*, 377 U.S. 533. States stuck with those lines, and the theory of corporate representation that underlay them, long after social reality had changed. Put simply, respect for county and town lines produced the malapportionments condemned by the Supreme Court in the one-person, one-vote cases.

groups."[26] The post-1990 round of redistricting that so vexed the Supreme Court had only two novel features. First, the emergence of sophisticated computer technology allowed far finer manipulation of district boundaries, making *all* forms of reliance on group status more obvious to the naked eye.[27] Second, nonwhite voters enjoyed unprecedented success in achieving districts in which they were the largest voting bloc—a success achieved in substantial part as a result of such "traditional" tactics as gaining seats on legislative reapportionment committees, political horsetrading, and implied threats to seek judicial redress if they did not get acceptable districts.[28]

So while districting is not arbitrary, neither is it subject to the application of a few agreed-upon, neatly rankable criteria that will generate a plan to comply with "the simple command that the Government . . . treat citizens 'as individuals.'"[29] The Court's invocation of its affirmative action cases in the voting context misses this point. In *City of Richmond v. J.A. Croson Co.*,[30] for example, the alternative to racial set-asides was awarding contracts to the individual with the lowest competitive bid. In *Wygant v. Jackson Board of Education*,[31] the alternative to using race in deciding which teachers should be laid off was reliance on individual seniority. And in *Regents of the University of California*

26. Davis v. Bandemer, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) (emphasis added); *see also* Miller v. Johnson, 115 S. Ct. 2475, 2505-06 (Ginsburg, J., dissenting) (describing America's history of drawing districts along ethnic lines); Whitcomb v. Chavis, 403 U.S. 124, 156 (1971) (observing that in the districting process, members of racially-defined groups occupy a position similar to many other politically cohesive groups such as "union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas"). Similarly, such practices as the ethnically balanced ticket are a mainstay of American political history and show the extent to which race has been salient in the division of political power. *See* Karlan, *supra* note 9, at 35-36.

27. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 569-75 (1993) (describing how districts across the country are all less compact after the most recent round of reapportionment); *see also* Issacharoff, *supra* note 4, at 880 & n.53 (describing contemporary districting technology).

28. Racial minorities, of course, have a set of threats not available to other groups. These arise from the preclearance provisions of the Voting Rights Act, which require states in the Deep South and some other jurisdictions to obtain federal approval for their districting plans. It is true that in some jurisdictions, the Court has limited the breadth of these threats by holding that the Department of Justice had wielded its preclearance power illegitimately in requiring maximization of the number of nonwhite districts. *See* Miller v. Johnson, 115 S. Ct. 2475, 2491-94 (1995). In any case, the power of a variety of groups, not just racial minorities, to resort to alternative authorities if their needs are not met is shown by such cases as Growe v. Emison, 113 S. Ct. 1075 (1993), where a stalemate between a Republican governor and a Democratic-controlled state legislature forced the apportionment into the courts. *See also* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 257-58, 264 (discussing how various political actors pre-empted the legislative reapportionment process through litigation); Karlan, *supra* note 15, at 1726-29 (same).

29. *Miller*, 115 S. Ct. at 2486 (citations omitted).

30. 488 U.S. 469 (1989).

31. 476 U.S. 267 (1986).

v. Bakke,[32] the alternative to rigid race-conscious admission to medical school was resort to test scores, prior academic performance, and individual promise within the profession. In apportionments, by contrast, the alternative to race-conscious districting is not to treat individuals as individuals, but rather to use some other demographic characteristics as an aggregating tool. For reasons that we explain below,[33] a command that forbids using race, but permits use of these other characteristics has the perverse consequence of discriminating against the intended beneficiaries of the Fourteenth and Fifteenth Amendments. If only race is excluded from the political calculus of redistricting, then only black and Hispanic voices will be excluded from the process of governance.

II
RACE VS. POLITICS

Race is not, of course, the only criterion that generally triggers judicial skepticism. The Equal Protection Clause requires strict scrutiny not only when the government uses a suspect classification, but also when it employs a classification that "impinges upon a fundamental right explicitly or implicitly protected by the Constitution."[34] One well-developed line of cases bans the government from distinguishing among citizens on the basis of their political affiliation unless the distinction is "narrowly tailored to further vital government interests."[35] And yet, distinguishing among—indeed, discriminating against—citizens on the basis of their political affiliation is the very lifeblood of districting.[36] Under current doctrine, "political gerrymandering," which allows the legislature to group and district voters almost at will, is

32. 438 U.S. 265 (1978).

33. *See infra* text accompanying notes 93-99.

34. City of Mobile v. Bolden, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)). As Justice Marshall explains, racial vote dilution cases invoke both lines of cases, and much doctrinal confusion has resulted from the Court's failure to recognize the effects of this intersection. *Bolden*, 446 U.S. at 113-14 (Marshall, J., dissenting).

35. Rutan v. Republican Party, 497 U.S. 62, 74 (1990); *see also* Branti v. Finkel, 445 U.S. 507 (1980) (finding unconstitutional discrimination in the firing of Republicans by a newly installed Democratic public defender); Elrod v. Burns, 427 U.S. 347 (1976) (finding unconstitutional discrimination in the replacement of county sheriff's department employees when control over the office changed from one party to another); *cf.* United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947) ("Congress may not enact a regulation providing that no Republican, Jew, or Negro shall be appointed to federal office . . . .") (internal quotation marks omitted).

36. *See* Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. . . . Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.").

presumptively permissible, while "racial gerrymandering" incurs strict scrutiny.[37] This distinction is both incoherent in theory and unadministrable in practice.

A. *Prior Consistent Statements: Districting Injuries Before* Shaw I *and* Miller

When gerrymandering is political, *Davis v. Bandemer*[38] sharply limits what counts as a judicially cognizable injury. Only the consistent degradation of a "group of voters' influence on the political process as a whole" can run afoul of the Equal Protection Clause.[39] In most cases, deliberately drawing district lines to benefit some discrete class produces no such degradation. The Court has identified two reasons for finding no injury. First, the "adequate representation" theory holds that "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district."[40] Second, the "virtual representation" theory takes as a premise that the relevant political unit for determining the fairness of political influence is an entire jurisdiction, rather than a single district.[41] Thus, Democratic voters in majority-Republican districts with Republican representatives will have their distinctively "Democratic" interests represented by Democratic representatives

37. *See Vera*, 64 U.S.L.W. at 4456 (opinion of O'Connor, J.). As Robert Dixon pointed out long ago, "[all] districting is gerrymandering." ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968). "[S]ince 'the legislature always is *aware* of race when it draws district lines,' and has the power to alter those lines if the racial composition of the resulting districts is displeasing, *every* district's racial composition is 'intended.'" Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post*-Shaw *Era*, 26 CUMB. L. REV. 287, 300 (1996) (footnote omitted) (quoting Shaw v. Reno, 113 S. Ct. 2816, 2826 (1993)). As neither a majority-black nor a majority-Republican district is likely to be created accidentally, "gerrymandering" is a fair description of both.

38. 478 U.S. 109 (1986).

39. *Id.* at 132 (plurality opinion).

40. *Id.*

41. Lower courts embraced and expanded the virtual representation rationale in taking a permissive approach to political gerrymanders by adopting broad conceptions of the relevant jurisdictions and time periods. In *Badham v. Eu*, for example, the Supreme Court summarily affirmed a California district court's decision upholding a Democratic districting plan that enabled Democrats to win a disproportionate number of congressional seats. 694 F. Supp. 664 (N.D. Cal. 1988) (three-judge court), *aff'd*, 488 U.S. 1024 (1989) (per curiam). The district court found insufficient the Republican plaintiffs' contention that the apportionment would deny them proportionate congressional representation throughout the 1980s because Republicans were not "'shut out' of the political process" as a whole. *Id.* at 670. Taking an even more expansive view of the scope of the political process than the Court in *Bandemer*, the *Eu* court looked to Republicans' *national* political power, observing that the Republicans' 40% bloc of California congressional seats (despite their 50.1% share of the statewide popular vote) ensured that their interests were not being "entirely ignored" in Congress, that California had one Republican senator, and that "a recent former Republican governor of California has for seven years been President of the United States." *Id.* at 672.

elected from other districts.[42] Under *Bandemer*, then, an individual has no more of an equal protection right not to be "segregated" on the basis of her political affiliation than she has not to be "segregated" on the basis of her zip code. What matters, according to the Court, is not the criteria used to sort individuals into districts, but the overall political power of the groups to which they belong.

