SUMMARY:
... [N]ow that the first round of reapportionment has been accomplished, there is need to talk "one man-one vote" a little less and to talk a little more of "political equity," and of functional components of effective representation. ... My claim is that racial-group representation is important, but it is only imperfectly realized through an electoral system based on territorial districting or through the limited concept of racially "descriptive" representation. ... If the decision to represent groups already has been made in the adoption of geographic districting, then group representation based on racial-group association or historical oppression becomes less problematic. ... Race-conscious districting -- as opposed to racial-group representation -- may be rigidly essentialist, presumptuously isolating, or politically divisive. ... In justifying race-conscious districting, voting rights activists appropriately employ the concept of racial-group identity. ... Since there were at least four Latino candidates, the white candidate would most likely win if the Latino vote were split, even though Latinos are fifty-five percent of the district's voting-age population. ... One-vote, one-value makes the assumption that each voter should enjoy the same opportunity to influence political outcomes. ... In other words, the criticism of racial-group representation is, at bottom, a criticism of winner-take-all districting in which the district boundaries and the incumbent politicians define the interests of the entire district constituency. ...

TEXT:

With voices pitched in the high decibel range, critics of race-conscious districting are blasting the Voting Rights Act and its 1982 amendments. A recent Wall Street Journal headline declares that voting is now "rigged by race." Ethnic activists, the writer asserts, are collaborating with GOP operatives in an unholy political alliance to herd minorities into their own convoluted urban districts in order to improve GOP prospects in majority white suburban areas. According to such critics, this is a "political one-night stand" made possible by misguided federal courts and Department of Justice officials construing the 1982 Act to create majority minority districts, the newest form of "racial packaging."  

My students inform me that Cokie Roberts, as part of ABC News's election night coverage, dramatically illustrated the concerns of critics when she traced on a map of the Chicago area the "earmuff" district, allegedly carved out of two noncontiguous Chicago neighborhoods joined by a narrow rod to maximize the possibility that the Latino residents would be able to elect a representative of their choice to Congress. And in June 1993, the Supreme Court discovered a new constitutional right enabling white voters in North Carolina to challenge, based on its odd and irregular shapes, a "highway" district that narrowly tracks the path of an interstate, creating a swatch of voters on either side of the highway from one end of the state to the other. This fifty-four percent black district, the
most integrated in the state, elected Melvin Watt, one of the first two blacks elected to Congress from that state in this century.  

The Voting Rights Act codified the right of protected minority groups to an equal opportunity to elect candidates of their choice, although its language disclaims the right to racial representation by members of the racial group in direct proportion to population. The critics now claim this is special and unwarranted protection for racial and language minority groups. In the name of liberal individualism, these critics assert that the statute effected a radical transformation in the allocation and nature of representation.

[*1591] Although race-conscious districting is their apparent target, these critics have fixed their aim on a deeper message -- that pressing claims of racial identity and racial disadvantage diminishes democracy. We all lose, the theory goes, when some of us identify in racial or ethnic group terms.

In my view, critics of race-conscious districting have misdirected their fire. Their emperor has no clothes. Their dissatisfaction with racial-group representation ignores the essentially group nature of political participation. In this regard, the critics fail to confront directly the group nature of representation itself, especially in a system of geographic districting. Perhaps unwittingly, they also reveal a bias toward the representation of a particular racial group rather than their discomfort with group representation itself. In a society as deeply cleaved by issues of racial identity as ours, there is no one race. In the presence of such racial differences, a system of representation that fails to provide group representation loses legitimacy.

Yet these critics have, in fact, accurately identified a problem with a system of representation based on winner-take-all territorial districts. There is an emperor wearing his clothes, but not as they describe. Rather than expressing a fundamental failure of democratic theory based on group representation per se, the critics have identified a problem with one particular solution. It is districting in general -- not race-conscious districting in particular -- that is the problem.

Winner-take-all territorial districting imperfectly distributes representation based on group attributes and disproportionately rewards those who win the representational lottery. Territorial districting uses an aggregating rule that inevitably groups people by virtue of some set of externally observed characteristics such as geographic proximity or racial identity. In addition, the winner-take-all principle inevitably wastes some votes. The dominant group within the district gets all the power; the votes of supporters of nondominant groups or of disaffected voters within the dominant group are wasted. Their votes lose significance because they are consistently cast for political losers.

