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## ARTICLE

### UNDERSTANDING THE RIGHT TO AN UNDILUTED VOTE

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# UNDERSTANDING THE RIGHT TO AN UNDILUTED VOTE

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*This Article offers a new approach for conceptualizing vote dilution claims. Professor Gerken argues that abridgment of the right to an undiluted vote is a special kind of injury, one that does not fit easily within a conventional individual rights framework. She demonstrates that vote dilution claims require a court to examine the relative treatment of groups in determining whether an individual has been harmed. Professor Gerken terms rights that share this special characteristic "aggregate rights." After closely examining the unique attributes of aggregate rights, the Article uses the Supreme Court's decision in Shaw v. Hunt — specifically its application of a traditional form of strict scrutiny to a remedy for vote dilution — to explore how the differences between conventional individual rights and aggregate rights play out in practice. Professor Gerken demonstrates that a doctrinal structure built around a traditional conception of individual rights fails to achieve its purpose when applied in the context of an aggregate harm. She further explains how a doctrine like strict scrutiny can be tailored to fit within an aggregate rights framework. Finally, Professor Gerken examines the difficult normative questions raised by an aggregate rights approach. She suggests that although an aggregate right does not fit easily with conventional assumptions about individual rights, it nonetheless can properly be deemed an individual right. She notes, however, that to the extent that the group-based characteristics of aggregate rights seem inconsistent with individualist principles, there is no easy doctrinal fix for this problem because these characteristics stem from the nature of the underlying injury. Thus, she concludes that the Court's adherence to a highly individualist notion of rights in Shaw v. Hunt portends a serious constitutional battle. At stake will be the constitutionality of § 2 and other measures to redress civil rights injuries that share dilution's unique attributes, as well as some of the basic principles that undergird our representative democracy.*

## INTRODUCTION

Two distinct approaches to equal protection are on a collision course: the highly individualistic view of rights developed by the

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Rehnquist Court and the group-based conception of harm evident in many other areas of the law. At stake is not only the coherence of equal protection doctrine, but also the constitutionality of many civil rights protections, including portions of Title VII, the Fair Housing Act, and the Voting Rights Act. As yet there is no conceptual framework for mediating this conflict. This Article represents the first step toward developing one.

The most immediate problem presented by this conflict arises in the context of redistricting. Every state in the country will redraw its district lines after the release of the 2000 Census. Litigation will be unavoidable and immediate. The latent tensions in equal protection law will inevitably emerge as vote dilution claims — which exemplify this special, group-based harm — are litigated. Indeed, these tensions have already manifested themselves in the voting context, and the Supreme Court has shown itself utterly ill-equipped to deal with them.

Vote dilution claims, which are usually raised under § 2 of the Voting Rights Act,<sup>1</sup> are one of the most important weapons in the civil rights arsenal. Section 2 applies when whites and racial minorities consistently prefer different candidates at the polls. A state could take advantage of this type of voting pattern by drawing district lines that give whites a majority in a disproportionate share of districts, thus ensuring that minority voters are unable to elect a candidate of their choice. Section 2 protects minority voters from this type of injury, which we call “vote dilution,” by requiring states to draw district lines that offer racial minorities a fair chance to elect their candidates of choice.

Vote dilution claims implicate a special kind of injury, one that does not fit easily with a conventional view of individual rights. That is because they require a court to consider the relative treatment of *groups* in determining whether an *individual* has been harmed. Although a handful of courts and commentators have noted the group-related aspects of dilution claims,<sup>2</sup> there is not yet a fully developed theory for describing and understanding this unique constitutional and statutory injury.

This Article therefore offers a new conceptual framework for understanding what makes dilution claims special and for adapting traditional doctrinal structures to such claims. It does so by identifying and closely analyzing the special nature of the injury in question. What

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<sup>1</sup> 42 U.S.C. § 1973 (1994 & Supp. II 1996). Vote dilution claims may also be raised as constitutional claims. Plaintiffs rarely litigate this type of claim because it requires proof of invidious intent as well as of discriminatory effect. See *infra* pp. 1673–74. This Article focuses primarily on statutory dilution claims, and references to dilution claims are to the statutory right unless otherwise noted.

<sup>2</sup> See sources cited *infra* note 46.

makes dilution claims unusual is that the individual injury at issue cannot be proved without reference to the status of the group as a whole; no individual can assert that her vote has been diluted unless she can prove that other members of her group have been distributed unfairly within the districting scheme. Because all of these features stem from the unique injury underlying dilution claims — in which individual injury arises from the aggregate treatment of group members — I call rights that share these characteristics “aggregate rights.”

Although many rights — including many civil rights — share dilution’s unique attributes and thus fit within this conceptual framework, this Article centers on the right to an undiluted vote. This focus allows for an in-depth exploration of the doctrinal and normative implications of the framework proposed here while addressing a particularly urgent problem.

The special nature of the dilution injury has received inadequate attention from courts and commentators, and little effort has been made to develop a framework for understanding § 2 claims that takes their unusual nature into account. During the last few years, the absence of such a framework has taken on special importance. The group-based conception of individual injury found in vote dilution claims has coexisted uneasily with the increasingly individualistic, anti-essentialist vision of rights expressed in the Supreme Court’s recent equal protection cases. But these competing visions of racial harm have finally come into direct contact as bizarrely shaped majority-minority districts,<sup>3</sup> drawn to avoid the dilution of minorities’ votes, have been challenged as racial gerrymanders under *Shaw v. Reno* (“*Shaw I*”).<sup>4</sup> *Shaw v. Hunt* (“*Shaw II*”)<sup>5</sup> presented the Court with the clearest evidence to date of the poor fit between these two visions. There the Court had to decide how to apply strict scrutiny — an analytic approach that has been built around a conventional view of individual rights — to a district designed to remedy vote dilution, an aggregate harm.

The Court’s answer is quite revealing. It evaluated the constitutionality of a dilution remedy by applying strict scrutiny in the form

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<sup>3</sup> By majority-minority district, I mean a district in which the minority population is large enough for its members to exercise electoral control by voting cohesively. In some instances, there may be sufficient white cross-over voting for members of a racial minority group to exert such control even if they constitute less than fifty percent of the district’s voters. See generally Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1 (1993) (discussing these issues); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 79–80 (2000) (same).

<sup>4</sup> 509 U.S. 630 (1993).

<sup>5</sup> 517 U.S. 899 (1996). In the interest of full disclosure, I should note that I was a law clerk to Justice David H. Souter during the Term that *Shaw II* was decided. It should go without saying that all views expressed here are my own and are based solely on the text of that opinion.

typically employed in *conventional* individual rights cases. And it expressly premised its decision to do so on the view that treating dilution claims differently from conventional individual rights claims would suggest that “the coordinate right to an undiluted vote (to cast a ballot equal among voters) belongs to the minority as a group and not to its individual members. *It does not.*”<sup>6</sup> In short, the Court ruled that dilution claims must be treated like claims implicating conventional individual rights.

That notion, however, is impossible to reconcile with the special nature of the injury we call vote dilution. If the right to an undiluted vote exists at all, it has to be an aggregate right. Disregarding this fact, as the Court did in *Shaw II*, results only in doctrinal incoherence, something the courts can ill afford with the post-2000 Census round of redistricting fast approaching. Moreover, ignoring the differences between conventional individual rights and aggregate rights in *Shaw II* did not make them go away; the Court merely postponed the day when it must squarely address this conflict.

This Article analyzes not only what the Court did in *Shaw II*, but also a far more interesting question: why did the Court choose this path? It concludes that the Court’s insistence on treating the right to an undiluted vote like a conventional individual right stemmed from one of two problems. The Court may simply have been unable to conceptualize this conflict (and thus its resolution) because the courts have not yet developed a framework for understanding dilution claims. If this is the case, the new framework proposed here may prove useful because it provides a roadmap for identifying the doctrinal adjustments that must be made to accommodate an aggregate harm like vote dilution. The example I offer here is strict scrutiny, although virtually every aspect of dilution doctrine — class certification, standing, etc. — can be analyzed using an aggregate rights approach.

Alternatively, the Court may in fact have properly conceptualized the dilution injury and recognized that § 2’s constitutionality represents a more difficult normative question than the Court’s easy dismissal of “group rights” would suggest. The framework proposed here also offers significant assistance in assessing this question. To begin with, it confirms the Court’s intuition that there is something different about aggregate harms, something that cannot be squared with the Court’s conventional conception of an individual right. As the last

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<sup>6</sup> *Shaw II*, 517 U.S. at 917 (emphasis added). It is difficult to gauge the long-term implications of the Court’s pronouncements in *Shaw II* because of divisions within the *Shaw* majority. See *infra* pp. 1692–93. Moreover, the Court’s approach in *Shaw II* is certainly not the only way to deal with this unique intersection of individual rights and group identity; indeed, it may be one of the most formalistic and least defensible. *Shaw II* is nonetheless extremely useful for analyzing the differences between conventional individual rights and aggregate rights.

part of this Article explores in depth, although an aggregate harm can properly be understood as an *individual* harm, there are significant tensions between the aggregative aspects of a dilution claim and the features of a conventional individual right. In the eyes of the Court, these differences might raise a number of normative concerns, all of which result from its equation of group rights with the problem of essentialization: Does the right to an undiluted vote belong to individuals or groups? Does dilution really injure individuals, or does the harm fall solely on the group as a whole? Does recognition of this type of right require the courts to make assumptions about the substantive preferences of individuals based on their group membership? Do dilution claims violate the antidiscrimination principle? While one can make a strong argument that aggregate rights fully comport with individualist principles, the nature of the harm certainly complicates the matter.

The framework proposed here tells us something else about this normative debate. Regardless of how one answers the questions above, an aggregate rights approach reveals that these group-like qualities cannot be eliminated with an easy doctrinal fix because they go to the essence of the injury itself. Thus, the fate of dilution claims rises or falls with the courts' willingness to recognize aggregate harms in the context of race.

Finally, this framework reveals what will be at stake when the Court is forced to address the question it ducked in *Shaw II*: whether the group-based conception of individual harm embodied in dilution claims can coexist with the Court's own highly individualistic, anti-essentialist approach. Indeed, the framework proposed here suggests that the Court's ultimate decision could cast doubt on the constitutionality of § 2 and similar civil rights protections.<sup>7</sup> As the final part of this Article mentions but leaves for another day, the Court's resolution of this question may even call into question some of the basic principles that undergird our system of representative democracy.

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This Article proceeds as follows. Part I begins to build a conceptual framework for understanding aggregate harms like vote dilution. That framework is rooted in the features that distinguish vote dilution claims from claims based on conventional individual rights. Part I identifies these three features: although the harm is an individual one, fairness is measured in group terms; an individual's right rises and

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<sup>7</sup> An aggregate rights framework also raises interesting questions about the continuing viability of dilution claims raised under the United States Constitution. See *infra* pp. 1736-37.

falls with the treatment of the group; and the right is unindividuated among members of the group.

The next two Parts of the Article use the Supreme Court's decision in *Shaw II* to illustrate how the differences between an aggregate right and a conventional individual right play out in practice. *Shaw II* is employed here not as a foil for attacking the *Shaw* doctrine — indeed, for these purposes I accept *Shaw* doctrine on its own terms — but as a means for illuminating the nature of vote dilution and other analogous racial harms. It thus serves as a starting point for furthering the main objective of this Article: fleshing out a theory for conceptualizing the special category of rights that take groups into account in defining individual injury.

*Shaw II* is particularly useful in this regard because the Court had to decide how to apply strict scrutiny — usually used to evaluate remedies for conventional individual harms — to districts designed to remedy dilution, an aggregate harm. Part II discusses the development of the *Shaw* doctrine and the question presented in *Shaw II*. Part III demonstrates that the conventional strict scrutiny framework the Court chose to apply in *Shaw II* fails to achieve its underlying purpose when applied to a remedy for an aggregate harm. Indeed, it led the Court to look to the wrong facts in applying strict scrutiny, and it increased the risk that the Court would ignore the right ones. This Part also demonstrates that a different choice was available to the Court — it could have tailored strict scrutiny to the unique nature of dilution remedies.

While Parts II and III examine the thorny doctrinal questions at issue here, Part IV deals with the difficult normative one. It places vote dilution claims within the context of a larger debate about individualist principles and group-related claims. It argues that the Supreme Court's rejection of the aggregate harm at stake here arises largely from concerns about essentialism. For the Court, a "group right" is one that requires a court to indulge in assumptions about individuals based on their group membership. This Part concludes that *Shaw II* portends a constitutional battle looming in the Court's future, a battle whose resolution will hold serious consequences for voting rights law and other civil rights protections. Finally, Part IV briefly identifies questions that warrant further exploration, including whether the Court's current approach could call into question some of the underlying principles of representative democracy itself.

## I. DILUTION AS AN AGGREGATE HARM

This Part sketches a conceptual framework for understanding the unique harm in dilution cases. Section I.A describes the development of dilution doctrine and the theory behind it. Section I.B identifies the three main characteristics of dilution claims that differ from conven-



tional individual rights. Section I.C then considers whether, and to what extent, current dilution doctrine reflects these three unique features.

### A. A Brief Introduction to Vote Dilution Claims

1. *The Development of Dilution Doctrine.* — Vote dilution doctrine has largely been developed by the courts over time. The statutory basis for the claim, § 2 of the Voting Rights Act, simply provides that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner that results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”<sup>8</sup> Initially, § 2 and its constitutional counterpart, the Fifteenth Amendment,<sup>9</sup> were invoked merely to protect an individual’s ability to cast her ballot on election day. These protections have been termed the “first generation” of voting rights; they concerned direct, formal limitations (poll taxes, literacy tests, and the like) on the ability of minorities to register and cast a ballot.<sup>10</sup> First-generation suits largely sought to vindicate classic examples of individual rights — individual citizens casting individual ballots.<sup>11</sup>

Vote dilution claims are commonly understood as part of the “second generation” of voting rights law developed by the courts.<sup>12</sup> Broadly understood, dilution claims are designed to ensure that members of a racial group have a fair opportunity to participate in the electoral process.<sup>13</sup> These claims typically arise when whites and racial minorities consistently prefer different candidates at the polls — that is, when voting is “racially polarized.” Even in circumstances in which

<sup>8</sup> 42 U.S.C. § 1973(a) (1994).

<sup>9</sup> For many years, § 2 was thought merely to mirror the requirements of the Fifteenth Amendment, and plaintiffs typically brought dilution claims under both the Voting Rights Act and the Constitution. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1841 n.38 (1992). See generally Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389 (1985) (reviewing the history of the Fifteenth Amendment). For simplicity’s sake, I will treat § 2 as if it were the sole source of the right to an undiluted vote unless otherwise noted.

<sup>10</sup> Issacharoff, *supra* note 9, at 1838–39; Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 210.

<sup>11</sup> See Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883 (1995).

<sup>12</sup> See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–94 (1991); Issacharoff, *supra* note 9, at 1839–40. The “third generation” of voting rights cases addresses practices that affect the ability of minority voters to achieve their goals *after* the election. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1481–82, 1494–95 (1991) [hereinafter Guinier, *No Two Seats*] (describing the types of claims that will be brought under the third generation of voting rights suits).

<sup>13</sup> See 42 U.S.C. § 1973 (1994 & Supp. II 1996).

all voters are able to cast their votes, a state can nonetheless take advantage of this type of voting pattern to undermine the ability of minority group members to affect the political process. It need only give whites an electoral majority in a disproportionate share of districts, thereby ensuring that minority voters in those districts, who consistently prefer a different set of candidates, are never able to elect a candidate of choice.

For example, a state with a population of 1,000,000 and an African-American population of 300,000 has several choices. It could adopt an "at-large" voting scheme, which would require that all candidates be elected by all voters, and thus ensure that the candidates preferred by minority voters would lose by a vote of approximately 700,000 to 300,000. It could divide the state into ten districts of 100,000 people but spread the African-American population out so that there are only 30,000 in each district (this is called "fracturing").<sup>14</sup> Here again, the candidates preferred by African-Americans would be outvoted by a seven to three ratio. Alternatively, the state could concentrate a large number of African-American voters in one or two districts (for example, two districts with 100,000 African-Americans in them), thereby reducing the opportunity for African-Americans to exercise significant electoral control in any other district (this is called "packing").<sup>15</sup> Finally, the state could create ten districts but ensure that at least three of those districts contain at least 50,000 African-Americans, thus making it possible for their candidates of choice to prevail in at least three districts, consistent with their overall share of the population. When the state's choice unfairly disadvantages minority voters, we say their vote has been "diluted" because they would have had more voting power were the districting scheme drawn differently.

Vote dilution doctrine developed in reaction to states' use of at-large districting schemes, in which more than one representative is elected from a single district (for instance, where all candidates are elected in statewide races, as in the first example described above).<sup>16</sup>

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<sup>14</sup> See *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). Democrat-dominated legislatures are most likely to employ this type of practice; because minority voters generally vote heavily Democratic, Democrats have an incentive to divide these voters among several districts to augment Democratic voting strength in each district. BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 169 (1984).

<sup>15</sup> See *De Grandy*, 512 U.S. at 1015; *Gingles*, 478 U.S. at 46 n.11. GOP-dominated legislatures are most likely to pack minority voters because this practice usually results in the packing of Democratic votes, thereby augmenting Republican strength. CAIN, *supra* note 14, at 170-71.

<sup>16</sup> Unsurprisingly, some of these districts were originally adopted to deprive recently freed slaves of political power. See J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 16 (1999); 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, 487 (1993).

Under a winner-take-all voting system, this districting scheme virtually guarantees that even a sizeable minority group will always be outvoted by whites in any state where voting is racially polarized.<sup>17</sup>

The Court's eventual solution to this problem was to invalidate at-large districts as "diluting" minority votes and to replace them with a single-member districting plan that gave minority voters a majority in one or more districts.<sup>18</sup> The prerequisites for establishing a vote dilution claim were less than clear,<sup>19</sup> perhaps resulting, as Professor Issacharoff notes, from the Court's uneasiness in dealing with a right that was difficult to fit within a classic individual rights framework.<sup>20</sup> Throughout this early period, the Court used a vague, multifactor analysis to assess whether minorities' votes had been diluted.<sup>21</sup>

The law was clarified due to a series of events triggered by the Court's 1980 ruling in *Mobile v. Bolden*<sup>22</sup> that § 2 and dilution claims

<sup>17</sup> See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 143-44 (1971).

<sup>18</sup> See, e.g., *White v. Regester*, 412 U.S. 755, 765 (1973) (affirming the invalidation of multi-member districts).

<sup>19</sup> See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2520 (1997).

<sup>20</sup> See Issacharoff, *supra* note 9, at 1840-41.

<sup>21</sup> See, e.g., *White*, 412 U.S. at 765-70; *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam). Although *Zimmer* was a circuit court decision, it was considered a paradigmatic example of the Supreme Court's approach to dilution claims at the time. See S. REP. NO. 97-417, at 23 (1982). The Senate report accompanying the 1982 amendments summarized the criteria used by the courts. *Id.* at 29 n.113. They include:

the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

*Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

While a number of commentators have criticized the multifactor test, see T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 357 n.120 (1992) (describing several academics' criticisms), some recent scholarship has come to its defense. Professor Aleinikoff, for example, has suggested that the multifactor approach helps a court determine whether the election process has been "tainted" by racism. *Id.* at 359-60. Professors Abrams and Karlan have used the test as a counterpoint to their criticisms of the formulaic approach of current dilution doctrine, which they argue focuses too heavily on electoral outcomes at the expense of other aspects of political participation and representation. See Kathryn Abrams, *Raising Politics up: Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 455-57 (1988); 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, 175, 186-88, 198 (1989).

<sup>22</sup> 446 U.S. 55 (1980).

raised under the Constitution require proof of invidious intent, not just harmful effects.<sup>23</sup> That decision prompted Congress to amend § 2 in 1982 to clarify that vote dilution claims are governed by an effects-based standard.<sup>24</sup> The distinction between the constitutional claim, which requires proof of intent, and the statutory claim, which demands only proof of discriminatory results, will be quite important when the constitutionality of § 2 is challenged under *City of Boerne*.<sup>25</sup> For our purposes here, however, the 1982 amendments are significant because they provided an opportunity for the Court to rethink and simplify the doctrinal framework for analyzing dilution claims raised under the Voting Rights Act.

Specifically, in *Thornburg v. Gingles*,<sup>26</sup> a seminal decision that has dramatically affected voting rights jurisprudence, the Court held that plaintiffs asserting a vote dilution claim under the amended § 2 must at least prove that (1) the state could have drawn an additional, compact majority-minority district (the *Gingles* district)<sup>27</sup> but failed to do so; (2) the minority group is politically "cohesive" — that is, its members vote in a similar fashion; and (3) the white electorate votes as a bloc, thus enabling whites usually to defeat the minority group's preferred candidates at the polls.<sup>28</sup> Although a vote dilution claim challenging an at-large district theoretically required some *qualitative* proof beyond the three *Gingles* factors,<sup>29</sup> plaintiffs were very likely to persuade a court to invalidate an at-large scheme if they succeeded in satisfying the *Gingles* preconditions alone.<sup>30</sup> Dilution cases thus became battles of the experts, who provided the necessary population and election data to evaluate the *Gingles* criteria.

<sup>23</sup> *Id.* at 62.

<sup>24</sup> S. REP. NO. 97-417, at 2, 16-34.

<sup>25</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997). For a discussion of these concerns, see *infra* pp. 1736-37.

<sup>26</sup> 478 U.S. 30 (1986).

<sup>27</sup> The Court has repeatedly reserved the question whether minority voters who are not numerous enough to constitute an electoral majority may bring a § 2 claim challenging the state's failure to create what is called an influence district, a district in which minority voters can theoretically influence the election but do not enjoy a controlling electoral majority. See *Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993); *Grove v. Emison*, 507 U.S. 25, 41 n.5 (1993).

<sup>28</sup> *Gingles*, 478 U.S. at 50-51; see also *De Grandy*, 512 U.S. at 1006-07; *Grove*, 507 U.S. at 39-41.

<sup>29</sup> See *De Grandy*, 512 U.S. at 1013. The necessary "proof" tended to be evidence of the nine "Senate Factors" listed in the Senate report accompanying the 1982 amendments of § 2. S. REP. NO. 97-417, at 28-29 n.113. These factors were, in turn, largely restatements of the factors the Court had considered in its pre-*Mobile* dilution decisions. See *supra* note 21.

<sup>30</sup> See *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993) (noting that in "only the very unusual case" will satisfaction of the *Gingles* preconditions not result in liability under § 2).

Eventually, the Court applied the *Gingles* framework to single-member districting schemes. The invalidation of at-large districts still left room for states to undermine minority voting strength by manipulating the boundary lines of single-member districts.<sup>31</sup> Because there are virtually an infinite number of ways to draw a single-member district,<sup>32</sup> racially polarized voting creates an opportunity for states to ensure that whites are a majority in as many districts as possible,<sup>33</sup> either by “packing” or “fracturing” minority voters.<sup>34</sup> The remedy for dilution in a single-member districting scheme is to redraw district lines to create one or more additional districts in which minority voters are able to exercise electoral control. (For these purposes, such a district is termed a “remedial district” even if it is drawn prospectively to avoid a § 2 challenge.)

The problem with extending *Gingles* in this manner is that there is no clear baseline for determining how many additional majority-minority districts a state can fairly be expected to create under § 2.<sup>35</sup> In the context of a single-member districting scheme, the *Gingles* preconditions establish only that vote dilution is possible, depending on how the lines are drawn, not that any unfairness has occurred.<sup>36</sup>

Confronted with this question in 1994, the Supreme Court sketched out both the baseline for evaluating dilution and the limiting principle for cabining the state’s duty to create additional majority-minority districts under § 2. In *Johnson v. De Grandy*,<sup>37</sup> the Court rejected the dilution claim of Hispanic and African-American voters because the challenged districting plan provided both sets of voters “rough proportionality” — that is, the opportunity to exercise electoral control in a number of districts that roughly corresponded to their share of the

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<sup>31</sup> See *Grove*, 507 U.S. at 40–41 (extending the *Gingles* test, which was designed to address at-large schemes, to single-member districting plans).

<sup>32</sup> Pildes & Niemi, *supra* note 16, at 489.

<sup>33</sup> See, e.g., *De Grandy*, 512 U.S. at 1016–17 (illustrating that a group with only forty percent of the voting population could control elections in up to seven of ten districts, depending on how the lines are drawn).

<sup>34</sup> See *supra* p. 1672.

<sup>35</sup> This is presumably why the Court noted in *De Grandy* that proof of the *Gingles* criteria would likely carry more weight in a challenge to a multimember districting plan than to a single-member districting scheme. See *De Grandy*, 512 U.S. at 1012–13 & n.10.

<sup>36</sup> See *id.* at 1012–16, 1023–24 (upholding a redistricting plan notwithstanding the plaintiffs’ satisfaction of the *Gingles* criteria); see also *Jenkins v. Manning*, 116 F.3d 685, 700 (3d Cir. 1997); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1024 (2d Cir. 1995); *Rural W. Tenn. African-American Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1107–09 (W.D. Tenn. 1995), *aff’d sub nom.* *Rural W. Tenn. African-American Affairs Council, Inc. v. Sundquist*, 516 U.S. 801 (1995).

<sup>37</sup> 512 U.S. 997 (1994).

relevant population.<sup>38</sup> Although the Court emphasized that proportionality does not provide a complete defense to a § 2 suit, proportionality receives extraordinarily heavy weight in evaluating such claims and has become the preeminent measure of fairness in redistricting.<sup>39</sup>

2. *The Theory of Dilution.* — Although dilution doctrine has concededly developed in a fairly haphazard fashion, it nevertheless may be justified in theoretical terms. For the purposes of this Article, I accept dilution doctrine on its own terms. I thus do not deal with the powerful critiques of winner-take-all schemes, territorially based redistricting, and the American political process as a whole offered by some commentators,<sup>40</sup> nor do I address the criticisms directed against dilution doctrine's heavy focus on a group's ability to elect its preferred candidate at the expense of other facets of electoral participation.<sup>41</sup>

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<sup>38</sup> The Supreme Court has never formally decided what population should be used as the baseline for assessing proportionality — total population, voting-age population, or citizen voting-age population. See *id.* at 1017 n.14.