Before *Shaw I* and *Miller*, the Court's view of the relevant injury in racial gerrymandering cases was compatible with this "consistent degradation" standard. In *White v. Regester*,[43] for example, the Court emphasized: (1) the historic exclusion of blacks and Mexican Americans from the political process; (2) the interaction between the electoral system and "cultural and economic realities;" (3) the majority's absence of "good-faith concern for the political and other needs and aspirations of the Negro community;"[44] and (4) the ensuing election of representatives who were "insufficiently responsive" to the distinctive needs of minority citizens.[45] Similarly, in *Rogers v. Lodge*,[46] the last of the Court's pre-*Shaw* constitutional analyses of racial vote dilution, the Court identified the injury suffered by Burke County's black citizens as their long-standing and complete exclusion from any role in a governing process that was dramatically "unresponsive."[47] In these cases, the plaintiffs disproved the "adequate representation" and "virtual representation" assumptions; they showed a consistent degradation of their ability to participate in both the pre- and post-electoral political processes.

By contrast, when plaintiffs failed to disprove the adequate and virtual representation assumptions, the Court found no injury. In *United Jewish Organizations v. Carey*,[48] the Court rejected a challenge by a Hasidic community to a plan that split its Williamsburgh (Brooklyn) neighborhood between state legislative districts in order to

42. The Court was content to argue in the alternative, apparently untroubled that the virtual representation rationale is superfluous if it is true that voters will be adequately represented by victorious candidates whom they did not support. Justice O'Connor, the author of the majority opinion in *Shaw*, would have gone even further in *Bandemer*. Concurring in the judgment, she advocated the view that political gerrymandering claims should be treated as raising nonjusticiable political questions. *Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring). Unlike racial minority groups, "whose voting strength in a particular community and the individual rights of its members to vote and to participate in the political process" are "immediately related," O'Connor argued, "the individual's right to vote does not imply that political groups have a right to be free from discriminatory impairment of their group voting strength." *Id.* at 150-51.

43. 412 U.S. 755 (1973).

44. *Id.* at 767.

45. *Id.* at 769.

46. 458 U.S. 613 (1982).

47. *Id.* at 625.

48. 430 U.S. 144 (1977).

create relatively safe majority-nonwhite districts.[49] Justice White, joined by Justices Stevens and Rehnquist, explained that the plan did not "minimize or unfairly cancel out white voting strength"[50] or "representation of white voters in the county or in the State as a whole."[51] A Hasid placed in the majority-nonwhite districts "will be represented, to the extent that voting continues to follow racial lines, by legislators elected from majority white districts."[52]

Thus, both the Court's political and racial gerrymandering cases recognized that the right to vote, insofar as it consisted of more than the simple right to enter the voting booth and cast a ballot, revolved around the allocation of power among groups. Moreover, the Court made clear that the placement of individual voters in particular districts was not a meaningful measure of the overall fairness of the political system.

B. No Harm, No Foul?: The Invention of a New Injury in Shaw I *and* Miller

In *Shaw I* and *Miller*, however, the Court suddenly turned its back on the virtual and adequate representation theories that had animated its prior districting jurisprudence. In both cases, the Court completely dismissed the relevance of virtual representation, for under any virtual representation theory the interests of white voters in the challenged majority-black districts would have been adequately represented, given that whites held more than a proportional share of the state's congressional seats.[53] Likewise, the Court rejected the very notion of adequate representation. *Shaw*, in fact, presumes exactly the opposite: if districts are drawn along racial lines, "elected officials are more likely to believe that their primary obligation is to represent only the members of [the majority racial group in the district], rather than their constituency as a whole."[54] This presumption of "special representational harms"[55] is an

49. The State drew the plan to obtain preclearance under § 5 of the Voting Rights Act of 1965. *Id.* at 148-49.

50. *Id.* at 165.

51. *Id.* at 166. A majority of the Court viewed the Hasidim as members of a fungible class of "white" voters, thereby eliding the difficult question whether the Hasidim were themselves a distinct ethnic or racial minority. *Id.* at 152, 165.

52. *Id.* at 166 n.24.

53. Miller v. Johnson, 115 S. Ct. 2475, 2498 (1995) (Stevens, J., dissenting); Shaw v. Reno, 113 S. Ct. 2816, 2838 (1993) (White, J., dissenting).

54. *Shaw I*, 113 S. Ct. at 2827. Apparently, these "special harms" do not arise when voters are segregated on the basis of political affiliation: in Pope v. Blue, 506 U.S. 801 (1992) (per curiam), the Court summarily affirmed the dismissal of a parallel political gerrymandering challenge to the North Carolina redistricting brought by Republicans, whose interests apparently were being adequately represented by Democratic legislators. *See* Pope v. Blue, 809 F. Supp. 392, 397 (W.D.N.C. 1992) (three-judge court). Nowhere, however, did the Court explain why Democratic legislators are more likely to listen to their Republican constituents than black legislators are to listen to their white constituents.

essentially irrebuttable normative theory, rather than an empirical prediction. Indeed, the Court struck down Georgia's, Texas', and North Carolina's reapportionment plans without reference to *any* findings that the representatives elected from the majority-black and -Hispanic districts ignored the needs of their white constituents.[56] Moreover, despite Justice O'Connor's insistence to the contrary,[57] the logic of "special representational harms" casts suspicion on the design of *most* districts. As Justice O'Connor herself recognized in *Shaw I*, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."[58] It is thus unlikely that any district's racial composition is unintended. As a result, *many* legislators (including all those who represent districts in multiracial communities where alternative configurations were possible) serve a constituency with a deliberately adopted racial composition. If the intentional creation of a predominantly one-race district by itself gives rise to "special representational harms," then every voter assigned to a district where members of a different race predominate is prone to such injuries.[59] It would follow, then, that black voters in majority-white districts (a group that comprises the majority of black Americans) as well as white residents of majority-black districts could cry constitutional foul, making every district in an area with a significant nonwhite population vulnerable to constitutional challenge. (It is unclear, however, what relief the plaintiffs would seek. As long as we have geographic districting, these representational harms cannot be cured.)

The Court has sought to avoid this ominous consequence by restricting the districts subjected to judicial scrutiny. *Shaw I* attempted to do so cartographically, repeatedly implying that only highly "irregular"[60] or "bizarre" district shapes trigger strict scrutiny.[61] But

55. *See* United States v. Hays, 115 S. Ct. 2431, 2436 (1995) (discussing the "special representational harms racial classifications can cause in the voting context").

56. *See* Karlan, *supra* note 37, at 296; *see also Shaw II*, 64 U.S.L.W. at 4445-46 (Stevens, J., dissenting) (pointing out that there was no showing of special representational harms in North Carolina); *Vera*, 64 U.S.L.W. at 4483-84 (Souter, J., dissenting) (analyzing the "failure to devise a concept of *Shaw* harm that distinguishes those who are injured from those who are not").

57. *See Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring).

58. Shaw v. Reno, 113 S. Ct. 2816, 2826 (1993).

59. Whether individual *voters* pick up on this message if they live in regularly shaped districts is beside the point. The question is whether elected *representatives*—who are acutely sensitive to the complexion and attitudes of their districts—will be affected. "[I]f there is racial bloc voting, each elected official will . . . be aware of and which voters support her and which oppose her. The message will be the same regardless of the shape of the envelope in which it is sent." Karlan, *supra* note 28, at 281.

60. *Shaw I*, 113 S. Ct. at 2824.

61. *Id.* at 2825.

