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Supreme Court Destabilization of Single-Member Districts

Samuel Issacharoff†

In the three decades since the passage of the Voting Rights Act ("VRA"),¹ attention has shifted dramatically from rudimentary notions of access to the ballot to the most difficult questions of representation. In part, the very successes of the VRA in making the franchise more broadly accessible than at any other time in the Nation's history placed the foundational questions of democracy properly before the political community. But in large part a confluence of events—from the decennial reapportionment, to the nomination of Lani Guinier as Assistant Attorney General, to the visible presence of an expanded group of minority elected officials²—has forced questions concerning "fair and effective" representation to the forefront of the voting rights agenda.

The Supreme Court's unsatisfying confrontation with the ultimate questions of political fairness in Shaw v Reno³ and Miller v Johnson⁴ opened the door to a reevaluation of one of the

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² After the 1992 elections, there were forty black members of Congress, Clarence Lusane, African Americans at the Crossroads: The Restructuring of Black Leadership and the 1992 Elections 174-176 (South End Press, 1994), one black U.S. Senator (Carol Moseley Braun of Illinois), id at 174-75, and one black governor (L. Douglas Wilder of Virginia), id at 161-62.

³ 113 S Ct 2816 (1993)(holding that a North Carolina redistricting plan was so irregular on its face that it could rationally be viewed only as an effort to segregate races for purposes of voting and that it thus violated the Equal Protection Clause of the Fourteenth Amendment and the VRA). See Samuel Issacharoff, Judging Politics: The Elusive Quest for Judicial Review of Political Fairness, 71 Tex L Rev 1643, 1693 n 249 (1993)(describing Shaw as "an opinion of extraordinary ambiguities" which has resulted in "a strained constitutional doctrine in which states are neither forbidden to consider racial criterion in redistricting nor required to create compact districts, but may nonetheless violate the Constitution if they both excessively rely on race and excessively depart from compactness") (emphasis in original).

⁴ 115 S Ct 2475 (1995). Miller reads Shaw expansively to strike down racially motivated district line drawing where race serves as the "predominant factor" in the redistricting process. Id at 2488. For other examples of how courts have dealt with the
fundamental building blocks of most representation in the United States—the single-member, geographically based district. With Justice Clarence Thomas’s forceful invocation of alternative voting systems as part of his dissent from twenty-five years of vote-dilution case law, and with the first judicial order of nondistricted elections as a court-imposed voting rights remedy, the issue of nondistricted elections is emerging front and center in the voting rights debate.

There is a significant and growing body of literature in political science on the benefits and demerits of various voting arrangements in use around the world. Much of it focuses on the unique Anglo-American attachment to single-member districts and the propensity of such electoral systems to overreward majorities and to deliver strong returns to those controlling the districting process. There is also by now a significant body of


5 In Holder v Hall, 114 S Ct 2581, 2594-96 (1994)(Thomas concurring), Justice Thomas questioned the seemingly unthinking adherence of the Court to traditional district-based electoral schemes, primarily to illustrate his argument that “there are undoubtedly an infinite number of theories of effective suffrage,” but that these are questions of “political philosophy, not . . . law” and are thus “beyond the ordinary sphere of federal judges.”

6 See Cane v Worcester County, Md, 847 F Supp 369 (D Md 1994), aff’d in part, rev’d in part, 35 F3d 921, 927-29 (4th Cir 1994), cert denied, 115 S Ct 1097 (1995), on remand, 874 F Supp 687 (D Md 1995), modification denied, 874 F Supp 695 (1995), in which the district court, in order to remedy a Section 2 violation of the VRA, initially ordered that the county commissioners be elected through cumulative voting. The Fourth Circuit reversed, holding that the district court had not properly considered the county’s preference for geographic diversity on the commission. On remand, the court ordered that primary elections be conducted in single-seat districts (ensuring geographically diverse candidates) but that the general election be conducted using cumulative voting.

work in the legal academy applying these political science insights to the problems of minority voting rights.8

Rather than attempting to rearticulate the relative advantages of various voting systems, this Article addresses the Supreme Court's contribution to the reevaluation of the foundational questions of voting rights. The thesis may seem a bit odd because, with the exception of Justice Thomas's disquisition on the failures of contemporary voting rights law, the Court has never addressed the question of alternative voting systems. Nonetheless, the thesis of this Article is that in its voting rights jurisprudence the Court has unleashed a set of expectations for, and constraints upon, the operation of electoral systems that are foundationally destabilizing for districted election systems.

The basic argument borrows from the analytical framework of the great political theorist Isaiah Berlin9 and from the seminal article by political scientist Jonathan Still.10 From Berlin comes the core insight that the language of freedom and liberty that animates voting rights jurisprudence expresses both a negative liberty of a region of individual autonomy from state control, and a more difficult positive conception of political goods that may be demanded of liberal society.11 The Supreme Court's most successful interventions into the political system, the ones that enforced the prohibitions on overt racial barriers to the franchise12 and on wealth qualifications for voting,13 identified

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12 See, generally, United States v Reese, 92 US 214, 217 (1875)(holding that the Fifteenth Amendment prohibits state and federal governments from discriminating in the exercise of the right to vote on account of race, color, or previous condition of servitude); Ex parte Yarbrough, 110 US 651, 665 (1884)(finding that Article I, Section 4 of the Fif-
the negative liberties that operate in the political arena. These opinions, and subsequent cases involving the more positive right to representational fairness,\(^\text{14}\) created a taxonomy of other

\(\text{10th}\) Amendment gives Congress the authority to make laws protecting the right of all persons to vote in national elections, and that the Fifteenth Amendment conferred on blacks the right to vote in any state which by law confined the right to vote to white persons; \textit{Myers v Anderson}, 238 US 368 (1915)(extending constitutional protection to municipal elections); \textit{Nixon v Herndon}, 273 US 536 (1927)(holding that a statute excluding blacks from voting in the Democratic primary was "state action" that violated the Fourteenth and Fifteenth Amendments); \textit{Smith v Allwright}, 321 US 649 (1944)(overturning a Texas scheme of excluding blacks from Democratic primary elections and finding the party to be an agent of the state because it operated under a state statutory system for the selection of party nominees to be included on the general ballot); \textit{Terry v Adams}, 345 US 461 (1953)(holding that all-white "Jaybird" primaries held prior to the Democratic primary were part of a "three step" exclusion process designed to deprive blacks of their right to vote and were a violation of the Fourteenth Amendment).\(^{13}\)


\[^{14}\] See \textit{Gomillion v Lightfoot}, 364 US 339 (1960)(finding that city's transparent attempt to remove all but four or five of its black voters by altering the city's shape from a square to a twenty-eight-sided figure constituted racial discrimination in violation of the Fourteenth and Fifteenth Amendments); \textit{Baker v Carr}, 369 US 186 (1962)(holding that the malapportionment of state legislative districts was justiciable under the Fourteenth Amendment and rejecting the claim that it was a "political" question not subject to judicial review); \textit{Gray v Sanders}, 372 US 368 (1963)(invalidating a method of nominating statewide candidates which unequally weighted votes in rural and urban areas and announcing the one person, one vote standard); \textit{Wesberry v Sanders}, 376 US 1 (1964)(finding unconstitutional an apportionment scheme in which a single congressman represented from two to three times as many voters as other congressmen); \textit{Reynolds v Sims}, 377 US 533 (1964)(applying the one person, one vote rule to state legislative apportionments); \textit{Lucas v Colorado General Assembly}, 377 US 713 (1964)(holding that the apportionment of state senate seats on any basis other than one person, one vote was unconstitutional even if approved by a statewide referendum); \textit{Allen v State Bd. of Elections}, 393 US 544 (1969)(holding that the VRA applied to a broad range of electoral practices); \textit{Kirkpatrick v Preisler}, 394 US 526 (1969)(finding a disparity in congressional district sizes following redistricting unconstitutional because it was avoidable and the districts were not as equal "as is practicable"); \textit{Wells v Rockefeller}, 394 US 542, 546 (1969)(companion case of \textit{Kirkpatrick} holding that the "as nearly as is practicable" standard applied to a plan that followed traditional county boundaries but had a deviation of 13 percent between the largest and smallest districts); \textit{Whitcomb v Chavis}, 403 US 124 (1971)(holding that multimember state legislative districts, while not \textit{per se} unconstitutional, violated the Equal Protection Clause by diluting the voting strength of blacks); \textit{East Carroll Parish School Bd. v Marshall}, 424 US 636 (1976)(finding that Louisiana at-large elections unconstitutionally diluted black voting strength); \textit{Rogers v Lodge}, 458 US 613 (1982)(holding that the at-large electoral system of Burke County, Georgia was unconstitutionally maintained for the "invidious" purpose of diluting black voting strength, and upholding the judicial ordering of single-member districts as the remedy); \textit{Karcher v Daggett}, 462 US 725 (1983)(finding a New Jersey congressional redistricting plan with less than 1 percent population deviation between districts unconstitutional because the imbalance was the result of "bad faith" reapportionment policies); \textit{Thornburg v Gingles}, 478 US 30 (1986)(applying the 1982 amendments to the VRA in overturning the use of a North Carolina legislative plan that impermissibly diluted the vote of the black minority through the use of multimember districts); \textit{Board of Estimate of City of New York v Morris}, 489
rights that may be distilled and examined independently. By examining these rights in light of Still's work, it is then possible to assess the extent to which any political system can adequately satisfy them. The major contribution to be drawn from Still concerns the necessarily elusive nature of the definition of "political equality" as a condition for fairness in the electoral arena. The term "equality" can be shown to cover a variety of criteria whose implications for the design of an electoral system may not necessarily be capable of coexistence.  