It is worth emphasizing that the proportionality standard does not suggest that only African-Americans can represent African-Americans or that only Latinos can represent Latinos, nor does it guarantee a win to minority voters whether or not they show up to vote. To the contrary, in *De Grandy* the Court explicitly rejected the view that courts should look to election outcomes — specifically, how many minority legislators are elected in a given district — in order to assess whether the districting scheme is “fair.” See *id.* at 1014 n.11. The Court was unwilling to assume that racial minorities can be represented only by other racial minorities, and it similarly refused to grant racial minorities a guaranteed right to electoral success. *Id.* Thus, *De Grandy* held that fairness should be measured against the *potential* voting power of a minority group — that is, whether group members are capable of electing a candidate of choice (whatever the race of that candidate) *if they choose to do so*. In the words of the Court, “the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.” *Id.* For these reasons, there is now a strong consensus that the proportionality standard is merely a functional, opportunity-based fairness standard, not an entitlement to descriptive representation, and thus does not raise problematic assumptions about the substantive preferences of minority voters.

<sup>39</sup> See, e.g., *Barnett v. City of Chicago*, 141 F.3d 699, 705 (7th Cir. 1998) (requiring the city to achieve “exact proportional equality” between blacks and whites if possible); see also *De Grandy*, 512 U.S. at 1018–19, 1023–24.

<sup>40</sup> For example, Professor Guinier has argued that current dilution doctrine — which is built around a winner-take-all, territorially based redistricting scheme — represents an impoverished view of participatory democracy and guarantees the permanent submergence of minority electoral preferences. See Guinier, *No Two Seats*, *supra* note 12, at 1437–58. She thus proposes cumulative voting schemes, arguing that they give a greater political voice to self-identified racial minorities (indeed, to *any* electoral minorities) and better promote democratic values. *Id.* at 1458–93; see also Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241 (summarizing and evaluating the success of efforts to employ cumulative voting). Other commentators have attacked the ability of our political process even to express the will of the *majority*. See, e.g., Philip Heymann & Jody Heymann, *The Fate of Public Debate in the United States*, 33 HARV. J. ON LEGIS. 511 (1996); Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

<sup>41</sup> See Abrams, *supra* note 21, at 455–56; Karlan, *supra* note 21, at 186–87, 198; Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 29–34 (1991). These criticisms include the problem of the “third generation” voting rights cases, in which minority interests are thwarted despite their ability to elect their candidates of

Dilution doctrine rests on two assumptions about the way representative democracy works: first, that there is more to "voting" than merely casting a vote, and second, that members of an electoral minority should enjoy an equal opportunity to coalesce effectively despite the mandate of majority rule. Although the examples included here involve racial dilution claims, members of any number of groups could conceivably claim that their votes have been "diluted," provided that they find a statutory or constitutional hook for doing so.<sup>42</sup>

(a) *An Effective Vote Hinges on One's Ability To Aggregate That Vote with Those of Like-minded Voters.* — The central premise of dilution doctrine is that voting involves something more than casting a ballot on election day. As the Supreme Court concluded in *Reynolds v. Sims*:<sup>43</sup>

There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes . . . the right to have the vote counted at full value without dilution or discount.<sup>44</sup>

It is this second, more elusive component of voting that dilution claims involve — how does a court determine whether one's vote, once cast, is "counted at full value"?

One might argue that a vote is "counted at full value" as long as everyone's vote is given equal weight.<sup>45</sup> The notion of dilution, however, hinges on the assumption that like-minded voters should have a fair chance to coalesce — that is, that an individual's ability to aggregate her vote with others matters in a representative democracy.<sup>46</sup>

choice. See MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY 7, 221–27 (1998); Guinier, *No Two Seats*, *supra* note 12, at 1426–28.

<sup>42</sup> For example, the Court recognized a cause of action based on partisan gerrymandering in *Davis v. Bandemer*, 478 U.S. 109, 138–39 (1986) (plurality opinion).

<sup>43</sup> 377 U.S. 533 (1964).

<sup>44</sup> *Id.* at 555 n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

<sup>45</sup> See Holder v. Hall, 512 U.S. 874, 901 (1994) (Thomas, J., concurring in the judgment); Larry Alexander, *Still Lost in the Political Thicket (or Why I Don't Understand the Concept of Vote Dilution)*, 50 VAND. L. REV. 327, 327–28 (1997).

<sup>46</sup> See, e.g., *Bush v. Vera*, 517 U.S. 952, 1048–49 (1996) (Souter, J., dissenting); *Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring in the judgment); *id.* at 167 (Powell, J., concurring in part and dissenting in part); WILLIAMS, *supra* note 41, at 27; Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 918 (1998); Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 28–29; Bruce E. Cain, *Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist, and Reformer*, in POLITICAL GERRYMANDERING AND THE COURTS 117, 128 (Bernard Grofman ed., 1990); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1591 (1993) [hereinafter Guinier, *Emperor's Clothes*]; Guinier, *No Two Seats*, *supra* note 12, at 1429–31; Issacharoff, *supra* note 11, at 883–84; Issacharoff, *supra* note 9, at 1856–59; Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2282 (1998); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 84; Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1202–03 (1996); Pildes, *supra*

The essential assumption behind the representative system we have developed in the United States is that individuals can collaborate to elect a person to speak on their behalf.<sup>47</sup> In the oft-repeated words of Justice Powell, “[t]he concept of ‘representation’ necessarily applies to groups: groups of voters elect representatives, individual voters do not.”<sup>48</sup> A key debate in American democratic theory is how to determine the makeup of these groups — whether by geography, economic interest, race, or party affiliation. None of these baselines is a neutral one,<sup>49</sup> and each often serves as a proxy for the others.<sup>50</sup>

Under the structure of our representative system, an individual has the best chance of influencing the political process when she acts as part of a cohesive voting group that can cast its weight behind one candidate or another.<sup>51</sup> Vote aggregation helps an individual convey her needs to her representative and creates an incentive for politicians to pay attention to her concerns.<sup>52</sup> In contrast to individual voters, or-

note 19, at 2544 n.133; Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 432–40 (1999); John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 164 (1984). *But see* Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 734–35 (1995). *See generally* Lani Guinier, *The Supreme Court, 1993 Term—Comment: [E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994) [hereinafter Guinier, *[E]racing Democracy*] (discussing the relevance of groups to democracy).

<sup>47</sup> Lani Guinier terms this principle “synecdoche.” *See generally* Lani Guinier, *Racial and Political Synecdoche: Issues of Representation* (July 14, 2000) (memorandum to the Harvard Law School Faculty, on file with the Harvard Law School Library). I do not mean to suggest that this theory represents the *only* theory of representation available or that it was somehow predestined to be the dominant theory of representation we employ in the United States. I simply intend this paragraph to be descriptive.

<sup>48</sup> *Bandemer*, 478 U.S. at 167 (Powell, J., concurring in part and dissenting in part).

<sup>49</sup> *See, e.g.*, CAIN, *supra* note 14, at 52–77.

<sup>50</sup> For example, those who assume that “geography” is simply a neutral baseline dating back to the Founding might be surprised that the Founders and the generations following them did not share that sense. Indeed, Congress eventually chose single-member districts largely because geography was a useful proxy for economic interests. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 769–73 (1998).

<sup>51</sup> *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 601 (1993); Guinier, *[E]racing Democracy*, *supra* note 46, at 125–26; Issacharoff, *supra* note 11, at 884; Carole J. Uhlaner, *Rational Turnout: The Neglected Role of Groups*, 33 AM. J. POL. SCI. 390, 419 (1989).

<sup>52</sup> Some political scientists have concluded that group participation may help resolve the “paradox of voting” — that is, it might explain why a rational individual will cast a vote even though her vote is extremely unlikely to alter electoral outcomes. *See, e.g.*, Rebecca B. Morton, *Groups in Rational Turnout Models*, 35 AM. J. POL. SCI. 758 (1991); Uhlaner, *supra* note 51. The debate on the utility of voting has largely built on Anthony Downs’s seminal work, *An Economic Theory of Democracy*, in which he offers a rational account of an individual voter’s decision to go to the polls. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 257, 274 (1957); *see also* DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* 43–61 (1995); John A. Ferejohn & Morris P. Fiorina, *The Paradox of Not Voting: A Decision Theoretic Analysis*,



ganized groups are often able to influence election outcomes — either by choosing to endorse one candidate over another or by increasing turnout for particular candidates.<sup>53</sup> For this reason, politicians will offer groups desirable “packages of benefits” in exchange for endorsements, registration drives, and turnout efforts.<sup>54</sup>

Redistricting practices plainly reflect the relevance of groups to a representational system. One of the main purposes of redistricting is to facilitate vote aggregation by grouping individuals together on the basis of shared interests. Redistricters do so to enable individuals to communicate their needs to their representatives<sup>55</sup> and to help legislators represent their districts effectively.<sup>56</sup>

Compact districts themselves reflect an effort to group individuals together in this fashion. Redistricters draw compact districts based in part on the assumption that keeping neighborhoods together will ensure a homogeneous district.<sup>57</sup> In short, even when drawing districts solely along preexisting geographical boundaries, redistricters do not, in the words of Justice Ginsburg, “treat people as individuals” but “assemble people in groups.”<sup>58</sup>

68 AM. POL. SCI. REV. 525, 526 (1974); William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25 (1968). For a critique of this approach, see generally DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994).

<sup>53</sup> Uhlaner, *supra* note 51, at 392. Indeed, every election is inevitably followed by an analysis of which “group” swung the election by turning out in high numbers. See, e.g., *id.*; Editorial, *Election '98: The Factors at Play in Tuesday's Elections*, DALLAS MORNING NEWS, Nov. 2, 1998, at 14A; Michael K. Frisby, *Both Parties Take Stock of Jump in Black Male Turnout*, WALL ST. J., Feb. 13, 1997, at A20; Michael J. Gerson, *Parties Know This Year's Voters Are Going to the Poles*, OREGONIAN (Portland), Oct. 11, 1998, at E1; John Harwood, *Left, Right, Left: Are You Apathetic About Fall's Election? You're Written off*, WALL ST. J., July 13, 1998, at A1.

<sup>54</sup> See Morton, *supra* note 52, at 760–61; Uhlaner, *supra* note 51, at 394. The relationship between groups and politicians is mutually reinforcing. If a group can increase its turnout, it can reward politicians who move “closer” to the group’s preferred policies, something an individual voter cannot do. Group leaders will, in turn, try “to provide their memberships with incentives to vote,” thereby “captur[ing that] collective benefit for the group.” *Id.* at 395–96; see also Morton, *supra* note 52, at 760. It is thus unsurprising that “voter turnout rates depend upon the expected benefits received from voting at a group level.” *Id.*; see also Uhlaner, *supra* note 51, at 394. Groups also exert significant influence over policymaking after the election. See Abrams, *supra* note 21, at 485 & n.209 (listing various studies).

<sup>55</sup> See Bush v. Vera, 517 U.S. 952, 1049 (1996) (Souter, J., dissenting); Karlan & Levinson, *supra* note 46, at 1204.

<sup>56</sup> See *Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge panel). Others have been less enthusiastic about homogeneous districts. See CAIN, *supra* note 14, at 63–65; Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185, 189 (1985).

<sup>57</sup> CAIN, *supra* note 14, at 63–65; see also *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 760 (1964) (Stewart, J., dissenting); Guinier, *Emperor's Clothes*, *supra* note 46, at 1601–06; Pildes & Niemi, *supra* note 16, at 483.

<sup>58</sup> *Miller v. Johnson*, 515 U.S. 900, 947 (1995) (Ginsburg, J., dissenting); see also Reed, *supra* note 46, at 410.

(b) *Democracy Offers Opportunities for Minority Influence Despite the Mandate of Majority Rule.* — The second fundamental assumption of dilution theory is that even numeric minorities should have an opportunity, consistent with their voting strength, to aggregate their votes effectively.<sup>59</sup> Indeed, single-member districts were historically chosen over at-large schemes precisely to afford electoral minorities a chance to affect the political process.<sup>60</sup>

Because even single-member districting schemes are extraordinarily malleable, however, a group that controls an electoral majority can effectively become what Professor Issacharoff has termed a “majority faction,” guaranteeing itself electoral power that far exceeds its share of the population.<sup>61</sup> Dilution doctrine is designed to ensure that a group cannot obtain an unfair share of political power by manipulating district lines.<sup>62</sup>

There are a variety of ways to define “fairness.”<sup>63</sup> It can be defined in procedural terms — that is, whether the election process offers individuals the same *opportunity* as others to aggregate their votes, without regard to election outcomes. Fairness can also be defined in outcome-based terms — that is, whether members of a group ultimately “claim a just share of electoral results.”<sup>64</sup> Once we make that choice, we must also determine how to measure what constitutes “equal” opportunity or results. We might, for example, inquire whether similar shares of white and minority voters are “wasted” (that is, not cast for election winners or unnecessary to the winner’s victory).<sup>65</sup> Additionally, we might compare the challenged scheme to a race-neutral dis-

<sup>59</sup> See S. REP. NO. 97-417, at 19 (1982); see also Christopher L. Eisgruber, *Democracy, Majoritarianism, and Racial Equality: A Response to Professor Karlan*, 50 VAND. L. REV. 347, 354 (1997) (“Democracy ceases to be an appealing idea if it is reduced to mere majoritarianism. Majoritarianism is a system wherein 40% of the people lose 100% of the time.”). Dilution principles, then, implicate what Professor Michelman terms “some of the most important [questions] that will ever face any political community . . . because they are decisions about exactly what a fair majority vote is, or about what the notion of a fair majority vote properly means.” Frank I. Michelman, “*Protecting the People from Themselves*,” or *How Direct Can Democracy Be?*, 45 UCLA L. REV. 1717, 1729 (1998).

<sup>60</sup> See ISSACHAROFF, KARLAN & PILDES, *supra* note 50, at 769–73.

<sup>61</sup> Issacharoff, *supra* note 9, at 1861–62; see also Guinier, *No Two Seats*, *supra* note 12, at 1429.

<sup>62</sup> See Karlan, *supra* note 41, at 3.

<sup>63</sup> See Gary King, John Bruce & Andrew Gelman, *Racial Fairness in Legislative Redistricting*, in CLASSIFYING BY RACE 85, 89–94 (Paul E. Peterson ed., 1995). Although there is considerable agreement among political scientists regarding the appropriate standard for gauging partisan fairness (the “partisan symmetry” standard), the same cannot be said for racial fairness. *Id.* at 85, 93.

<sup>64</sup> Issacharoff, *supra* note 11, at 883; see also Pildes, *supra* note 19, at 2524–25 (contrasting procedural and outcome-based definitions of fairness).

<sup>65</sup> Professor Guinier has devoted considerable attention to the problem of “wasted votes” under our current, territorially based system. See, e.g., Guinier, *Emperor’s Clothes*, *supra* note 46, at 1606.

tricting scheme. We could also determine whether, if whites enjoyed the same share of the population as nonwhite voters, they would be granted a similar amount of electoral power under the existing scheme.<sup>66</sup> Or we might examine each group's relative share of the electorate. The question is a significant one, and our answer will largely depend on what theory of voting and representation we prefer. At least for now, the courts have adopted an opportunity-based standard that grants minority voters a share of electoral control in keeping with their share of the population.<sup>67</sup>

### B. Dilution as an Aggregate Harm

Working from the description of dilution theory set out in section I.A, we can identify what distinguishes dilution claims from conventional individual rights.<sup>68</sup> There are at least three differences. First, although the harm of dilution can be understood as an individual injury, fairness is measured in group terms. Second, the right of an individual to an undiluted vote rises and falls with the treatment of the group. Third, the right is unindividuated among members of the group; no group member is more or less injured than any other group member.<sup>69</sup> The distinctions reflected in this taxonomy are concededly artificial. Each simply illustrates a different facet of the same harm. Taken together, they provide what amounts to a diagnostic test for identifying aggregate harms and serve as a basis for creating a broader conceptual framework to understand these harms.

Before turning to the diagnostic test, it is worth setting out what this framework is and is not designed to do. As noted above, an aggregate rights framework is not designed to answer the difficult normative questions regarding when dilution claims should be recognized and who should be able to bring them.<sup>70</sup> An aggregate rights framework could apply to *any* dilution claim — indeed, to any other type of civil rights claim that shares its characteristics — no matter what

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<sup>66</sup> This test roughly resembles the approach used by political scientists to estimate partisan fairness. See King, Bruce & Gelman, *supra* note 63, at 93. For example, if Democrats receive fifty-five percent of the votes and win seventy-five percent of the seats, this result would be deemed fair if Republicans could similarly garner fifty-five percent of the votes and win seventy-five percent of the seats. Professors Ackerman and Strauss have described and critiqued comparable means of assessing fairness in the context of race and gender. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 721 (1985); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956–67, 971–75 (1989).

<sup>67</sup> See *supra* note 38.

<sup>68</sup> Part IV analyzes the relationship between dilution claims and group rights.

<sup>69</sup> As I explain below in section I.B.4, these three characteristics apply equally to the definition of the *harm* in dilution cases brought under the Constitution. They may not, however, provide an appropriate framework for establishing the invidious intent required to prove a constitutional harm. See *infra* pp. 1688–89.

<sup>70</sup> See *supra* p. 1676.

broad principle that suit seeks to vindicate. This framework will also work for members of *any* group, however that group is defined. Thus, if an environmentalist or a Democrat or an ultraconservative wished to bring a dilution claim, this framework would tell us not whether that individual should be allowed to do so, but only how to analyze the claim should we allow it to proceed.

1. *Fairness Is Measured in Group Terms.*<sup>71</sup> — One key characteristic of an aggregate right is that whatever benchmark is chosen for measuring fairness, it will differ significantly from that used in a conventional individual rights framework. To understand this difference, it is helpful to think of voting rights claims as falling along a continuum. At one end of the continuum are what we consider classic examples of individual rights. And as we progress along the continuum, groups become increasingly more important for understanding the underlying injury. At the other end of the continuum are group rights. Dilution claims (and other aggregate rights) fall somewhere between the two extremes. They are *individual* harms that are measured by reference to the treatment of a *group*.

Before further describing this continuum, let me offer a brief word on terminology to avoid any unnecessary confusion that might stem from the multiple definitions that can be attached to the phrase "group right." For some, a right cannot fall along a continuum, as I suggest here. On this view, the individual/group right distinction is like a light switch — a right is either an individual right or a group right. Subscribers to this dichotomous view are likely thinking of the term "group right" differently than I employ it here. This alternative conception would define "group rights" as belonging to a group as a whole (for example, a tribe's right to self-determination<sup>72</sup>). Such rights cannot inure to an individual. When I refer to an aggregate right's "group-based characteristics," however, I merely refer to "group" in the sense of "a collection of individuals," not as an entity that exists separate and apart from its members. For those who adopt this dichotomous view, I should emphasize at the outset that the right to an undiluted vote can properly be understood as an *individual* right within a dichotomous scheme,<sup>73</sup> and one need not accept the view that rights can be enjoyed by groups as autonomous, self-defining entities to accept an aggregate rights framework.<sup>74</sup>

Consider just two examples of what we typically think of as "individual rights" if we use the continuum model described above. In the

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<sup>71</sup> For a similar formulation, see Issacharoff, *supra* note 11, at 884–88.

<sup>72</sup> See *infra* note 243.

<sup>73</sup> See *infra* section IV.A.1, pp. 1722–24.

<sup>74</sup> I am indebted to Frank Michelman for drawing my attention to this potential source of confusion.

first category of individual rights claims are claims that can be established without reference to the treatment of other group members. For example, imagine that a state employee refuses to register a voter explicitly on the ground that the voter is African-American. Our excluded registrant would not need to document the treatment of other African-Americans to prove that she has been treated unfairly.<sup>75</sup> Nor could the state defend against the discrimination claim by pointing out that it had properly registered many other African-Americans. Group membership is relevant to this claim only to the extent that race was the source of the disparate treatment.

Even in cases in which the treatment of other group members may provide relevant evidence to support an individual's claim of discrimination, the claim can nonetheless be established without reference to the group. Consider, for example, an African-American voter who is denied an opportunity to cast her vote based on what appear to be frivolous but nonracial grounds. Evidence that other African-Americans were similarly excluded would certainly buttress her claim of unfair treatment. But such evidence is not essential for establishing her discrimination claim. She could, for instance, succeed by proving that the grounds offered for rejecting her application were pretextual and that the state employee who excluded her was a racist.

Both of these examples fit within a conventional understanding of an individual right. In each instance, the treatment of other members of the plaintiff's racial group is either irrelevant or relevant, but not necessary, to the plaintiff's case. There is also no question about which individual possesses the right or who is entitled to a remedy — the right-holder is the person treated in a discriminatory fashion by the state. Indeed, even if a number of other African-Americans brought similar claims in a class action, at bottom the right asserted by each member of the class would inure only to that individual and could be evaluated independently of the other class members' rights.<sup>76</sup>

It is difficult to fit dilution claims into this framework because evidence regarding the treatment of other group members is *essential* for establishing that an individual's vote has been diluted.<sup>77</sup> A court cannot determine whether an individual has a "fair" opportunity to aggregate her vote with other members of her racial group without knowing

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<sup>75</sup> See, e.g., 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 30 (3d ed. 1996).

<sup>76</sup> See 1 NEWBERG ON CLASS ACTIONS § 1.02, at 1-7 to -8 (3d ed. 1992).

<sup>77</sup> See Pildes & Niemi, *supra* note 16, at 493 ("[D]iminution of relative group political power . . . is the sine qua non of a vote-dilution claim."); see also Thornburg v. Gingles, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in the judgment); Aleinikoff & Issacharoff, *supra* note 51, at 634; Briffault, *supra* note 46, at 60; cf. Issacharoff, *supra* note 11, at 883-84 ("[A]ny sophisticated right to genuinely meaningful electoral participation must be evaluated and measured as a group right, that of groups of voters seeking the outcomes promised to them through the electoral system.").

where those other group members are located within the districting scheme.

For this reason, dilution cannot be established simply by examining the treatment of an individual voter. Such an inquiry will reveal only whether that person had an equal opportunity to *cast* a vote. It will not tell us whether she had an equal opportunity to *aggregate* her vote.<sup>78</sup>

Interestingly, even an examination of the ability of all members of a single group to aggregate their votes does not tell us whether dilution has occurred. That analysis tells us only whether each member of the group has had a chance to elect her candidates of choice. It does not tell us whether each has had a *fair* chance to do so. No matter how fairness is defined, we must look to the opportunities afforded to white voters to make that assessment.

In this respect, a dilution claim intuitively resembles a housing segregation claim.<sup>79</sup> In contrast to the conventional individual injuries described above, the harm of segregation is generally measured by considering the relative positions of groups. One cannot determine whether a particular individual has been "segregated" without knowing how other members of her race are distributed within the challenged housing system.<sup>80</sup> Thus, as with dilution, the relative treatment of groups is the baseline for measuring fairness.

2. *The Right Rises and Falls with the Treatment of the Group.* — A second distinguishing feature of an aggregate right is that it rises and falls with the treatment of the group. As noted above,<sup>81</sup> in a conventional individual rights case a claim cannot be established or disproved solely by reference to the defendant's treatment of other members of

<sup>78</sup> Dilution cannot be established, then, by examination of the treatment of individual group members; it requires examination of the entire districting scheme. See Karlan & Levinson, *supra* note 46, at 1210 ("[T]he relevant political unit for determining the fairness of political influence is an entire jurisdiction, rather than a single district."); see also Issacharoff & Karlan, *supra* note 46, at 2282 ("[R]acial vote dilution necessarily requires looking at results across a set of districts . . .").

<sup>79</sup> In analogizing dilution claims to segregation claims, I simply refer to the way in which we understand the injury underlying both claims. An aggregate rights framework is designed to help us understand this special kind of injury and decide how to remedy it. But one must look to broader, normative theories to determine when to recognize an aggregate injury, such as dilution or segregation, and who should be protected from such an injury. See *infra* section IV.A.4, pp. 1732-35. Because the answers to these broader, normative questions may differ for dilution claims and for segregation claims, I do not mean to conflate the two when comparing the injury that underlies them both.

<sup>80</sup> There may even be tensions between segregation remedies and traditional conceptions of individual rights that are similar to those tensions discussed in the dilution context. See, e.g., *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir. 1988).

<sup>81</sup> See *supra* pp. 1682-83.

the same racial group.<sup>82</sup> In dilution cases, in contrast, a state *can* defeat an individual's claim by showing that it treated the rest of the group fairly.<sup>83</sup>

Consider a case in which the state has created one majority-minority district and could theoretically create a second but has instead fractured the minority group's remaining members into two majority-white districts, where they will be consistently outvoted by whites when voting is racially polarized. If we conclude that the group as a whole has been treated fairly, then even those individuals who are fractured into the majority-white districts — and are thus unable to elect their candidates of choice — cannot claim that their votes have been diluted.<sup>84</sup>

Conversely, if we conclude that the group has been treated unfairly, individual voters in *both* the majority-white and majority-minority districts could claim dilution. Even those group members capable of electing their candidate of choice in their own district have had their votes diluted. If the group members had been properly distributed, these individuals would have been able to aggregate their votes in such a way that they could have elected *two* candidates of choice.<sup>85</sup> These voters and their chosen representatives would thus have a better chance of influencing the political process at the legislative level.