[*1593] The essential unfairness of districting is a result, therefore, of two assumptions: (1) that a majority of voters within a given geographic community can be configured to constitute a "group"; and (2) that incumbent politicians, federal courts, or some other independent set of actors can fairly determine which group to advantage by giving it all the power within the district. When either of these assumptions is not accurate, as is most often the case, the districting is necessarily unfair.

Another effect of these assumptions is gerrymandering, which results from the arbitrary allocation of disproportionate political power to one group. Districting breeds gerrymandering as a means of allocating group benefits; the operative principle is deciding whose votes get wasted. Whether it is racially or politically motivated, gerrymandering is the inevitable by-product of an electoral system that aggregates people by virtue of assumptions about their group characteristics and then inflates the winning group's power by allowing it to represent all voters in a regional unit.
Given a system of winner-take-all territorial districts and working within the limitations of this particular election method, the courts have sought to achieve political fairness for racial minorities. As a result, there is some truth to the assertion that minority groups, unlike other voters, enjoy a special representational relationship under the Voting Rights Act's 1982 amendments to remedy their continued exclusion from effective political participation in some jurisdictions. But the proper response is not to deny minority voters that protection. The answer should be to extend that special relationship to all voters by endorsing the equal opportunity to vote for a winning candidate as a universal principle of political fairness.

I use the term "one-vote, one-value" to describe the principle of political fairness that as many votes as possible should count in the election of representatives. One-vote, one-value is realized when everyone's vote counts for someone's election. The only system with the potential to realize this principle for all voters is one in which the unit of representation is political rather than regional, and the aggregating rule is proportionality rather than winner-take-all. Semiproportional systems, such as cumulative voting, can approximate the one-vote, one-value principle by minimizing the problem of wasted votes.

One-vote, one-value systems transcend the gerrymandering problem because each vote has an equal worth independent of decisions made by those who drew district lines. Votes are allocated based on decisions made by the voters themselves. These systems revive the connection between voting and representation, whether the participant consciously associates with a group of voters or chooses to participate on a fiercely individual basis. Candidates are elected in proportion to the intensity of their political support within the electorate itself rather than as a result of decisions made by incumbent politicians or federal courts once every ten years.

My project in this Paper is to defend the representation of racial groups while reconsidering whether race-conscious districting is the most effective way of representing these groups or their interests. My claim is that racial-group representation is important, but it is only imperfectly realized through an electoral system based on territorial districting or through the limited concept of racially "descriptive" representation.

In Part I, I describe current doctrinal approaches, such as the jurisprudence of one-person, one-vote, on which some critics of race-conscious districting rely to emphasize the individual rather than the group nature of voting. I suggest that the one-person, one-vote doctrine is consistent with both group and individual conceptions of voting, but in the context of winner-take-all territorial districting, it is a limited principle of political equality. In Part II, I argue that racial-group representation is a natural response to historical and current reality, but it is one best realized in electoral systems employing proportional or semiproportional aggregating rules. Proportional or semiproportional aggregating rules are primarily a proxy for the aspirational concept of procedural or political fairness. In such systems, the unit of representation is political rather than regional, and almost all votes count in the election of officials. In this way, systems such as cumulative voting are consistent with principles of both one-person, one-vote and one-vote, one-value.

In contrast to winner-take-all districting systems, cumulative voting may -- in appropriate, fact-specific circumstances -- be an expedient, and more politically fair, election method. Cumulative voting promotes a concept of racial group identity that is interest-based rather than biological. In light of the controversy surrounding race-conscious districting, where circumstances dictate, it is at least worth considering this alternative, thereby attempting to tailor the emperor with some real clothes by putting the principles of political equality into practice.
I.

For many liberal reformers, the one-person, one-vote principle is politically fair because its ideal of universal suffrage incorporates the respect due and the responsibilities owed to each citizen in a democracy. 25 The one-person, one-vote cases attempt to equalize the purely formal opportunity to cast a ballot through a system of population-based apportionment. 26 Under this rationale, each district contains approximately the same number of people; each person within the district has the same opportunity to vote for someone to represent the district; and each district representative represents the same number of constituents.