The core thesis of this Article is that the Supreme Court's description of the positive goods that should be delivered by a voting system is difficult to satisfy under current systems of representation. Were one to begin from scratch to determine which system would best satisfy the various constraints imposed by the Court on a fair system of representation, it is unlikely that single-member, geographically based districts would be the electoral system of choice. It is through the development of these notions of political fairness that the Supreme Court has helped destabilize current structures of representation and contributed to the present examination of alternative voting systems.

I. INDIVIDUAL EQUALITY

Without doubt, the Supreme Court's most triumphant incursions into the electoral arena have been in the name of protecting the individual's right to participate. It is these claims, most clearly identified by the act of getting to the polling site and casting a ballot, that fall within the ambit of negative constraints upon apparently arbitrary uses of state authority. The act of casting a vote that is relatively uninhibited by state regulation is at the heart of the political zone in which an individual "is or should be left to do or be what he is able to do or be, without interference by other persons[.]" Thus, in landmark cases, such as \textit{Harper v Virginia Board of Elections}, the Court pronounced both the centrality of the franchise in the constellation of constitutional

\footnotesize{US 688 (1989)(finding that a 78 percent population disparity between seats on the Board of Estimate was an unconstitutional deviation from one person, one vote); \textit{Chisom v Roemer}, 501 US 380 (1991)(finding state judicial elections to be within the scope of the VRA); \textit{Houston Lawyers' Ass'n v Attorney General of Texas}, 501 US 419 (1991)(reaffirming \textit{Chisom}).}

Still, 91 Ethics at 375-94 (cited in note 10).


\footnotesize{383 US 663 (1966).}
rights\textsuperscript{18} and the paramount importance that individual citizens be free from invidious or arbitrary governmental restrictions on that right, as through a poll tax.\textsuperscript{19}

Instances of the complete exclusion of entire classes of people from the franchise propelled what has been termed the “first generation” of voting rights cases.\textsuperscript{20} Particularly with regard to functionally disenfranchised black citizens, the removal of the negative constraints upon individual rights of participation dramatically altered citizen access to the political process.\textsuperscript{21} The first generation of access cases defined a certain “minimum area of personal freedom”\textsuperscript{22} to be protected from state encroachment. These cases elaborate a principle that Jonathan Still has defined as “Universal Equal Suffrage”; namely, that “[e]veryone is allowed to vote, and everyone gets the same number of votes.”\textsuperscript{23}

This right of access, however, defined no positive freedom to elect, nor did it condition what sorts of political rules were legitimate. As I have stated elsewhere, there is little that distinguishes truly democratic elections from authoritarian “show” elections if one focuses exclusively on issues of individual access to the polls.\textsuperscript{24} Individual freedom from undue state interference with access to the ballot may be a necessary precondition for democratic politics, but it does little to define the actual structure of a political system.

Only with the advent of the “one person, one vote” line of cases did the Court for the first time apply an individual-rights component to the structure of local governance. In Reynolds v Sims,\textsuperscript{25} the Court took a decisive doctrinal step to move its vot-

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\textsuperscript{18} Id at 670 (“[T]he right to vote is too precious, too fundamental to be so burdened or conditioned.”).
\textsuperscript{19} Id at 668-69.
\textsuperscript{22} Berlin, Two Concepts of Liberty at 126 (cited in note 9).
\textsuperscript{24} See Aleinikoff & Issacharoff, 92 Mich L Rev at 600-01 (cited in note 20).
\textsuperscript{25} 377 US 533 (1964).
ing rights jurisprudence beyond the simple recognition of the franchise as a fundamental individual right. *Reynolds* begins with a view that “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”26 The opinion quickly changes gears, however, to an instrumental argument about the exercise of the franchise “in a free and unimpaired manner” as “preservative of other basic civil and political rights.”27 Having made that shift, the Court in turn reasoned that the instrumental value of the vote can be abridged not simply by outright denial but “by a debasement or dilution of the weight of a citizen’s vote.”28 Operationally, as has been well chronicled, the Court doomed any departure from a strictly mathematical conception of equality in the weighing of votes:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. . . . The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.29

The concept of equipopulational voting terminated the extreme malapportionment that represented a significant bulwark of rural American society against the encroachment of urban power.30 In the Court’s arching rhetoric, “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”31 The reapportionment revolution that began with

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26 Id at 555. My colleague, Professor Levinson, refers to this as the “liberal side” of *Reynolds*. Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t It Go Away?*, 33 UCLA L Rev 257, 263 (1985).
28 Id at 555.
31 *Sanders*, 372 US at 381.
Baker v Carr\textsuperscript{32} dismantled the established representational order with breathtaking sweep.\textsuperscript{33} Within a short period of time, the practice of assigning state senate representation on a county basis, for example, had fallen sway to the one-person, one-vote principle of redistricting.\textsuperscript{34} On its own terms, however, the equipopulational principle could require "equal shares"\textsuperscript{35} in the distribution of votes, but it could not distinguish among forms of government that could satisfy what Justice Potter Stewart caustically referred to as the "uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic."\textsuperscript{36}

The limitations of the one-person, one-vote principle is clearly evident in Fortson v Dorsey,\textsuperscript{37} a challenge to the use of multimember districts for election to the Georgia State Senate. The Supreme Court held that so long as there was "substantial equality of population"\textsuperscript{38} among the districts, the constitutional requirements were satisfied. When confronted with a hypothetical situation in which all voters of a subdistrict voted for a losing candidate and thus had undesired representation thrust upon them, the Court opined that since such a representative must stand for election before the entire multimember district,

[H]e must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator. If the weight of the vote of any voter in a Fulton County district, when he votes for seven senators to represent him in the Georgia Senate,
is not the exact equivalent of that of a resident of a single-member constituency, we cannot say that his vote is not “approximately equal in weight to that of any other citizen in the State.”

Despite the limited application of the one-person, one-vote principle in distinguishing among equipopulational voting systems, the Court nonetheless did infuse these early voting cases with a strong measure of idealized political power. This is most clearly illustrated in Reynolds v Sims, when the Court added that its one-person, one-vote rule should ensure that “each citizen have an equally effective voice in the election of members of his [ ] legislature.” The guarantee of an “equally effective voice” in turn would promote a process that yielded “fair and effective representation” for the electorate as a whole, or as the Court later would term it, a process that would be “politically fair.”

The new fairness constraint yielded two immediate problems for voting rights jurisprudence. First, the term “political fairness” has no self-evident meaning. It could be as limited as guaranteeing every adult citizen the opportunity to cast a ballot, or as expansive as securing “proper” outcomes from contested elections. The first interpretation would trivialize the objectives of the reapportionment cases; the second would involve the Court in precisely the types of “political” decisions that elicited the ongoing dissents of Justices Felix Frankfurter and John Harlan.