One might be tempted to argue that the voters fractured into the two majority-white districts are injured in both examples because they cannot elect their candidate of choice. Such an argument would, however, conflate two types of harms that can arise from a territorially based districting scheme. It might well be true that minority voters within the majority-minority district in our hypothetical are better represented because their candidate of choice holds office there.<sup>86</sup> That

<sup>82</sup> In this respect, dilution claims differ even from other claims that depart from our conventional view of individual rights. See *Connecticut v. Teal*, 457 U.S. 440, 452–53 (1982) (rejecting the “bottom-line” defense to a disparate impact claim).

<sup>83</sup> Cf. Issacharoff & Karlan, *supra* note 46, at 2282–85 (emphasizing that racial vote dilution claims require consideration of the results in a number of districts).

<sup>84</sup> One might argue that we should simply divide these minority voters into two groups — groups that can elect their candidates of choice and groups that cannot. As an initial matter, such a division would not disprove the point here. Even if we decide to focus only on group members capable of electing a candidate of choice, no individual member of that subgroup could establish her claim without reference to the treatment of other members of her subgroup. I discuss the broader question raised by this hypothetical — whether only those capable of residing in a majority-minority district, if one were drawn, should be deemed injured — at pp. 1703–07, below.

<sup>85</sup> *But see* Issacharoff & Karlan, *supra* note 46, at 2283–84 (asserting that group members do not have their votes directly diluted if they are in a district that allows their group to elect its representative of choice).

<sup>86</sup> Professor Guinier has documented the benefits that come from direct representation. *E.g.*, Guinier, *Emperor's Clothes*, *supra* note 46, at 1607–08; *see also* Issacharoff & Karlan, *supra* note 46, at 2283–84. There is, to be sure, anecdotal evidence suggesting that minority voters across a state will often rely on the assistance of a minority candidate elected in a different district. Ber-

harm, however, is distinct from a dilution injury. As the Supreme Court explained in *De Grandy*, "some dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size."<sup>87</sup> A dilution injury hinges on whether group members are arranged so that they have an *equal* chance to aggregate their votes, not on whether every group member is able to cast a winning vote.

When lines are drawn fairly, then, a minority voter cannot claim that she has been placed in a majority-white district due to a racial skew in districting. She is there simply because *any* territorially based scheme will place some whites in majority-minority districts and racial minorities in majority-white districts. Thus, these voters cannot claim vote dilution any more than a minority group member can claim a legally cognizable injury when she is denied a job through a nondiscriminatory hiring process. In each instance, although someone is deprived of her preference, she is not "injured" in the legal sense because this deprivation is not due to a racial skew in the distribution of benefits.<sup>88</sup>

Here again, the right to an undiluted vote can be analogized to the right not to be segregated. In a housing segregation case, for instance, it does not matter whether a particular African-American is placed in a municipality's worst housing development if the housing system as a whole is fully integrated. So too, under § 2 it does not matter whether some minority voters are placed in a majority-white district if group members are arranged fairly. Once a certain level of fairness is achieved — integration in the housing context or a fair arrangement of voters in the redistricting context — an individual cannot say that her placement in the overall scheme is, to quote § 2, "a denial or abridgment of [a] right . . . on account of race."<sup>89</sup>

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nard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1246 n.40 (1993); Telephone Conversation with J. Gerald Hebert, General Counsel, IMPAC 2000 (June 15, 1999). One can certainly imagine that to the extent that a representative's job is to bring local services back to her district, see Karlan, *supra* note 21, at 181, minority voters fragmented in majority-white districts may have less influence over the kind and quality of services they receive than their counterparts in majority-minority districts. After all, representatives' first priority is usually attending to the needs of their electoral base.

<sup>87</sup> *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1993).

<sup>88</sup> Interestingly, in *Strauder v. West Virginia*, 100 U.S. 303 (1879), the Court used a similar argument to describe a defendant's right not to stand trial before a jury from which African-Americans were systematically excluded. It noted that the question "is not whether a colored man . . . has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether . . . the composition or selection of jurors by whom he is to be indicted or tried" can be racially skewed. *Id.* at 305.

<sup>89</sup> 42 U.S.C. § 1973 (1994) (emphasis added).



3. *The Injury Is Unindividuated Among Group Members.* — Finally, in the context of dilution we would also expect to find a different type of injury than that which we encounter in a classic, individual rights suit. In a conventional case, the right is generally individuated — that is, a court can readily sort those who are “injured” by the challenged practice from those who are unharmed.

The injury of vote dilution, in contrast, is unindividuated; all group members are injured equally by dilution, and all benefit equally from a remedy.<sup>90</sup> Each voter has an equal stake in the group’s ability to aggregate its vote because each has the same power — one vote — to contribute.<sup>91</sup> And when the state has drawn a plan to remedy vote dilution, all minority voters benefit from that plan whether or not they are included within the new “remedial” majority-minority district. That is because once the remedial district is drawn, no one can claim that her inability to aggregate her vote is due to a racial skew in the system. For all of these reasons, group members in dilution cases are effectively “fungible” for liability and remedial purposes.<sup>92</sup>

Again, segregation cases offer us a useful analogy. In housing segregation cases, housing residents are fungible for purposes of a prospective injunction. Imagine a housing program with two projects. The first is a rundown, poorly maintained project located in a poor, segregated neighborhood. It is 100% African-American. The second is a new, well maintained project located in an integrated, middle-income neighborhood. It is 100% white. In remedying the injury of segregation on a prospective basis, it does not matter which African-Americans are moved out of the inferior project into the superior one to bring about integration. From a legal standpoint, those moved to the better housing and those left behind benefit equally from the injunction — the integration achieved by the switch. That is because the injury at issue is not the state’s frustration of particular individuals’ preferences, but segregation itself,<sup>93</sup> which is the *aggregate* result of

<sup>90</sup> Dilution doctrine does not distinguish between minority voters who vote in the same manner as most other members of the group and those who do not. I reserve discussion of the normative implications of this fact for section IV.A.3, pp. 1727–32.

<sup>91</sup> This principle does, of course, have its limitations. See *infra* section III.D.1, pp. 1711–13.

<sup>92</sup> Cf. Guinier, *Emperor’s Clothes*, *supra* note 46, at 1608–09, 1612 (noting that virtual representation “assumes that individuals are interchangeable based on some externally observed characteristics”); Guinier, *No Two Seats*, *supra* note 12, at 1427 n.49 (noting that virtual representation “assumes that the interests of blacks and whites are fungible”).

<sup>93</sup> Segregation tends to result from a wide range of discriminatory practices arising in many different programs and housing developments, including racial steering, admissions practices that have a disparate impact on minorities, and discriminatory site selection. Despite this fact, courts have refused to disaggregate the class (by requiring one representative for racial steering claims, one representative for site selection claims, etc.). Instead, they have defined the injury as the end result of these actions — segregation itself — which affects all members of the group, regardless of how the state has treated them or where they live. See *Smith v. City of Cleveland Heights*, 760

the state's many different types of discriminatory actions against many individuals.<sup>94</sup>

4. *A Brief Note on Intentional Dilution Claims.* — As noted above, plaintiffs in voting rights cases can theoretically bring *two* types of dilution claims: those alleging discriminatory effects, brought under § 2, and those alleging both a discriminatory purpose and effect, which arise under the Constitution. For obvious reasons, plaintiffs rarely litigate the latter type of claim.<sup>95</sup> Nonetheless, it is worth considering whether an aggregate rights framework bears any relationship to the constitutional claim, especially in light of the questions that may be raised in the future regarding the constitutionality of § 2.<sup>96</sup>

Despite the differences between the statutory and constitutional claims, an aggregate rights framework remains necessary for proving discriminatory effect in the constitutional context. Regardless whether a state's actions are intentional, one cannot determine whether the injury of dilution has in fact occurred without reference to the three criteria discussed above.

To the extent that intent is inferred from effect,<sup>97</sup> an aggregate rights framework applies equally well to the intent prong of a constitutional dilution claim. But we may need to modify the aggregate rights framework in cases in which the state's intentional discrimination is directed not at the group as a whole, but at a particular subset of mi-

*Fzd 720, 722* (6th Cir. 1985) (holding that an African-American who was not racially steered was nevertheless injured by the practice because of the stigma arising from the exclusion of other African-Americans); *Young v. Pierce*, 628 F. Supp. 1037, 1042 (E.D. Tex. 1985) (holding that all participants in a housing program are injured in the same way if all "are illegally required to live in racially segregated housing" and the injury — that is, the "system of segregated housing" — is the "result" of the housing agency's many actions); *cf. Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 114 (1979) (holding that a neighborhood whose "racial composition allegedly is being manipulated may be so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident"). Contrast this with Title VII suits involving a conventional individual right. In such suits, a named plaintiff bringing a hiring claim generally cannot represent class members pursuing promotion claims. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

<sup>94</sup> I leave aside the question of what type of reparations might be necessary to compensate *all* of those forced to live in poor, segregated housing until the court issued an injunction. I should also note that there is at least one key difference between housing segregation claims and dilution claims: segregation cases generally require a finding of prior *de jure* segregation by the state. Thus, individualized proof is necessary to show that the *defendant* has engaged in discriminatory acts. Significantly, however, individualized proof of discriminatory treatment is unnecessary for the *victims* of segregation (just as it is unnecessary for the victims of dilution). We see a similar approach in affirmative action cases. *See Daniel R. Ortiz, Self-Defeating Identities, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 371, 372-73 (Robert Post & Michael Rogin eds., 1998).

<sup>95</sup> *See supra* pp. 1673-74.

<sup>96</sup> I am indebted to Richard Fallon for raising this concern. For a discussion of § 2's constitutionality, see *infra* pp. 1736-37.

<sup>97</sup> *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 618 (1982).

nority voters.<sup>98</sup> In such a situation, an aggregate rights framework would continue to provide guidance regarding the nature of the harm and the appropriateness of the remedy, but a court would apply it in a more localized fashion.<sup>99</sup>

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In sum, because an aggregate harm like dilution takes groups into account in defining individual harm, it differs in important ways from our conventional view of individual rights. The next question is whether the three-part diagnostic test for identifying aggregate rights described above helps us make sense of dilution doctrine in practice.

### C. *Until Shaw II, Case Law Reflected the Aggregate Nature of Dilution Claims*

Although the courts have rarely acknowledged, let alone come to grips with, the group-related aspects of dilution claims, dilution doctrine has reflected the aggregate nature of these claims to a remarkable extent. Indeed, while the courts lacked a fully articulated conceptual framework for dealing with dilution claims, until *Shaw II* they nonetheless instinctively moved toward an aggregate rights approach, even when that approach was at odds with a conventional view of individual rights.

One way in which dilution doctrine has traditionally reflected the aggregate nature of dilution claims is that fairness has been measured in group terms.<sup>100</sup> When voting is polarized, the Supreme Court has chosen to evaluate dilution claims against a baseline of “proportionality” — that is, whether group members have an opportunity to exercise electoral control in a share of districts roughly proportional to their share of the relevant population.<sup>101</sup>

More importantly for our purposes, the Court has chosen to adopt a statewide or regionwide proportionality inquiry that includes the entire minority population.<sup>102</sup> That inquiry would be largely irrelevant if dilution implicated a classic individual right. After all, *Gingles* held that a dilution claim requires proof that minority voters are numerous enough to constitute an electoral majority in a compact, single-member district, and a state may certainly defend against a § 2 claim by as-

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<sup>98</sup> See *infra* pp. 1709–10.

<sup>99</sup> See *infra* pp. 1709–10.

<sup>100</sup> See *Johnson v. De Grandy*, 512 U.S. 997, 1000, 1014 (1994). Even the Justices most critical of § 2 agree with this assessment. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 414 (1991) (Scalia, J., dissenting) (noting that § 2 “looks not merely to the equality of individual votes but also to equality of minority blocs of votes”).

<sup>101</sup> See *De Grandy*, 512 U.S. at 1012–13.

<sup>102</sup> See *id.* at 1014, 1023.

serting that such a *Gingles* district could not be drawn.<sup>103</sup> Under a conventional individual rights framework, it simply would not make sense to consider minority voters who have no chance of being included within the *Gingles* district in the proportionality calculus.<sup>104</sup> These voters, on their own, could not assert a § 2 claim. They are thus not "injured" in the classic, individual rights sense, nor could they prove they would "benefit" from the remedy imposed.<sup>105</sup>

A second noteworthy element of pre-*Shaw* dilution doctrine is that dilution claims have depended entirely on the treatment of the group as a whole. In *De Grandy*, for example, the plaintiffs tried to establish liability by pointing to a number of places in the state where minority voters were "fractured" — that is, placed in majority-white districts where whites would always outvote them. The *De Grandy* Court, however, rejected fracturing as a basis for liability.<sup>106</sup> It held that if the group as a whole enjoys rough proportionality, a dilution claim will fail regardless of how the state treats individual group members.<sup>107</sup> Thus, even those who have suffered what appears to be a concrete "harm" — the inability to elect their candidate of choice — cannot claim dilution if the group as a whole is treated fairly.

Additionally, the courts' pre-*Shaw* rulings on standing and class certification in dilution cases have similarly reflected the aggregate nature of the claim. Courts have routinely granted standing to, and certified classes consisting of, *all* members of the minority group who reside (or have registered) within the state or locality, not merely those who are capable of residing within a remedial majority-minority district should such a district eventually be drawn.<sup>108</sup> Such an approach to certification and standing makes sense only if voters who cannot be

<sup>103</sup> See *supra* p. 1674.

<sup>104</sup> See *infra* section III.B.

<sup>105</sup> *Shaw v. Hunt*, 517 U.S. 899, 916–17 (1996); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>106</sup> See *De Grandy*, 512 U.S. at 1015–16.

<sup>107</sup> *Id.* This is not to suggest that minority voters could not levy a § 2 challenge premised on the state's use of different line-drawing standards for minority and white voters, even in the presence of substantial proportionality. But such a challenge either would not be a *dilution* claim or would be a dilution claim of a quite different sort. See *infra* p. 1709.

<sup>108</sup> See, e.g., *Brooks v. Miller*, 158 F.3d 1230, 1232 (11th Cir. 1998); *Concerned Citizens v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 525 (11th Cir. 1990); *Solomon v. Liberty County*, 957 F. Supp. 1522, 1526 (N.D. Fla. 1997); *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1552 (S.D. Ga. 1994); *Williams v. Orange County*, 783 F. Supp. 1348, 1350 (M.D. Fla. 1992); *Bradford County NAACP v. City of Starke*, 712 F. Supp. 1523, 1526 n.2 (M.D. Fla. 1989); *Warren v. City of Tampa*, 693 F. Supp. 1051, 1061 (M.D. Fla. 1988); *Potter v. Washington County Sch. Bd.*, 653 F. Supp. 121, 122 (N.D. Fla. 1986); *Jordan v. Allain*, 619 F. Supp. 98, 101 n.1 (N.D. Miss. 1985); *Butts v. New York*, 615 F. Supp. 1527, 1528 (S.D.N.Y. 1985); *Chapman v. Nicholson*, 579 F. Supp. 1504, 1510 (N.D. Ala. 1984); *Major v. Treen*, 574 F. Supp. 325, 328 (E.D. La. 1983); *Buskey v. Oliver*, 565 F. Supp. 1473, 1474 n.1 (M.D. Ala. 1983); *Bailey v. Vining*, 514 F. Supp. 452, 453 (M.D. Ga. 1981); *Brown v. Moore*, 428 F. Supp. 1123, 1123 (S.D. Ala. 1976).

placed in a remedial majority-minority district are nonetheless injured by the dilutive effect of the plan.<sup>109</sup>

Judicial rulings on dilution remedies similarly suggest that the right is unindividuated. For example, courts have concluded that when a state draws a new remedial district, the injury to *all* minority voters — not just those who reside within the newly drawn district — has been remedied.<sup>110</sup> In sum, far from finding that an aggregate right cannot be squared with an individual rights approach, courts until *Shaw II* largely adapted conventional individual rights doctrines to the unique harm at issue in dilution cases.

## II. THE PROBLEM OF STRICT SCRUTINY IN *SHAW* CASES

In *Shaw II*, the Supreme Court broke with this longstanding tradition. Having recognized a cause of action for challenging race-based districting, the Court was forced to confront the differences between its highly individualistic view of rights and the aggregative aspects of dilution. North Carolina, accused of a racial gerrymander, defended the challenged districts as an appropriate remedy to avoid a § 2 violation.<sup>111</sup> As a result, the Court had to decide how to apply strict scrutiny, a doctrine developed within the context of conventional individual rights, to districts drawn to avoid dilution, an aggregate harm. Thus, these disparate strains of equal protection doctrine came into direct contact in *Shaw II*, and strict scrutiny became the framework for mediating the differences between them.

Faced with this doctrinal puzzle, the Supreme Court not only applied a self-consciously individualist approach to dilution remedies, but also explicitly rejected some of the basic tenets of an aggregate rights approach as signaling the existence of a “group” right. *Shaw II* thus provides an excellent example of how the conceptual differences between conventional individual rights and dilution claims (described in Part I) actually play out in practice. Section II.A describes the development of the *Shaw* doctrine, placing it within the context of the Rehnquist Court’s equal protection jurisprudence. Section II.B sets out the doctrinal problem facing the Supreme Court in *Shaw II* and describes the Court’s response.

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<sup>109</sup> See *Cannon v. Durham County Bd. of Elections*, No. 97-1459, 1997 WL 701399, at \*1 (4th Cir. Nov. 12, 1997). *But see* *Barnett v. City of Chicago*, No. 92 C 1683, 1996 WL 34432, at \*4-\*5 (N.D. Ill. Jan. 29, 1996).

<sup>110</sup> See *De Grandy*, 512 U.S. at 1015-16 (noting that packing or fragmenting some minority voters “does not make the result vote dilution when the minority group enjoys substantial proportionality”); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988); *McGhee v. Granville County*, 860 F.2d 110, 118 n.9 (4th Cir. 1988); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).

<sup>111</sup> *Shaw v. Hunt*, 517 U.S. 899, 911, 914-18 (1996).

### A. Placing Shaw II in Context

1. *The Development of the Shaw Doctrine.* — In *Shaw I*, the Supreme Court first addressed the constitutionality of a bizarrely shaped district drawn deliberately to augment minority voting strength. There the Court announced that, depending on how they were drawn, certain majority-minority districts would be subject to challenge under the Equal Protection Clause.<sup>112</sup>

The Court initially identified two components to the *Shaw* injury. First, it held that race-based districting can cause “representational” harms because, according to the Court, it may lead the representatives elected in such districts to “believe that their primary obligation is to represent only the members of [the minority] group, rather than their constituency as a whole.”<sup>113</sup>

Second, the Court suggested that the shape of the district itself could cause an injury.<sup>114</sup> Professors Pildes and Niemi have termed this injury an “expressive harm” because it results from the social meaning of the district’s shape rather than from the actions or motivations of the state.<sup>115</sup> On this view, the “expressive harm” doctrine prohibits “value reductionism” — that is, it prevents policymakers from “transform[ing] a decision process that ought to involve multiple values . . . and reduc[ing] it to a one-dimensional problem.”<sup>116</sup>

The *Shaw* majority appears to have backed away from both explanations during the last six years. It has not, to be sure, always spoken with one voice due to divisions between Justice O’Connor, who exercises the controlling fifth vote, and the other four members of the *Shaw* majority — Chief Justice Rehnquist and Justices Scalia, Ken-

<sup>112</sup> *Shaw v. Reno*, 509 U.S. 630, 648–49 (1993). As with dilution doctrine, I accept *Shaw* doctrine on its own terms and thus set aside many of the powerful critiques and analyses of *Shaw*. See, e.g., Aleinikoff & Issacharoff, *supra* note 51; Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45; Samuel Issacharoff, *Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle*, 45 CATH. U. L. REV. 1257 (1996); Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47 (1996); Issacharoff & Karlan, *supra* note 46, at 2285–88; Pamela S. Karlan, *All over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245; Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731 (1998); Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 304–13 (1997); Karlan, *supra* note 46; Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287 (1996); Pildes, *supra* note 19; Pildes & Niemi, *supra* note 16.

<sup>113</sup> *Shaw I*, 509 U.S. at 648; see also *United States v. Hays*, 515 U.S. 737, 744 (1995). But see DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION 243–64 (1999) (discussing study results suggesting that black members of Congress balance the distinctive needs of black voters and the general interests of all voters more effectively than white members of Congress).

<sup>114</sup> *Shaw I*, 509 U.S. at 648–49, 658.

<sup>115</sup> See Pildes & Niemi, *supra* note 16, at 506–16.

<sup>116</sup> *Id.* at 500.

nedy, and Thomas. For want of a better phrase, I term these four Justices the "traditionalists" because they have tried to apply the type of equal protection analysis that has traditionally been used in most other areas of equal protection law to evaluate racial gerrymandering claims.<sup>117</sup> All five members of the *Shaw* majority appear to have abandoned the "representational harm" justification for the *Shaw* doctrine. Only those opinions written by Justice O'Connor consistently identify *Shaw* as addressing "expressive" harms, however, and only her first such opinion garnered a majority of the Court.<sup>118</sup>

Significantly, however, all of the recent opinions supported by the entire *Shaw* majority — those the "traditionalist" Justices have drafted and Justice O'Connor has joined — have avoided expositions of the expressive harm doctrine. These opinions have shifted the *Shaw* doctrine to a more conventional equal protection approach focusing on the use of a racial classification itself.<sup>119</sup> In so doing, they have effectively redefined the harm arising under *Shaw*.<sup>120</sup> Rather than concentrating on the message conveyed by bizarrely shaped districts, the traditionalist Justices have focused on the state's "essentialization" of a voter through the use of a racial classification.<sup>121</sup> To the extent that the dis-

<sup>117</sup> See *Shaw v. Hunt*, 517 U.S. 899, 905 (1996). This term should not be read as suggesting that the Court's application of this approach to benign classifications or to redistricting cases is "traditional." To the contrary, there were many reasons to think that the Court would not take this route in redistricting cases. See *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977). Nor should one assume that these "conservative" Justices adhere more closely to precedent than their predecessors or colleagues. See generally Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

<sup>118</sup> Compare *Bush v. Vera*, 517 U.S. 952, 980–81 (1996) (plurality opinion) (alluding to the expressive harm doctrine), with *Shaw I*, 509 U.S. at 648 (discussing expressive harms).

<sup>119</sup> See, e.g., *Hunt v. Cromartie*, 526 U.S. 541, 546–47 (1999) (Thomas, J., joined by Rehnquist, C.J., and O'Connor, Kennedy, & Scalia, JJ.); *Bush*, 517 U.S. at 1000–01 (Thomas, J., concurring in the judgment, joined by Scalia, J.); *Shaw II*, 517 U.S. at 904–05, 907–08 (Rehnquist, C.J., joined by the rest of the *Shaw* majority); *Miller v. Johnson*, 515 U.S. 900, 904–05, 911–14 (1995) (Kennedy, J., joined by the rest of the *Shaw* majority). Even the most recent *Shaw* opinion drafted by Justice O'Connor that gained a majority vote confines itself to discussion of the "harms caused by racial classifications" and thus mentions only stigma and "representational harms." *United States v. Hays*, 515 U.S. 737, 747 (1995) (O'Connor, J., joined by the rest of the *Shaw* majority).

<sup>120</sup> One example of this shift in focus is *Miller*, 515 U.S. at 913, 916, in which Justice Kennedy, writing for the entire *Shaw* majority, rejected the notion that *Shaw* was limited to bizarrely shaped districts, choosing instead to adopt the "predominant factor" test. That standard moves *Shaw* claims toward the test used in conventional equal protection analysis, which involves determining whether race was the "motivating" factor in the state's decisionmaking process. See, e.g., *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977).

<sup>121</sup> See, e.g., Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 595–96 (1995) (arguing that the injury in *Shaw* is the racial classification itself); O'Rourke, *supra* note 46, at 736 (same). But see Eisgruber, *supra* note 59, at 350 (arguing that *Shaw* cases are not really racial classification cases); Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 CUMB. L. REV. 515, 523 (1996).

strict's appearance is considered under this modified version of the *Shaw* doctrine, it is only as evidence of the use of a racial classification and not as the source of the harm.<sup>122</sup>

2. *Shaw, Equal Protection, and Strict Scrutiny.* — Once the Supreme Court decided in *Shaw I* that certain uses of race in redistricting would be subject to challenge under the Equal Protection Clause, it faced two conceptual problems. First, assuming that the Court adhered to its prior equal protection jurisprudence, it had to decide what would trigger "strict scrutiny" analysis. Second, if it chose to apply strict scrutiny to some or all majority-minority districts, it had to decide *how* to do so. Although only the second question concerns us here, it is worth placing the Court's answer to the first question in context.

The paradigmatic case for applying strict scrutiny is one in which the government has adopted an explicit racial classification that disadvantages racial minorities.<sup>123</sup> Strict scrutiny is applied in such a case to ensure that the government has a strong reason for doing so (that is, a "compelling state interest"), and that there is a sufficient nexus between the means the state has used to achieve that end and the end itself (that is, the classification must be "narrowly tailored" to achieve the government's purpose). There are several ways to think about this test. On one view, it indicates that racial classifications disadvantaging racial minorities are so problematic that we will allow the government to use race only in the most extraordinary circumstances — and even then it must proceed with caution.<sup>124</sup> But one could also characterize the test as a means to smoke out an illicit motive when race-neutral goals are offered to justify the racial classification.<sup>125</sup> A court can gauge whether the state's proffered justification actually motivated its conduct by considering whether the means employed are closely aligned with the ends purportedly pursued.<sup>126</sup>

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<sup>122</sup> See *Shaw II*, 517 U.S. at 905–06; *Miller*, 515 U.S. at 913. I do not mean to overstate the significance of this doctrinal change. Given the shifting nature of the alliances formed by the Justices and their noteworthy failure to abandon the expressive harm theory, expressive harms might well reemerge in future Supreme Court decisions.