Shaw I's variation on Justice Stewart's "I know it when I see it" approach to obscenity[62] must have reminded the Court of the inevitably slippery result of such an impressionistic non-standard: the obscenity cases resulted in a six-year period of fact-specific obscenity inquiries, with the basement of the Supreme Court pressed into service as an adult theater.[63] *Miller* represented the Court's attempt to enunciate a more clear standard in the voting context by creating an administrable standard of how much race-consciousness in districting is *too* much. In place of "bizarreness," *Miller* substituted a "predominant factor" test. A plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," that is, that the legislature "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations."[64]

Miller's test involves several critical distortions of general equal protection doctrine. The first involves the relationship among the notions of purpose, awareness, and effect. Prior cases, particularly *Personnel Administrator v. Feeney*,[65] had downplayed the significance of simple awareness by distinguishing it from discriminatory purpose: "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[66] Had the Court tried to fit wrongful districting claims into this framework, it would have required plaintiffs to show more than that the legislature had intended to create majority-black districts ("volition"). It would have demanded proof that the legislature did so precisely *because it would adversely affect white voters placed in*

62. *See id.* at 2827 (quoting Karcher v. Daggett, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring))).

63. *See* Karlan, *supra* note 37, at 288 & n.7, 311.

64. Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995). The fractured opinions in *Vera* remuddy the waters *Miller* sought to clear. Justice O'Connor, who remains the critical fifth vote for the entire enterprise of wrongful districting jurisprudence, emphasized in both of the opinions she filed in the case that the shape of the challenged districts was critical to her decision to hold them unconstitutional, given that the state could have justified drawing other, more regularly shaped majority-nonwhite districts. *See Vera*, 64 U.S.L.W. at 4456-57 (discussing the shape of the Dallas district); *id.* at 4458-59 (discussing the shape of the Houston districts); *id.* at 4462-63 (reprinting maps); *id.* at 4464 (discussing again the role of bizarreness).

65. 442 U.S. 256 (1979).

66. *Id.* at 279 (citation omitted).

those districts.[67] It is telling that the Court, despite its invocation of the *Feeney* standard, never took this final step. How else could injury be found, especially if white voters had not had their overall voting strength diluted? And where was the evidence that any actor in the redistricting process had intended to discriminate *against* the group of white voters? Ultimately, the Court has proceeded on the assumption that the very use of race—and not some additional adverse effect—constitutes the injury.[68]

That is a radical proposition indeed. If racial classification is itself the injury, then a wide range of government activities—from juror selection questionnaires to police descriptions of fleeing suspects to much of the census—may also be presumptively unconstitutional.[69] (Indeed, without the prior evil of demographic census classification, it would be extremely difficult for legislatures to draw precisely configured majority-black districts.) But we are hard-pressed to identify any case in which the Equal Protection Clause has been used to strike down a racial classification which has had no tangible consequences. All of the examples *Miller* used to explain why the plaintiffs in a wrongful districting case are injured by the race-conscious separation of voters into different districts involved the actual *exclusion* of individuals from public facilities that, absent racial discrimination, they would have been entitled to enter.[70] The plaintiffs in the wrongful districting cases were not really protesting their exclusion from anything. Rather, they were protesting the *inclusion* of too many nonwhite voters in the district to which they were assigned.[71]

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67. In *Vera*, Justice Thomas managed to elide this distinction between volition and constitutionally meaningful intent by transforming it into the because of/in spite of distinction. *See Vera*, 64 U.S.L.W. at 4466 (Thomas, J., concurring in the judgment).

68. *See Shaw II*, 64 U.S.L.W. at 4439 ("[A] racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect.").

69. *See, e.g.*, Jury Selection Act of 1968, 28 U.S.C. § 1869(h) (1988) (requiring the government to "elicit" the race of all persons being considered for jury duty); Office of Management and Budget, Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting (1977), *reprinted in* Office of Management and Budget, Standards for the Classification of Federal Data on Race and Ethnicity, 60 Fed. Reg. 44,692 app. (1995) (providing for the collection and use of data involving racial classifications) (available on the Internet as gopher.census.gov/00/Bureau/Doc-Pub/Class/ombdir15.txt); *see also Shaw II*, 64 U.S.L.W. at 4445 (Stevens, J., dissenting) (making a similar point about the census).

70. *See Miller*, 115 S. Ct. at 2486 (citing New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (public parks); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (per curiam) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches); and Brown v. Board of Educ., 347 U.S. 483 (1954) (schools)).

71. *See Shaw II*, 64 U.S.L.W. at 4444 (Stevens, J., dissenting) ("[T]he injury these plaintiffs have suffered, to the extent that there has been injury at all, stems from the integrative rather than the segregative effects of the State's redistricting plan."). Moreover, a voter remains free to move into any district he chooses after they have been drawn. Thus, electoral districting is unlike the cases

Second, *Miller* creatively misread the conventional burden-shifting trigger. According to *Miller*, a plaintiff must show that "race was the predominant factor motivating the legislature's decision."[72] But the standard equal protection test is far more plaintiff-friendly. In conventional equal protection cases, like *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[73] the plaintiff need not show that race was *the predominant* factor; rather she need show only that race was "*a* motivating factor,"[74] after which the defendant must prove that it would have taken the same course, "even had the impermissible purpose not been considered" at all.[75] Again, the Court flinched from applying equal protection doctrine wholesale, because the result would have been so unpalatable. In any racially diverse jurisdiction where race is even loosely correlated with voting behavior, race will simply be one motivating factor in the placement of voters.[76] If the *Arlington Heights* test were applied straightforwardly, the state would virtually *never* be able to defend a plan from invalidation, since it is hard to imagine how it could ever show that the legislature would have adopted precisely the same plan had it been entirely unaware of the racial distribution of voters.

This Term's attempt at a further gloss on when strict scrutiny is required, *Bush v. Vera*,[77] fizzled miserably, producing no majority opinion, two somewhat contradictory opinions each written by Justice O'Connor,[78] and a deeply divided Court on which four Justices called for the overruling of the entire line of wrongful districting cases.[79] All that seems clear is that Justice O'Connor is the pivotal voter and that district appearance—a factor seemingly irreducible to any easy to articulate or to apply set of rules—is the key to her approach.

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cited in the previous note, where there was nothing a black citizen could do that would enable her to use white beaches, parks, golf courses, schools, or bus seats.

72. 115 S. Ct. at 2488.

73. 429 U.S. 252 (1977). Thus, although Justice O'Connor characterized the Texas reapportionment litigation as "a mixed motive case," *Vera*, 64 U.S.L.W. at 4454, she did not apply the traditional test.

74. *Arlington Heights*, 429 U.S. at 270 (emphasis added).

75. *Id.* at 271 n.21.

76. This may be true even if *no* majority-black districts are drawn. For example, in a jurisdiction where black voters are the most loyal Democratic constituency group but are too small a group to form a district where they predominate, white Democrats may seek to have such communities placed in their districts, and white Republicans may seek to exclude such voters from their districts.

77. 64 U.S.L.W. 4452 (June 13, 1996) (No. 94-805).

78. *See id.* at 4454-62 (opinion joined by the Chief Justice and Justice Kennedy (who also filed his own concurrence)); *id.* at 4463-65 (separate concurrence). *Compare, e.g., id.* at 4459-60 (opinion of O'Connor, J.) (leaving open the question whether compliance with § 2 of the Voting Rights Act is a compelling state interest) *with id.* at 4463-64 (tentatively nnswering that question).

79. *See id.* at 4467 (Stevens, J., dissenting); *id.* at 4481 (Souter, J., dissenting). Justices Ginsburg and Breyer joined both dissents.

In sum, the Court's failure to apply its equal protection precedent honestly calls into question its reliance on non-voting cases. Although the Court purports to be bringing voting in line with the rest of equal protection jurisprudence, it has actually created a doctrinal morass by selectively wrenching concepts out of the contexts in which they were developed and attempting to jury-rig them to work in a context where they do not make sense. Why undertake such a misguided project? As we discuss below, the Court seems to be motivated by a misunderstanding of the relationship between race and politics.