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39 Id at 438.
40 Reynolds, 377 US at 565 (emphasis added).
41 Id at 565-66.
42 Gaffney v Cummings, 412 US 735, 753 (1973)(holding that the Equal Protection Clause is not violated when a state, redistricting its legislature, ignores political subdivision lines in a self-conscious attempt to ensure that the state’s two major political parties would be represented in rough proportion to their statewide popularity).
43 This line of dissents picks up from the objections raised by Justice Felix Frankfurter in his exposition of the political question objection to judicial review of reapportionment. See Colegrove v Green, 328 US 549, 553-54 (1946)(“It is hostile to a democratic system to involve the judiciary in the politics of the people.”).
44 The two Justices’ rejection of the judicial review of such “political” questions is further illustrated by Justice Frankfurter’s dissent in Baker v Carr, which was joined by Justice Harlan. “[T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. . . . Appeal must be to an informed, civicly militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people’s representatives.” Baker, 369 US at 270 (Frankfurter dissenting). See also Justice John Marshall Harlan’s dissent in Allen v State Bd. of Elections, 393 US 544, 583-95 (1969)(Harlan concurring in part and dissenting in part).
Second, it was completely unclear what relation the Court envisioned between the operational command of the equipopulation cases and the ultimate objective of a fair system of representation. Clearly the Court believed that malapportionment on the scale of that present in Tennessee or Alabama was incompatible with any guiding conception of fairness. But if the definition of unfairness turned solely on malapportionment, did the converse definition of fairness require only equipopulational distribution of representation? And if so, what purpose did the language of fairness serve beyond simply commanding the states to reapportion on the basis of one person, one vote?

The early one-person, one-vote cases provide no methodological clue as to how these questions were to be answered. Rather, the cases express an ill-defined aspiration for equitable political outcomes combined with a hope that the equipopulation principle would deliver the new political order. As the rule of equal population across districts was internalized by political actors, however, its limitations in achieving the goal of transforming the political system increasingly became apparent. Particularly with the advent of the computer, sophisticated political actors showed remarkable resourcefulness in gerrymandering political boundaries without running afoul of the equal population principle. The clearest example is *Karcher v Daggett*, a challenge to the post-1980 congressional redistricting of New Jersey, where district lines were aptly characterized as "a flight of cartographic fancy." The sole response offered by the Court was to ratchet up a "zero tolerance" standard for one person, one vote to require precise mathematical fidelity to equally weighted votes, even where the disparities between districts were less than the margin of error of the underlying Census enumeration.

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45 *Baker*, 369 US at 245 (Douglas dissenting)(noting that disparities in representation in Tennessee ranged up to nineteen to one).
46 *Reynolds*, 377 US at 545 (noting that disparities in representation in Alabama's state senate ranged up to forty-one to one).
47 Indeed, there is even some evidence that conformity to the one-person, one-vote rule provided political cover for partisan gerrymandering. See Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 Ariz St L J 277, 278-79.
49 Id at 762-63 (Stevens concurring), quoting Larry Light, *New Jersey Map Imaginative Gerrymander*, 40 Cong Q 1190, 1193 (1982). In his article, Light states that New Jersey's redistricting resulted in "some of the most bizarrely shaped districts to be found in the nation." Light, 40 Cong Q at 1190.
50 See *Karcher v Daggett*, 462 US at 732 (finding the New Jersey apportionment plan
II. ANTIDISCRIMINATION I: INDIVIDUAL RIGHTS

The history of voting rights is, quite simply, inseparable from the issue of minority suffrage. The implementation of restrictions on the franchise dates from the post-Reconstruction "redeemed" constitutional conventions of the former Confederate states. The legacy of this period included the principal targets of the first generation of voting rights cases, including the poll tax,\(^5\) the literacy test,\(^6\) and the prohibition on voting by persons convicted of certain categories of crimes.\(^7\) This area of law is well rooted in the Fifteenth Amendment and stretches back for over a century.\(^8\) In voiding such laws, the Supreme Court grounded the operative principle in the "organic law" of the Constitution that "grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race."\(^9\)

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\(^5\) See, for example, Miss Const of 1890, Art 12, § 243 (repealed in 1975)(imposing poll tax on all eligible male electors).

\(^6\) See, for example, Miss Code § 3613 (1892)(requiring voters to be able to read and interpret the state constitution);\(^1\) \textit{Louisiana v United States}, 380 US 145 (1965)(striking down a Louisiana literacy test on grounds of discriminatory application).

\(^7\) See, for example, Miss Code § 3614 (1892)(prohibiting voter registration by persons convicted of certain crimes);\(^2\) \textit{Hunter v Underwood}, 471 US 222, 229 (1985)(striking down a 1901 Alabama criminal disenfranchisement law because the legislature's intent in enacting the statute was to preclude blacks from voting).

\(^8\) See, for example, \textit{United States v Reese}, 92 US 214 (1875)(holding that the Fifteenth Amendment prohibits state and federal governments from discriminating in the exercise of the right to vote on account of race, color, or previous condition of servitude);\(^3\) \textit{Guinn v United States}, 238 US 347 (1915)(holding unconstitutional under the Fifteenth Amendment an amendment to the Oklahoma Constitution enacting a stringent literacy requirement but grandfathering all those able to vote prior to 1866, those who resided on foreign soil in 1866, and lineal descendants of both groups);\(^4\) \textit{Myers v Anderson}, 238 US 368 (1915)(striking, on Fifteenth Amendment grounds, a grandfather clause which effectively disenfranchised black citizens);\(^5\) \textit{Nixon v Herndon}, 273 US 536, 541 (1927)(holding that the Fourteenth Amendment was passed with "a special intent to protect the blacks from discrimination against them," but not reaching the Fifteenth Amendment question);\(^6\) \textit{Lane v Wilson}, 307 US 268, 275 (1939)(holding that "[t]he reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions").

\(^9\) \textit{Smith v Allwright}, 321 US 649, 664 (1944)(holding that the right to vote in primary elections is an integral part of the electoral process, and that the exclusion of blacks from the Texas Democratic party primary was state action because under Texas law party membership was required to vote in state-sanctioned party primaries).
The use of the antidiscrimination principle to strike down racial exclusion from the franchise is an extension of the principle of negative liberties. Prohibitions on racial or ethnic exercise of the franchise simply confirm the overriding principle that the state should not be permitted to deny a societal good on the basis of an irrelevant or arbitrary classification. Securing the right of minority citizens actually to register and vote confirms "the fundamental rights of personal choice and expression which voting in this country was designed to serve." As such, however, the antidiscrimination model of voting rights does nothing to ground the discussion of what form of political governance should prevail. Nor does it help to differentiate single-member districts from any other allocative device for representational opportunity.

More fundamentally, the easy manifestation of the exclusion of blacks from the exercise of the franchise obscured the relation between the negative liberty claim of equal individual treatment and the more elusive conception of full and effective integration into the political process. The dual nature of the claims of black citizens for full participation in the political process draws back to two separate concerns evident in the United States v Carolene Products definition of the proper scope of strict judicial oversight. On the one hand, the exclusion of blacks from the franchise is as overt an example as can be had of a prohibition based on animus against a discrete and insular minority. But the form of the excluded good, the franchise, necessarily implicates a closing of the political process for that group, an alternative and somewhat less explored concern of the famous footnote. Carolene Products addresses not just the discrete and insular quality of the minority group subject to adverse governmental action, but whether this quality constitutes "a special condition" such that it "tends seriously to curtail the operation of those political process-

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57 304 US 144, 152-53 n 4 (1938) (upholding a federal statute prohibiting the interstate shipment of filled milk because it "rests upon some rational basis within the knowledge and experience of legislators," but indicating that there may be a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution").
58 Id at 153 n 4 (suggesting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"). The concern with process failure as a governing principle for judicial oversight of political decisions is most fully explored in John Hart Ely, Democracy and Distrust 101-04 (Harvard University Press, 1980).
es ordinarily to be relied upon to protect minorities... No doubt the exclusion of minorities from all exercise of the franchise closed off the political processes to them. Whether removing the overt prohibition restored the operation of the political process to its presumed curative role remained in doubt through the early years of voting rights litigation.