<sup>123</sup> See generally Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 71, 94–102 (1997) (offering a taxonomy of purpose tests). For a recent effort to provide a coherent and comprehensive approach to strict scrutiny, see Rubin, *supra* note 3.

<sup>124</sup> See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979).

<sup>125</sup> See, e.g., David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 25–26.

<sup>126</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); Jed Rubinfeld, *Affirmative Action*, 107 YALE L.J. 427, 436 (1997); Strauss, *supra* note 125, at 25–26. Peter Rubin has offered an even more detailed taxonomy of the multiple purposes served by the twin prongs of the strict scrutiny inquiry. See Rubin, *supra* note 3, at 14.



As equal protection law developed, the Court eventually had to decide how to evaluate a classification that was facially race neutral but had a disparate racial effect and might have been motivated by a racial purpose. The Court declined to apply strict scrutiny to a facially neutral classification that merely had a disparate effect. Instead, in *Washington v. Davis*<sup>127</sup> it required proof of a racial motivation to trigger strict scrutiny.<sup>128</sup>

Still later in the development of this jurisprudence, the Court dealt with cases in which explicit racial classifications, such as affirmative action programs, *advantaged* racial minorities. In *City of Richmond v. J.A. Croson Co.*<sup>129</sup> and *Adarand Constructors, Inc. v. Peña*,<sup>130</sup> the Court applied strict scrutiny to such classifications, just as it did for classifications that disadvantaged racial minorities.<sup>131</sup> Strict scrutiny is employed in such cases not to smoke out an illicit purpose — in these cases the state's purpose is usually assumed to be benign — but to prevent the *overuse* of race in two respects: first, to ensure that “innocent bystanders” (usually whites) are not unduly burdened by the state's use of a racial classification;<sup>132</sup> and second, to ensure that non-victims (usually minorities who have not been injured by the discrimination) do not unnecessarily benefit from the remedy proposed.<sup>133</sup> Both of these concerns may relate to the Court's use of strict scrutiny to smoke out illicit motives — the absence of fit between the state's justifications and its allocation of benefits and burdens may reveal the existence of concealed animus.<sup>134</sup> But these inquiries are often treated as independent checks on a state even when its motives are not really in question.<sup>135</sup>

In many ways, *Shaw* represents the next logical step in the development of equal protection law: it involves a facially *neutral* classification (we cannot look at a district line and immediately conclude that

<sup>127</sup> 426 U.S. 229 (1976).

<sup>128</sup> *Id.* at 239–40.

<sup>129</sup> 488 U.S. 469 (1989).

<sup>130</sup> 515 U.S. 200 (1995).

<sup>131</sup> *Id.* at 226; *Croson*, 488 U.S. at 493.

<sup>132</sup> See Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1788 (1996).

<sup>133</sup> See *Croson*, 488 U.S. at 506, 508; Ayres, *supra* note 132, at 1786.

<sup>134</sup> See Rubinfeld, *supra* note 126, at 436–37. As some commentators have pointed out, however, these limitations do not always achieve the Court's purposes. See, e.g., Ayres, *supra* note 132, at 1787.

<sup>135</sup> Commentators have taken the Court to task for using the narrow-tailoring prong of strict scrutiny to conduct what some term a “cost-benefit” test. See, e.g., Rubinfeld, *supra* note 126, at 428. For an article drawing similar conclusions in the First Amendment context, see Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

the government has employed a racial classification<sup>136</sup>) that *benefits* racial minorities.<sup>137</sup> The fact that the challenged governmental action is facially neutral suggests that *Shaw* cases fall into the *Washington v. Davis* line of decisions. Yet it is generally quite obvious in these cases that the state has deliberately used a racial classification — demographics alone will usually suffice to establish that fact — thus moving us toward the more conventional equal protection cases involving explicit racial classifications, in which strict scrutiny is automatically applied. To add a further complication, in most of these cases the state deliberately used race to advance a benign purpose — the augmentation of minority voting strength.<sup>138</sup>

In response to this conceptual problem, the Supreme Court has termed these districts facially neutral classifications<sup>139</sup> but has nonetheless declined to require the particularized proof of intent needed for challenges that fit within the *Washington v. Davis* paradigm.<sup>140</sup> The state's purpose, in the Court's view, is clear from the bizarre shape of the district itself. For this reason, it has treated these cases as if the state's use of a racial classification were overt and has applied strict scrutiny without explicit proof of a racial purpose.<sup>141</sup>

### B. *Shaw II's Solution to the Strict Scrutiny Question*

Once the Court had resolved when to apply strict scrutiny in racial gerrymandering cases, it had to decide how to do so. As the briefs filed in the Supreme Court during the mid-1990s reflect,<sup>142</sup> the answer was not intuitively obvious.

<sup>136</sup> Cf. Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 22–25 (1995) (exploring whether majority-minority districts involve facially neutral classifications).

<sup>137</sup> I am indebted to Philip Frickey and Robert Post for helping me to situate *Shaw* within its doctrinal context.

<sup>138</sup> *Hunt v. Cromartie*, 526 U.S. 541 (1999), appears to be the exception. There, the state put forward a political explanation for the odd shape of its district. See *id.* at 549.

<sup>139</sup> E.g., *Bush v. Vera*, 517 U.S. 952, 958 (1996).

<sup>140</sup> See Parker, *supra* note 136, at 26–34 (attacking this approach).

<sup>141</sup> Professor Saunders has offered a different explanation for the Court's approach. She argues that *Shaw* should be understood as a prophylactic rule, like *Miranda*, a characterization that could also explain the Court's approach to strict scrutiny in *Shaw* cases. See Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1616–36 (2000).

<sup>142</sup> See, e.g., State Appellants' Brief on the Merits at 24–25, *Bush* (No. 94-805), available at 1995 WL 517594; Brief Amici Curiae of the Democratic National Committee and the Democratic Congressional Campaign Committee Supporting Appellants at 7–9, *Bush* (No. 94-805), available at 1995 WL 782859; Brief for the United States as Amicus Curiae Supporting Appellees at 17–19, *Shaw v. Hunt*, 517 U.S. 899 (1996) (No. 94-923), available at 1995 WL 702822; Brief Amicus Curiae of the American Civil Liberties Union and the Lawyers' Committee for Civil Rights Under Law in Support of Appellees at 4–7, *Shaw II* (No. 94-923), available at 1995 WL 702821.

In *Shaw II*, the Court squarely addressed this question, and its decision sheds significant light on the differences between an aggregate right and a conventional individual right. The facts of that case were as follows: North Carolina had deliberately drawn a bizarrely shaped majority-minority district in the center of the state (District 12). In defending against the plaintiff's racial gerrymander claim, the state argued that it had drawn District 12 to achieve a compelling state interest — compliance with § 2.<sup>143</sup> As it has in virtually every *Shaw* case, the Court assumed, arguendo, that compliance with § 2 constitutes a compelling state interest justifying the creation of a majority-minority district.<sup>144</sup> Thus, the real fight concerned whether District 12 was “narrowly tailored” to achieve compliance with § 2. It is here that the *Shaw* majority's highly individualistic view of the Fourteenth Amendment came into direct contact with the aggregate conception of harm — vote dilution — that had prompted the creation of District 12.

In resolving this doctrinal problem, the Court focused on two key facts. First, although whites and African-Americans consistently voted for different candidates in the center of the state (thus satisfying the second and third preconditions for proving dilution under the *Gingles* test), it was not possible to draw a compact majority-minority district in that area. *Gingles*, of course, requires evidence that the state could have drawn an additional, compact majority-minority district (“the *Gingles* district”) but failed to do so.<sup>145</sup> Second, it was possible to draw a compact majority-minority district in the southeastern part of North Carolina, where polarized voting also existed, but the state had chosen to draw its remedial district elsewhere. Thus, the Court had to decide whether a bizarrely shaped remedial district located in the center of the state, where a *Gingles* district could not be drawn, was an appropriate remedy for dilution suffered by minority voters on the southeastern side of the state, where it was possible to draw an additional, compact majority-minority district.

The Court answered this question in the negative. It held that a remedy for vote dilution is not narrowly tailored to comply with § 2 if the remedial district drawn by the state substantially departs from the compact *Gingles* district. In the words of the Court, a bizarrely shaped district “somewhere else in the State” does not remedy “the vote-dilution injuries suffered by” minority voters residing within the *Gingles* district.<sup>146</sup>

For example, if a geographically compact, cohesive minority population lives in south-central to southeastern North Carolina, as the Justice

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<sup>143</sup> *Shaw II*, 517 U.S. at 916–17.

<sup>144</sup> *Id.*

<sup>145</sup> *See supra* p. 1674.

<sup>146</sup> *Shaw II*, 517 U.S. at 917.

Department's objection letter suggested, District 12 that spans the Piedmont Crescent would not address that § 2 violation. The black voters of the south-central to southeastern region would still be suffering precisely the same injury that they suffered before District 12 was drawn. District 12 would not address the professed interest of relieving vote dilution, much less be narrowly tailored to accomplish the goal.

Arguing, as appellees do and the District Court did, that the State may draw the district anywhere derives from a misconception of the vote-dilution claim. *To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not.*<sup>147</sup>

*Shaw II*'s application of strict scrutiny neatly illustrates the differences between the Rehnquist Court's highly individualistic conception of rights and an aggregate rights theory. The Court simply ignored the aggregate aspects of the dilution injury that District 12 was designed to remedy and applied strict scrutiny as if the right to an undiluted vote were like any other conventional individual right.

### III. STRICT SCRUTINY IN *SHAW II*: A CASE STUDY OF THE DIFFERENCES BETWEEN AN AGGREGATE RIGHT AND A CONVENTIONAL INDIVIDUAL RIGHT

Part I identified the conceptual differences between an aggregate right and a conventional individual right. *Shaw II*'s application of strict scrutiny to North Carolina's District 12 provides a concrete example of how those differences play out in practice. *Shaw II* makes clear that a remedy for an aggregate harm like dilution simply cannot be squeezed into a conventional individual rights framework.<sup>148</sup>

One sign that *Shaw II*'s traditional approach does not mesh with an aggregate rights framework is how difficult it is to square its pro-

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<sup>147</sup> *Id.* (emphasis added) (citations omitted); see also *Bush*, 517 U.S. at 997-98 (Kennedy, J., concurring) (applying the narrow-tailoring test in the same fashion as the *Shaw II* majority). Several commentators have advocated a similar approach. See, e.g., Butler, *supra* note 121, at 616-17; O'Rourke, *supra* note 46, at 757-70. Justice O'Connor joined *Shaw II* in its entirety. Moreover, in applying strict scrutiny in the opinions she has authored, Justice O'Connor has adopted a similar focus. See *Bush*, 517 U.S. at 979 (finding that a district failed the strict scrutiny test because it included minority populations that "could not possibly form part of a compact majority-minority district"); see also *id.* at 994 (O'Connor, J., concurring) (arguing that a remedial district cannot "deviate substantially from a hypothetical court-drawn § 2 district").

<sup>148</sup> See Pildes, *supra* note 19, at 2544 n.133 (arguing that the Court's "effort to recast vote dilution litigation in terms of individual rights simply cannot be sustained analytically"); cf. Ayres, *supra* note 132, at 1783 n.8 (concluding that strict scrutiny may be applied differently in different contexts); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 129 (1976) (contending that an individual rights approach "either provides no framework of analysis [for a group right] or, even worse, provides the wrong one"); *id.* at 170-77 (explaining how strict scrutiny might differ depending on the underlying right).

nouncements with the doctrine that had developed in the dilution context prior to *Shaw II* — doctrine that had, as noted above, been adapted to the unique characteristics of an aggregate right. For example, because it is often possible to draw the *Gingles* district in several different areas of the state,<sup>149</sup> the Court's assertion that the right of a voter located inside one such district is not remedied by drawing the remedial district elsewhere necessarily leads to the conclusion that the state should draw *two* remedial districts — one to remedy the dilution of each set of minority voters. But the creation of an extra remedial district is precisely the result the Court condemned as a policy of maximization in *De Grandy*,<sup>150</sup> a ruling that was plainly premised on the aggregate nature of dilution claims.<sup>151</sup>

Even when there is only one general area for plaintiffs to locate the *Gingles* district but many ways to draw it, the *Shaw* majority's approach to strict scrutiny runs into another doctrinal hurdle: the Court's longstanding view that the state retains broad remedial power to choose where and how to draw the remedial district.<sup>152</sup> Were the Court correct that any voter within the *Gingles* district is injured and that the creation of a district elsewhere does not remedy that injury, then the state could not draw a remedial plan that departs from the map offered by the plaintiffs as a precondition for establishing liability. The state would therefore have *no* discretion in drawing the remedial district. Interestingly, the Court recognized this tension in *Shaw II*. The Court indicated in a footnote that its statements did not confer on plaintiffs "the right to be placed in a majority-minority district once a violation of the statute is shown" because "[s]tates retain broad discretion in drawing districts to comply with the mandate of § 2."<sup>153</sup> This obiter dictum, however, does not resolve the tension between *Shaw II*'s pronouncements and the doctrine emerging from courts' prior efforts to accommodate the unique nature of dilution claims.<sup>154</sup>

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<sup>149</sup> See Grofman, *supra* note 86, at 1260. This possibility may even have been true in *Shaw II*. See *Shaw II*, 517 U.S. at 935–36 (Stevens, J., dissenting).

<sup>150</sup> See *Johnson v. De Grandy*, 512 U.S. 997, 1016–17 (1994); see also *Miller v. Johnson*, 515 U.S. 900, 917 (1995). "Maximization" is the Court's term for the policy of creating as many majority-minority districts as possible, rather than the number the Court views as "fair."

<sup>151</sup> See *supra* p. 1690.

<sup>152</sup> See *Lawyer v. Dep't of Justice*, 521 U.S. 567, 575–76 (1997); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *White v. Weiser*, 412 U.S. 783, 795 (1973).

<sup>153</sup> *Shaw II*, 517 U.S. at 917 n.9; *accord id.* at 947 (Stevens, J., dissenting); see also *McGhee v. Granville County*, 860 F.2d 110, 118 n.9 (4th Cir. 1988); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).

<sup>154</sup> The importance of this doctrinal shift will not become clear until the *Shaw* majority stabilizes. For example, the invalidation of the district challenged in *Shaw II* need not have hinged on a conventional approach to strict scrutiny, and the shifting nature of the Court's majority might lead it to adopt different approaches in the future.

The problem with *Shaw II*'s analysis runs much deeper than superficial doctrinal conflicts, however. By applying the same form of strict scrutiny used for conventional individual rights, the Court necessarily endorsed a conception of dilution that fails to capture what makes that injury unique. That conceptual mistake, in turn, has had practical consequences. Indeed, the Court's choice has led it to focus on the wrong facts when evaluating *Shaw* claims and to ignore the right ones, thus frustrating the basic purposes of strict scrutiny.

The Court's application of strict scrutiny in *Shaw II* hinged on two assumptions: first, it is possible to evaluate the constitutionality of a dilution remedy simply by looking at the shape of a single district; and second, it is possible to distinguish minority voters unharmed by dilution from those who are actually injured. Sections III.A, III.B, and III.C analyze these assumptions in depth and explain why they cannot be reconciled with an aggregate rights approach. Section III.D proposes an alternative approach to strict scrutiny, one that is tailored to the unique attributes of dilution claims.

#### A. *The Court's Focus on a Single District in Evaluating a Dilution Remedy*

The Court's focus on a single district when applying strict scrutiny in *Shaw II* illustrates one way in which the Court's traditional approach does not fit within an aggregate rights framework. In *Shaw II* the Court examined a *single* district, District 12, in evaluating the constitutionality of North Carolina's remedial plan. The Court concluded that it needed to look no further because the bizarre shape and location of the remedial district demonstrated undue reliance on a racial classification.<sup>155</sup>

Inferring a violation of strict scrutiny solely from the shape and location of a single district would make sense if the state were trying to remedy the violation of a conventional individual right. But remedies for aggregate harms cannot be analyzed seriatim or in isolation.<sup>156</sup> In this case, for example, examination of a single district tells us only that the state created at least one majority-minority district. But as long as § 2 demands at least one majority-minority district, that is precisely what the state was supposed to do.

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<sup>155</sup> To be fair to the Court, this argument probably exaggerates its position. At least in *Miller*, in which the Court struck down a remedy for retrogression on the ground that the state had created more majority-minority districts than necessary to remedy the harm, the Court looked at the entire districting scheme to evaluate the remedy. See *Miller*, 515 U.S. at 920-21, 923-24. But in every other *Shaw* case, the Court has done precisely what it did in *Shaw II*: assumed that a single district could provide all the evidence necessary to determine whether the state's remedial plan was narrowly tailored.

<sup>156</sup> See Guinier, *supra* note 47, at 4-5 (identifying this approach as a clear departure from prior dilution doctrine).

Indeed, a single district tells us little more about a dilution remedy than it tells us about whether dilution has occurred in the first place. As noted above, if we examine only the position of group members in a single district, all we can determine is whether those particular group members can elect their candidates of choice under the state's remedial plan. But we do not know whether they have a *fair* chance to do so. To make that assessment, as detailed in Part I, we must look at the opportunities afforded to all members of the minority group relative to those afforded to whites — a task that requires an examination of the entire districting scheme.

This principle applies equally to a dilution remedy. A single district cannot answer the questions strict scrutiny is designed to resolve. First, did the state go too far in drawing a remedy (for example, did it create two districts when only one was necessary)? Second, did the state go far enough (for example, did it create two districts when three were required)?

One might argue in response that this conclusion simply misses the point of strict scrutiny. At least one purpose of strict scrutiny is to ensure that the state does not overuse race in drawing a remedy. And what better proof is there to establish that the state has excessively relied on race than the shape of the remedial district? That is, one could argue that a compact majority-minority district indicates that the state has used race much less than does a bizarrely shaped district with precisely drawn lines that trace the racial boundaries of every census block. Such an analysis is presumably the impetus for Justice Kennedy's conclusion that a bizarrely shaped district suggests that the state has engaged in what he terms "gratuitous race-based districting."<sup>157</sup> If it is true that a bizarrely shaped district reveals an excessive use of race, then district shape should tell us all we need to know under the narrow tailoring prong of strict scrutiny analysis.

Although this argument has intuitive appeal, Justice Kennedy's assumption that "gratuitous race-based districting" is tied to the shape and location of the district cannot be sustained when viewed through the lens of an aggregate rights framework.<sup>158</sup> An aggregate rights approach lets us examine the trade-offs involved in redistricting and uses the entire scheme, not just an isolated district, to assess the state's use of race.

In this respect, an aggregate rights framework reflects one of the essential truths about districting: everything is related. When one

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<sup>157</sup> *Bush v. Vera*, 517 U.S. 952, 999 (1996) (Kennedy, J., concurring).

<sup>158</sup> See Daniel Hays Lowenstein, *You Don't Have To Be Liberal To Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 799-800 (1998) (critiquing Justice Kennedy's approach on similar grounds).

voter is moved into a district, another is moved out.<sup>159</sup> Focusing on a particular set of voters or a particular district does not tell us the whole story. For this reason Professor Pildes has criticized the Court's focus on a particular district's boundaries when analyzing *Shaw* cases,<sup>160</sup> a problem analogous to the one identified here.

To put this aphorism in more concrete terms, a state remedying dilution must draw a plan that contains a sufficient number of majority-minority districts. To achieve that goal, a state must classify a certain number of voters. But it certainly does not classify fewer voters when drawing a compact majority-minority district than it does when creating a misshapen one. To the contrary, it draws both in precisely the same way.<sup>161</sup> After selecting the type of geographic "building block"<sup>162</sup> it will use to draw its maps from a computer-based districting program, the state (acting through its redistricter) locates the core of the district and continues to add building blocks until it reaches its goal — here, an appropriately sized district of an appropriate racial makeup. Every time the state adds or subtracts a building block, it must consider the effect of that change on the population ratio (a fact that will usually appear on the redistricter's computer screen). Otherwise, the state risks liability under § 2, either for failing to create a district with enough minority voters to constitute an electoral majority or for including so many that the state will be accused of packing those voters and diluting their voting strength. Thus, no matter what the shape of the district it draws, the state must use a racial classification to include or exclude voters until it obtains the right ratio of minority to nonminority voters.<sup>163</sup> And whenever the state departs from a compact district to accommodate a race-neutral request, it must add a predominantly minority neighborhood elsewhere to offset this population change (and probably draw a bizarrely shaped district to do so). For purposes of narrow tailoring, then, shape is irrelevant for determining whether the state has overused a racial classification.<sup>164</sup>

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<sup>159</sup> Cf. Issacharoff & Goldstein, *supra* note 112, at 64 ("[I]n districting, a decision to include one kind of person is fundamentally also a decision to exclude other kinds of people.")

<sup>160</sup> Pildes, *supra* note 19, at 2545-47.

<sup>161</sup> Lowenstein, *supra* note 158, at 822.

<sup>162</sup> States often identify what type of building block they will use as one of their districting criteria. See, e.g., NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2000, at 158 (1999) (defining Kansas's building block); *id.* at 146-89 (providing a state-by-state analysis of districting requirements); see also DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 42-64 (1992).

<sup>163</sup> Cf. Pildes & Niemi, *supra* note 16, at 506 (concluding that a bizarrely shaped district "does not involve a more invidious use of race than" a compact one).

<sup>164</sup> It is odd that any of the traditionalist Justices has latched onto shape as a sign that race has been "overused." The best justification for their decision to extend *Shaw* to compact majority-minority districts is the fact that the same number of voters are classified on the basis of race in creating compact and noncompact districts, so that either can reflect an overuse of race. See



*B. The Court's Effort To Separate Voters "Injured" by Dilution from Voters Who Are Unharmed*

The second key to the Court's approach in *Shaw II* is its view that it is possible to distinguish those minority voters who are actually "injured" by a dilutive plan from those who are unharmed. Indeed, the Court explicitly rejected the state's contention that for strict scrutiny purposes, it did not matter which minority voters were placed in the remedial district. And the Court condemned North Carolina's remedial plan for its failure to identify and separate "injured" minority voters from those voters unharmed by dilution.

Although the injury in *Shaw* cases no longer stemmed from the shape of the district by the time *Shaw II* was decided, the shape and location of the district were central to the Court's effort to distinguish between these two sets of minority voters. In the Court's view, the only minority voters injured by dilution were those residing in the compact *Gingles* district (the hypothetical compact majority-minority district that plaintiffs must identify to establish dilution).<sup>165</sup> Thus, the Court reasoned, a bizarrely shaped remedial district located in a different part of the state improperly benefits nonvictims (those voters located outside the *Gingles* district) and fails to remedy the injuries of those voters actually injured (those within the *Gingles* district).

The Court's approach would be perfectly sensible in a conventional individual rights context. Courts routinely apply strict scrutiny to ensure that a race-conscious remedy reaches those voters whom the state has injured and does not benefit those whom the state has not harmed.<sup>166</sup> But it is very difficult to square the Court's view with an aggregate rights framework, in which dilution claims belong.

Here, for example, dilution is an unindividuated injury that falls on all minority voters, regardless of where they live. As explained in detail in Part I, dilution does not mean that a particular individual can-

Miller v. Johnson, 515 U.S. 900, 912-13 (1995); see also *Shaw v. Reno*, 509 U.S. 630, 672 (1993) (White, J., dissenting); Lowenstein, *supra* note 158, at 822 ("[T]he mere shape of a district . . . does not indicate whether it is more or less racially drawn."). If this tenet can be used to invalidate compact majority-minority districts, however, it should equally preclude reliance on a bizarre shape to establish the *overuse* of race in applying strict scrutiny.

<sup>165</sup> *Shaw v. Hunt*, 517 U.S. 899, 914-17 (1996). Some commentators have echoed this view, arguing that departures from the compact *Gingles* district reveal a lack of fit between the state's use of a racial classification and its purported ends. See Butler, *supra* note 121, at 617; O'Rourke, *supra* note 46, at 756.

<sup>166</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). There appears to be at least one exception to this principle. The Court strongly prefers race-neutral remedies over race-conscious ones. See *infra* note 198. As Ian Ayres has explained, however, race-neutral remedies may be dramatically underinclusive or overinclusive — that is, they may not remedy the injuries of all victims, or they may benefit those who were not harmed by discrimination. See Ayres, *supra* note 132, at 1789-90. For the reasons discussed below in note 198, I assume for these purposes that any viable remedy for dilution *requires* the state to employ a racial classification.

not elect her preferred candidate. The claim hinges instead on the relative ability of an individual to aggregate her vote effectively. Because that harm cannot be measured without reference to the placement of all members of a group, no group member is injured more or less than any other.<sup>167</sup> Similarly, the remedy for dilution — the creation of an additional majority-minority district — eliminates the injury for all minority voters, whether or not they are ultimately placed in the remedial district.<sup>168</sup> Again, that is because the injury hinges on the overall distribution of the group. For these reasons, although the Court's effort in *Shaw II* to identify the minority voters whom North Carolina injured would make sense in a conventional individual rights context, the Court's approach is not the right way to apply strict scrutiny in the context of an aggregate harm like vote dilution.<sup>169</sup>

The Court's only defense of its approach is little more than a non sequitur. The Court has asserted that the state's departure from the *Gingles* district in drawing a remedial plan signals a misuse of race because "§ 2 does not require a State to create . . . a [noncompact district]." <sup>170</sup> While the quoted statement is clearly correct, it certainly does not suggest that § 2 *forbids* noncompact districts.<sup>171</sup> Section 2 does not require a state drawing a remedial district to create a district that is predominantly Democratic, a district that follows county lines, or a district that preserves an incumbent's seat. But given the deference courts grant to state districting choices, a state can assuredly consider these criteria in drawing a district.<sup>172</sup> And unless the *Shaw* injury arises from the district's shape — a view the traditionalists have

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<sup>167</sup> The Court's concern with the location of the district might have carried greater weight had voting been racially polarized in only one part of the state. See *infra* p. 1714.