C. None So (Color)Blind as Those Who Will Not See: Race as a Source of Political Community

Having blanched at wholesale incorporation of its existing equal protection doctrine into voting cases, the Court was faced with the question of when race-conscious districting is permissible. *Miller* and *Shaw I* offer the following formulation:

> A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at the polls," it engages in racial stereotyping at odds with equal protection mandates.[80]

This refinement is internally inconsistent. In the context of voting, what constitutes a "common thread of relevant interests"? As an initial approximation, thinking alike, sharing the same political interests and preferring the same candidates at the polls are what *defines* a "common thread," at least for the purposes of drawing electoral districts. Districting, as we have already seen, is inherently a process of stereotyping. If all the Supreme Court is asking is that the state show that residents of a majority-black district actually think alike, share the same political interests, and prefer the same candidates, then its test simply collapses into the question posed in *Thornburg v. Gingles*[81]: Is the minority group "politically cohesive"?[82] But the Court does not intend to invite states to prove the equivalent of this section 2 vote dilution claim ele-

80. *Miller*, 115 S. Ct. at 2490 (quoting *Shaw I*, 113 S. Ct. at 2826-27) (alterations in original) (citations omitted).

81. 478 U.S. 30 (1986).

82. *Id.* at 50-51 (setting out a three-part test for assessing claims that a particular districting scheme violates § 2, the second prong of which asks whether the minority group is "politically cohesive").

ment as an affirmative defense in every *Miller* case. Instead, the Court seems to reject the idea that blacks *can* comprise a political community because of a normative vision—because it actively resists, as an ideological matter, the proposition that black voters have a distinct political viewpoint.[83] This normative vision contains, as Justice O'Connor described it in *Croson*, "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity."[84] More stridently expressing the same sentiment with respect to voting rights, Justice Thomas, in his concurrence two terms ago in *Holder v. Hall*,[85] decried the "enterprise of segregating the races into political homelands" as "repugnant to any nation that strives for the ideal of a colorblind Constitution."[86] As rhetoric like this illustrates, the Court dreams not in black and white, but in colorblind.

In the waking world of reapportionment, however, the Court's ideologically pure position renders it willfully blind to the messy realities of the political process. The distinction the Court draws between race and politics is both incoherent in theory and unadministrable in practice. The theoretical incoherence stems from a crucial distinction the Court has failed to recognize: "race" means something different in the political context than it means in the areas in which the Court's individual rights conception of affirmative action has developed. In these other areas—university admissions, government contracts, and public employment[87]—the government uses race as a proxy for past discrimination resulting in present disadvantage. Thus, race operates primarily as an *external* ascription of a particular identity to the minority group by the majority—used in the past as a cue for discriminatory treatment, and in the present as a cue for preferential treatment. In the electoral context, however, race is first and foremost an *internal* identification, generated through the political positions taken by members of a discrete, demographically-identifiable group. The *voluntariness* of racial and ethnic group affiliation in the political process requires that these groups be recognized as expressing legitimate interests; not to do so would be to denigrate the autonomy of those individuals who choose to affiliate themselves along this axis.

In the political process, members of racially-defined groups occupy a position similar to that of many other socially and politically

83. *See* Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 92-94.

84. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989).

85. 114 S. Ct. 2581 (1994).

86. *Id.* at 2598 (Thomas, J., concurring in the judgment).

87. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Croson, 488 U.S. 469; Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

cohesive groups, such as "union-oriented workers, the university community, [and] religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas."[88] To the extent that racially homogeneous social groups share political preferences, a pluralist political system that seeks to aggregate exogenous preferences cannot categorically exclude such groups without sacrificing legitimacy. In particular, unless black voters are able to elect candidates of their choice, their particular bundle of interests, for which race serves as a shorthand, may be undersatisfied relative to the number of individuals asserting these interests and the intensities of their preferences.[89] Preventing the creation of districts from which black representatives have a realistic chance of being elected, therefore, shortchanges certain political interests and distorts the pluralist process.[90]

Racial identification in the electoral context, then, is essentially "bottom-up," produced by the choices of members of the black community to unite politically and to "pull, haul, and trade" their way into electoral power.[91] Because the identification is largely self-chosen, the essentializing effect of race—the consequence that lies at the root of the Court's normative objection—is uniquely small. First, and most obviously, the actual choice of which candidate to support is never determined. Individual members of a racial group who do not share the political views of the majority of their group are free to vote according to their interests. Second, if enough members of a racial group dissent from the majority views of that group, then the group will no longer be politically cohesive and will lose both its statutory and its practical claim to group representation. In the meantime, some dissenting voters inevitably will be categorized into districts where their race, but not their political viewpoint, is in the majority and therefore will not be able to elect the candidates of their choice. The necessity of such "filler people,"

88. Whitcomb v. Chavis, 403 U.S. 124, 156 (1971).

89. Empirical evidence suggests, for example, that the substantive interests of black voters may not be "adequately represented" by nonblack representatives, even if those representatives share the party affiliation of most black voters. *See* Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1384-89 (1995) (book review) (surveying empirical evidence related to party, ideology, and race of elected officials as it bears on the issue of the costs and benefits to blacks of descriptive versus substantive representation).

90. This point fits into a more general process-based view of voting rights. Unlike other areas of civil rights law which are concerned with the just distribution of goods and opportunities in society, voting rights law may be limited to policing the political process for blockages, in the same way that antitrust law polices the economic market for blockages. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1854-71 (1992). In this way, voting rights can be conceived as a pro-democratic form of judicial review, as well as a way of relieving courts of the need to scrutinize the substantive outcomes of well-functioning elected bodies. *See generally* JOHN H. ELY, DEMOCRACY AND DISTRUST 116-25 (1980).

91. Johnson v. De Grandy, 114 S. Ct. 2647, 2661 (1994).

however, is a product of districting in general and has nothing in particular to do with race. Black Republicans in a majority-black Democratic district are no more essentialized or stereotyped than "limousine liberals" who happen to be lumped together with their wealthy neighbors into safe Republican districts.[92]

When groups coalescing around race are properly viewed as ordinary, contingent factions in a pluralist political system, judicially denying those groups the recognition available to other politically successful factions serves not to de-emphasize race, but quite the opposite, to single it out as taboo. Ironically, the Court's current approach threatens to deny the intended beneficiaries of the Fourteenth Amendment access to the same sort of pluralist electoral politics that every other politically cohesive bloc of voters enjoys.

The relevant equal protection concern in this context, therefore, is not the protection of an empty individual right to be free from racial classification, but rather the collective right, recognized in *Hunter v. Erickson*,[93] of groups of voters who affiliate along racial lines to participate in the political process on an equal footing with voters who choose to affiliate based on other shared characteristics. *Hunter* struck down a provision of the Akron City Charter that required approval by referendum of any housing ordinance that sought to regulate discrimination on "the basis of race, color, religion, national origin or ancestry."[94] The Court identified the fatal weakness in the ordinance as the distinction it "drew . . . between those groups who sought the law's protection against racial, religious, or ancestral discriminations" and those involved in "the pursuit of other ends."[95] The "reality" of such a provision, the Court explained, is that "the law's impact falls on the minority" because they are more likely to "benefit from laws barring racial, religious, or ancestral discriminations . . . ."[96] The Court concluded that the Akron charter amendment was racially discriminatory because "the

92. In this and other respects, however, the essentialization critique points in constructive directions. Concern for replacing static, monolithic group identities with fluid, diverse coalitions of interests has generated a number of imaginative proposals for restructuring the electoral system by eliminating geographical districts altogether and representing shifting, interest-based coalitions rather than fixed groups of voters. For examples of these proposals, see, e.g., LANI GUINIER, THE TYRANNY OF THE MAJORITY 14-18, 92-101, 149-51 (1994); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 221-36 (1989); Daniel R. Ortiz, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144 (1982); Edward Still, *Alternatives to Single-Member Districts*, *in* MINORITY VOTE DILUTION 249 (Chandler Davidson ed., 1984). We find it odd that critics of the essentialism of race-conscious districting like Justice Thomas are not more receptive to these ideas.