The secondary effects of a closed political process, even in the absence of formal barriers to the exercise of the franchise, could remain obscured as long as the franchise was simply denied to minorities. Once that barrier fundamentally had been lifted—the direct and immediate consequence of the VRA—the individual concern for equal access to the ballot shifted to a more positive liberty concern with effective exercise of the franchise. Put another way, access to the ballot for previously disenfranchised black citizens moved the focus of concern from that of simple animus against a discrete and insular minority to that of voters seeking to be effective actors in the political process. In this fashion, the voting rights claims of minorities followed the developmental path of urban and other undervalued votes in the jurisprudential aftermath of *Baker v Carr* and its progeny.

III. ANTIDISCRIMINATION II: ASSOCIATIONAL GROUP RIGHTS

Once the central questions of the minority franchise moved into the terrain of effective representation, the group quality of minority voting necessarily came to the fore. In the "second generation" of voting rights cases, primarily in the challenge to at-large or multimember districting schemes, the case law quickly outstripped a simple notion of individual autonomy and posed an increasingly complex set of questions.

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60 See *East Carroll Parrish School Bd. v Marshall*, 424 US 636 (1976)(finding that at-large elections would unconstitutionally dilute black voting strength in Louisiana); *United Jewish Organizations, Inc. v Carey*, 430 US 144 (1977)(holding that the Constitution permits states to draw lines deliberately in such a way that the percentage of nonwhite majority districts roughly approximates the percentage of nonwhites in the county); *City of Mobile v Bolden*, 446 US 55 (1980)(finding that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation," id at 62 (emphasis added), and that "disproportionate impact alone cannot be decisive," id at 70, but also stating that "the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation," id at 79); *Rogers v Lodge*, 458 US 613, 622 (1982)(holding that the at-large electoral system of Burke County, Georgia was being maintained for the "invidious purpose" of diluting black voting strength); *Karcher v Daggett*, 462 US 725 (1983)(emphasizing again that the Court is concerned with intentional dilution, and that unavoidable, unintentional, or justifiable variance is often acceptable); *Thornburg v Gingles*, 478 US 30 (1986)(holding that the use of multimember dis-
In retrospect, the second generation of voting rights cases had distinctive periods of development. At first, the case law developed in classic situations involving the complete exclusion of blacks from any representation in heavily black cities of the Deep South, such as Jackson, Mississippi, or Selma, Alabama. These cases presented the limitations of simply securing the right to the franchise for minority voters who stood no chance of ever electing a candidate of their choosing to public office. At-large elections in these jurisdictions dated from the late nineteenth century, the period of an unholy alliance between northern progressives and southern redeemers, and were inaugurated as part of the post-Reconstruction enshrinement of white rule in the South. In such cases, courts had little difficulty condemning both the outward purpose of the adoption of at-large elections and the function of these elections as a continuing bulwark of black exclusion from elected office.

Unfortunately, the cases developing the constitutional or statutory infirmity of at-large elections did not elucidate any exact contours for determining when at-large elections were indeed discriminatory. Under White v Regester and the Fifth Circuit's influential Zimmer v McKeithen, courts developed a laundry list of considerations that were to be judged in their totality of the circumstances. While the inquiry under White and Zimmer was multifaceted, the facts were generally similar: a

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61 See Kirksey v City of Jackson, 461 F Supp 1282 (S D Miss 1978), vacated and remanded on other grounds, 625 F2d 21 (5th Cir 1980), on remand, 506 F Supp 491 (S D Miss 1981), aff'd 663 F2d 659 (5th Cir 1981); Talton v City of Selma, 758 F2d 585 (11th Cir 1985).


63 The Court pointed out on several occasions that while multimember districts were not per se unconstitutional, they would be invalidated if "conceived or operated as purposeful devices to further racial discrimination" by minimizing, canceling out or diluting the voting strength of racial elements in the voting population." Rogers, 458 US at 617 (1982), quoting Whitcomb v Chavis, 403 US 124, 149 (1971). The Court has also recognized the various methods of discrimination by districting, finding that dilution of the minority vote occurs "by the dispersal of blacks into districts in which they constitute an ineffective minority . . . or from the concentration of blacks into districts where they constitute an excessive majority." Gingles, 478 US at 46 n 11 (emphasis added).


66 See Zimmer v McKeithen, 485 F2d at 1305.
century of deep racial antagonism; the exclusion of blacks from any meaningful participation in public life, including elective office; and a panoply of official assaults on the integrity of black civil life directly traceable to Jim Crow.\textsuperscript{67} We may speculate that, as an evolutionary matter, no great doctrinal clarity emerged from the early case law challenging Deep South, at-large elections because none was needed. Even the crude methodology of \textit{White/Zimmer} sufficiently illustrated that something was wrong when, more than a century after the adoption of the Fifteenth Amendment, blacks still were clustered in great numbers in poverty-stricken neighborhoods, unable to secure any meaningful representation on the councils of state.

As the cases moved north, they lost much of the factual clarity of the first challenges to at-large elections. Most critically, cases arising in Norfolk, Virginia, and Pittsburgh, Pennsylvania, for example, raised complicated claims of diminution of electoral opportunity where in fact blacks had sat on city councils for decades.\textsuperscript{68} It was impossible in such cases to simply bootstrap a principle of exclusion to stand as the predominate proxy for an infirm political system. Instead, a more precise definition of rights in the political arena was required: what level of representation was "sufficient"? If exclusion was not complete, then were blacks better served by serving as swing voters for all elections rather than commanding the complete accountability of only a subset of representatives?\textsuperscript{69} And who, besides blacks, could lay claim to the emerging concept of group representation?\textsuperscript{70}

Once the voting cases moved beyond electoral patterns that stood as surrogates for Jim Crow, two basic problems confronted

\textsuperscript{67} See id at 1305-06 for a detailed discussion of this "panapoly of factors" that could be used to establish vote dilution.

\textsuperscript{68} See \textit{Collins v City of Norfolk}, 883 F2d 1232, 1235 (4th Cir 1989)(one black representative on city council at all times since 1968); \textit{Metropolitan Pittsburgh Crusade for Voters v City of Pittsburgh}, 727 F Supp 969, 970 (W D Pa 1989)(six blacks had served on city council since 1911), aff'd in part, rev'd in part, 964 F2d 244 (3d Cir 1992).


\textsuperscript{70} See, for example, \textit{Campos v City of Baytown}, 849 F2d 943 (5th Cir 1988)(Higginbotham dissenting from denial of rehearing en banc), in which Judge Patrick Higginbotham argued that populations of black and Mexican-American voters, separately too small to each be entitled to a minority district, could not be aggregated so as to qualify for a single minority district. Such a combination, he argued, could not be considered politically cohesive under \textit{Gingles} (even if they voted similarly) because, lacking a common race or ethic origin, the combination was nothing more than a political coalition. Id at 945-46.
voting rights law. First, there was a critical need to establish how groups would be defined for legal protection. Second, courts had to be able to define the rights that such groups could properly claim.

The Court sought to avoid the first problem in *Thornburg v Gingles* by allowing political self-definition to determine the scope of protected group status under the VRA—at least for blacks. Essentially, the Court held that if a "cohesive minority" in a geographically compact area could establish that it faced significant "white bloc" voting—the primary operational device for excluding minorities from political office—then such a group merited legal protection. While this standard created some difficulty for lower courts assessing joint claims of exclusion brought by multiracial groups, the Court sought to avoid either a straight-off declaration that at-large electoral systems were per se impermissible or the messy business of assigning representation to some groups but not others. Therefore, *Gingles* allows self-selection for group status by voting patterns to satisfy the first condition for claiming political exclusion.

Unfortunately, *Gingles* failed to define the actual political goods to be delivered through voting rights claims in an adequate manner. *Gingles* developed in the context of whether or not to strike down at-large or multimember elections. Its primary role was to affirm the sweep of the 1982 amendments to the VRA and to sound the death knell for *City of Mobile v Bolden* and the conception that no claims for just representation may be made absent proof that exclusion was overtly purposeful. But *Gingles* says little with regard to the actual distribution of political goods independent of whether or not a cause of action could be stated against at-large or multimember election units. For

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71 478 US 30.
72 Id at 46-49.
74 See id at 46 ("Electoral devices, such as at-large elections, may not be considered per se violative of [Section] 2." (emphasis in original)).
76 446 US 55 (holding that since blacks in Mobile register and vote without hindrance, Mobile's at-large electoral system does not violate the Fifteenth Amendment).
77 Id at 62 ("Racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").
example, in the redistricting context in which districts are to be reassigned on a territorial basis, Gingles provides little guidance for evaluating the competing claims of various social and ethnic groups.