The one-person, one-vote principle thus assures all voters the right to cast a theoretically equal ballot. In this Part, I argue that this theoretical possibility is unlikely to be realized in an electoral system using winner-take-all districts. I further suggest that neither groups of voters nor individuals are fairly represented under such a system.

There are two issues at stake. One raises the question of whether voting is constitutionally protected because it implicates individual rights. If voting is an individual right, the second question asks whether the one-person, one-vote principles that operate within the confines of geographic districts adequately protect the right to vote. I concede that voting has garnered its highest constitutional protection when presented as an individual rights issue, but the widespread use of winner-take-all districts undermines the validity of this characterization. The fact that constitutional rules about voting evolved within a system of regional representation suggests that posing the problem as one of individual rather than group rights has been a distraction. I claim that the heavy reliance on one-person, one-vote jurisprudence to develop a theory of democracy fails both as a theory and as an adequate doctrinal protection of either individual or group rights.

A. One-Person, One-Vote and the Limits of Liberal Individualism

In this subpart, I examine the assumption that allocation of representatives through winner-take-all districting is a form of representation of individuals. The heart of this assumption is that citizenship is the ultimate reflection of individual dignity and autonomy and that voting is the means for individual citizens to realize this personal and social standing. Under this theory, voters realize the fullest meaning of citizenship by the individual act of voting for representatives who, once elected, participate on the voters' behalf in the process of self-government. 27 Indeed the very terminology employed in the Supreme Court's one-person, one-vote constitutional principle suggests that voting is an individual right. 28 For these reasons, some assume that the right at stake is the individual right to an equally weighted vote or an equally powerful vote. 29

The assumption is that constitutional protection for voting is exclusively about protecting an individual right, not necessarily about ensuring equal voting rights. At first, the connection between the two concepts seems plausible because every citizen has the right to vote and every citizen has the right to an equally weighted vote. 30 But the one-person, one-vote principle of voting is primarily about equal, not individual, representation. 31 Under this equality norm, the right to "fair and effective representation" subsumes concerns about equal voting and equal access. As the Court stated in one of its early reapportionment cases, the principle of equal representation for equal numbers of people is "designed to prevent debasement of voting power and diminution of access to elected representatives." 32 Implicit in this equality norm is the moral proposition that every citizen has the right to equal legislative influence. This means an equal opportunity to influence legislative policy. 33

The assumption that voting is an individual right is also unnecessary for the view that voting rights are
a means of political empowerment. One-person, one-vote rules emerged in response to claims about population-based malapportionment and about the right of the majority of people to elect a proportionate share of representatives. 34 In announcing this principle, the Supreme Court recognized that the growing urban majority of the 1960s would never command its fair share of legislative power unless the Court intervened. 35 In conjunction with concern about both a fair share of power and developments in the law of minority vote dilution, the Court also adopted an instrumental view of voting. People would participate when and if they thought their vote mattered. Under this empowerment [*1599] norm, the primary purpose of voting rights is to empower citizens to participate in the political process. 36

I take the position that the right of the individual to participate politically is a right best realized in association with other individuals, i.e., as a group. 37 As Justice Powell recognized, "[t]he concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not." 38 This is a bottom-up view of representation in which voters are empowered by their collective participation in the process of self-government. Under this view, voters engage in collective action to choose someone to represent their interests within the governing body. The representative is charged with influencing public policy on behalf of constituents' collective interests. 39

The Court's jurisprudence does not consistently express a bottom-up view of representation within either the equality or the empowerment norms. 40 On occasion, though, the Court implicitly assumes the value of collective participation and influence in opinions that do not articulate the bottom-up view. For example, the Court's discussion in Reynolds v. Sims [*1600] of a fair share of representation for population majorities suggests that by equalizing the number of people for whom each representative is responsible, the election of a single individual can fairly represent what are in essence collective interests. 41 Another example is Baker v. Carr, where the plaintiffs' original complaint alleged a systematic plan to "discriminate against a geographical class of persons." 42