93. 393 U.S. 385 (1969).

94. *Id.* at 387.

95. *Id.* at 390.

96. *Id.* at 391.

State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[97] So, too, an equal protection principle that treats racially-affiliated voters differently than voters who affiliate along other shared characteristics and makes it more difficult for black voters than for other groups to enact favorable apportionment legislation inverts the constitutional commitments of the Fourteenth and Fifteenth Amendments.[98] The invocation of "traditional" districting principles turns out to limit only the political aspirations of precisely that group whom the amendments were originally intended to serve: black Americans.[99]

As we explain in the final section of this paper, the integrationist ideals expressed by the Court can be realized through electoral law—which does not regulate the decisionmaking of individual voters[100]—only in the form of integrated elected bodies. The Voting Rights Act, starting from the empirically undeniable premise that race matters to voters, has facilitated far greater integration in legislatures than in society at large. Blaming the Act (or those racial groups who have taken advantage of the political possibilities the Act has created) for our persisting social segregation and race consciousness is not utopian, bnt backwards.

D. Heads You Lose, Tails We Win: The Shell Game of Race or Politics

The theoretical complications that arise from attempts to disaggregate race and politics are borne out on the ground. The basic difficulty is that race in contemporary America is highly correlated with views on politically salient issues.[101] For some issues, race may be just a proxy for other determinants of political viewpoint, such as residence, religion, education, or socioeconomic status. For other issues, especially those related to racial discrimination, racial identity can practically determine

97. *Id.* at 393.

98. *See Vera*, 64 U.S.L.W. at 4485-86 (Souter, J., dissenting); *see also id.* at 4467, 4469 (Stevens, J., dissenting) (pointing to majority-white districts that survived challenge although they were no less irregular in shape than the minority districts that were struck down).

99. Jim Blacksher's forthcoming article develops this point in a particularly powerful and persuasive form, by comparing the underpinnings of *Shaw* and *Miller* to the assumptions behind Dred Scott v. Sandford, 60 U.S. 393 (1857), and Plessy v. Ferguson, 168 U.S. 537 (1896). *See* James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, HOWARD L.J. (forthcoming).

100. *See infra* text accompanying notes 137-40.

101. *See* Pildes, *supra* note 89, at 1378 n.84 (citing "an abundance" of sources that attest to "systematic racial differences" in voting behavior). *Cf. Vera*, 64 U.S.L.W. at 4456 (opinion of O'Connor, J.) (discussing possible correlations between race and community of interest).

political position.[102] For still other issues—for example, criminal justice reforms that have a disparate impact on the black population[103]—public opinion exhibits varying degrees of racial causation beyond bare correlation.[104] In *Holder v. Hall*,[105] Justice Thomas aptly recognized the difficulty of determining the extent to which the observed correlation between race and political viewpoint reflects causation. He complained that, "whenever similarities in political preferences along racial lines exist, we proclaim that the cause of the correlation is irrelevant, but we effectively rely on the fact of the correlation to assume that racial groups have unique political interests."[106] But in identifying a "working assumption that racial groups can be conceived of largely as political interest groups,"[107] Justice Thomas was being disingenuously optimistic about courts' consistency of method. Courts have, in fact, attempted to distinguish racial groups from political groups in vote dilution cases, and the results have been dubious at best.

Consider the plight of black, Democratic voters in inner-city Indianapolis. In *Whitcomb v. Chavis*,[108] they claimed unconstitutional racial vote dilution arising from the state's inclusion of their community in county-wide majority-white multimember districts. There was no question that the "Center Township Ghetto" was a politically discrete community; the district court had found that the community had distinctive "'compelling interests in such legislative areas as urban renewal and rehabilitation, health care, employment training and opportunities, welfare, and relief of the poor, law enforcement, quality of education, and anti-discrimination measures.'"[109] Nonetheless, the Supreme Court found no unconstitutional dilution. The Court determined that the black ghetto voters were unsuccessful not because they were *black*, but

102. Much modern legislation is aimed at racial discrimination, and it is no surprise that racial minorities take a particular interest in these measures. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (1988)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 3601 et seq. (1988)); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 42 U.S.C. § 2000e (1988)); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (codified at 42 U.S.C. § 1973 et seq. (1988)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (to be codified at 42 U.S.C. § 3601 et seq.); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified in scattered sections of 42 U.S.C.).

103. *See, e.g.*, Paul M. Barrett, *Crack-Cocaine Case Involving Charges of Bias to be Decided by Supreme Court*, WALL ST. J., Oct. 31, 1995; Ann Devroy, *Clinton Retains Tough Law on Crack Cocaine: Panel's Call to End Disparity in Drug Sentencing is Rejected*, WASH. POST, Oct. 31, 1995 at A1.

104. *See, e.g.*, Issacharoff, *supra* note 90, at 1877-79 (exploring the wide range of issues on which black and white viewpoints diverge).

105. 114 S. Ct. 2581 (1994).

106. *Id.* at 2598 (Thomas, J., concurring in the judgment).

107. *Id.*

108. 403 U.S. 124 (1971).

109. *Id.* at 132 (quoting the district court's findings).

because they were *Democrats*. As the Court explained, "The voting power of ghetto residents may have been 'canceled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls."[110] The Court never considered the possibility of an intersectionality, that is, the possibility that "black Democrats" are a distinctive political group whose interests differ from those of white Republicans along more than one dimension.

Fifteen years later, in *Davis v. Bandemer*,[111] inner-city black voters in Indianapolis again challenged the state's legislative apportionment and again lost because they were viewed simply as Democrats.[112] And the confusion between race and politics persists. In a 1992 challenge to the at-large seats on the Marion City-County Council, the Seventh Circuit rejected a claim of racial vote-dilution on the now-familiar basis that black voters in Indianapolis were losing not because they were black, but because they were Democrats in a "Republican stronghold."[113] The court noted that a black candidate, albeit a Republican, had won an at-large seat in the 1991 elections. Responding to the plaintiffs' argument that a Republican could not be the "representative of choice" of a black population that prefers Democrats, the court explained that the Voting Rights Act "is a balm for racial minorities, not political ones—even though the two often coincide."[114]

The Indianapolis/Marion County cases exemplify the problem of disaggregating race and political affiliation in vote dilution cases that was first highlighted in *Thornburg v. Gingles*.[115] In *Gingles*, Justices Brennan, O'Connor, and White offered competing approaches, and there was no majority opinion on this point. The dispute was essentially between Justice Brennan's position that the racial bloc voting relevant to a section 2 claim is shown by racially divergent voting patterns alone, regardless of their explanation or cause,[116] and Justice O'Connor's willinguess to consider potential non-racial explanations in the analysis.[117]

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110. *Id.* at 153.

111. 478 U.S. 109 (1986).

112. *See id.* at 118 n.8. Not until a post-*Gingles* challenge to the same districts upheld in *Davis* did the state agree to abandon its multi-member scheme and create several majority-black single-member districts. *See* Dickinson v. Indiana State Election Bd., 817 F. Supp. 737 (S.D. Ind. 1992) (recounting the history of the § 2 litigation).

113. *See* Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 361 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2334 (1993).

114. *Id.*

115. 478 U.S. 30 (1986).

116. *See id.* at 61-74.

117. *See id.* at 100-02 (O'Connor, J., concurring in the judgment).