In Johnson v De Grandy, for instance, the Court confronted a claim by Cuban-Americans in Florida that Gingles required a “maximization” of their influence by creating the greatest number of Hispanic majority state senate districts possible. Under this theory, whenever a cohesive minority group could show that additional compact and contiguous districts that would be under its control could be drawn, and that its electoral aspirations for additional representation were frustrated by polarized voting patterns, a claim for judicial relief had been stated. This theory yields a mathematical conundrum. Take a jurisdiction that has five districts and is 36 percent black, 36 percent Hispanic, and 24 percent Anglo. Under various residential patterns it would be possible to create three majority Hispanic districts or three majority black districts (12 percent of total population made up of the preferred group, 8 percent of others). Regardless of whether a jurisdiction sought to satisfy the black or Hispanic claim for representation, the other could make a viable vote-dilution claim. Furthermore, no theory of “political fairness” could justify permanently assigning the white voters to “filler” status without any prospect of securing representation at all.

Applied literally, Gingles had difficulty warding off such a result. The Dade County Cuban community did engage in identifiably separate voting patterns (the polarized voting requirement), it did reside in clustered areas that could be fitted within reasonably configured majority Cuban districts, and the alteration of district lines would have created greater Cuban representation in the state legislature. By providing a formula that allowed for political advancement of self-defined political groups (along ethnic and racial lines), the Court in Gingles invited precisely the claim advanced in De Grandy.

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78 114 S Ct 2647 (1994).
79 Id.
80 The Gingles decision outlined three prerequisites to a successful voting rights claim. First, the minority group must show that it could command a majority in a redrawn single-member district. Second, the minority community must show that it is politically “cohesive” in its electoral preferences. Third, the minority group must demonstrate that their electoral choices are usually defeated as a result of white majority bloc voting. Gingles, 478 US at 50-51.
The Court resolved the claim for superordinate representation in *De Grandy* by holding that proportional representation should serve as a presumptive defense to claims of vote dilution. This holding serves as a stopgap against the most destabilizing claims of what amounts to a representational landgrab. Yet the fact remains that *De Grandy* is a direct result of the core problem with the assignment of representational opportunity under single-member districting schemes. The *Gingles* Court tried to define the circumstances under which groups could claim exclusion from the process of representation. The *Gingles* formula, however, could not escape the problem that, at some point, the state must assign the right of representation. Political self-definition only can go so far in districted election systems. While *De Grandy* places an upper boundary on claims for representation, even the *De Grandy* rationale cannot solve the competing claims of, for example, black and Hispanic groups over the last congressional seat in Florida. *Gingles*, even when considered with the additional *De Grandy* presumption, provides no normative basis for deciding among rival allocative decisions beyond decreeing that no cognizable group be excluded.

Moreover, as is evident in the *De Grandy* fact pattern in Florida, the decision to allocate representational opportunity to one group but not another raises a second level of individual claims. Ideally, a black or Hispanic district created under voting rights law (or, for that matter, the creation of a district expected to be Democratic or Republican or Irish or Italian or Jewish, etc.) would have a sufficient electoral density of the desired group to win elections, but without an excess of that group in the district, so as to avoid wasting the additional votes of that group—votes that could be used to influence the election result in a neighboring district. By conventional wisdom, Republican districts are “safe” when about 50 percent of the eligible voters are Republican; similarly, 55 percent Democratic districts are “safe,” as are minority districts that are about 65 percent minority in total population. Of necessity, this requires that significant num-

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81 *De Grandy*, 114 S Ct at 2651. This also logically follows from the fact that the third requirement of a successful voting rights claim in *Gingles*—that plaintiffs must demonstrate that their electoral choices are “usually defeated”—would not be satisfied if there was “proportional representation.”

82 The role of state authorities in making race-based districting decisions is central to the reemergence of constitutional scrutiny after *Shaw v Reno*. See *Miller v Johnson*, 115 S Ct 2475, 2486 (1995)(focusing on whether the “State assigns voters on the basis of race”).

83 The “65 percent Rule” is a rule of thumb that evolved to ensure minority safe
bers of "other" voters be cordoned off into these designated districts in order to fill out the equipopulational requirement without disrupting the preexisting designation of the district as belonging to the preferred group.

Both the Court's jurisprudence and the statutory text of the VRA\textsuperscript{64} seek to obscure the core distributional concern at the heart of all districting by invoking the language of equality, as in "the equal opportunity to elect its candidate of choice."\textsuperscript{65} But, as Peter Westen has aptly shown, the invocation of an equality principle cannot circumvent hard normative choices about distributional aims.\textsuperscript{86} Whether cast as a violation of the antiessentialism principle\textsuperscript{67} or as an embodiment of an expressive harm to individual dignity,\textsuperscript{68} assigning representation based on what state authorities determine to be the defining feature of a citizen's existence is necessarily problematic. While this is an inherent feature of districting, it becomes a first-order problem once the drawing of lines is coupled with the express objective of securing prescribed levels of group representation.\textsuperscript{69} Indeed, Professor Martin Shapiro consistently has argued that this, the fatal step, dates from Reynolds, where Chief Justice Earl Warren sought to collapse equal voting strength into the far more elusive concept of fair representation.\textsuperscript{70}

Only through a process of self-aggregation at the ballot box can the problem of state assignment of representational opportu-

\textsuperscript{64} 42 USC § 1973 et seq (1988).
\textsuperscript{65} Voinovich v Quilter, 113 S Ct 1149, 1156 (1993)(holding that a state could establish majority-minority districts—rather than a greater number of influence districts—even where not required under the VRA and even where this would allegedly reduce the electoral power of the minority).
\textsuperscript{70} Martin Shapiro, Gerrymandering, Unfairness, and the Supreme Court, 33 UCLA L Rev 227, 232 (1985).
nities be overcome. The Supreme Court in *Gingles* took a first step in furtherance of this principle by recognizing that self-aggregation would be indispensable to the operational definition of what constitutes a cohesive group for voting rights purposes. The problem is that, once a violation is proven, the remedy—the creation of single-member districts—necessarily violates such a principle of voter autonomy by using preconfigured geographic units as the basis of representation. Once the principle of group representation is pushed beyond the initial question of the complete exclusion of black representation in at-large elections, the voting rights analysis of who should be afforded representation in single-member districts quickly borders on the impossible. Should blacks or Hispanics control the last Florida congressional district? Should Asians be grouped with Hispanics or white professionals in a lower Manhattan district? Should the law offer protection to white districts made up of distinct ethnic groups, such as Jews? *Gingles* took a first step into this arena by recognizing the role that racial cleavages in voting played in frustrating the desires of minority communities for representation. Once that lesson is internalized, however, and districting decisions are made on the basis of the presumptively intractable attachment to race or ethnicity, the result looks like structured "balkanization" of the polity, to draw from Justice Sandra Day O'Connor's vivid imagery in *Shaw v Reno*. Indeed, the drawing of district lines to achieve preconceived group divisions of representation necessarily challenges the integrative ideal of civil rights law. This in fact is the challenge set out by Justice William Douglas three decades ago:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion

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91 See *Gingles*, 478 US at 51.
93 Guinier, 71 Tex L Rev at 1628-30 (discussing the fracturing of the New York congressional district represented by Representative Stephen Solarz)(cited in note 8).
95 113 S Ct 2816, 2832 (1993).
rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.\textsuperscript{96}

To view this simply as a knee-jerk endorsement of race-blind politics, regardless of the prospect of exclusion of minorities, would be wrong. Justice Douglas's challenge focuses on the role the state plays in drawing inflexible lines, an issue that no combination of \textit{Gingles}, \textit{De Grandy}, \textit{Shaw}, and \textit{Miller} can put to rest.\textsuperscript{97}

\section*{IV. FIDELITY TO VOTER PREFERENCES}

It should be axiomatic that the purpose of elections in a democratic order is to have "chosen the free and uncorrupted choice of those who have the right to take part in that choice."\textsuperscript{98} The principle of "popular choice of representatives"\textsuperscript{99} is, in the Supreme Court's view, "the foundation of our representative

\textsuperscript{96} \textit{Wright v Rockefeller}, 376 US 52, 67 (1964)(Douglas dissenting).