<sup>168</sup> See *supra* pp. 1687–88.

<sup>169</sup> For similar reasons, the Court's approach in *Shaw II* cannot be justified on the ground that the challenged district's shape suggests that the state has tried to "burden" white voters. Although the creation of a majority-minority district requires the inclusion of white voters to ensure that the district's population satisfies equipopulosity requirements, see Aleinikoff & Issacharoff, *supra* note 51, at 601, 630–32, that is true no matter where the district is drawn. See *Shaw I*, 509 U.S. at 682 (Souter, J., dissenting) ("'Dilution' thus refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a group. This is the reason that the placement of given voters in a given district, even on the basis of race, does not, without more, diminish the effectiveness of the individual as a voter." (citations omitted)); Pildes & Niemi, *supra* note 16, at 506; cf. Issacharoff, *supra* note 9, at 1879 (noting that, in contrast to other areas, "[v]oting is not an area in which preexisting individual white expectations have been formed").

<sup>170</sup> Bush v. Vera, 517 U.S. 952, 979 (1996) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)); see also Butler, *supra* note 121, at 617; O'Rourke, *supra* note 46, at 756 (arguing that a remedial plan that "depart[s] from traditional redistricting criteria" is "not narrowly tailored").

<sup>171</sup> See Lowenstein, *supra* note 158, at 823 ("Section 2 simply requires a specified number of [majority-minority districts] . . . , but is indifferent to the shapes of the [majority-minority districts] that are actually drawn.").

<sup>172</sup> See *S. Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1302 (11th Cir. 1995) (en banc) (Hatchett, J., dissenting).

disavowed — a state may choose to privilege these other criteria over compactness when remedying the dilution injury.<sup>173</sup>

An example might be useful. Imagine that § 2 requires State A and State B each to draw a majority-minority district. State A values compactness highly as a districting criterion. When it draws a remedial district, it will draw the district in roughly the same place the plaintiffs drew the *Gingles* district to establish their claim, even if that choice means that the state has to divide a county or put two incumbents in the same district and force them to run against each other.

State B may think compactness is generally a good idea, but it may be worried that drawing the remedial district where plaintiffs drew the *Gingles* district would mean that Congressman X's house will be in Congresswoman Y's district and that the Democrats will end up with majorities in seven of twelve districts, a result the Republican state legislature will not accept.<sup>174</sup> States often compromise compactness on these grounds even when race is not involved, so State B will prefer to piece together a majority-minority district elsewhere, even if that district will end up bizarrely shaped. And the end result is the same for purposes of remedying the harm — the districting scheme remedies the aggregate injury of dilution. Thus, as long as the shape of the district is not itself inherently harmful,<sup>175</sup> the shape of the district tells us nothing about the state's motive.

There is, however, a stronger response to the argument sketched out above than the Court has offered. That response would go something like this: if a precondition for establishing dilution is the ability to draw a compact majority-minority district, then the Court is right to say that the only people who are injured by dilution are those who reside in that district. These voters are the only ones with standing to bring a claim, and they should therefore benefit from the remedy. This argument is a weighty one, but it is ultimately unpersuasive.

To determine whether the Court is right to focus so heavily on *Gingles* at the remedial stage, we need to decide why the *Gingles* district is a requirement for establishing dilution in the first place. One possible story — the story the Court has plainly adopted — is that the existence of a compact majority-minority district is somehow essential to the definition of dilution itself. There are several problems with this story.

<sup>173</sup> Justice Kennedy, alone among the traditionalist Justices, has conceded that *Gingles* does not mandate that the state's remedial district be drawn where the *Gingles* district was placed. *Bush*, 517 U.S. at 999 (Kennedy, J., concurring) ("While § 2 does not require a noncompact majority-minority district, neither does it forbid it . . ."); see also *id.* at 1034 (Stevens, J., dissenting) ("[N]othing in § 2 requires the creation of a noncompact district.").

<sup>174</sup> For an example of how one state ranked its preferred districting criteria, see *Miller v. Johnson*, 515 U.S. 900, 906 (1995). See also NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 162, at 146–89 (1999) (providing state-by-state districting requirements).

<sup>175</sup> See *supra* pp. 1693–94.

*First*, this story cannot be reconciled with existing dilution doctrine. As explained in section I.C, courts grant standing to, and certify classes of, *all* minority voters in a state, regardless of where they live.<sup>176</sup> Moreover, in assessing whether the state has drawn “enough” remedial districts, the court includes *all* of the state’s minority voters in the proportionality calculus, not just those residing in the *Gingles* district. Again, if only those voters who reside in the *Gingles* district are injured, this line of case law would be nonsensical.

*Second*, although this explanation may dispose of the facts in *Shaw II*, in which a compact district could not have been drawn in the central part of the state, it runs into a practical problem in cases in which more than one *Gingles* district could be drawn. As noted above,<sup>177</sup> if all minority voters who could reside in a *Gingles* district must obtain a remedy, a state would have to maximize the number of majority-minority districts when drawing a remedial plan.

*Third*, nothing about the theory of dilution itself requires us to import “compactness” into the equation. For example, imagine a state where all districts are noncompact. If minority voters in these districts were denied the opportunity to elect a proportionate share of representatives, we would surely term that injury “dilution.” Similarly, imagine a group that is either too small or too dispersed to elect a candidate of choice in a districting scheme that uses compact districts. Presumably we could conclude that those voters have had their votes “diluted” (although we might not be willing to take the steps necessary to remedy that dilution). In short, the compactness requirement in *Gingles* does not necessarily stem from the nature of the injury itself.

*Fourth*, nothing in § 2 suggests an independent congressional endorsement of territorially based schemes, let alone compactness. Yet Congress surely knows how to mandate compactness if it wishes to do so. Indeed, at various points in history, Congress has clearly and explicitly mandated a single-member districting scheme or compactness for congressional districts.<sup>178</sup> Thus, if anything, established canons of statutory construction counsel against reading the vague text of § 2 as mandating compact remedial districts.<sup>179</sup>

Similarly, there is no reason to think that the only conception of dilution possible under the Constitution — the source of Congress’s power to enact § 2 — is one that incorporates a compact, territorially based scheme. The Court itself has consistently disavowed any notion

<sup>176</sup> See *supra* pp. 1690–91.

<sup>177</sup> See *supra* p. 1699.

<sup>178</sup> See ISSACHAROFF, KARLAN & PILDES, *supra* note 50, at 769–72.

<sup>179</sup> Cf. *Custis v. United States*, 511 U.S. 485, 492 (1994) (declining to infer congressional intent when there was evidence that when Congress sought to achieve a particular result, “it knew how to do so”).

that the Constitution requires compact districts.<sup>180</sup> Indeed, if the Constitution required compactness, the states — thirty percent of which do not legally mandate compactness<sup>181</sup> — could not privilege other districting criteria over compactness under any circumstances. Such a theory would also be inconsistent with the states' historical practice of using at-large districting schemes.<sup>182</sup>

To place this analysis in more concrete terms, consider the following hypothetical: imagine that tomorrow all of the states begin drawing bizarrely shaped districts or using a postcard districting scheme, in which the state assigns people from entirely different regions to the same "virtual" district, either randomly or systematically (for example, alphabetically). Would the courts continue to require a minority group to show that a compact *Gingles* district could be drawn in order to establish dilution? If the answer to this question is no, then the *Gingles* requirement does not stem from the essential nature of the injury we call dilution.

Finally, a rule that the only individuals deemed "injured" by dilution are voters capable of residing in the majority-minority district that the state will eventually draw reflects a fairly anemic view of the democratic process. It suggests a theory of representation that reduces democracy entirely to the relationship between a constituent and her elected representative. On this view, what happens in another district — and thus at the legislative level — is simply irrelevant to a voter. For instance, a minority voter living in a majority-minority district would not be concerned about whether her representative is capable of finding other legislators who share similar concerns to form coalitions. And a member of a racial minority who lives in a majority-white district where she is routinely outvoted would not care whether her elected representative works within a decisionmaking body that contains other legislators capable of articulating her needs.<sup>183</sup> In short, if the *Gingles* compactness requirement does not stem from the essential nature of the injury, it is not clear why only those who reside within the *Gingles* district should be deemed "injured" by a dilutive plan.

Why, then, does *Gingles* require proof that a compact majority-minority district can be drawn before allowing a suit to go forward? Here is an alternative story. The Court recognized that it theoretically could have construed § 2 as mandating proportionality even when it is not possible to create compact remedial districts. That is, the Court could have read § 2 as requiring unusual remedies (for example, a dis-

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<sup>180</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

<sup>181</sup> See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 162, at 146–89.

<sup>182</sup> ISSACHAROFF, KARLAN & PILDES, *supra* note 50, at 772.

<sup>183</sup> See *supra* note 21 (discussing critics who argue that current dilution doctrine pays insufficient attention to these questions).

tricting scheme made up of bizarrely shaped districts, a postcard districting scheme, or a system of cumulative voting) in states where a single-member, territorially based districting plan would fall short of proportionality, as it always would for small or geographically dispersed minority groups.

The Court presumably chose not to construe § 2 in this way because it recognized that almost all states and localities use a territorially based system for elections, and that many states consider compactness to be an important districting criterion. If the Court were to recognize *all* dilution claims, then it would necessarily tread on the traditional districting discretion of the states, something the courts are always reluctant to do. Specifically, by requiring that a plaintiff show at least that a state could have drawn a *compact* majority-minority district, the Court prevents small or dispersed groups from filing § 2 claims and thus seeking a remedy that it would be reluctant to grant.<sup>184</sup> Thus, the *Gingles* requirement suggests that there are limits to the Court's willingness to exercise its remedial authority on behalf of minority voters whose votes have been diluted.

There are at least two other instances in which the Court has similarly cabined the reach of § 2 to avoid intruding on state districting prerogatives. Section 2 challenges to judicial electoral schemes provide one such example. There, as here, the courts have concluded that the states have a significant redistricting interest that may override § 2 concerns. As a result, in several recent cases appellate courts have concluded that the states' interest in allowing judges to be elected at large is weighty enough to preclude certain types of § 2 challenges.<sup>185</sup>

Courts have taken comparable steps to protect the state from intrusive claims when a plaintiff brings a valid challenge to a districting plan close to election time. Courts often deny plaintiffs the remedy that they would otherwise receive for fear of forcing the state to undertake the burdensome task of redistricting late in the election cycle.<sup>186</sup>

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<sup>184</sup> See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 50-51 n.17 (1986) (explaining why the Court adopted the compactness requirement).

<sup>185</sup> See, e.g., *Cousin v. Sundquist*, 145 F.3d 818, 829-31 (6th Cir. 1998) (rejecting the notion that cumulative voting represents an appropriate § 2 remedy in the context of judicial elections); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1201 (7th Cir. 1997) (upholding the state's at-large districts against a § 2 challenge); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 875-76 (5th Cir. 1993) (en banc) (rejecting a single-member districting scheme as well as limited and cumulative voting as remedies in judicial elections).

<sup>186</sup> See, e.g., *White v. Daniel*, 909 F.2d 99, 103-04 (4th Cir. 1990); *MacGovern v. Connolly*, 637 F. Supp. 111, 115-16 (D. Mass. 1986).

In sum, the compactness requirement may resemble a prudential standing requirement.<sup>187</sup> Neither requirement is essential to the statutory claim (an “irreducible minimum”<sup>188</sup> for establishing an injury), but each is an expression of judicial reluctance to extend the courts’ remedial powers beyond a certain limit (a “judicially self-imposed limit[.]”<sup>189</sup>). The Court simply will not allow plaintiffs seeking radical changes in the electoral system to gain remedial assistance from the courts.

If this alternative story about the compactness requirement is correct, it *disfavors* requiring a state to draw a compact district once a plaintiff has established a § 2 violation. Indeed, if the reason for the *Gingles* requirement is that states need not abandon compactness in order to comply with § 2, this principle of deference should equally prevent courts from imposing a compactness requirement when a state remedying a § 2 violation values other districting criteria more highly.

### C. Other Types of Dilution Claims

One might be able to justify the Court’s heavy focus on the location of the remedial district for a narrow set of claims. For example, one could imagine a case in which a state grants a minority group rough proportionality but deliberately packs more voters into majority-minority districts than in majority-white districts. The Court has suggested that it would be willing to entertain such a claim.<sup>190</sup> If this injury were termed “dilution,” it would more closely resemble the type of dilution we see in one-person, one-vote cases than the dilution claim presented in *Shaw II*. Although the injury would still retain all of the characteristics of an aggregate harm,<sup>191</sup> the remedy would necessarily require the state to redraw the overpopulated districts and thus would cabin the state’s remedial discretion in a way that traditional dilution theories would not.

A more interesting question would arise in a case in which most minority voters subscribe to an extremely liberal political agenda but the state deliberately places its majority-minority districts where more “moderate” minority voters are concentrated. Again, the Court might consider such a claim.<sup>192</sup> Indeed, it is in this sense that one might understand *De Grandy*’s concern with “the rights of some minority voters

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<sup>187</sup> See generally *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551–58 (1996) (describing prudential standing requirements).

<sup>188</sup> *Id.* at 551.

<sup>189</sup> *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (internal quotation marks omitted).

<sup>190</sup> See *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1986).

<sup>191</sup> See *infra* pp. 1737–38 (describing one-person, one-vote claims as involving aggregate harms).

<sup>192</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 75 (1986).

... be[ing] traded off against the rights of other members of the same minority class."<sup>193</sup>

This type of claim would be best understood as a claim of dilutive *intent* directed at the left-wing group of minority voters rather than at all minority voters. In such a case, it would be appropriate for the Court to focus on the lines drawn in one part of the state because of the directed nature of the harm. Nonetheless, to the extent that the Court evaluates the dilution suffered by that subset of minority voters, it would still require an aggregate rights framework to evaluate their injury and determine the appropriate remedy.

One might argue that the same analysis should apply to *all* intent claims, even those in which the state intends to discriminate against minority voters statewide. That is, one might contend that even when the state intends to discriminate against minority voters generally, the main locus of its discriminatory efforts will likely be where there is a large concentration of minority voters (where the *Gingles* district could be drawn).<sup>194</sup> If one is seeking this type of "congruence," to borrow a term from *City of Boerne*,<sup>195</sup> between the locus of the state's primary efforts to harm minority group members and the remedy, then perhaps the Court's emphasis on the *Gingles* district would be defensible.<sup>196</sup> But in a case involving statewide polarization and an intent to discriminate against all minority voters, placing the remedial district where the *Gingles* district could be drawn achieves "congruence" only in a fairly imprecise sense. After all, the effects of the action are felt — and are intended to be felt — statewide.<sup>197</sup> Further, the state must be race conscious wherever there are pockets of minority voters — that is, it must deliberately decide not to create a noncompact majority-minority district wherever pockets of minority voters exist, just as it must consciously decide not to create a compact district in the area where minority voters are most concentrated.

In any case, the arguments for adhering to the *Gingles* district for the hypothetical claims above stem not from the aggregative aspects of the underlying harm, but from the state's intentional infliction of that

<sup>193</sup> *De Grandy*, 512 U.S. at 1019. One might argue that this case could never arise because the minority voters could not establish that they vote cohesively statewide, as required by *Gingles*. See *supra* p. 1674. Thus, as hypothesized below, see *infra* p. 1714, while each group might be able to raise a dilution claim challenging the lines drawn in the area in which its members reside, neither group could bring a statewide dilution claim.

<sup>194</sup> I am indebted to Richard Fallon and Frank Michelman, both of whom proposed variants of this argument.

<sup>195</sup> *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997); see also *infra* p. 1736.

<sup>196</sup> The *Gingles* requirement might thus be understood as an effort to balance the "effects" language of § 2 ("in a manner which *results* in a denial or abridgment or the right of any citizen"), 42 U.S.C. § 1973(a) (1994) (emphasis added), against the "intent" language of § 2 ("denial or abridgment . . . of the right to vote *on account of* race or color"), *id.* (emphasis added).

<sup>197</sup> See *supra* pp. 1687–88.



harm. Even in those situations in which it might be appropriate for a court to focus on lines drawn in only one part of the state, an aggregate rights framework would still apply in analyzing the harm and its remedy, albeit in a more localized fashion. The Supreme Court's highly individualistic approach to strict scrutiny would thus remain ill-suited to achieve the Court's purpose.

#### D. *An Alternative Approach to Strict Scrutiny*

Merely establishing that the application of conventional strict scrutiny analysis to dilution remedies is theoretically incoherent does not prove that the Court had a choice in the matter. Thus, before condemning the Court's approach, we must first address whether strict scrutiny can be tailored to an aggregate rights framework. The following is a preliminary outline of what such an approach might look like.

1. *Scope of the Remedy.* — Assuming that a race-conscious remedy is necessary to cure dilution,<sup>198</sup> the question to be answered by the strict scrutiny inquiry is whether the state has somehow overused or misused a racial classification in complying with § 2. To resolve that question in an aggregate rights context, a court would not consider where and how a particular district is drawn. Instead, it would analyze whether the state's remedial plan, taken as a whole, contains more

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<sup>198</sup> Before assuming that a race-conscious remedy is appropriate under the narrow-tailoring prong, one must first determine whether a race-neutral alternative for achieving the same end exists. See Ayres, *supra* note 132, at 1789–93 (criticizing this requirement as violating other tenets of strict scrutiny). One might argue that the state should employ race-neutral tactics — like advertising or community outreach — to decrease racial tensions and thereby avoid the need for race-conscious districting. See *id.* at 1789–90. Given the entrenched nature of racial polarization, however, it is extremely unlikely that such tactics would reduce it sufficiently to achieve their purpose, particularly during the ten-year span during which a dilutive districting plan would remain in place. One of the few viable race-neutral alternatives to creating majority-minority districts is some form of cumulative voting. But the courts have been extraordinarily reluctant to require states to adopt such a system. See, e.g., Cousin v. Sundquist, 145 F.3d 818, 822 (6th Cir. 1998); Quilter v. Voinovich, 912 F. Supp. 1006, 1021 (N.D. Ohio 1995) (deeming it “obvious[.]” that a race-neutral means of complying with § 2 “does not exist”). That fact may change, particularly to the extent that conservatives are attracted to cumulative voting schemes because they are race neutral, see, e.g., Samuel Issacharoff & Richard H. Pildes, *All for One: Can Cumulative Voting Ease Racial Tensions?*, NEW REPUBLIC, Nov. 18, 1996, at 10, and allow other electoral minorities — including religious and political ones — to have a voice in the system. Cf. Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 349–50 (1998) (arguing that certain types of cumulative voting enhance the ability of “racial and ethnic minorities to elect preferred candidates”); *id.* at 355 (contending that under an “alternative electoral scheme voters are free to vote on racial or nonracial lines as they see fit, without forfeiting their chance of obtaining fair representation for nonmajority views”). In any case, because a cumulative voting scheme does not further the analysis here, for these purposes I will assume — as the Supreme Court has — that no race-neutral alternatives exist for remedying a dilution violation and that creating majority-minority districts is necessary to comply with § 2.

remedial districts than necessary to provide minority voters rough proportionality — which is all that § 2 can be construed to afford.<sup>199</sup> First, such an analysis might indicate that the state has used race more than was necessary to achieve its purported goal.<sup>200</sup> Second, if the state has given minority voters a greater-than-proportional share of districts, white voting strength may be diluted.<sup>201</sup> In either case, one might infer that compliance with § 2 was not the state's true motive.<sup>202</sup>

Another relevant criterion for evaluating whether the state's remedial scheme is narrowly tailored would be whether the state included more minority voters within the remedial district than necessary to accomplish its purported end — the creation of a district in which minority voters can exert electoral control.<sup>203</sup> The inclusion of more minority voters than necessary to create an effective voting majority<sup>204</sup>

<sup>199</sup> See *Johnson v. De Grandy*, 512 U.S. 997, 1016–18 (1994); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1045 n.17 (D. Md. 1994); Issacharoff & Karlan, *supra* note 46, at 2283. This proposal is comparable to the Court's conclusion in *Miller v. Johnson*, 515 U.S. 900 (1995), that Georgia had used race excessively because it created more majority-minority districts than required by § 5 of the Voting Rights Act. *Id.* at 920–21, 923–24.

<sup>200</sup> Cf. *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 162 (1977) (noting with approval that the state created no more majority-minority districts than necessary to comply with the Voting Rights Act).

<sup>201</sup> See *Marylanders for Fair Representation*, 849 F. Supp. at 1045 n.17; see also *Quilter*, 912 F. Supp. at 1021; cf. *Briffault*, *supra* note 46, at 60–61.

<sup>202</sup> A state could, of course, create an additional majority-minority district for a variety of other reasons. It simply could not justify the creation of the additional district on § 2 grounds.

<sup>203</sup> See *Shaw v. Hunt*, 861 F. Supp. 408, 446 (E.D.N.C. 1994); *Hays v. Louisiana*, 839 F. Supp. 1188, 1206–08 (W.D. La. 1993), *vacated*, 515 U.S. 737 (1995). In some cases, this criterion will be irrelevant. For example, in areas where minority voters are highly concentrated, a remedial district will inevitably be a “supermajority” district in which minority voters constitute sixty-five percent or more of the voting population. In cities, for example, there are usually neighborhoods in which African-Americans are very concentrated. See, e.g., *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1438–39 (N.D. Ill. 1997), *aff'd in part and vacated in part*, 141 F.3d 699 (7th Cir. 1998); see also *Barnett v. Daley*, 32 F.3d 1196, 1200–01 (7th Cir. 1994) (noting that African-Americans in Chicago live in “highly compact,” segregated neighborhoods). As a result, when compact districts are drawn in these areas, African-American voters are often “packed” into them. See *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

<sup>204</sup> Political scientists have yet to agree on what percentage of minority voters is necessary to allow the group to elect its candidate of choice. Compare Lisa Handley, Bernard Grofman & Wayne Arden, *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates, in RACE AND REDISTRICTING IN THE 1990S* 13, 37 (Bernard Grofman ed., 1998) (determining that there is “no evidence to indicate that majority minority districts are no longer necessary to ensure African-Americans and Hispanics fair representation”), and David Lublin, *Racial Redistricting and African-American Representation: A Critique of “Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?”*, 93 AM. POL. SCI. REV. 183, 185–86 (1999) (concluding that majority-minority districts are necessary to elect minority voters' candidates of choice), with David Epstein & Sharyn O'Halloran, *A Social Science Approach to Race, Redistricting, and Representation*, 93 AM. POL. SCI. REV. 187, 187 (1999) (concluding that districts containing less than a fifty percent minority population can elect the group's candidate of choice). This difficult question becomes even more complex if one considers the extent to which potential white crossover voting should be taken into account in determining what constitutes a

may indicate a lack of fit between the state's means and ends. It might suggest that the state is providing too great a "benefit" to a minority group. Section 2 merely guarantees minority voters an effective *opportunity* to exercise electoral control;<sup>205</sup> it does not guarantee them overwhelming electoral majorities regardless whether the minority community can field a viable candidate or makes adequate efforts to get out the vote.<sup>206</sup> Or a court might find that the state is actually harming a minority group by packing more members of that group than necessary into the remedial district, thereby robbing the group of an opportunity to influence electoral outcomes in other districts.<sup>207</sup> Finally, the state's packing of minority voters might have occurred at the behest of the incumbent of that district,<sup>208</sup> who will always prefer a safe district to a horse race.<sup>209</sup>

2. *The Location of the District When Polarization Exists in Only One Part of the State.* — Interestingly, in some instances a court would consider the location of a district when applying strict scrutiny in a form tailored to an aggregate right (although it would do so for a different reason than the Court did in *Shaw II*). In *Shaw II*, the Court

controlling majority. See *Thornburg v. Gingles*, 478 U.S. 30, 89 n.1 (1986) (O'Connor, J., concurring in the judgment). See generally Lichtman & Hebert, *supra* note 3 (arguing that the determination of what constitutes a controlling majority requires a careful examination of racial polarization levels).

<sup>205</sup> *Johnson v. De Grandy*, 512 U.S. 997, 1017 n.11 (1994).

<sup>206</sup> See *Uno v. City of Holyoke*, 72 F.3d 973, 986 (1st Cir. 1995); *NAACP v. City of Columbia*, 850 F. Supp. 404, 419 (D.S.C. 1993), *aff'd mem.*, 33 F.3d 52 (4th Cir. 1994).

<sup>207</sup> See *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993); *Gingles*, 478 U.S. at 46 n.11 (stating that the minority vote is rendered less effective if states concentrate minority voters "into districts where they constitute an excessive majority"); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 172-73 (1977) (Brennan, J., concurring in part) (explaining other ways that "benign" remedies can conceal discriminatory animus); Briffault, *supra* note 46, at 68-69. For an effort to reduce this concern to an empirical test, see W. Mark Crain, *The Constitutionality of Race-Conscious Redistricting: An Empirical Analysis*, 30 J. LEGAL STUD. 193 (2001).

<sup>208</sup> See *CAIN*, *supra* note 14, at 1 (arguing that incumbent self-interest influences all districting decisions); Briffault, *supra* note 46, at 32; Grofman, *supra* note 86, at 1248 (describing this concern); Guinier, *No Two Seats*, *supra* note 12, at 1454.