Justice White's position, expressed in a cryptic paragraph-long concurrence, seems to be that the race of a candidate is relevant to determining whether there has been "interest-group politics" rather than racial discrimination. *Id.* at 83. But because he also prematurely inserts the question of crossover voting into his analysis, it is hard to say whether he would find a violation in a case in which

Dueling opinions in a recent Fifth Circuit en banc case vividly illustrate the emerging complexity of this debate. *League of United Latin American Citizens v. Clements* ("*LULAC*")[118] involved a challenge to the election process for state trial court judges in a number of Texas counties. After a second en banc hearing of the case, Judges Patrick Higginbotham (writing the opinion of the court and taking Justice O'Connor's approach)[119] and Carolyn King (dissenting and seconding Justice Brennan's analysis)[120] squared off over the meaning of, and requisite evidentiary basis for, proving racial bloc voting in the context of a section 2 vote dilution claim. Judge Higginbotham's approach requires that to establish legally significant white bloc voting and racially polarized voting, plaintiffs must at least show that the racially divergent voting is not primarily the result of partisan politics. Thus, it is not sufficient for minority plaintiffs to demonstrate the existence of racially divergent voting that consistently defeats their candidates of choice unless they also negate partisan politics as a causal factor.[121]

The many difficulties attending the disaggregation of race and politics, exhaustively catalogued by Judge King,[122] all result from the fact that race and political affiliation are, in fact, substantially correlated. It is thus impossible to determine which of the two is a better *explanation*—as opposed to a *predictor*—of voting patterns. A hypothetical example may clarify this point. Suppose that the two dominant political parties were the Anti-blacks and the Pro-blacks, each advocating a platform consistent with its name. If, as we might expect, virtually all black voters were members of the Pro-black party and voted for Pro-black candidates, then political affiliation would be nothing more than a proxy for race. In that example, race would provide a better explanation of voting patterns than would political affiliation, leaving little room for doubt as to the existence of racial bloc voting. In contemporary American politics a similar (though, of course, weaker) causal relationship obtains between race and political party. Most blacks find that their interests are better represented by the Democratic party.[123] As a

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black voters' votes are undeniably submerged and white voters elect a black candidate whom no black voters supported.

118. 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 878 (1994).

119. *See id.* at 855-59.

120. *See id.* at 905-07 (King, J., dissenting).

121. *See id.* at 859-60.

122. *See id.* at 904-10 (King, J., dissenting).

123. *See* THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 151 (1991) (arguing that racial attitudes after the 1960s "became a central characteristic of both ideology and party identification, integral to voters' choices between Democrats and Republicans"); Michael Kelly, *Segregation Anxiety*, THE NEW YORKER, Nov. 20, 1995, at 43 (quoting Colin Powell's statement that blacks "have seen the Democratic Party as more in line with their needs over the years.... And the Republican Party has not succeeded in breaking that hold").

consequence, statistical tests, such as the multivariate regression analyses of voting patterns offered by the LULAC defendants, will necessarily be indeterminate with respect to the causal role of race in affecting voting behavior.[124] As Judge King points out, a typical section 2 scenario involves a politically cohesive group of nonwhite voters, usually Democrats, who have been unable to elect their preferred candidates because their votes, combined with white Democratic "crossover" votes, have been consistently submerged by the votes of an overwhelmingly white, largely Republican majority.[125] In other words, the black or Hispanic voters have not been able to form a coalition with enough white voters to overcome the white majority bloc vote. In this scenario, as long as some whites vote with minorities for the Democratic candidate, political affiliation will *always* be a better predictor of election outcome than will race. Accordingly, under Judge Higginbotham's approach, the nonwhite voters will have no remedy. Yet this is precisely the sort of racial exclusion that section 2 and *Gingles* sought to remedy.

Although attempting to disaggregate race and politics seems practically unworkable in the context of vote dilution claims, at least the motivation behind the attempt is understandable. After all, the purpose of the section 2 inquiry is to identify situations where cohesive *racial* minorities are being denied a fair share of political power--the advantages of the *Gingles* structure should not be extended to political groups that lack the history of discrimination and concomitant contemporary vulnerability to substantial exclusion from the political process.[126] If the voting patterns of racial or ethnic minority groups are in fact significantly splintered, then race should not be a relevant political category.

But attempting to make the distinction between race and politics in the wrongful districting cases, where the plaintiffs' injury is not even clear, promises to be positively Sisyphean. Whereas section 2 litigation

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124. The statistical problems are indeed daunting. Consider an election between a black Democrat and a white Republican in which most blacks, most of whom are Democrats, vote for the black Democrat, whereas most whites, most of whom are Republicans, vote for the white Republican. In this case, race and party will be so confounded (i.e., will be collinear in a regression process) that one is unlikely to be able to untangle whether voting is based on race or party affiliation. In a stepwise regression analysis, with vote regressed on voters' party identification and race, the collinearity of the two independent variables may cause whichever variable enters the equation second not to explain any added variance in the vote. Thus, if race is entered first, party might explain no more, and if party is entered first, race might explain no more.

Worse, this analyses assumes the availability of data on the party affiliation, race, and the candidate of choice of individual voters. Election results as a whole or even within small areas (e.g., census tracts) will not suffice. Yet, such individual data will be difficult—and perhaps even impermissible—to obtain. *See infra* text accompanying notes 134-38.

125. *See LULAC*, 999 F.2d at 910 (King, J, disseuting).

126. *See* Issacharoff, *supra* note 4, at 873, 888-99 (explaining why the logic of footnote four of United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938), should not apply to Cuban American voters in Dade County, Florida despite their being a "discrete and insular minority").

is concerned solely with electoral rules that have the effect of disadvantaging minority voters, regardless of the purpose behind those rules, the wrongful districting cases require courts to focus primarily on ferreting out overly race-conscious legislative *intent.* The results of the redistricting process—the actual districting plans and post-electoral representation—receive relatively little attention.[127] The collective calculus of representatives selecting their electors, however, relies on a host of variables, responsive to multifarious concerns, and the notion of a single, "predominant" reason for any particular districting configuration is really just a fiction.[128] Compactness, contiguity, preservation of political subdivisions, equipopulosity, political affiliation, and incumbent protection are just some of the vectors, aside from race, that determine the ultimate shape of electoral districts.[129] As these considerations will have varying influences on the positions of individual legislators, it is hard to imagine how a court would divine which among them is "predominant" in the overall process.[130]

Furthermore, the interest of legislators in the race, political affiliation, or any other characteristic of voters, is non-existent except to the extent that these characteristics predict voting patterns. Legislators will rely on as much demographic data about voters as is practically available, for it is voters' expected behavior at the polls, not their characteristics, that is relevant in districting. Scrutinizing districts for whether race was the "predominant factor" in their creation, therefore, will necessitate not only drawing the distinction between race and other explanatory factors for *voters'* behavior (as in the section 2 context), but also somehow drawing this distinction for *legislators'* behavior. If inquiring into voters' motivations is difficult in practice, trying to rank legislators' multiplex motivations is just incoherent. As long as both race and political affiliation predict voting behavior, there will be no principled way for courts (or anyone else) to sort out racial gerrymanders from political ones. For example, using black voters to bolster the electoral base of white Democratic politicians is standard political ger-

127. *See The Supreme Court, 1994 Term—Leading Cases,* 109 HARV. L. REV. 111, 168 (1995).

128. For a more extensive discussion of this point see Samuel Issacharoff, *The Constitutional Contours of Race and Politics,* 1995 SUP. CT. REV. 45, 53-60 (forthcoming).

129. This list is hardly exhaustive. There will be many quite idiosyncratic explanations for district boundaries. For example, Texas' Thirtieth Congressional District, as drawn in the 1991 congressional redistricting, contained a thinly populated "tentacle[]" that reached out to ingest the Dallas-Forth Worth Airport, an important source of patronage power. *See* Vera v. Richards, 861 F. Supp. 1304, 1310, 1337 (S.D. Tex. 1994) (three-judge court), *aff'd sub nom.* Bush v. Vera, 64 U.S.L.W. 4452 (June 13, 1996) (No. 94-805).