\textsuperscript{97} The role of the state in fixing such race-based lines of political demarcation has been the focus of critics of the VRA who charge that such remedies perpetuate race-based politics. See \textit{Miller}, 115 S Ct at 2486. Thus, for example, Judge Garnette Eisele has asked: "Do we really believe in the idea of one political society or should this be a nation of separate racial, ethnic, and language political enclaves?" \textit{Jeffers v Clinton}, 730 F Supp 196, 227 (E D Ark 1989)(Eisele dissenting), aff'd, 498 US 1019 (1991). Abigail Thernstrom has criticized the argument that proportional representation is necessary because it reflects and perpetuates the notion that "this is a deeply divided society of separate nations." Ronald Brownstein, \textit{Minority Quotas in Elections?}, LA Times A1, A14 (Aug 28, 1991). The permanence of racially defined political boundaries troubles even strong proponents of increased minority representation. T. Alexander Aleinikoff reflected that race-consciousness in districting "assigns a value to what should be a meaningless variable" and pointed out that "[t]o categorize on the basis of race is to miss the individual." T. Alexander Aleinikoff, \textit{A Case for Race-Consciousness}, 91 Colum L Rev 1060, 1063 (1991). Lani Guinier stated that "to some extent I agree that the current approach is divisive," Guinier, 71 Tex L Rev at 1620 n 120 (cited in note 8), but felt that "[i]n balancing the fears of balkanization against observations about existing alienation, I conclude that exclusiveness is a greater evil than controversy ...." Id at 1638. Guinier also has argued that alternative nonterritorially based cumulative voting schemes avoid this problem to the extent that groups are self-defined and changeable, allowing "continuous redistricting by the voters themselves," with any differences in voting-group composition being chosen by the voters rather than being imposed externally "based on assumptions about demographic characteristics." Id at 1638-39.

\textsuperscript{98} \textit{Ex Parte Yarbrough}, 110 US 651, 662 (1884)(rejecting a writ of habeas corpus of one who intimidated and beat a black citizen for attempting to exercise his right to vote, and holding that the defendant's acts properly fit within the scope of the federal statute of which he had been convicted).

\textsuperscript{99} \textit{United States v Classic}, 313 US 299, 319 (1941)(holding that the right to vote in a primary election is protected by the Constitution).
Ultimately, the popular choice is frustrated when electoral outcomes represent a "frustration of the will of a majority of the voters or the effective denial to a minority of voters of a fair chance to influence the political process."

But districting necessarily imposes a filtering device on the popular choice of the voters. In their aggregate, voters may have a prescribed set of choices. When those votes are broken down into territorially based subunits, however, substantially different outcomes may result, even within the equipopulational constraint on districts. This proposition is so self-evident as to need no elaboration. One need only look at the enormous resources devoted to redistricting battles to understand that different configurations of voters may yield different electoral outcomes, even with the same distribution of total votes. A ready example is the fourteen contested congressional elections that occurred in Texas in 1990. The Democratic candidates in these races received a total of three thousand votes more than the Republican candidates, out of more than two million cast. Yet the Democrats won ten of the fourteen congressional races—proving not only that district lines matter, but strongly indicating that control of the line-drawing process yields tangible rewards.

Even the Supreme Court has recognized that districting of necessity is not coextensive with insuring fidelity to popular choices:

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.

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100 Kramer v Union Free School District, 395 US 621, 626 (1969)(holding that the right to vote in certain elections may only be denied to a class of voters where there is a compelling state interest, and further holding under this standard that a New York law permitting only parents of school-age children, property owners, and tenants to vote in elections for school board members is unconstitutional).

101 Davis v Bandemer, 478 US 109, 133 (1986)(holding that political gerrymandering is justiciable under the Equal Protection Clause).


103 Gaffney v Cummings, 412 US 735, 753 (1973)(holding that the Equal Protection Clause is not violated when a state, redistricting its legislature, ignores political subdivision lines in a self-conscious attempt to ensure that the state's two major political parties
Or, to put the point more simply, in "a functional sense... districting is gerrymandering."\textsuperscript{104}

The burning question then becomes determining whether the resulting districting indeed does further the two, not necessarily compatible, goals of faithfully reproducing popular choices and yielding "a more politically fair" outcome than if elections simply were left to the electorate at large. The driving consideration in this area, as in so much of voting rights law, is the concern for minority representation. It is this concern, after all, that inspired the second generation of voting rights cases and forced courts to substitute districted elections for at-large elections precisely for reasons of political fairness. Once in this terrain, the inevitable concern was to ensure representational opportunities roughly proportional to preconceived notions of group rights. Even the weaker form of group protection afforded to political, as opposed to racial, minorities must take some measure of proportionate outcomes as the point of departure:

\textit{[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole. . . . [S]uch a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.}\textsuperscript{105}

Repeatedly, the Supreme Court has fallen back on proportional and semiproportional theories of representation to justify the inevitable political filtering that occurs with districting. In \textit{Gaffney v Cummings}, for example, the Court found that a rather

\textsuperscript{104} Robert G. Dixon, Jr., \textit{Democratic Representation: Reapportionment in Law and Politics} 462 (Oxford University Press, 1968)(emphasis in original). The Supreme Court recognized the same point in \textit{Gaffney}:

\textit{It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. 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.}

\textit{Gaffney}, 412 US at 753.

\textsuperscript{105} \textit{Davis}, 478 US at 132-33.
evident political gerrymander should elicit only minimal judicial scrutiny so long as a "State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." This principle appears even more candidly in the context of racial exclusion from representation: "[T]he Constitution permits [a State] to draw district lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county."

At the most basic level, it is difficult to reconcile the concept that electoral fairness requires proportional representation with the express command of Section 2 of the VRA that the VRA creates no right to proportional representation. But more significantly, the dilemma is to create a conception of fairness that escapes the "brooding omnipresence" of concerns for proportionality that emerge throughout voting rights law. This is, as Justice Antonin Scalia vociferously has noted, the conceptual weakness at the heart of enforcing politically fair objectives on an unruly electoral system: how does one ultimately measure the dilution of voting influence in the absence of a comprehensible baseline definition of proper outcomes? Once the case law moved beyond the complete exclusion of minorities from political opportunity, there was an inexorable push towards the ultimate resolution of what group rights are cognizable. That definition of group rights, in turn, had to use some conception of proportionality as its baseline.

At this point, the weakness of districting systems in achieving proportionate outcomes becomes manifest. Territorially based districts are an inherently poor mechanism for reflecting the autonomous preferences of groups defined through the act of voting. Since districted elections necessarily stand between voter preferences and electoral outcomes, it is difficult for districted election systems to satisfy the demands for voter autonomy and outwardly determined proper outcomes. In any event, it is inconceivable that districted elections better could satisfy these objectives than many of the proportional and semiproportional systems employed elsewhere that assure proportionate results by

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106 Gaffney, 412 US at 754.
reproducing voter preferences without state-sanctioned manipulation of the outcomes.

V. LEGITIMACY AND RESPONSIVENESS

The Supreme Court has provided over a century's worth of glowing tributes to the centrality of the right to the franchise as "preservative of all rights."110 Underlying the special solicitude the Court has carved out for the franchise must be the conception that the right to vote is "central to any theory of why American democracy is a legitimate form of government."111 Some elements of what constitutes political legitimacy already have been discussed. Clearly, the right of the individual franchise and the fidelity of the process to majoritarian desires are critical features under any theory of legitimacy.

A separate concern arises with the accountability of decisionmakers to the electorate. One of the Supreme Court's criticisms of at-large elections is not only that they "tend to submerge electoral minorities and overrepresent electoral majorities," but that they do so by "mak[ing] legislative representatives more remote from their constituents...."112 By increasing the direct accountability of legislators to specified constituents, the Court believes that there will be a more broadly democratic access to goods available through the political process:

The American approach to government is premised on the theory that, when citizens have the unfettered right to vote, public officials will make decisions by the democratic accommodation of competing beliefs, not by deference to the mandates of the powerful. The American approach to civil rights is premised on the complementary theory that the unfettered right to vote is preservative of all other rights.113

This theory of the greater accountability of legislators from single-member districts found support in the early vote-dilution cases attacking at-large elections. Under White v Regester114

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110 See, generally, Yick Wo v Hopkins, 118 US 356, 370 (1886).
and *Zimmer v McKeithen*, a one of the elements in the “totality of the circumstances” inquiry was the responsiveness of elected officials to the specific concerns of minority constituents. This open-ended inquiry confirmed the infirmity of the electoral system by linking the failure to respond to a constituency with exclusion from meaningful participation in the political process. No elected official who owed a genuine duty to his or her constituents, it stood to reason, ever would disserve them so convincingly as to disregard their needs. The remedy of choice, single-member districts, cemented the ties between constituents and elected officials and thereby held out the promise of real constituent services.