<sup>209</sup> When voting is polarized, it is always safer for the incumbent to include as many minority voters as possible in the district. *CAIN*, *supra* note 14, at 176. While that impulse is certainly understandable, a state may have trouble justifying its compliance with the incumbent's wishes on § 2 grounds if such packing is unnecessary to provide a full remedy. This is especially true if the candidate's interest in a "safe" district offers no benefit to voters within that district. See *Roberts v. Wamser*, 883 F.2d 617, 622 (8th Cir. 1989) (discussing "[t]he possible divergence of interests between a candidate seeking office and a citizen attempting to protect his right to vote"); *CAIN*, *supra* note 14, at 2 (explaining why incumbents with safe seats have less incentive to pay attention to their constituents' needs and interests); Cain, *supra* note 46, at 128; see also Guinier, *No Two Seats*, *supra* note 12, at 1454-56 (making a similar argument); Lublin, *supra* note 204, at 186 (noting evidence of decreased turnout when a minority candidate enjoys a "safe" seat). But see *Bush v. Vera*, 517 U.S. 952, 1066 (1996) (Souter, J., dissenting) (noting that the *Shaw* doctrine is problematic because it does not allow a "minority incumbent [to be] protected as any other incumbent could be").

rejected a district drawn in the center of the state to remedy the dilution injury of voters on the southeastern side of the state. It did so not because of regional variations in polarization levels, but because the *Gingles* district could be drawn only on the southeastern side of the state.

If whites voted consistently against the preferences of African-American voters in the southeastern part of North Carolina (but not in the central part, where the remedial district was drawn), then the Court's concern with the location of the remedial district in *Shaw II* would have been more defensible. In that context, African-American voters in the middle of the state would *not* have been deprived of a fair opportunity to aggregate their votes. They could aggregate their votes as effectively as whites because their preferences would not meaningfully differ from whites, and thus no group would consistently outvote them. Because there would be no need to "remedy" any injury in that area, a court might well conclude that a remedial district drawn there was not narrowly tailored to remedy a dilution injury.<sup>210</sup>

3. "*Representational Harms*" of a Different Sort. — Is there any sense in which a single district's shape might be relevant if the narrow tailoring prong were reworked to take into account the unique attributes of aggregate rights? One could argue that a severely misshapen district imposes an injury that has nothing to do with dilution or the aggregate nature of the underlying right. On this view, when lines are drawn as bizarrely as they were in North Carolina and Texas in the first round of redistricting following the 1990 Census, it is not possible to represent the districts effectively.<sup>211</sup> In *Bush*, for example, the state drew lines with surgical precision to divide Hispanic voters and African-American voters into two districts.<sup>212</sup> It was thus difficult for voters and candidates to determine where the districts began and ended, causing some chaos during the election.<sup>213</sup> Moreover, a change in the

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<sup>210</sup> This argument is not inconsistent with the criticism of *Shaw II* set forth in section III.A, above, which argues that a single district cannot be examined in isolation when evaluating a dilution remedy — if only part of a state exhibits polarized voting, a plaintiff's challenge will not be statewide but will focus instead on a particular region within the state. It remains true that a remedial district drawn in a region where polarized voting is a problem cannot be evaluated in isolation.

<sup>211</sup> *But see* Pildes & Niemi, *supra* note 16, at 501–02 (offering and rejecting this explanation of *Shaw*). Professor Grofman has offered a slightly different version of this theory, arguing that such districts are "non-cognizable" because one cannot "characterize the district boundaries in a manner that can readily be communicated to ordinary citizens of the district in commonsense terms based on geographical referents." Grofman, *supra* note 86, at 1262–63.

<sup>212</sup> *Bush*, 517 U.S. at 962.

<sup>213</sup> *See id.* at 974. Similarly, in his dissent in *Shaw*, Judge Voorhees argued that the unusual length and bizarre shape of District 12 "make fair representation virtually impossible." *Shaw v. Hunt*, 861 F. Supp. 408, 493–94 (E.D.N.C. 1994) (Voorhees, C.J., dissenting); *see also* *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1056 (D. Md. 1994); E. Jefferson Coa-

shape of a district — particularly the shift from a compact to a bizarrely shaped district — may adversely affect grassroots and community organizations that have previously depended on shared political campaigns<sup>214</sup> or ties to local political structures.

There is also some mild support in political science literature for the view that traditional districting criteria such as compactness have some effect on voter turnout and participation.<sup>215</sup> A bizarrely shaped district may even inhibit an official's ability to serve her constituency once she is elected.<sup>216</sup> That possibility is more likely if, as is sometimes the case, the neighborhoods that are divided contain and define communities of interest.<sup>217</sup> Thus, misshapen districts arguably cause a "representational harm" of a different sort than that identified in the early *Shaw* opinions.<sup>218</sup>

Although the view that the shape of a district should be considered in applying strict scrutiny is fraught with difficulty,<sup>219</sup> the most persuasive justification for rejecting this view is the dearth of empirical evidence to support it.<sup>220</sup> Even if courts were to engage in the type of

lition for Leadership & Dev. v. Jefferson Parish, 691 F. Supp. 991, 1007-08 (E.D. La. 1988); Briffault, *supra* note 46, at 42-43; Grofman, *supra* note 86, at 1262-63.

<sup>214</sup> Cf. CAIN, *supra* note 14, at 12-13 (exploring some of these issues); Eisgruber, *supra* note 59, at 351 (same).

<sup>215</sup> See Briffault, *supra* note 46, at 42-43; cf. Niemi, *supra* note 56, at 189 (noting a relationship between voter recognition of candidates and compactness).

<sup>216</sup> See WILLIAMS, *supra* note 41, at 234; Briffault, *supra* note 46, at 42 (noting that "close attention to territoriality may be appropriate" when local services are involved).

<sup>217</sup> See Saunders, *supra* note 141, at 1623-24; cf. Miller v. Johnson, 515 U.S. 900, 908 (1995) (noting that inclusion of rural and urban African-Americans in a single district "tells a tale of disparity, not community"); *id.* at 919 (finding that no "community of interest" existed between the disparate groups of voters included in the district) (internal quotation marks omitted); Prosser v. Elections Bd., 793 F. Supp. 859, 863 (W.D. Wis. 1992) ("To be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs; otherwise the policies he supports will not represent the preferences of most of his constituents."). *But see* Briffault, *supra* note 46, at 41-42.

<sup>218</sup> See Butler, *supra* note 121, at 620-21 (suggesting an even stronger role for geographical representation in evaluating remedial districts); O'Rourke, *supra* note 46, at 767-72.

<sup>219</sup> One might argue that this view requires the type of balancing test that many commentators have rejected as incompatible with traditional strict scrutiny; it tells us only whether the state's properly intentioned choice represents bad policy for reasons that have little to do with the Equal Protection Clause. See *supra* note 135. One also might conclude that courts cannot — or should not — second-guess state judgments about what constitutes an effective district. See *Shaw v. Hunt*, 517 U.S. 899, 922-23 (1996) (Stevens, J., dissenting) (questioning the federal courts' jurisdiction to evaluate "legislative choices about the political structure of a State"); *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) ("[T]he apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' is primarily a political and legislative process." (citations omitted) (quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966)); Pildes & Niemi, *supra* note 16, at 502-13. The Court itself has repeatedly insisted that it does not intend *Shaw* to require states to adhere to compactness or any other districting criteria. *E.g.*, *Bush v. Vera*, 517 U.S. 952, 962 (1996); *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

<sup>220</sup> In the words of one leading expert, "the usefulness of requiring that districts be compact has been vastly overrated." Bernard Grofman, *Criteria for Districting: A Social Science Perspective*,

balancing required by this view, it is not clear that these fairly nebulous harms are sufficient to invalidate a state's redistricting priorities,<sup>221</sup> particularly given the advancements in communications and transportation that make proximity less important than in years past.<sup>222</sup> Thus, except perhaps in extreme circumstances,<sup>223</sup> these nebulous harms are unlikely to outweigh the benefits of strict compactness to states (which retain the freedom to choose their own districting criteria, particularly incumbency protection, in complying with § 2) and the concomitant benefits to minority voters (because the flexibility accorded to the states will make voluntary compliance with § 2 more likely).<sup>224</sup>

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Were the Court to accept the approach outlined above, the practical consequences would be significant. Professor Grofman has said that every voting rights controversy involves three components: theory, doctrine, and "a consideration of *cui bono* and whose ox is being gored."<sup>225</sup> Here, the restrictions the Court has imposed on states may have a significant practical impact on the next round of redistricting, which will take place following the release of the 2000 Census data. The Court has effectively mandated that all districts drawn to comply

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33 UCLA L. REV. 77, 89 (1985); see BUTLER & CAIN, *supra* note 162, at 73; CAIN, *supra* note 14, at 32-51 (calling into question the significance of compactness); Pildes & Niemi, *supra* note 16, at 538 & n.177 ("Empirical evidence on this question is slim."); cf. *Shaw II*, 517 U.S. at 936 n.13 (Stevens, J., dissenting) (dismissing the importance of compactness). For an extensive judicial analysis of the effect (or lack thereof) of compactness on districting, see *Shaw v. Hunt*, 861 F. Supp. 408, 472 n.60 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996).

<sup>221</sup> See CAIN, *supra* note 14, at 52-77 (describing the tradeoffs between compactness and other legitimate interests and arguing that compactness should not always outweigh such interests).

<sup>222</sup> See, e.g., *id.* at 32-33; Briffault, *supra* note 46, at 43; Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 22 (1985); Pildes, *supra* note 19, at 2531-32; Pildes & Niemi, *supra* note 16, at 538 n.177 (documenting the increasing irrelevance of compactness for redistricting purposes).

<sup>223</sup> One example might be the "postcard districts" described by Professor Pildes. See Pildes, *supra* note 19, at 2535.

<sup>224</sup> See Grofman, *supra* note 86, at 1263 (reaching a similar conclusion). Admittedly, this new definition of a representational harm seems inviting in at least one sense — it would explain the Court's puzzling ruling in *Hays* that the only individuals with standing to pursue *Shaw* claims are those individuals, minority or white, residing in the challenged district. See *United States v. Hays*, 515 U.S. 737, 744-45 (1995). Numerous commentators have struggled to make sense of this ruling, which is difficult to justify no matter how one characterizes the *Shaw* injury. See, e.g., John Hart Ely, *Standing To Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997); Issacharoff & Karlan, *supra* note 46; Saunders, *supra* note 141; Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313 (1999). If the injury at issue here is indeed tied to the state's creation of an unrepresentable district, then those living within the district, regardless of their race, are injured by the misshapen district's effect on the ability of their chosen candidate to represent them.

<sup>225</sup> Grofman, *supra* note 86, at 1267.

with § 2 be compact. If states continue to be constrained by these court-imposed limitations in complying with § 2, they may decide that the costs of compliance — creation of an additional compact majority-minority district even when it undermines other state concerns, such as the preservation of incumbents' seats — outweigh the benefits. Indeed, a state unable to draw bizarrely shaped majority-minority districts to satisfy its § 2 duties may decide not to draw any majority-minority districts at the outset of the redistricting process. It might instead wait until it is forced to do so, when a court-ordered remedial plan could provide the state with additional political cover. That choice is one we should expect many states to be tempted to make in the next round of redistricting,<sup>226</sup> and the costs to minority voters in terms of delay and resources could be significant.

#### IV. THE RELATIONSHIP BETWEEN AGGREGATE RIGHTS AND AN INDIVIDUAL RIGHTS FRAMEWORK

As a theoretical matter, the arguments sketched out in Part III are largely interesting detours. It is not necessary to agree with them to accept the conceptual framework put forth in this Article. Returning to the issues discussed in sections III.B and III.C, for example, even if one preferred a theory of dilution that incorporates a compactness requirement into the definition of injury, two things would remain true. First, the underlying harm would retain all of the characteristics of an aggregate right sketched out in Part I. However one defines “fair,” fairness would have to be measured in group terms, and no individual could assert an injury without reference to the relevant group. Second, to the extent that the Court has arrived at the correct approach to strict scrutiny, it has not done so because it adopted an aggregate rights approach while favoring the counterarguments sketched out in sections III.B and III.C. Instead, the Court's efforts to apply strict scrutiny in its *conventional* form fortuitously led it to the same result one might reach using an aggregate rights framework.<sup>227</sup> Thus, at best the Court has reached what some might consider the “right” result for the wrong reason.

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<sup>226</sup> See Statement Made at the National Conference of State Legislatures Conference on “Plotting the '00s Maps” (Mar. 5, 1999).

<sup>227</sup> Similarly, to return to Justice Kennedy's concern about “gratuitous race-based districting” discussed in section III.A, even if the shape of a single district could establish that race was misused — for example, if the Court returns to the “expressive harm” theory so that the *Shaw* injury stems from the shape of the district itself — it would remain true that a dilution remedy could not be fully evaluated without reference to the districting scheme as a whole. And one need not accept the version of strict scrutiny outlined in section III.D to conclude that dilution is different from more conventional forms of individual injury.

For these reasons, the arguments set forth above in favor of my proposed approach are important even if they do not persuade. These are the arguments that the Court has *not* considered because it thinks the right to an undiluted vote is a conventional individual right. Accordingly, the next time that the Court encounters an aggregate right, it will again try to squeeze it into a conventional individual rights framework, just as it did in *Shaw II*.

The more interesting question is: why? Why has the Court ignored the possibility that dilution claims are different from conventional individual rights? Perhaps the answer is simply that the Court has not had a conceptual framework for understanding and resolving these questions. If that is the case, then this Article represents a first step toward developing such a framework and should provide assistance to future courts dealing with dilution claims.

Although it is possible that the scales will simply fall from the traditionalist Justices' eyes the moment a framework for analyzing aggregate harms is offered, it seems unlikely that the Court's inability to conceptualize this conflict is the source of the results or rhetoric we see in the *Shaw* cases. Prior courts have lacked the conceptual framework outlined here but have nonetheless instinctively adapted dilution doctrine to fit the unique harm at issue. And the Court would not have had to work too hard to come up with an appropriate adaptation of the strict scrutiny framework. That is because lower courts, which had tried their hand at fashioning a framework for applying strict scrutiny before *Shaw II*, had come up with at least a rudimentary version of the alternative approach to strict scrutiny proposed in this Article.<sup>228</sup>

It thus seems more likely that the Court's self-conscious adherence to a conventional version of strict scrutiny reflects deeper normative concerns about recognizing an aggregate harm like dilution. On this view, the Court's attachment to the *Gingles* district is merely a proxy for expressing its discomfort with the group-based aspects of dilution claims.

The Court's fear of the group-based aspects of aggregate rights, in turn, seems to stem largely from concerns about essentialization — the drawing of inferences about an individual's substantive preferences based on her group membership. The driving force behind the *Shaw* doctrine is, of course, the Rehnquist Court's extreme discomfort with race-based decisionmaking in any context, and the aggregate nature of the right at issue here seems likely to draw the Court's attention to that concern in the context of voting. That is, to the extent that *Shaw*

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<sup>228</sup> See *supra* p. 1712 & nn.199 & 203.



resembles *Bakke* in its effort to downplay the state's use of race,<sup>229</sup> the aggregate nature of dilution harms and their remedies inevitably highlights the group-based aspects of redistricting and the inherent tensions between voting rights jurisprudence and a highly individualist, anti-essentialist conception of rights.<sup>230</sup>

The language of the *Shaw* opinions suggests that the Court is well aware of these tensions. Indeed, the *Shaw* doctrine itself can be viewed as part of a longstanding normative debate about the role of groups and community identity in our rights-based system. *Shaw I* is replete with normative justifications for the Court's decision to recognize the "analytically distinct" constitutional violation arising from certain majority-minority districts, all of which suggest that the Court is uncomfortable with the aspects of voting that do not fit easily with conventional individualist assumptions.<sup>231</sup> If anything, the *Shaw* doctrine has become increasingly individualistic as the traditionalists have shifted toward a more conventional equal protection approach, one that focuses on the use of the racial classification itself. As Professor Fiss has observed, "by making classification the focus of the Equal Protection Clause," one "furthers the ideal of individualism" by buttressing the "ideal of treating people as 'individuals.'"<sup>232</sup> The Court's highly individualistic conception of voting can also explain subsidiary aspects of the *Shaw* doctrine — for example, its puzzling treatment of the standing question.<sup>233</sup>

As I explore in greater depth in this Part, it would not be surprising if the Court were uncomfortable with some of the basic attributes of an aggregate right for the same reasons that it is uncomfortable with race-based decisionmaking in general.<sup>234</sup> For example, in the eyes of the Court, acceptance of a bizarrely shaped remedial district might suggest that it is not important which individual voters are included in

<sup>229</sup> See Aleinikoff & Issacharoff, *supra* note 51, at 643 (predicting that the *Shaw* doctrine will not end up "Crosenizing reapportionment law" but "will ultimately be understood to have *Bakked* it").

<sup>230</sup> Professors Guinier and Torres have noted that voting cases involving race often call the Court's attention to deeper, more systemic questions about the democratic process. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: RETHINKING RACE AND POWER* ch. 6 (forthcoming 2001).

<sup>231</sup> *Shaw v. Reno*, 509 U.S. 630, 647–49, 657–58 (1993). For example, there may be a connection between the group-based nature of dilution claims and the Court's early concern about the "message" purportedly conveyed by bizarrely shaped districts. That is, because aggregate rights do not fit neatly within an individualist approach, bizarrely shaped districts — where the lack of fit between the two frameworks becomes most apparent — create the "perception" that race has been overused. See *supra* pp. 1701–02.

<sup>232</sup> Fiss, *supra* note 148, at 126.

<sup>233</sup> See generally Reed, *supra* note 46.

<sup>234</sup> Some members of the Court have clearly expressed their concerns about § 2's group-based qualities. See, e.g., *Holder v. Hall*, 512 U.S. 874, 892–905 (1994) (Thomas, J., concurring).

the remedial district and that all that matters under § 2 is what the group as a whole ultimately receives. Fungibility and notions of group entitlement, of course, sit uncomfortably within a conventional individual rights framework and a jurisprudence geared toward avoiding group-based classifications. Indeed, these notions would seem wholly inconsistent with the fundamental respect that liberalism accords to individual autonomy.

Thus, a requirement that a state adhere to the *Gingles* district when drawing its remedial plan helps counter any impression that voters are interchangeable or that the right inures to the group. At least at a superficial level, the emphasis on the remedial district's shape and location makes dilution claims look as if they fit within a conventional view of individual rights and helps downplay the significance of the race-conscious decisionmaking behind it.

The Court's opaque suggestion at the end of its opinion in *Shaw II* that applying anything but a traditional approach to strict scrutiny would signal that the right to an undiluted vote is a "group" right<sup>235</sup> is further evidence that the approach it adopted stems from the Court's fear that recognition of the group-related attributes of dilution claims require it to indulge in essentialization.<sup>236</sup> For the Rehnquist Court, "group right" is a loaded term, and it is quite striking that the Court employed it when first forced to confront the aggregative aspects of dilution directly. In sum, *Shaw II*, for all of its unintelligible formalism, may have been a key moment in the Court's equal protection and voting rights jurisprudence.

And notice what the Court did at this key moment. One might have expected the Court in *Shaw II* to follow one of two paths when faced with a doctrinal question that so clearly implicated these two competing visions of the Equal Protection Clause. First, the Court could have done what courts have historically done in the dilution context: allowed both conceptions of equal protection injury to coexist and tailored strict scrutiny to fit the unique attributes of the right to an undiluted vote.<sup>237</sup> Second, the Court could have rejected the view that both visions can coexist and invalidated dilution claims on that ground. Instead, the Court simply ignored these differences and mechanically applied a conventional individual rights framework.

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<sup>235</sup> *Shaw v. Hunt*, 517 U.S. 899, 916-17 (1996).

<sup>236</sup> See Charles Fried, *The Supreme Court, 1989 Term—Comment: Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 108-09 (1990) (identifying two main tenets of a "liberal, individualistic conception of equal protection" as the view that "the individual," not the group, is "the object of fundamental rights" and the resistance to a "separation of the polity into racial groupings from which individuals cannot escape").

<sup>237</sup> See *supra* section I.C.

That choice does not represent a viable, long-term jurisprudential strategy. First, the Court's approach not only leads to doctrinal incoherence in dilution law, as Part III demonstrates, but unnecessarily burdens minority voters in their efforts to achieve equality.<sup>238</sup> Second, the Court will repeatedly face questions similar to those presented in *Shaw II* outside the dilution context. The conception of harm that an aggregate rights framework helps explain is not limited to dilution claims but permeates much of our legal culture. As explained in the next section, many rights — particularly civil rights — fall along the same type of individual/group rights continuum that characterizes the right to vote. At some point, then, the Court must decide whether these competing visions of racial harm are irreconcilably in conflict.

The remainder of this Article discusses these normative questions but leaves their full resolution for another day. Section IV.A examines some of the concerns that the Supreme Court, with its highly individualist account of rights and its antiessentialist impulses, might have about the group-like qualities of dilution claims. It concludes that these concerns can largely be traced to the unique nature of the injury in dilution cases.

That conclusion means that the stakes in this conflict are very high. As section IV.B explains, if the Court's normative concerns about recognizing an aggregate right go to the basic nature of the underlying injury, there is no possibility of an easy doctrinal fix. Were the Court to define constitutional rights in such highly individualistic terms that there were no room for aggregate rights, it would prevent the courts and Congress from recognizing a large number of concrete racial harms, as well as rights that promote broader structural principles essential to a well-functioning democracy. Such a move by the Court might even raise questions about the viability of representative democracy itself — a question worthy of much greater attention than can be given here.

*A. Is the Right to an Undiluted Vote an Individual Right,  
a Group Right, or Something in Between?*

The Court's trepidation about departing from a conventional individual rights framework is understandable.<sup>239</sup> Indeed, many scholars have debated whether group rights of any sort can be integrated into a liberal tradition like our own.<sup>240</sup> As noted earlier, part of that debate has centered on how to define an "individual" or "group" right.<sup>241</sup>

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<sup>238</sup> See *supra* p. 1717 & n.226.

<sup>239</sup> See Fiss, *supra* note 148, at 118–24 (offering institutional justifications for the courts' marked preference for an individualist approach).

<sup>240</sup> See *infra* note 279.

<sup>241</sup> See *supra* p. 1682.

There are at least as many definitions of these terms as there are academics writing about them, and the terms themselves can be defined along more than one axis, as Professor Post's helpful taxonomy suggests.<sup>242</sup> "Group right" is a particularly slippery concept because the term is invoked in quite different contexts.<sup>243</sup> Further, these categories may not be mutually exclusive, but may instead exist along the type of continuum described at the beginning of this Article.<sup>244</sup> And we might label rights differently depending on how they are characterized.<sup>245</sup>

Articulating a fully developed theory of what constitutes a group right is beyond the scope of this Article. Instead, this section focuses on the concerns that the Supreme Court might have about the group-like attributes of aggregate rights — a list derived from its prior jurisprudence. These categories are certainly not mutually exclusive — to the contrary, all seem to boil down to concerns about essentialism — but each is addressed separately for simplicity's sake.

1. *Whether the Right to an Undiluted Vote Inures to the Individual or to the Group.* — The Court might be concerned about an aggregate right like the right to an undiluted vote because the right rises and falls with the treatment of the group, thus suggesting that the right itself inures to the group.<sup>246</sup> An individual right typically "focuses on the specific effect of the alleged discrimination on particular

<sup>242</sup> Professor Post, in deciding how to classify a right, distinguishes between right-holders and interests. For example, the right to hold property may be understood as an individual right — because it protects an interest shared by everyone in a society, not just the interest of a more narrowly defined group — even if a group of individuals (like a church or a corporation) may be the "right-holder" (or property owner) in some cases. Robert C. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTRALIAN J. LEGAL PHIL. 185, 191–92 (2000).

<sup>243</sup> For example, in the United States one might instinctively think of a "group right" as a right an individual enjoys by virtue of her membership in a group. Yet much of the literature in other areas of the world — particularly the literature dealing with communitarianism — conceives of a group right as a right that belongs to the group (often a tribe or community) as a whole and fosters interests that are distinctively those of the group, such as a community's right to cultural self-definition. See Allen Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 89 (1993); Peter Jones, *Human Rights, Group Rights, and People's Rights*, 21 HUM. RTS. Q. 80 (1999); Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CAN. J.L. & JURISPRUDENCE 217 (1993); Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368 (1991); Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539 (1991) (discussing such claims in the human rights context); Vernon Van Dyke, *Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought*, 44 J. POL. 21 (1982). See generally WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989) (discussing these issues and their relation to traditional principles of liberalism).

<sup>244</sup> See *supra* section I.B.1, pp. 1682–84; see also Steiner, *supra* note 243, at 1544 (noting that some rights share the "characteristics of both individual and group rights").

<sup>245</sup> See Post, *supra* note 242, at 12.

<sup>246</sup> See *Shaw v. Hunt*, 917 U.S. 899, 917 (1996).

individuals, rather than on groups,<sup>247</sup> and evidence regarding the treatment of other group members usually cannot establish or defeat a claim of discrimination.<sup>248</sup> Rights that rise and fall with the treatment of the group, in contrast, may involve theories of group entitlement or the possession of rights by a collectivity that is autonomous from its individual members.<sup>249</sup> In such circumstances, the Court may fear that individuals receive a benefit not because they have been personally injured, but because they are members of a group to which the right ultimately belongs.<sup>250</sup> Further, as Professor Melissa Williams has observed in a different context, group rights raise concerns about essentialism: “[l]iberal wariness of group-based claims . . . arises from a suspicion that such claims will make groups’ moral status prior to individuals’ moral status and will result in the denial of individual equality and autonomy in the name of group equality.”<sup>251</sup>

The right to an undiluted vote does not fit easily into either a group rights or an individual rights category. While it is certainly true that an individual’s right is linked to the status of the group, that is because the injury being asserted by an individual is the inability to *aggregate* her vote. The only way to measure that individual harm is to evaluate the position of other group members with whom she wishes to coalesce.