The bottom-up view of representation is reflected in some of the Court's early language about the importance of having a voice -- meaning a public policy vote -- in the process of self-government. 43 It also is the basis for the Court's 1986 decision in Davis v. Bandemer that political gerrymandering claims are justiciable. 44 In his plurality opinion for the Court in Davis, Justice White suggests that the policy decision to represent groups fairly already had been made in the context of racial minorities. 45

Of course, one could counter that representation is essentially a process of providing individual constituents with individual service and that it is therefore an individual right. This is a top-down view of representation in which the representative reaches back to his or her district to return government benefits to district constituents. 46 In this sense, equalizing the number of constituents equalizes access for individuals, not groups of individuals. Representation becomes the formal opportunity to receive one's fair share of government benefits or to have access to one's representative for individual constituency service. Voting creates "a personal value," or a symbolic statement of belonging, by the mere act of casting a ballot. 47 [*1601] A vote is meaningful because it is counted, whether or not it actually affects the outcome.

While this top-down view might rest on the assumption that the right to representation is an individual right, it does not mesh well with the assumption that the right to vote is an individual right. Indeed, a voter need not vote at all to be represented under this understanding. 48 Actually casting a vote is less important than establishing voting status. Representation becomes the process of initiating a relationship in which one need not ever participate except by moving into the district. Even nonvoters are represented vicariously by choices made on their behalf.
Proponents of the philosophy of individualism attempt to use the one-person, one-vote principle to locate voting in the status of individual or constituent. They rely on the fact that every individual has the opportunity to cast a potentially winning vote or to be represented vicariously by one who does. This approach camouflages the group nature of voting by emphasizing the personal aspects of representation.

Consistent with their prevailing political philosophy of individualism, some members of the Court have struggled mightily to use one-person, one-vote rules to avoid the concept of group representation. However, even where its nexus to group activity remains disguised, the principle of one-person, one-vote is as consistent with group as it is with individual representation. Similarly, the one-person, one-vote principle is consistent with semiproportional representation systems. Even if voters each were awarded five votes to plump as they choose, the one-person, one-vote principle would be satisfied, since each voter would have the same voting power or voting weight.

In this Paper, I argue that despite the efforts of some members of the Court to characterize representation as an exclusively individual notion, the concept of group representation became unavoidable for two reasons. The first, which I develop in Part II, is that the concept of group voting was necessary to understand the political unfairness of excluding racial minorities in a racially polarized constituency. The second, to which I now turn, is that the one-person, one-vote principle was conceived and articulated within a construction of constituencies based on geography. It is districting itself that merges individual representation with the representation of groups of individuals. Thus, it always has been necessary to acknowledge, at least implicitly, the relationship between districts and interests. I already have explored some of the bottom-up interest representation aspects of the equality and empowerment claims elsewhere. In the next subpart, I further develop the link between group representation and territorial districting.

B. Group Representation and Territorial Districting

In this subpart, I argue that because of our explicit and implicit recognition of constituencies of geography, we have never actually employed a system of individual representation. Indeed, the use of geographic districts as the basis for establishing representational constituencies is at its very heart a system of group-based representation. Moreover, even where districts comply with principles of one-person, one-vote, such districts dilute the voting strength of both individuals and groups.

The concept of representation necessarily applies to groups: groups of voters elect representatives; individuals do not. Representation is more than the individual relationship between constituent and elected representative. Because representation is primarily about political influence, not political service, bottom-up representation becomes the essential link to a genuine voice in the process of self-government. Districting is a form of group-interest representation, albeit an imperfectly realized one.

Districting, by definition, assumes that each voter is a "member' of a 'group' comprised of all the voters in her district." As Justice Stewart noted, "The very fact of geographic districting . . . carries with it an acceptance of the idea of legislative representation of regional needs and interests." Regardless of whether other Justices of the Warren Court ever consciously adopted the idea of interest representation, in working within territorial districts they assumed that interests reflect where people live.