The Supreme Court’s view of the beneficial proximity of legislators to identifiable constituents has support in the political science literature. Legislators from single-member districts are more readily identifiable to their constituents and can be called upon to deal with conflicts with governmental agencies. This “ombudsman” function is particularly significant for the poor and for minorities who are less likely to have access to lawyers and lobbyists, or to have personal connections to lubricate

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115 485 F2d 1297 (5th Cir 1973).

116 The Court noted in *White v Regester* that, under the challenged multimember electoral system in place in Dallas County, because the Democratic Party “did not need the support of the Negro community to win elections . . . it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community.” *White v Regester*, 412 US at 767. Thus, the Court was willing to strike down the electoral system despite its unwillingness to find either the 9.9 percent maximum deviation between districts or the lack of proportional representation to be *per se* unconstitutional. *White v Regester*, 412 US at 763-65. In *Zimmer v McKeithen*, the Fifth Circuit held that “where a minority can demonstrate . . . the unresponsiveness of legislators to their particularized interests, . . . a strong case is made.” *Zimmer v McKeithen*, 485 F2d at 1305.

117 An example can be found in the fact record in *Lodge v Buxton*, 639 F2d 1358, 1375-78 (5th Cir 1981), aff’d as *Rogers v Lodge*, 458 US 613 (1982), in which the court examined the quality and funding levels of local schools; the hiring practices of local public agencies; the appointment processes to administrative boards, committees, and judicial offices; and the allocation of municipal services such as road construction and repair. This elaborate factual record is by no means atypical. See James U. Blacksher and Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L J 1, 43 n 283 (1982)(arguing that inquiry into unresponsiveness is so open-ended that it becomes completely unmanageable in the courts).

118 A review of numerous studies confirming the greater demand for constituent services in single-member districts may be found in Malcolm E. Jewell, *Representation in State Legislatures* 146-49 (University Press of Kentucky, 1982).

119 This term, which originated with political scientists, has crept into the political vocabulary. See, for example, Jewell, *Representation in State Legislatures* at 150 (quoting a California legislator describing his highest priority in office as “being the ombudsman to society”)(cited in note 118).
dealings with the state. Thus, as a general rule, “the demand for constituent services is greater in districts that are below average in socioeconomic terms.”

Assuming a fair distribution of electoral opportunity for racial and ethnic minorities, this is the one area in which single-member districts best correspond with the Supreme Court’s conception of political fairness.

VI. COUTH OR CONSEQUENCES

A related theme arises with the Supreme Court’s concern over the shape or configuration of political boundaries. Prior to the Court’s direct confrontation of the issue of the compactness of district lines in Shaw v Reno, inquiries into the physical configuration of political subunits served primarily to guide judicial concern over impermissible state motivations in allocating political opportunity. The classic example is Gomillion v Lightfoot, in which the Court took the fact that the city boundaries of Tuskegee, Alabama had been drawn into an “uncouth twenty-eight-sided figure” as evidence that the plan was designed to fence out blacks from participation in the city’s political life.

Running through the Court’s voting rights jurisprudence is an awareness that political boundaries may be manipulated to deprive disfavored groups of a meaningful, much less equal, opportunity to participate in the political process. Where the manipulations of district configurations can confirm that ulterior purposes underlie the structuring of the political process, the resulting political arrangement may fail. Thus, in Gomillion, the Court was satisfied that the “uncouth” configuration only could be explained as an exclusionary device; consequently, it struck down the city’s boundary lines under the Fifteenth Amendment. By contrast, in Gaffney v Cummings, the Court ac-

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120 Id at 145-46.
121 Id at 145.
122 113 S Ct 2816 (1993).
124 Id at 340-41. Petitioners alleged that the city’s old boundaries fenced out all but four or five of its four hundred African-American voters. The Court said that if these allegations were proven, “the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing citizens out of town so as to deprive them of their pre-existing municipal vote.” Id.
125 Id.
cepted an alternative explanation for unconventional line drawing. Because Connecticut could defend its districting plan as an attempt to preserve the political balance between Democrats and Republicans, the unusual appearance of the districting configuration did not elicit constitutional concern. Therefore, the Court could reaffirm that the Constitution compels neither compactness nor “attractiveness” in districting arrangements.

This approach confirms the peculiarity of the Court’s reasoning in Shaw. Consistent with prior cases, including both Gomillion and Gaffney, the Court refused to constitutionalize any particular compactness requirement on the redistricting process. Absent such a requirement of compactness, however, the opinion left a conceptual void. Like Gaffney, but unlike Gomillion, the North Carolina districting plan did not require the use of spatial configurations as a proxy for ulterior motives. Rather, the plan had an overt purpose: an increase in black electoral opportunity.

Unless courts move in the direction of specific compactness constraints, the search for reasonable configurations of districts will become a distinct liability for territorially based electoral systems. The reasons for this are in part technological. Computer technology has evolved dramatically to the point that an increasing number of actors are able to carve ever more intricate districting patterns that seek to advance a particular political agenda. In addition, alterations in the use of Census data yield precise demographic information about each electoral building block, such as the precinct. By coding past electoral data,
the new computer technology allows virtually anyone to redistrict consistent with general equipopulation principles and rerun past elections across altered district lines to determine optimal future arrangements.\textsuperscript{133}

In addition to technological wizardry, the amended VRA imposes great pressure on redistricting to optimize minority electoral prospects. The demystification of the process of drawing district lines allows an infinitely greater array of possible plans to be considered in the redistricting process. Section 2 of the VRA then provides a mechanism for substantive judicial evaluation of the plan’s propriety under the guise of a claim that the proposed plan impermissibly diluted minority voting strength. This in effect has turned the courts into a secondary forum for political jockeying over the spoils of redistricting.\textsuperscript{134} Given the vagaries implicit in definitions of “compactness,” it appears likely that the effect of Shaw will be to create a secondary route to substantive court evaluation based on the appearance of districts.\textsuperscript{135}

Even this reading of Shaw understates the uncertainty surrounding the role of appearances in districting. Whereas Shaw seemed to envision a safe harbor for political compromises carried out within the rough parameters of “traditional districting principles,” Miller v Johnson\textsuperscript{136} may serve to undercut the critical role of appearance in Shaw. Miller expressly rejects reading Shaw to require a threshold showing of bizarreness for there to be a constitutional violation.\textsuperscript{137} Rather, according to Miller, bizarreness is simply one possible avenue to proving an inordinate reliance on race.\textsuperscript{138} Nonetheless, Justice O'Connor, the author of Shaw and the fifth vote for Justice Anthony Kennedy’s majority
opinion in *Miller*, added a concurrence in *Miller* interpreting the majority opinion narrowly as “help[ing] achieve Shaw’s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review.”

Thus, while appearances clearly matter in the redistricting process, the Court’s final word on how and why they matter awaits another day.

VII. POLITICAL STABILITY

While not a major theme of the voting rights case law, a number of Supreme Court opinions express concern with the stability of the political order. The clearest form occurs in cases addressing administrative restrictions on the franchise, such as voter registration requirements or ballot access restrictions for third parties. In such cases, the Court repeatedly has invoked the interest of state authorities in orderly regulation of the electoral process to justify clear restrictions on access to the franchise. In *Jenness v Fortson*, for example, the Court explained that the state interest in restricting the ability of independent candidates to get their names printed on Georgia’s ballot served to protect against “confusion, deception, and even frustration of the democratic process . . . .”

This theme emerges more clearly in a handful of opinions in which the Court has addressed the privileged position of the Democratic and Republican parties under many of the regulatory regimes established by the prevailing political order—to wit, the incumbent Democratic and Republican authorities. If the freedom of expression and association clauses of the First Amendment may be construed to carry an equivalent of the antiestablishment provisions of the religion clauses, then the purposeful creation of rules seeking the establishment of the two major parties should be highly suspect.