One might respond that the right to an undiluted vote must be a group right (at least in the sense the Court uses that term) because even an individual who *cannot* aggregate her vote effectively — for example, a racial minority in a majority-white district where voting is racially polarized — cannot raise a dilution claim if the group as a whole is fairly distributed. The status of the group seems to be what matters here, not the status of the individual.

Perhaps group status is paramount here in this limited sense, but that is only because individual injury cannot be evaluated without reference to the treatment of the group, not because the individual suffers only by virtue of her membership in the group. The injury here is not the inability to elect a candidate of choice, but the inability to aggregate one’s vote *on account of race*.<sup>252</sup> And because of the special na-

<sup>247</sup> Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005 (1986).

<sup>248</sup> See *supra* pp. 1682–83 & nn.75–76.

<sup>249</sup> See Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48–49 (1976).

<sup>250</sup> See *id.* at 51.

<sup>251</sup> WILLIAMS, *supra* note 41, at 240.

<sup>252</sup> Cf. *supra* pp. 1687–88 (comparing the right to an undiluted vote to the right not to be segregated).

ture of the injury, that might be enough for us to conclude that the right is nonetheless consonant with individualist principles.<sup>253</sup>

Consider the typical employment discrimination case. Racial minorities who are denied a job surely suffer a concrete harm. But even in a world without discrimination, we would expect both racial minorities and whites routinely to be denied jobs. Racial minorities are thus "injured" in a legal sense only when that denial is because of race.

The same is true in redistricting. Any territorially based system will result in the placement of some whites in majority-minority districts and the placement of some minorities in majority-white districts. For this reason, a minority voter placed in a majority-white district is not "injured" when the group as a whole is distributed fairly; the harm she suffers is not a harm inflicted "on account of race," but one that naturally arises in a territorially based scheme. Although such an injury might be sufficiently concrete to confer standing, this harm is not a *legal* harm for which the Constitution or § 2 provides a remedy.

In contrast to conventional discrimination claims, however, in dilution cases we can decide whether an individual has suffered harm "on account of race" only by looking at the relative treatment of different groups.<sup>254</sup> It is the unique nature of the injury here that requires a group focus, not the identity of the right-holder.<sup>255</sup> Thus, although an analysis of group treatment is necessary to assess the injury, the harm remains an individual one.

2. *Whether Deprivation of the Right to an Undiluted Vote Inflicts a Concrete Harm on Individuals.* — The Court might also be concerned about an aggregate rights approach because the right at issue is unindividuated and group members are effectively fungible for dilution purposes. In a conventional individual rights case, in contrast, courts can readily separate the injured from the unharmed. This con-

<sup>253</sup> Professor Guinier has argued that an approach that takes into account the aggregative aspects of a representative democracy does not require an abandonment of an individual rights principle. See Guinier, *No Two Seats*, *supra* note 12, at 1511-12; see also Aleinikoff, *supra* note 21, at 358-64 (offering an individualist account of dilution doctrine premised on "racial taint").

<sup>254</sup> For further discussion, see pp. 1683-84, above.

<sup>255</sup> One possible test for determining whether dilution claims are consonant with individualist principles is whether an individual could assert such a claim. Again, segregation claims, which also involve an aggregate right, offer a useful analogy. A single child can certainly raise a segregation claim even though proving the harm will require the courts to examine the treatment of other children in the school system and any remedy granted will be systemwide, not merely confined to the plaintiff's school. The same seems to be true of dilution cases. An individual can theoretically assert that her vote has been diluted — that is, she is unable to aggregate her vote effectively due to a racial skew in the state's districting choices — even if she cannot prove that claim without referring to the status of racial groups and the relief she seeks necessarily involves a rearrangement of racial groups. Thus, as the Supreme Court itself has noted, while "the right to vote is personal," any remedial plan may require the restructuring of an entire districting scheme. *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

cern presumably stems from a fear that the injury is not sufficiently concrete for standing purposes.<sup>256</sup> Although the concreteness requirement of standing rules implicates separation of powers issues,<sup>257</sup> standing doctrine is also closely tied to individualist principles — that is, the assumption that rights belong to the individual and that only the individual may pursue a remedy for the harm she has suffered, even if that harm is inflicted because of the individual's membership in a group.<sup>258</sup> That is presumably why fungibility sits uncomfortably in an individualist framework.<sup>259</sup>

For those minority voters who would be able to elect their candidate of choice but for the racial skew operating in the distribution of voters, concreteness seems an unlikely ground for rejecting dilution claims.<sup>260</sup> Moreover, to the extent that fungibility is a concern in this context, it is certainly possible to hypothesize a case in which a court could distinguish between group members who are injured and those who are unharmed. For example, as noted above, if polarized voting occurred in only one part of the state, voters in another area of the state — where group members' ability to aggregate their votes was not thwarted by polarized voting — would not be able to assert an injury, and it would be problematic to treat them as fungible for remedial purposes.<sup>261</sup>

The Court's concern with concreteness is much weightier for those individuals who will remain in a majority-white district under *either* the dilutive or the remedial plan. For example, imagine that a Latino lives in a large, all-white suburban neighborhood far from any other Latinos. As long as the state adheres to a territorially based system with contiguous districts and voting is racially polarized throughout the state, he will always be outvoted by his white neighbors. That is true even if Latinos in other parts of the state can establish a dilution claim and obtain a remedial district. As long as the remedial Latino-majority district is contiguous, it will not reach our hypothetical voter.

<sup>256</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Allen v. Wright*, 468 U.S. 737, 752 (1984); Pildes & Niemi, *supra* note 16, at 513.

<sup>257</sup> See *Lujan*, 504 U.S. at 559–60.

<sup>258</sup> See Charles Kelso & P. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 94 (1996) (arguing that standing doctrine is difficult to apply in situations in which groups, rather than individuals, are injured); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1459 (1988) (“‘Standing’ is a metaphor of individualism.”).

<sup>259</sup> See Brest, *supra* note 249, at 51; Guinier, *Emperor's Clothes*, *supra* note 46, at 1612.

<sup>260</sup> Indeed, the remedy in dilution cases is always immediate and is only applied when someone has already been injured. Grofman, *supra* note 86, at 1246; cf. *Smith v. City of Cleveland Heights*, 760 F.2d 720, 723 (6th Cir. 1985) (finding that injury to an African-American living in an area where racial steering took place is “direct and concrete” because it is “peculiar . . . to a distinct group of which he is a part”).

<sup>261</sup> See *supra* p. 1714; see also Issacharoff & Karlan, *supra* note 46, at 2282 n.33.

One might argue that this voter has not been sufficiently injured by the dilutive plan to have standing. To be sure, the first question that comes to mind is whether a Latino living in a white, suburban neighborhood has more in common with Latinos living in poor, urban areas than with his white, middle-class neighbors.<sup>262</sup> This argument is a variant of the essentialization argument, which I discuss in the next section.<sup>263</sup> For now, I assume our hypothetical Latino shares the same interests and political goals as other Latinos.

Even accepting this assumption, we nonetheless face a difficult problem: no matter what happens, he will never be able to elect his candidate of choice, and a dilution remedy will have no effect on his relationship with his own representative. To conclude that this individual has standing to assert a dilution claim, we must articulate a theory of injury that does not depend on his eventual placement in a majority-Latino district.

We might describe the injury in the following way: although no Latino voter in the state is entitled to elect a candidate of choice, each is entitled to know that the reason he or she cannot do so is not due to a racial skew.<sup>264</sup> But here our hypothetical voter knows that, with or without the racial skew, he would never be able to elect a candidate of choice as long as voting is racially polarized.

A stronger response would be to argue that our plaintiff has a concrete interest in what happens in other districts. Acceptance of this view would require a fairly robust theory of democratic representation. Specifically, the Court would have to accept that "fairness" in redistricting involves something more than the relationship between a constituent and her direct representative. On this view, voters are not only interested in the service their representative provides or how their representative votes, but in the proper functioning of the legislature itself. For example, our hypothetical Latino voter might have good reason to prefer a legislature in which at least one candidate chosen by Latino voters is able to take part in coalition building or legislative deliberation, or he might simply believe that the legislative process improves when it includes a more diverse range of voices and interests.<sup>265</sup>

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<sup>262</sup> See *Miller v. Johnson*, 515 U.S. 900, 908 (1995).

<sup>263</sup> See *infra* section IV.A.3, pp. 1727-32.

<sup>264</sup> See *supra* p. 1686.

<sup>265</sup> This theory of harm would seem to explain the injury of dilution whether one prefers a deliberative or a pluralist, interests-oriented account of democracy. In the latter instance, of course, a racial minority has lost an opportunity to have a representative in the legislature pursuing his interests. In the former instance, our hypothetical Latino voter has lost the opportunity to have his representative offer a distinct voice to the process of deliberation. As Professor Michelman points out, one need not assume that "deliberative politics . . . demand[s] of participants the submergence of their individualities . . . in a collective being or common good." Frank I. Michelman,



Another possible response — one I am exploring in a forthcoming article — is that the right derives from a structural principle regarding the way democracy should function. On that view, all Latinos — indeed, all voters — have an interest in a well-functioning democracy that makes room for the perspectives of racial minorities.<sup>266</sup> The absence of concreteness stems from the fact that the right is a structural one rather than a classic individual harm.

In addition to requiring significant changes in standing doctrine, this approach would require a broader view of the right to an undiluted vote.<sup>267</sup> At present, dilution claims largely involve easy mathematical standards — a court analyzes whether there is rough proportionality and, if not, whether there is a good reason for its absence. And although courts ruling on dilution claims dutifully recite the nine Senate factors, which require courts to consider the *quality* of representation that minority groups receive,<sup>268</sup> dilution claims almost always come down to a *quantitative* judgment.<sup>269</sup> Although this quantitative approach certainly has its own shortcomings,<sup>270</sup> it is at least a judicially manageable standard. Shifting to a qualitative standard for dilution, in contrast, would lead the courts further into the political thicket, in which there are no easy baselines for assessing what is fair. Courts would have to make nuanced judgments about what participation means, how to define representation, and how to evaluate whether racial minorities are full participants in our democracy.

In any case, here, too, we find ourselves in the quandary discussed above.<sup>271</sup> What makes dilution claims more “group-like” is the special nature of the injury. To the extent that the Court is uncomfortable with this aspect of dilution doctrine, there is no easy doctrinal fix; there is nothing we can do to make dilution claims function exactly like conventional individual rights claims.

3. *Whether Preventing Dilution Requires a Court To Indulge in Essentialization.* — An aggregate right may also raise concerns about essentialization — the fear that vindicating the right would require assumptions about the political preferences of minority voters based on their racial identity.<sup>272</sup> Indeed, much of the Court’s concern that dilution claims implicate a “group right” stems from this discomfort. The

*Conceptions of Democracy: The Case of Voting Rights*, 41 FLA. L. REV. 443, 448 (1989); see also Frank I. Michelman, *Law's Republic*, 97 YALE L. J. 1493, 1504 (1988).

<sup>266</sup> Such a theory would result in a different Article III problem because every voter would presumably share this interest and thus have standing to assert a claim.

<sup>267</sup> See *supra* note 21 (discussing related issues).

<sup>268</sup> See *id.*

<sup>269</sup> See *supra* p. 1673 & n.39.

<sup>270</sup> For examples of authors discussing these shortcomings, see *infra* note 283.

<sup>271</sup> See *supra* p. 1723–24.

<sup>272</sup> See *Shaw v. Reno*, 509 U.S. 630, 647–49, 657–58 (1993).

Court's reluctance to endorse an aggregate right should not surprise us. To return to our hypothetical Latino voter in the suburbs, a court might be unwilling to assume that he shares the same interests and concerns as Latino voters in poorer, urban areas. When voting is racially polarized between whites and Latinos in *both* the suburbs and the city, there are many reasons to make such an assumption. Polarization across socioeconomic classes strongly suggests that race is the source of that polarization and that Latinos of all classes are politically aligned. After all, even if our hypothetical Latino voter has not suffered the type of economic harms often associated with racism, history suggests that race remains a salient characteristic in his life.<sup>273</sup> Indeed, even when the cohesion of African-American voters and the divisions between those voters and white voters are explained just as effectively by economic status as by racial identity, courts have been willing to assume that race, not economics, is the source of these voting patterns.<sup>274</sup>

Further, denying the possibility of such connections based solely on class or geography would prevent our hypothetical Latino voter and other members of his group from choosing and defining their own collective identity.<sup>275</sup> Nonetheless, although the courts routinely indulge in such assumptions when politics are involved — no one worries about concluding that the Democrats stranded in Orange County care whether other voters can elect Democrats to the California legislature — the Supreme Court has never thought of race as a political construction<sup>276</sup> and has already shown its reluctance to assume that minority voters from different classes and neighborhoods share enough in common to justify treating them as a group.<sup>277</sup> Presumably, the Court fears that when states move individual members of a minority group around in a districting scheme to comply with § 2, they are treating them, to quote Professor Bernard Williams, merely “as the surface to which a certain [political] label can be applied.”<sup>278</sup>

The typical response to this concern has been to point out that there is no danger of essentialization when the individual has deliber-

<sup>273</sup> See Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967–88 (1997) (discussing racial discrimination experienced by African-American members of the middle class); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996) (same); Rubin, *supra* note 3, at 114 (same).

<sup>274</sup> See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 62–66 (1986).

<sup>275</sup> See generally GUINIER & TORRES, *supra* note 230 (proposing race as a political category that allows for self-identification and definition).

<sup>276</sup> See generally *id.* (proposing that race be understood as a political construction).

<sup>277</sup> See *Miller v. Johnson*, 515 U.S. 900, 908 (1995) (noting that the inclusion of different African-Americans “tells a tale of disparity, not community”).

<sup>278</sup> Bernard Williams, *The Idea of Equality*, in MORAL CONCEPTS 153, 159 (Joel Feinberg ed., 1969). Indeed, fear that the Voting Rights Act conceives of racial groups “largely as political interest groups” has concerned a number of its critics. See, e.g., *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring).

ately *chosen* that identity.<sup>279</sup> To put this theory in more pragmatic terms, § 2 is triggered only when voting is racially polarized<sup>280</sup> — that is, when both whites and minorities are in fact voting along racial lines.<sup>281</sup>

This response is not a complete one, however. Even if we focus on group status because most group members have chosen to self-identify along racial lines, we might fear that the state is treating the few group members who *do not* share the preferences of the group as if they do. This was the nub of Justice Thomas's attack on § 2 in *Holder v. Hall*,<sup>282</sup> in which he excoriated proponents of § 2 for purportedly treating all members of a minority group as if they "think alike."<sup>283</sup>

Professor Guinier has offered one theory for addressing Justice Thomas's concern. In territorially based districting schemes, the state *must* make assumptions about individuals' substantive preferences in order to comply with § 2 and other districting criteria. A cumulative voting scheme, Professor Guinier argues, allows individuals to coalesce

<sup>279</sup> This argument is similar to one sometimes offered by scholars trying to reconcile various strands of communitarian thought with the tenets of liberalism. See KYMLICKA, *supra* note 243, at 49, 162–81, 194–205, 254; THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995) (providing a collection of essays related to this topic); WILLIAMS, *supra* note 41, at 15, 203–37, 239–43; Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992) (rejecting the notion that liberalism is incompatible with communitarianism); Daniel R. Ortiz, Correspondence, *Saving the Self?*, 91 MICH. L. REV. 1018 (1993) (same). As Professor Steiner has noted, however, references in liberal political theory to groups and group rights are "guarded (if not hostile)." Steiner, *supra* note 243, at 1549.

<sup>280</sup> See *Bush v. Vera*, 517 U.S. 952, 1056 (1996) (Souter, J., dissenting); Karlan & Levinson, *supra* note 46, at 1216.

<sup>281</sup> For example, Professors Karlan and Levinson have argued that "racial and ethnic group affiliation in the political process" is "voluntary" because "race is first and foremost an *internal* identification, generated through the political positions taken by members of a discrete, demographically-identifiable group." Karlan & Levinson, *supra* note 46, at 1217 (emphasis omitted). Similarly, Professor Issacharoff has argued that "group status" under *Gingles* is "self-generated by the voting patterns of those claiming statutory protection." Issacharoff, *supra* note 11, at 887. Thus, these commentators argue, voters who choose to "affiliate along racial lines to participate in the political process" should be able to do so "on an equal footing with voters who choose to affiliate based on other shared characteristics." Karlan & Levinson, *supra* note 46, at 1219; see also WILLIAMS, *supra* note 41, at 206; Rubin, *supra* note 3, at 114; cf. Fiss, *supra* note 148, at 148 (making the same argument in more general terms to support subordination theory); Guinier, *Emperor's Clothes*, *supra* note 46, at 1634–35 (arguing for the empowerment of self-identified groups).

<sup>282</sup> 512 U.S. 874 (1994).

<sup>283</sup> *Holder*, 512 U.S. at 906 (Thomas, J., concurring in the judgment). Professor Guinier has addressed this concern at length in [*E*]racing Democracy, *supra* note 46, at 118–25. Professor Melissa Williams has offered another response to Justice Thomas's view, arguing in VOICE, TRUST, AND MEMORY, *supra* note 41, at 176–202, that shared experiences among minority groups are sufficient to establish a commonality of interest. See also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400–01 (1978) (Marshall, J., dissenting); Eisgruber, *supra* note 59, at 351 (1997) (arguing that the fact that minority voters may share common interests does not require us to assume that they think alike); Eisgruber, *supra* note 121, at 523 (same).

along whatever lines they wish without requiring the state to involve itself in these groupings.<sup>284</sup>

Assuming that we retain territorially based districting schemes, a different response to the antiessentialist challenge would return us to § 2's procedural underpinnings. A dilution suit can be understood as vindicating the principle that fairness in redistricting requires that individuals have the opportunity to aggregate their votes effectively along certain lines (be they racial, political, etc.<sup>285</sup>) *should they choose to do so*.<sup>286</sup> When voting is not racially polarized, minority group members can aggregate their votes no matter how the lines are drawn because they are voting in roughly the same way that whites are voting. But where voting is polarized, the state must take special care to ensure that it does not prevent minority voters from aggregating their votes. An aggregate rights framework, then, is simply a procedural fix designed to equalize an individual's opportunity to make her vote count, regardless of how she ultimately decides to vote.<sup>287</sup>

The Supreme Court has taken precisely this approach in the one-person, one-vote cases, which require that states include a roughly equal number of voters in all state and congressional districts.<sup>288</sup> These cases were originally fashioned as equal protection claims based on the assumption that rural voters — who enjoyed a disproportionate share of voting power in the legislature because their districts were so underpopulated — had different interests from urban voters, who were typically the victims of such schemes.<sup>289</sup> The Court gradually redefined the right in process-based terms to avoid the problem of essentialization. Thus, rather than describing the right to equipopulosity as the right of urban voters to influence the voting process as a group or to attain particular substantive outcomes, the Court eventually cast it

<sup>284</sup> See Guiner, *[E]racing Democracy*, *supra* note 46; Guinier, *No Two Seats*, *supra* note 12.

<sup>285</sup> Obviously, a state cannot ensure that members of *every* political, racial, social, or religious group have a fair chance to aggregate their votes under every scheme; a normative decision must be made regarding *which* voters we wish to protect. See WILLIAMS, *supra* note 41, at 26.

<sup>286</sup> See *id.* at 10–11 (describing the dilution doctrine in this fashion).

<sup>287</sup> See Issacharoff, *supra* note 9, at 1865 (identifying § 2 as a “process correction” mechanism, distinct from “purely outcome-driven civil rights claims against the distribution of goods and opportunities in this society”); Karlan, *supra* note 21, at 178 (noting process-based underpinnings of the *Gingles* compactness requirement).

<sup>288</sup> The one-person, one-vote principle requires almost mathematical equality among congressional districts. See *Karcher v. Daggett*, 462 U.S. 725, 730–31 (1983). *But see* *Abrams v. Johnson*, 521 U.S. 74, 98–101 (1997) (approving higher deviations in the creation of congressional districts among other reasons to accommodate the state interest in preserving communities of interest). Courts apply a slightly more lenient standard to state or local districts. See, e.g., *Mahan v. Howell*, 410 U.S. 315, 324–25 (1973) (permitting more flexibility in state or local districting than in congressional districting).

<sup>289</sup> See *Baker v. Carr*, 369 U.S. 186, 273 (1962) (Frankfurter, J., dissenting) (quoting the complaint as challenging a “purposeful and systematic plan to discriminate against a geographical class of persons”).

as the right of every citizen to have an equal opportunity to participate in the political process, regardless of his or her views.<sup>290</sup> Indeed, some have argued that the Court has gone even further by defining the right as nothing more than a guarantee to an equal share of a representative's attention — a right easily vindicated by ensuring that every representative serves the same number of constituents.<sup>291</sup>

Procedurally defined rights fit more easily within an individual rights approach. At least in theory, they require no substantive judgments about what is fair and allow courts to treat all individuals the same way regardless of their views, thereby avoiding the problem of essentialization.<sup>292</sup> Indeed, the Court itself explicitly grounded its characterization of the one-person, one-vote principle in antiessentialist terms: “[A]ll 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.”<sup>293</sup>

Similarly, the alterations to a dilutive scheme required by § 2 need not be premised on the assumption that group members will vote alike any more than the one-person, one-vote rule hinges on the view that equipopulosity will alter electoral results. Both simply ensure that, if members of a group (whether defined in geographic or racial terms) choose to affiliate along certain lines, they will have a fair opportunity to do so. I call this a “proceduralist” approach for want of a better term.<sup>294</sup> A proceduralist account is deliberately designed to ignore the substantive preferences of voters and the way those preferences are filtered through the legislative process; it is concerned solely with the manner in which voters aggregate their votes on election day.

This answer, however, has its own limitations. A proceduralist account risks ignoring the complex role that political groups play within the democratic process.<sup>295</sup> While such an approach concededly offers a manageable, easily applied standard for judges and redistricters, it also prevents courts from assessing the conditions under which cross-racial alliances can form, the effect of racial minorities' participation on po-

<sup>290</sup> *Reynolds v. Sims*, 377 U.S. 533, 565, 568 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964); *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963). Indeed, the Court has often described the injury as one grounded in the right to full citizenship. See, e.g., *Reynolds*, 377 U.S. at 567 (noting that debasement of the vote makes an individual “that much less a citizen”).

<sup>291</sup> See *Reed*, *supra* note 46, at 454–55 (1999); *Guinier*, *supra* note 47, at 1–5.

<sup>292</sup> See *WILLIAMS*, *supra* note 41, at 9.

<sup>293</sup> *Gray*, 372 U.S. at 379.

<sup>294</sup> That term has been used in a different sense, and with a great deal more precision, by Professor Michelman. See Frank I. Michelman, *Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary*, 47 *UCLA L. REV.* 1221, 1234 (2000).

<sup>295</sup> I detail these issues in a forthcoming article. Heather K. Gerken, *Looking Ahead: The Limits of Procedural Accounts of Voting* (Feb. 23, 2001) (unpublished manuscript, on file with the Harvard Law School Library).

litical debate, the quality of representation received by racial minorities, constitutive aspects of participation, or the dynamics of the legislative process after election day.

Precisely because this approach provides such a thin conception of voting — one that is arguably at odds with the basic theories that give rise to concerns about vote dilution<sup>296</sup> — one might prefer a *third* alternative: accepting that courts cannot remedy the aggregate harm of dilution *without* indulging in some assumptions about the political preferences of minority voters. On this view, the cost of making such assumptions is minor when compared to the alternative: the dilution of minority votes that will inevitably result from a colorblind approach.<sup>297</sup>

In any case, whatever choice one prefers, what matters for the purposes of this Article is that the necessity of making the choice stems, once again, from the injury at issue. Dilution claims are about the aggregation of group preferences, and the identification of group preferences is fraught with difficulties, particularly in the context of race. For that reason, to the extent the Court remains uncomfortable with the group-based nature of dilution claims, no easy doctrinal change can eliminate this problem.

4. *An Issue Outside the Aggregate Rights Debate: The Antidiscrimination Principle.* — Even if one were willing to conclude that an aggregate right is properly understood as an individual right (albeit not a conventional individual right), two questions would remain: who should be able to assert the right, and when should she be able to do so? Here, in contrast to the characteristics of dilution claims identified above, these questions can be addressed without reference to the injury at issue. They therefore need not be considered when deciding whether dilution claims themselves are consistent with individualist principles.

Scholars generally invoke two main normative theories to explain who should be able to assert a right under the Equal Protection Clause and when she should be able to do so: the antidiscrimination principle and the subordination theory. The antidiscrimination principle, which has long been “the predominant interpretation of the Equal Protection Clause,”<sup>298</sup> provides that individuals should not be treated differently

<sup>296</sup> See *supra* section I.A.2, pp. 1676–81.

<sup>297</sup> Frank Michelman has argued that Justice Brennan’s decisions reflect such an approach and may nonetheless be consonant with principles of liberal individualism. See Frank Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.’s Constitutional Thought*, 77 VA. L. REV. 1261, 1290–1326 (1991). For an opposing critique of Justice Brennan’s affirmative action jurisprudence, see Fried, *supra* note 236.