130. *See* Miller v. Johnson, 115 S. Ct. 2475, 2500 (1995) (Ginsburg, J., dissenting) ("District lines are drawn to accommodate a myriad of factors—geographic, economic, historical and political—and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims; courts, with a mandate to adjudicate, are ill-equipped for the task.").

rymandering practice, but this tactic is rational only because black voters have proved likely to vote for Democrats.[131] Legislators doing the gerrymandering are equally well aware of two things about these "filler people": they are black and they vote for Democrats. Are the resulting majority-white districts drawn predominantly on account of race or on account of politics? The question is empty. Race may be a "but for" cause of every district in every racially integrated area of America, but so is political affiliation and every other characteristic that predicts the candidate for whom groups of voters are likely to cast their ballots. The incoherence of this entire inquiry is cast into particularly sharp relief by this Term's decisions in *Shaw II* and *Vera* where the Court was deeply divided over whether the shapes of the challenged districts reflected the predominance of race or of politics.[132]

After *Miller*, the Supreme Court now asks the impossible of the lower courts. Not only are these courts now required somehow to unravel an inextricably intertwined panoply of factors that influence districting and, in particular, to pry apart race and politics, but they must do so without the benefit of any coherent doctrinal structure or theoretical basis. The prognosis hardly looks promising, except perhaps to the contingent losers in state political processes, who now will be granted second lives as voting rights plaintiffs.[133] Since *Shaw*, the Court has

131. *See Vera*, 64 U.S.L.W. at 4458 & n.* (opinion of O'Connor, J.) (describing how this was done in Texas).

132. *Compare Shaw II*, 64 U.S.L.W. at 4439 (holding that race was the predominant motive explaining the configuration of North Carolina District 12) *with id.* at 4448-49 (Stevens, J., dissenting) (arguing that politics rather than race explained the placement and shape of the district); *compare Vera*, 64 U.S.L.W. at 4457 (opinion of O'Connor, J.) (characterizing the motivation behind the creation of Texas District 30 as primarily racial) *with id.* at 4471-73 (Stevens, J., dissenting) (claiming the primacy of political motivations).

133. The *Shaw* litigation itself is a harbinger of confusion to come as courts attempt to disentangle the intertwined claims of race and politics. In North Carolina, Republican plaintiffs were the first to challenge the Democrat-controlled state legislature's post-1990 congressional districting, claiming that the plan was an unconstitutional political gerrymander. Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.) (three-judge court), *aff'd* 506 U.S. 801 (1992). The district court dismissed the claim after finding that the plan created a number of safe Republican seats and that there was no evidence that Republicans in Democratic districts were unable to influence their representatives. The court found nothing to suggest that Republicans would be "consistently degraded in their participation in the entire political process." *Id.* at 397. While *Pope* was being litigated in the Western District of North Carolina, five other voters filed a challenge to the redistricting plan in the Eastern District, raising an equal protection claim based on the intentional concentration of black voters into two districts. Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992). This was the case that went to the Supreme Court as Shaw v. Reno, 113 S. Ct. 2816 (1993). The *Shaw* plaintiffs asserted the equivalent of citizen standing; the district court, however, repaired their "deliberate (and humanly, if not legally, laudable) refusal to inject their own race[s]" into the lawsuit by taking judicial notice of the plaintiffs' identity as white voters. Shaw v. Barr, 808 F. Supp. at 470 (alteration in original). Ultimately, on remand of *Shaw* from the Supreme Court, the spurned *Pope* plaintiffs recast themselves as plaintiff-intervenors in the ensuing district court proceedings. Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (three-judge court). When the case reached the Supreme Court, the Court held that they all lacked standing because none of the Republican plaintiff-intervenors lived in the districts they were challenging. *See*

been playing chicken both with state political processes and with the Voting Rights Act; as political losers flock to the federal courts, perhaps the Justices will recognize these cases as their own ill-begotten brood coming home to roost.

III
PUBLIC VS. PRIVATE

The distinctive blend of state action and private choice involved in the electoral process offers a third reason why districting should be approached from a constitutional perspective different than the one employed in other areas of equal protection law. Alex Aleinikoff and Sam Issacharoff capture this interaction nicely in their identification of a central feature of the Voting Rights Act:

> Unlike other civil rights statutes, the Voting Rights Act is notably passive in its treatment of the central operational pattern that it addresses. . . .
>
> [It] seeks to alter the consequences of racial bloc voting patterns without governing the way individual voters cast their ballots; the primary conduct—the racial patterns in voting—is unaffected . . . As the Act has developed, the structural changes have been brought about primarily through the race-conscious drawing of district lines.[134]

As we have already explained, race-conscious districting does not directly constrain any voter's exercise of free choice. Each individual remains free to vote for whomever she prefers and free to move into any district in which she wishes to establish herself.[135] Nor, as we have also explained, does race-conscious districting—in the absence of racial vote dilution—impermissibly impair an individual voter's ability to elect the candidates of her choice. Race-conscious districting *does*, however, try

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Shaw II, 64 U.S.L.W. at 4439; *see also id.* at 4443 (Stevens, J., dissenting) ("It is plain that these intervenors are using their allegations of impermissibly race-based districting to achieve the same result that their previous, less emotionally charged partisan gerrymandering challenge failed to secure. In the light of the amorphous nature of the race discrimination claim recognized in *Shaw I*, it is inevitable that allegations of racial gerrymandering will become a standard means by which unsuccessful majority-race candidates, and their parties, will seek to obtain judicially what they could not obtain electorally.").

134. Aleinikoff & Issacharoff, *supra* note 15, at 634. *See also* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1099 (1991) (making a similar observation); Issacharoff, *supra* note 90, at 1861 (same).

135. *Cf.* Carrington v. Rash, 380 U.S. 89, 94 (1965) (holding that citizens who are "bona fide residents" of a district into which they have recently moved may not be denied the ability to vote in that district because the state is wary of the opinions they hold). Perversely, the standing rule enunciated in United States v. Hays, 115 S. Ct. 2431 (1995), means that a voter excluded from a particular district in order to achieve a desired racial balance within the district apparently has suffered no legally cognizable injury. *See also* Karlan, *supra* note 37, at 289-300 (criticizing the Court's analysis of standing in *Shaw I* and *Miller*).

to give minority voters, as distinct groups, an equal opportunity to elect the candidates of their choice in the face of essentially unreachable private conduct that would otherwise frustrate their efforts.[136]

The voting decisions of individual white citizens are absolutely protected under the First Amendment. This is true whether they decline to support candidates favored by the black community out of ignorance, selective sympathy or indifference,[137] or outright racism.[138] Thus, unlike such contexts as employment or housing, the government cannot reach and regulate directly the private decisionmaking that produces a disparate racial impact. Nonetheless, if we assume—and the Voting Rights Act represents a congressional embrace of this assumption—that a "denial or abridgment of the right to vote on account of race" may occur without any discriminatory purpose,[139] then surely the states must be free to prevent this denial or abridgment. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[140]

Thus, race-conscious districts, unlike most affirmative action programs, can be seen as designed to prevent *present-day* discrimination.[141] In the context of voting, this discrimination may serve to "consistently degrade a . . . group of voters' influence on the political process as a whole."[142] Racial bloc voting by white voters "allows those elected to ignore the interests of racial minorities without fear of political consequences."[143] The resulting political powerlessness may deny (and historically has denied) equal protection beyond the electoral arena. The right to vote is "preservative of all rights."[144] Thus, "enhanced political

136. *Cf.* Ortiz, *supra* note 5, at 1126-31 (discussing how the peculiar interaction between state and private action in voting has influenced the development of the intent standard applicable in voting rights cases).

137. *See* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976).

138. *See* Kirksey v. City of Jackson, 663 F.2d 659, 662 (5th Cir. 1981) (holding that First Amendment concerns preclude plaintiffs in a vote-dilution lawsuit from inquiring directly into the motivation behind individual citizens' votes); S. REP. No. 417, 97th Cong., 2d Sess. 36 (1982) (rejecting a discriminatory purpose test because inquiring into the racial motivations of individual citizens would be "unnecessarily divisive").

139. The quoted language comes from § 2(a) of the Voting Rights Act of 1965, *as amended* 42 U.S.C. § 1973(a) (1988), which tracks the language of § 1 of the Fifteenth Amendment. *See also* S. REP. No. 417, *supra* note 138, at 36-37 (rejecting a discriminatory purpose test for claims of statutory racial vote dilution).

140. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

141. "A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Shaw II*, 64 U.S.L.W. at 4440.

142. Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion).

143. Rogers v. Lodge, 458 U.S. 613, 623 (1982); *see* Issacharoff, *supra* note 90, at 1865-71 (explaining the interaction between racial bloc voting and process failure).

144. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

power [can] be helpful in gaining nondiscriminatory treatment in public services" more generally.[145] Elsewhere, we have explained why the pursuit of regularity in district boundaries should not categorically pretermit efforts to combat the effects of racial polarization.[146] For present purposes, it is sufficient to note that the Court's opinions do not explain why a state's commitment to ensure the "advantages that [a fully effective] ballot affords"[147] to an otherwise excluded racially identifiable voting bloc is not a sufficiently compelling governmental interest to justify race consciousness.[148] This is particularly true where, as here, the state may act at virtually no cost to the legitimate expectations of other voters.

Moreover, present-day racial bloc voting may itself be the product of past de jure race discrimination. To the extent that racially correlated differences in political preferences are the product of socioeconomic disparities produced by inferior access to schools, government services, and the like, state action has *caused* polarized voting. More directly, purposeful state discrimination *in the election process itself* is hardly a relic of the distant past. In the Georgia of *Miller v. Johnson*,[149] to take one particularly salient example, the post-1980 round of congressional reapportionment produced no majority-black districts at all because Joe Mack Wilson, then the chairman of the Georgia House Reapportionment Committee declared, "I don't want to draw nigger districts."[150] Surely, such overt state-sponsored discrimination is likely to have affected white voters' attitudes by communicating the idea that black voters' attempts to gain political power should be resisted.[151] Simply announcing, after more than a century of pervasive, purposeful, overt state action, that from here on out the state will communicate no new polarizing messages does not fully cure the violation or place black citizens in the electoral posture they would have occupied absent that unconstitutional state action. Rather, it perpetuates the discriminatory effects into the future.[152]

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145. Katzenbach v. Morgan, 384 U.S. 641, 652 (1966).

146. *See* Karlan, *supra* note 37, at 302-03, 309.

147. Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960).

148. For a brilliant discussion of this issue, see Blacksher, *supra* note 99.

149. 115 S. Ct. 2475 (1995).

150. *Id.* at 2502 (Ginsburg, J., dissenting) (internal quotation marks omitted) (quoting Busbee v. Smith, 549 F. Supp. 494, 501 (D.D.C. 1982) (three-judge court)). Only after the *Busbee* court denied Georgia preclearance under § 5 did the state draw the majority-black Fifth Congressional District now represented by John Lewis.

151. *See, e.g.*, Anderson v. Martin, 375 U.S. 399 (1964) (striking down a Louisiana statute requiring that candidates' races be disclosed on the ballot because such a requirement encouraged racially polarized voting); *cf.* Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993) (describing the "pernicious" message race-conscious districting may send to both voters and representatives).

152. The state's direct role in creating and perpetuating racial bloc voting takes it out of the realm of non-remediable "societal discrimination," *see Shaw II*, 64 U.S.L.W. at 4440. Justice

Curing prior purposeful discrimination that has infected a central public institution may require race-conscious assignment of individuals, particularly when individuals' choices will otherwise continue to reflect pre-existing patterns. This insight is hardly new. What is surprising, however, is that the Supreme Court, having borrowed so indiscriminately from the ill-fitting affirmative action case law and having offhandedly analogized race-conscious districts to segregated public facilities, has completely ignored a line of precedent that speaks directly to this point. Race-conscious districting, to the extent it verges on any pre-existing category of race-conscious government decisionmaking, does not resemble state attempts to *segregate* citizens on the basis of race, but rather state attempts to *integrate* previously de jure segregated institutions like the public schools.

In the aftermath of *Brown v. Board of Education*,[153] "[s]chool boards that [had] operated dual school systems [were] 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'"[154] Given residential patterns (which might have been produced in part by school segregation) and the pre-existing attendance patterns that created racially identifiable schools, desegregation "almost invariably require[d] that students be assigned 'differently because of their race.'"[155] As the Court observed in 1971, after a decade of discouraging experience with freedom of choice plans (under which jurisdictions remained ostensibly race neutral, knowing all the while that segregated schools would persist)[156]: "Any other approach would freeze the status quo that is the very target of all desegregation processes."[157]

The race consciousness required in the school desegregation cases rested on the correspondence between violation and remedy: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in

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O'Connor's one-paragraph dismissal of this argument when a state responds to the problem by creating non-compact remedial districts, *see Vera*, 64 U.S.L.W. at 4461, does seem to assume its validity as a compelling remedial interest.

153. 347 U.S. 483 (1954).

154. McDaniel v. Barresi, 402 U.S. 39, 41 (1971) (quoting Green v. County School Bd., 391 U.S. 430, 437-38 (1968)).

155. *McDaniel*, 402 U.S. at 41 (internal quotation marks omitted).

156. *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (striking down a state anti-busing law because the "apparently neutral" directive that school assiguments be "'color blind' . . . against the background of segregation, would render illusory the promise of *Brown v. Board of Education*," 347 U.S. 483 (1954)).

157. *McDaniel*, 402 U.S. at 41.

formulating a remedy."[158] Moreover, the racial assignment of particular pupils in the course of implementing the remedy did not give rise to a legally cognizable injury: all students were eutitled to attend *a* school, and each one received a constitutionally acceptable education.[159]

An analogous perspective should inform the Court's treatment of race-conscious districting. The starting point is an understandiug of "what sorts of integration and segregation electoral structures can produce."[160] As we have explained elsewhere, "while the Voting Rights Act cannot do very much to desegregate American neighborhoods, it has made considerable progress in integrating national, state, and local legislative bodies."[161] But this progress is almost entirely a function of deliberately created majority-nonwhite districts.[162] Without intentional state and federal efforts, legislative desegregation simply would not have occurred. Moreover, the negligible number of nonwhite representatives elected from majority-white constitueucies suggests that race-conscious districting is still necessary to secure desegregated elected bodies.[163] Put in terms of the schools cases, Congress, for one, has not yet clearly attained "unitary status."[164]

As long as racial bloc voting persists, legislative integration will depend on the retention of majority-nonwhite districts. Moreover, like the public schools cases (and unlike the examples of race consciousness on which *Shaw* and *Miller* rely), absent special circumstances, the assignment of white voters to majority-black districts imposes no tangible injury and disturbs no legally cognizable settled expectations. No voter has a right to be assigned to any particular district, no voter has a right to be placed in a district where her preferred candidate will win, and

158. *Swann*, 402 U.S. at 46 ("To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.").

159. "To be sure, a [white] pupil who is bused from a neighborhood school to a comparable school in a different neighborhood [as part of a desegregation remedy] may be inconvenienced.... But the position of bused pupils is far different from that of employees who are laid off or denied promotion. Court-ordered busing does not deprive students of any race of an equal opportunity for an education." United States v. Paradise, 480 U.S. 149, 187 n.2 (1987) (Powell, J., concurring); *see Barresi*, 402 U.S. 39 (rejecting an equal protection claim brought by the parents of students bused to achieve racial balance).

160. Karlan, *supra* note 83, at 95.

161. *Id.* at 96.

162. *See* Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, at 335, 336-37, 343 (Chandler Davidson & Bernard Grofman eds. 1994); Pildes, *supra* note 89, at 1360-61.

163. *Cf.* Lemon v. Bossier Parish Sch. Bd., 444 F.2d 1400, 1401 (5th Cir. 1971) (noting, in the context of a school district that had been desegregated for only one semester, that "[o]ne swallow does not make a spring").

164. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 486-87 (1992) (defining the achievement of "unitary status" as the satisfaction of the duty to eliminate the dual educational system).

certainly no voter has a right to expect that members of her racial group will continue to exercise disproportionate political power simply because this group constitutes a numerical majority. The persistence of racial bloc voting and the place of the electoral process at the absolute heart of democratic self-government render Justice Blackmun's insight in *Bakke* especially compelling: "In order to get beyond racism, we must first take race into account. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."[165]

165. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.).