To date, however, the inclination of the Court has been in the opposite direction. For years, the Court resisted various entreaties to recognize political gerrymandering as a constitutional cause of action. Even after recognizing such claims in *Davis v*

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139 Id at 2497 (O’Connor concurring)(emphasis added).
140 403 US 431 (1971).
141 Id at 442.
142 The clearest example is *Karcher v Daggett*, 462 US 725 (1983). In reviewing a rather evident partisan gerrymander termed a “flight of cartographic fancy,” id at 762 (Stevens concurring), quoting Larry Light, *New Jersey Map Imaginative Gerrymander*, 40
Bandemer, the Court created an opaque test turning on a "consistent[ ] degrad[ation]" of political power that seemed designed to be impossible to apply. Perhaps consistent with the theme that the Constitution is not a suicide pact, the Court has evaluated constitutional voting claims through the distinctly pragmatic lens of not fundamentally altering the prevalence of two-party politics. Three chief examples come readily to mind. The first is Justice O'Connor's remarkable disquisition on the central role of political stability represented by the two-party system in Davis. Here she expressly lauded the interests of states in conserving the political hegemony of the reigning political parties: "The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change."

A similar chord was struck in Burdick v Takushi, in which the Court, per Justice Byron White, upheld a prohibition on write-in ballots in Hawaii state elections. Under Hawaii law, voters seeking to express dissatisfaction with the political status quo had to form a separate political party and meet an elevated petition requirement in order to secure a position on the printed ballot. Since Hawaii operates, in effect, as a one-party Democratic state, the result of this prohibition was to frustrate any challenge to the political status quo. The Court, with rather astonishing reasoning, found the result defensible as a protection against "unrestrained factionalism" at the ballot box, and hence a sufficient state interest.

The most significant opinion, however, came in Gaffney v Cummings, the Court's foremost confrontation with bizarrely shaped districts prior to Shaw. In upholding what political scientist Bruce Cain would term a "bipartisan gerrymander," the Court refused the invitation of Justices Lewis Powell and John Paul Stevens to address the partisan gerrymandering question head-on. See id at 748 (Powell concurring); id at 787 (Powell dissenting). Instead the Court struck down the offending plan under a rather specious one-person, one-vote standard. Karcher, 462 US at 734-44.

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478 US 109 (1986)(holding that political gerrymandering is justiciable under the Equal Protection Clause).

Id at 132.

145 Id at 145 (O'Connor concurring).

146 112 S Ct 2059 (1992).

147 Id at 2066, quoting Munro v Socialist Workers Party, 479 US 196 (1986).

148 412 US 735 (1973)(rejecting a challenge to the Connecticut General Assembly's proposed reapportionment plan for House districting because partisan political structuring had resulted in excessive population deviations).

149 Bruce E. Cain, The Reapportionment Puzzle 159-66 (University of California Press,
Court relegated territorial regularity to a distinctly secondary role, favoring instead the stability of a political compromise that sealed in place the relative division of power between Democrats and Republicans. Because the state acted in conformity with the preexisting distribution of political power, its redistricting was safe from challenge so long as it sought to "provide a rough sort of proportional representation in the legislative halls of the State."

Although I find troubling the idea of electoral arrangements ordered so as to return incumbent powers to their historic levels of power, I nonetheless assess this objective in the terms ascribed to it by the Court. By these criteria, a state objective of preserving entrenched political power is indeed consistent with the use of single-member districts. Curiously, however, the Court has not recognized any corresponding power to constrain the electoral advantages that flow from entrenched power. The state initiatives attempting to limit the tenure of incumbents may be seen as a reciprocal concern of the states that the political process remain open. That particular form of analysis has not fared particularly well under the First Amendment, nor has the Court accepted this form of regulation under the reserved powers of the states to regulate in the name of fairness.

Nonetheless, the effect of single-member districts is clearly to promote the stability of the major parties. No doubt proportionate systems derived on broader jurisdictional bases, such as statewide elections, would favor the electoral prospects of third parties and single-issue movements. Indeed, the factionalism and superordinate power of decidedly minority parties associated with extreme variants of proportional representation systems such as

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1884).

150 Gaffney, 412 US at 754.

151 See First Nat'l Bank v Bellotti, 435 US 765 (1978)(holding unconstitutional under the First Amendment a Massachusetts statute forbidding certain types of corporations from spending money to support or oppose referendums); Buckley v Valeo, 424 US 1 (1976)(holding that Federal Election Act provisions capping the amount an individual or group could spend to support a candidate unconstitutional under the First Amendment).


the Israeli Knesset are held out as a major criticism of proportional representation. This criticism is correct, although somewhat overstated.

It is true that the requirement of an absolute majority in a geographic district frustrates third party candidacies, a problem further compounded by the rewards to party membership at the legislative level through institutions such as the party seniority system in legislative committees. Still, every electoral system has a mathematic threshold of exclusion that determines the minimum level of votes required to secure legislative representation. In single-member districts that threshold is either an outright majority or a plurality of votes cast in the district. In proportional systems, the threshold may be as low as the Israeli 1 percent, or may be set higher in order to thwart any disproportionate influence accruing to truly fringe parties. Moreover, the destabilizing effect of vesting "kingmaker" power in fringe parties may be of less concern in the United States. Proportional representation produces this exaggerated result in parlia-

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154 See Sanford Levinson, Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?, 33 UCLA L Rev 257 (1985)(cited in note 26). Levinson argues that some minority parties will gain disproportionate power "because of their ability to supply marginally essential votes in constructing a coalition." Id at 272. He illustrates this by noting that several religious parties in Israel, while representing less than 15 percent of the electorate, exercise "enormous power" because they are able to provide the key one or two votes necessary to give one voting bloc a majority of legislative seats. Id.

155 An example is the decision of Bernie Sanders, a socialist candidate elected to Congress from Vermont, to enlist informally as a member of the Democratic Party caucus. Gabriel Kahn, The Bernie Sanders Seniority Dilemma: 'I Want To Be Treated the Same as Any Other Democrat', Roll Call 17 (Dec 5, 1994).


mentary systems in which not only legislative majorities but also executive power are reconstituted with each shift of electoral preferences. It is unlikely that such results would occur in a presidential system.

CONCLUSION

There are several ways of analyzing the varying Supreme Court doctrines governing the legal constraints upon the electoral process. At its most simple level, the Court is effectively able to police the ambit of negative liberties from most forms of state encroachment. While this is an accomplishment of no small measure, it is by no means complete. Perhaps because of the association of the reapportionment revolution with breaking a rural stranglehold on local politics, or perhaps because of the inevitable association of access to the franchise with eradicating the political power of Jim Crow, the Court in these cases sought a transformative vision of politics. Out of these cases establishing individual rights in the political sphere grew the more difficult propositions defining a new objective of political fairness.

In analyzing both the initial articulation of what the Reynolds v Sims158 Court termed "fair and effective representation" and the subsequent applications of that principle, the challenge to single-member districts emerges most clearly. The positive liberties in these cases traverse an unsteady divide between political self-realization through concerted activity and the proper filtering role of districting in producing equitable electoral outcomes. At this level of analysis, however, single-member districts poorly fit the objectives set out by the Court. Indeed, single-member districts would serve as the electoral system of choice only to satisfy immediate access to local representatives for constituent services and to preserve the political oligopoly enjoyed by the Democratic and Republican parties. These are hardly the most inspiring declarations of our democratic order.

The broader Supreme Court declarations have particular salience in the post-1990 period of redistricting. The first generation of voting rights cases broadened the electorate and made the process more open than ever before in American history. The amended VRA has subjected the actual choices of political line drawers to substantive judicial review. Technological changes in turn have opened the redistricting process to a broader set of

activists. The sum total is a districting process under greater pressure, under greater public scrutiny and judicial oversight, and still unable to deliver the promises of three decades of Supreme Court pronouncements.

The simple final thesis of this Article is that these unrealized expectations, more visible than ever, ultimately are destabilizing to the established order of territorial districting. Into this void inevitably will surface renewed attention to alternatives to districting, particularly if these alternative systems emerge as more faithful to the substantive vision of fairness that has animated the case law to date.