<sup>298</sup> Fiss, *supra* note 148, at 118, 123 (describing the “highly individualistic” nature of the antidiscrimination principle); cf. Guinier, *Emperor’s Clothes*, *supra* note 46, at 1620 (describing critiques of the Voting Rights Act).

based on arbitrary criteria.<sup>299</sup> It thus focuses on the motivations of the decisionmaker.<sup>300</sup> Inflicting an injury on the basis of race is improper because race is an "irrational" basis for making decisions about individuals.<sup>301</sup> The subordination theory,<sup>302</sup> in contrast, focuses not on intentional discrimination, but on action that has the effect of further disadvantaging a group that has traditionally been relegated to an inferior position in society.<sup>303</sup>

The antidiscrimination principle dictates that both whites and racial minorities should be able to bring dilution claims. Given its focus on illicit intent, it would also require that the baseline for measuring whether dilution has occurred be a race-neutral scheme.<sup>304</sup> Advocates of the subordination theory, in contrast, would be concerned only about dilution suffered by racial minorities, not whites. And the standard for evaluating what is "fair" would not be race neutrality. Instead, the subordination theory, with its focus on societal harms, would likely find unacceptable any districting scheme that falls short of society's perception of what is "fair" — anything less would exacerbate the powerlessness of an already subordinated group<sup>305</sup> and further stigmatize minority group members.<sup>306</sup>

Whether or not the antidiscrimination principle is properly equated with an individualist approach,<sup>307</sup> however, any inconsistencies be-

<sup>299</sup> Fiss, *supra* note 148, at 109.

<sup>300</sup> Colker, *supra* note 247, at 1005; Strauss, *supra* note 66, at 945.

<sup>301</sup> Strauss, *supra* note 66, at 940-41; see also Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 241, 263-313 (1971) (describing an individualist, "color-blind" approach and critiquing that approach); Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 568 (1998) (same). See generally Fiss, *supra* note 148, at 108-28, 129-77 (describing and critiquing this approach and offering an alternative view).

<sup>302</sup> Owen Fiss offered an early articulation of the subordination theory in his seminal piece, *Groups and the Equal Protection Clause*. See Fiss, *supra* note 148, at 107-08. Erving Goffman's book, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963), has also proved to be a seminal work in this area.

<sup>303</sup> Colker, *supra* note 247, at 1007-08; Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 8 (1977); Strauss, *supra* note 66, at 943; Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411-12 (1994). The subordination theory can take a number of forms. Professor Strauss has, for example, described four different varieties: (1) subordination, (2) stigma, (3) second-class citizenship, and (4) encouragement of prejudice. Strauss, *supra* note 66, at 941-44. As Professor Strauss acknowledges, although the focus of these theories is different, they "overlap and their boundaries are not clear." *Id.* at 940, 945. For simplicity's sake, I group all of these theories under the rubric of "subordination."

<sup>304</sup> Colker, *supra* note 247, at 1005; Strauss, *supra* note 66, at 945.

<sup>305</sup> See Fiss, *supra* note 148, at 152-54 (emphasizing the special importance of remedying disparities in political power).

<sup>306</sup> See Karlan, *supra* note 21, at 214-15; Karlan, *supra* note 41, at 42-43.

<sup>307</sup> The equation of the two is certainly understandable, for the former "yields a highly individualized conception of rights." Fiss, *supra* note 148, at 127; see also Fiss, *supra* note 301, at 241. Nonetheless, many commentators have argued that rights derived under a subordination theory

tween current dilution doctrine and the antidiscrimination principle do not stem from the injury in question. They therefore *can* be remedied with a doctrinal fix.

Imagine, for example, that the Supreme Court explicitly held that the antidiscrimination principle is the sole normative theory for adjudicating racial harms under the Fourteenth and Fifteenth Amendments. If a lower court had held that only racial minorities could assert dilution claims, the Supreme Court could correct that problem without calling into question the aggregate nature of the dilution injury. That is because *anyone* can assert an aggregate right under this principle. The injury at issue is the same no matter who asserts it. Indeed, the framework sketched out above would work equally well for vote dilution suffered by whites, Republicans, or members of the Christian Right.

The same is true for the standard one chooses to define what is "fair." If the Court were to conclude that the proportionality standard is inconsistent with the antidiscrimination principle,<sup>308</sup> rejection of that

are consonant with an individual rights approach. See Colker, *supra* note 247, at 1011 n.24; Fiss, *supra* note 148, at 123-26, 159-60; Karst, *supra* note 303, at 7. And Professor Brest has offered an individual rights theory for considering group-related harms, stigma, and aggregative injuries. See Brest, *supra* note 249, at 48. Professor Melissa Williams has gone further, asserting that recognition of group status in vindicating what she terms "group-based claims" is essential to achieving liberal ideals. WILLIAMS, *supra* note 41, at 239-43.

<sup>308</sup> At first glance, one might mistakenly think that proportionality is an inappropriate remedy because it represents more than a minority group could hope to gain in a winner-take-all system like our own. Winner-take-all schemes are systematically skewed against electoral minorities of all sorts. Thus, "one can expect a [group] with even a narrow majority statewide to win a much larger proportion of seats than its proportion of the statewide vote." Marylanders for Fair Representation v. Schaeffer, 849 F. Supp. 1022, 1042 (D. Md. 1994); see CAIN, *supra* note 14, at 166-68; REIN TAAGEPERA & MATTHEW SHUGART, SEATS AND VOTES: THE EFFECTS AND DETERMINANTS OF ELECTORAL SYSTEMS 233 (1989); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 267-68 (1985); Richard Niemi & Stephen G. Wright, *Majority-Win Percentages: An Approach to the Votes-Seats Relationship in Light of Davis v. Bandemer*, in POLITICAL GERRYMANDERING AND THE COURTS 266, 278 n.4 (Bernard Grofman ed., 1990); Pildes, *supra* note 19, at 2530-31. Political scientists have used the "Cube Law" as a rough rule of thumb for calculating this "disproportionality effect." The Cube Law was first formulated during the early 1900s in an effort to justify the absence of proportionality in British elections; two scholars revived it during the 1950s. See TAAGEPERA & SHUGART, *supra*, at 158, 208. Under the Cube Law, a group that represents three of every five voters will, *ceteris paribus*, control a ratio of seats that equals  $3^{3/2}$ , or 27/8. See *id.* at 158. Thus, a party with only sixty percent of the population will generally win seventy-seven percent (27/35) of the available seats.

If past government conduct can properly be understood as the source of racially polarized voting, then the "disproportionality effect" routinely observed in winner-take-all elections becomes more problematic, and the proportionality standard can be defended more readily under the antidiscrimination principle. The injury to be remedied in a dilution case would not be that a racial group is an electoral minority, but that voting is racially polarized. After all, the votes of a racial minority would be fully effective if voting were not racially polarized — that is, they would enjoy a roughly proportional share of political power — because their preferences would not differ in any relevant respect from those of the white majority. See Briffault, *supra* note 46, at 28-30;



standard would not prevent the Court from recognizing the injury of dilution. What matters in an aggregate rights context is that *some* group-based measure is used for evaluating fairness; it need not be proportionality.<sup>309</sup> And even if the Supreme Court were to abandon proportionality as a measure of fairness, we would nonetheless need to examine the relative treatment of groups to determine whether an injury exists at all.

The same would be true if the Court elevated the subordination theory to constitutional status. The subordination theory merely superimposes a second level of injury on the underlying aggregate harm; it infers stigma or a reinforcement of second-class citizenship from the fact that a minority group member's vote has been diluted. We would therefore still need a framework for defining and recognizing when the underlying injury, dilution, has occurred and what should be done to remedy it.

In short, our choice of a normative theory for identifying who can assert a claim and when she can assert it is largely irrelevant to an aggregate rights framework. To the extent that the Court prefers one normative theory over another, it can address this concern by shifting the standard for identifying the right-holder and measuring fairness. It need not, however, reject the basic theory of aggregate harms behind § 2.

### *B. The Choice Before the Court*

Section IV.A makes two things clear. First, the Supreme Court is correct when it asserts that certain attributes of an aggregate right push the right to an undiluted vote further down the individual/group rights continuum. The right to an undiluted vote cannot be squeezed into the highly individualistic account of equal protection rights that we see in many of the Court's recent decisions. Second, the group-related attributes of the right to an undiluted vote stem from the underlying injury itself. There is therefore no easy doctrinal "fix" to reconcile these competing visions of racial harm.

These facts present the Court with a stark choice. It is fair to assume that the Court will not knowingly recognize a "group right," at least as the Court understands that term.<sup>310</sup> Thus, it must either adopt a theory of individual rights flexible enough to include the group-based

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King, Bruce & Gelman, *supra* note 63, at 95–96. Their situation would be comparable to that of people of Swedish origin or those whose last names begin with the letter "Y". While these groups are certainly in the electoral "minority," their votes are not diluted because no one is voting consistently against their preferences. For these reasons, proportionality is an appropriate remedy for the true source of vote dilution.

<sup>309</sup> See *supra* pp. 1680–81.

<sup>310</sup> See *supra* section IV.A.

aspects of dilution claims or come to grips with the tension between its own individualist impulses and the constitutionality of § 2.

One might think that a third alternative is available to the Court: muddling through. On this view, the Court could continue to ignore the differences between aggregate rights and conventional individual rights. But that strategy is not viable in the long term. The tensions between these two competing conceptions of racial harm will continue to build, and doctrinal conflicts will continue to multiply.<sup>311</sup> At some point these pressures will become so great that the Court will no longer be able to maintain the fiction that aggregate rights and conventional individual rights are indistinguishable. Moreover, as noted above,<sup>312</sup> the Court's adherence to this approach comes at the cost of imposing burdensome and doctrinally incoherent restrictions on the states' efforts to augment minority voting strength.

Proponents of § 2 may prefer these costs to the obvious alternative — having the Supreme Court squarely address the constitutionality of § 2. Indeed, this Article suggests that the Court could theoretically invalidate § 2 on grounds that are quite different from those suggested by other commentators, who have focused on the adequacy of Congress's justification for adopting a results-based test for measuring discrimination.<sup>313</sup>

Under *City of Boerne v. Flores*,<sup>314</sup> Congress has the power to enact prophylactic rules to prevent the deprivation of constitutional rights, and it may take steps to remedy past constitutional harms.<sup>315</sup> The most likely basis for challenging the constitutionality of § 2 is the argument that the results-based test adopted by Congress — and the remedy of proportionality — is not “congruent” or “proportional” to the underlying harm. Defenders of § 2 would have to establish that Congress had an adequate factual record to conclude either that it is fair to infer intentional discrimination from a state's failure to achieve proportionality or that the requirement of proportionality is an appropriate remedy for intentional discrimination.<sup>316</sup>

This Article suggests that there may be a *second*, less obvious ground for questioning the constitutionality of § 2 under *City of Boerne*. *City of Boerne* held that Congress cannot “alter[] the mean-

<sup>311</sup> Judith Reed has identified one such example. She explains that the Court's highly individualistic conception of the right to vote led to a standing principle in the *Shaw* cases that many find difficult to reconcile with established standing doctrine. See Reed, *supra* note 46, at 418.

<sup>312</sup> See *supra* pp. 1716–17.

<sup>313</sup> See, e.g., Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998).

<sup>314</sup> 521 U.S. 507 (1997).

<sup>315</sup> *Id.* at 517–22.

<sup>316</sup> Such an argument would likely track the analysis provided by Professor Karlan in a recent article defending the statute. See Karlan, *supra* note 313.

ing” of the Constitution or “chang[e] what the right is.”<sup>317</sup> While Congress may adopt prophylactic measures to prevent future deprivations of a constitutional right or offer remedies for past deprivations, the Court has held that the power to identify the underlying right itself rests exclusively with the judiciary.<sup>318</sup> If the Court were to conclude that the Constitution recognizes *only* the type of conventional individual harm we see in its recent equal protection jurisprudence, then aggregate rights, with their group-based attributes, arguably exceed the scope of the injury that the Constitution recognizes. Congress would thus lack the power to vindicate these rights.

One major problem for those who seek to invalidate § 2 on these grounds is that any such attack would apply equally to *intentional* dilution claims brought under the Constitution, which the Court itself has endorsed.<sup>319</sup> While the first ground of attack noted above would preclude a results-based statutory standard for dilution claims, it would leave in place intentional dilution claims brought under the Constitution. An attack on the aggregate aspects of dilution claims, in contrast, would go to the injury itself, and that injury is common to *both* the statutory and constitutional rights. In short, the Court cannot easily make the aggregate rights problem go away.

In any case, the lack of a conceptual framework for resolving this question certainly increases the risk that the Court will take the extraordinary step of declaring § 2 unconstitutional. Without a theory for understanding precisely what makes dilution claims different, the Court might repeat the mistake it made in *Shaw II*: condemning any right that takes groups into account as a group right. As Part I and section IV.A establish, the dilution injury requires taking groups into account. Thus, the conceptual framework proposed here at least offers an appropriate approach for identifying and resolving the possible sources of the Court’s concern.

Even setting aside the fate of § 2, an aggregate rights framework is helpful because it shows us what else is at stake in this controversy. This framework makes clear that rejection of an aggregate harm in the context of vote dilution will hold serious consequences for many other areas of the law.

Consider first the one-person, one-vote doctrine. Although the right to an equally weighted vote is typically considered a classic “individual right,” it shares the characteristics of an aggregate right.<sup>320</sup>

<sup>317</sup> *City of Boerne*, 521 U.S. at 519.

<sup>318</sup> *Id.* at 519–21.

<sup>319</sup> See *Rogers v. Lodge*, 458 U.S. 613, 615 (1982).

<sup>320</sup> Compare *Reynolds v. Sims*, 377 U.S. 533, 561 (1963) (describing the right as an individual one), *Briffault*, *supra* note 46, at 28–29 (noting that the Court classifies the right as an individual one despite its group-based characteristics), *Cain*, *supra* note 46, at 128 (describing the right as an

Like dilution, the one-person, one-vote doctrine focuses on the *aggregative* qualities of voting — a court measures whether an individual's vote is equal to another's by considering whether the number of votes aggregated to elect a candidate in one district equals the number of votes aggregated in another district to do the same.<sup>321</sup> An individual's right similarly rises and falls with the treatment of the group (albeit a geographically defined group rather than a racially defined one); if each district contains an equal number of voters, no individual voter therein can assert a one-person, one-vote claim. And the right is undivided among members of the group; no individual in a district is more or less injured than any other.

Similarly, many civil rights claims involve aggregate harms. For example, Title VII disparate impact claims challenge neutral employment practices that have a disparate impact on members of a minority group. The only way to assess whether an individual has been denied a job as a result of a racially skewed process is to compare the treatment of members of her group with the treatment of white applicants. Thus, individual claims of injury hinge at least in part on the treatment of the group.

As detailed in Part I, segregation claims offer another example of an aggregate harm. In segregation cases, the harm arises from the arrangement of different racial groups, again necessitating an examination of group treatment to assess an individual claim.

The rejection of an aggregate rights theory would also have implications for broader normative theories that explain when a civil rights

individual one), Guinier, *Emperor's Clothes*, *supra* note 46, at 1597 (noting that the Court's terminology suggests that the right is an individual one), Issacharoff, *supra* note 9, at 1856–58 (noting that the Court “unambiguously expressed the right . . . in terms of individual entitlements” but describing the right's group-based characteristics), and Sunstein, *supra* note 303, at 2410 (describing the one-person, one-vote right as an “idea that every citizen should have the same power over political outcomes”), with Moore v. Ogilvie, 394 U.S. 814, 818–19 (1968) (describing this principle as forbidding “the idea that one group can be granted greater voting strength than another”), Guinier, *Emperor's Clothes*, *supra* note 46, at 1595 (arguing that the one-person, one-vote principle is “consistent with both group and individual conceptions of voting”), Issacharoff & Karlan, *supra* note 46, at 2282 n.30 (asserting that one-person, one-vote cases “should be viewed as cases about group political power . . . rather than purely about individual rights”), Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1717–18 (1993) (same), and Low-Beer, *supra* note 46, at 164 (classifying the right as “both an individual and a group right”).

<sup>321</sup> See *Reynolds*, 377 U.S. at 565; *Baker v. Carr*, 369 U.S. 186, 207–08 (1961); Guinier, *Emperor's Clothes*, *supra* note 46, at 1597–98; cf. *Brown v. Thomson*, 462 U.S. 835, 846–48 (1983) (rejecting a one-person, one-vote claim because it challenged a single district rather than the state-wide plan). As Justice Powell explained, “[w]hile population disparities do dilute the weight of individual votes, their discriminatory effect is felt only when those individual votes are combined.” *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part). In the dilution context, in contrast, the “discriminatory effect” is felt when certain individual votes are consistently *not* combined.

injury like dilution should be recognized. For example, the subordination theory, with its focus on stigma and the disadvantaging of previously outcast groups, fits neatly within an aggregate rights framework. Both the dilution and subordination theories are concerned with the aggregation of disadvantages,<sup>322</sup> although the latter's source ("society"<sup>323</sup> versus polarized voting in a specific state or subdivision), timing ("past discrimination" versus a particular census cycle), and means (all political, social, and economic discrimination versus polarized voting) are far less discrete. Moreover, group subordination theories focus on the relative treatment of groups of individuals; indeed, the overarching injury under a subordination theory (stigma, or the reinforcement of second-class citizenship) is premised on inequities in group status and the harms to individuals that arise from such inequities.<sup>324</sup> And, as with aggregate rights, the harm of subordination is unindividuated among members of the group; when a particular group is excluded from participation in political and community life, every individual member of that group is arguably injured by that exclusion.<sup>325</sup>

Interestingly, the "expressive harm" doctrine, which the Court has apparently discarded as an explanation for the *Shaw* injury but could revive in the future,<sup>326</sup> shares the traits of an aggregate right. The harm at issue can be measured only by examining relative group treatment — whether the lines of a bizarrely shaped district divide members of different racial groups into separate districts. In addition, the right rises and falls with the treatment of members of a group. If the aggregate result of the state's many line-drawing decisions is to divide racial groups, then everyone in the challenged district can claim an expressive harm; if not, no individual can claim any harm. Finally, the injury is unindividuated, for all citizens are harmed by a district that suggests that the state has privileged racial considerations over all

<sup>322</sup> Strauss, *supra* note 66, at 941; see also Neal Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 40, 44-45, 50 (1991); Karst, *supra* note 303, at 48-49.

<sup>323</sup> See Colker, *supra* note 247, at 1008-09 (explaining that subordination theory focuses on discrimination by society as a whole, not just discrimination by a particular actor).

<sup>324</sup> *Id.* at 1009; Strauss, *supra* note 66, at 941-43, 951. Thus, like an aggregate right, a group subordination theory rises and falls with the status of the group. See Fiss, *supra* note 148, at 148. In the absence of such inequities between racial groups, no individual could claim an injury. See Fiss, *supra* note 148, at 148-49, 154-55; Sunstein, *supra* note 303, at 2443 (declining to apply the anticaste principle to Asian-Americans).

<sup>325</sup> See *Smith v. City of Cleveland*, 760 F.2d 720, 722 (6th Cir. 1985); Fiss, *supra* note 148, at 148-49 ("That is why the free blacks of the antebellum period — the Dred Scotts — were not really free, and could never be so long as the institution of . . . slavery still existed."); cf. Strauss, *supra* note 125, at 21 ("A person might be subject to the effects of past discrimination even if he himself has never been the victim of a specific act of discrimination.").

<sup>326</sup> Cf. *supra* note 6 (noting that the *Shaw* majority has not offered a consistent rationale for the doctrine); pp. 1992-94.

others.<sup>327</sup> And even if the Court does not return to the expressive-harm doctrine in voting cases, that injury resembles the harm articulated in Establishment Clause cases, particularly those authored by Justice O'Connor.<sup>328</sup>

Constitutional injuries are not the only harms that fit within an aggregate rights framework. In the torts context, for example, some scholars have begun to develop theories that mass torts differ from traditional torts in that "no coherent individualized relationship exists . . . between 'wrong' and 'harm,'" thus necessitating a new framework for adjudicating these claims that takes group interests into account.<sup>329</sup>

Finally, rejection of an aggregate rights approach may hold serious consequences for democratic theory. In most of the contexts described above, the rejection of an aggregate harm would not necessarily call into question the fundamental principles undergirding that body of law. For example, one could presumably reject a cause of action for disparate impact claims under Title VII without abandoning the concept of employment discrimination itself.

In the context of voting, however, the rejection of an aggregate rights framework might sweep more broadly than the Court anticipates by casting doubt on some of the fundamental premises of representative democracy outlined in Part I. That is because, as noted above, the theory of representative democracy is built around the concept of vote aggregation. As Justice Stewart observed, "[r]epresentative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy."<sup>330</sup> For example, rejection of aggregate harms may call into question the notion that one individual can represent a group<sup>331</sup> or that the aggregation of preferences is an appropriate way to represent individuals with diverse interests.<sup>332</sup> We also might be less willing to trust a majoritarian system that depends on vote aggregation if we cannot correct districting deci-

<sup>327</sup> See *supra* p. 1692.

<sup>328</sup> E.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 774, 776-79 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (focusing on the "message" conveyed by a religious display to the reasonable observer).

<sup>329</sup> See David Rosenberg, *Collectivized Adjudication of Mass Tort Cases* 8 (August 9, 2000) (memorandum to the Harvard Law School Faculty, on file with the Harvard Law School Library); see also David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996).

<sup>330</sup> *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting).

<sup>331</sup> Professor Guinier terms this principle "synecdoche." Guinier, *supra* note 47, at 5.

<sup>332</sup> See *supra* pp. 1678-79.

sions that skew the aggregation process in favor of members of the dominant racial group.

A highly individualist account of voting rights would also push us toward a very narrow conception of democracy. If only individual harms matter, there will be little work for democratic theory to do in determining what should occur *after* votes are placed in the ballot box. To use Professor Karlan's shorthand, to the extent that voting involves "participation," "aggregation," and "governance,"<sup>333</sup> only participatory rights will be protected under a purely individualistic constitutional scheme. Aggregation and governance cannot be understood without taking groups into account.<sup>334</sup> Further, to the extent that aggregate rights are designed to protect *structural* concerns — such as accommodating minority interests in a majoritarian system or fostering partisan competition — there will be less room to address such concerns in the context of our current individual rights-based system.<sup>335</sup>

As these examples demonstrate, the consequences of rejecting an aggregate rights framework in the context of vote dilution might matter to us for two distinct reasons. A pure instrumentalist might be reluctant to reject aggregate rights because such a decision would prevent the courts and Congress from remedying an entire category of serious harms, especially those that have been perpetrated against ra-

<sup>333</sup> Karlan, *supra* note 320, at 1708.

<sup>334</sup> See Guinier, [*E*]racing Democracy, *supra* note 46, at 126–28 (explaining that groups become increasingly relevant as one moves from rights designed to guarantee equal access to the polls to rights intended to equalize legislative influence); Reed, *supra* note 46, at 418 (making a similar prediction about the future of the Court's voting-rights jurisprudence based on its standing rulings); see also James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 899, 983 (1997) (arguing that the Court has historically been less receptive to certain types of voting claims).

Another way of looking at this problem is to consider what Jonathan Still terms the six basic "criteria for political equality." See Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375, 377–385 (1981). A highly individualistic account of voting would address only two of these problems: the question of "universal suffrage," which ensures that everyone is able to vote, and "equal shares," which roughly resembles the one-person, one-vote principle. *Id.* at 378–80. But we certainly could not consider the question of "Equal Probabilities," *id.* at 380–82 — that is, that every voter has the same chance of affecting election outcomes (the problem with which dilution doctrine is concerned) — or any of the other three conceptions of equality that further depart from an individualist approach. These include the principle of "Anonymity," which means that the results of the election would be the same if every voter cast her vote for her preferred candidate's opponent; "Majority Rule," which means that the results of the election represent the preference of the majority; and "Proportional Group Representation," which means that each group of voters receives a share of legislative seats that is proportional to its voting power within the electorate. *Id.* at 382–85. We could not address these criteria because each would require us to look at what happens to the democratic process after every voter has gained access to the ballot, a stage in which groups become most relevant.

<sup>335</sup> For a powerful argument in favor of thinking about democracy in structural terms, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

cial minorities. But the fact that, at least until recently, aggregate rights have peacefully coexisted with conventional individual rights might give us pause for a different reason. It suggests that our jurisprudential system can encompass a more robust and flexible conception of individual rights than the Court's most recent equal protection jurisprudence might indicate.

Although the last issue must be saved for another day, here is a broad sketch of what a response might look like: We might be willing to define individual rights broadly enough to make room for a right with group-based aspects that stem not from the identity of the right-holder — groups versus individuals — but from the unique nature of the underlying injury. On this view, we can fit aggregate rights, which seem to blend both individual and group characteristics, into an individual rights scheme (broadly defined) as long as the group-based aspects of these rights stem entirely from the causal relationship between individual and group treatment. In short, as long as the underlying harm is an *individual* harm, it does not matter that we measure it by examining the treatment of other group members.

### CONCLUSION

This Article represents the first step toward developing a conceptual framework to understand vote dilution and the many other aggregate harms that pervade our jurisprudence. It provides a roadmap for identifying aggregate harms and adapting those doctrinal structures that have been built around conventional individual rights to the special nature of the injury in question.

If the absence of a conceptual framework for understanding dilution claims is the only explanation for the Court's ruling in *Shaw II*, then adoption of this approach will serve the limited but salutary purpose of correcting that mistake — with the practical result that states will be much less constrained in their efforts to augment minority voting strength. The framework proposed here will similarly help other courts avoid the mistake made in *Shaw II* — trying to squeeze aggregate rights into a conventional, individual rights framework — and thus prevent incoherent results in other areas of the law.

The framework proposed here also suggests, however, that a larger constitutional battle may be looming in our future. It confirms the Court's intuition that there is something different about aggregate rights — that they fall further down the individual/group rights continuum than the highly individualistic, profoundly antiessentialist conception of harm recently put forward by the Court. Additionally, it suggests that these group-like qualities cannot be eliminated through doctrinal adjustments because they go to the essence of the injury in question. In short, if we are going to recognize an aggregate harm like dilution, we must take into account its group-like qualities.



If the Court refuses to do so, it is not only § 2 that will fall. Many claims, particularly civil rights claims, will be in constitutional jeopardy. And a rejection of dilution claims because of their group-like qualities might even cast doubt on some of the basic assumptions behind our representative democracy. The only questions that remain are whether — and when — the Court will address these issues directly.