The view that geography approximates political interests is not a new idea. Indeed, the idea that geographic units reflect a common or group identity is part of the historical explanation for the winner-take-all system of districts. The American system of winner-take-all districts was adapted from the
system in Britain prior to 1832, which in turn can be traced to feudal origins. The feudal tradition helped define the law of the franchise on the theory that "it was the land, and not men which should be represented." It was the community, in theory, that was represented, and therefore the qualification for voting was corporative, with the franchise varying between communities. Functional groupings, not individuals, were the basic units of representation.

The British system also created a link between political representation and geographically based interests. Elected representatives were not seen as representatives of individual constituencies; they were merely equal members of Parliament who represented all of Britain. The parliamentary system of representation had evolved in Britain because of feudal duties and obligations; the lord and his vassals were literally tied to the land, and representation in Parliament was actually part of the lord's feudal service to the king. Similarly, inhabitants of the medieval town were not separate, for representational purposes, from the town itself. The town was a political association, and the status of its inhabitants was defined by the rights of the group to which they belonged, namely the town. This link between political representation and economic or geographic ties was later carried over to the United States during the Colonial period.

By the late eighteenth century, towns were directly represented in the American colonial legislatures by representatives with explicit instructions to represent the towns' interests. The relevance of town representation is that colonial towns "exercised power as a group; as a group they had rights, as a group they had powers." Representation by geographical groups became the norm, in part because there was often no practical distinction between occupational and territorial representation.

Indeed, the word "representation" originated as a term used by medieval jurists to describe the personification of collectivities; the spokesperson for a community was its embodiment, the bearer of its representative personhood. Even in its modern form, representation often connotes the activity of furthering the interests of an abstraction rather than of an individual. Although many liberal theorists of American democracy espouse the importance of representation of the rational individual, this claim is at odds with the historical roots of an electoral system that relies on regional rather than political units of representation.

It is also at odds with the practice of districting. The process of geographic districting collects people into units of representation by virtue of certain group characteristics or assumptions about shared characteristics within geographic communities. Geographic districting grounds the representational relationship in the opportunity to vote for a candidate to represent the interests of voters within a regionally defined political unit. It is assumed that those voters who share the homogeneous characteristics that give the district its "identity" (its dominant political, regional, or racial affiliation) are in fact represented. Because all voters share at least a common regional identity -- they all live within the district's geographic walls -- all voters are therefore assumed to be represented without regard to their actual choice of a candidate.

But the geographic unit is not necessarily politically homogeneous or of one mind as to who should represent it. In any contested election, some voters will vote for someone other than the winning candidate. These votes do not lead to the election of any candidate. Although these voters reside in equally populated districts, they have not chosen someone to represent their interests. Their theoretically equal votes are, as a practical matter, wasted in that the casting of their vote did not lead to the selection of their representative. The term "wasted votes," therefore, refers to votes cast for a candidate who does not win. In addition, I use the term to refer to votes cast for someone who does not need the votes to win.
Perhaps for this reason, one commentator refers to the constituency of geography as an "artificial group." Constituents do not consciously choose to become members of this group, since very few people move somewhere in recognition of their likely voting efficacy within particular election subdistricts. Similarly, when they move, few people know in advance the particular elected officials by whom they are likely to be represented. In other words, voters do not move to an election district; they move to a neighborhood or community.

I am suggesting that constituents within a geographically districted group may be there involuntarily, without sharing the same interests as other community residents, and despite pre-existing hierarchical relationships. In this way, membership in the territorial constituency is like membership in a family, with the former imposed by residence and the latter by kinship. Like family, geographic districts may not reflect conscious choice; as "compulsory constituencies," they nevertheless reflect ties that bind.

Moreover, even if this factual assumption is incorrect, voters who might move based on the likelihood that they will reside within a specific election district are not acting rationally. This is because the imperative of the one-person, one-vote rule mandates continual redistricting. Even motivated voters may rely on existing district configurations for only limited lengths of time.

In addition, the level of mathematical equality now required by the courts makes it hard to claim that many election districts are neighborhoods. The upshot of absolute population equality as the basis for representation is that equipopulous districts are more important than districts that preserve communities of interests or leave neighborhoods intact. In this respect, districting under the one-person, one-vote rule is arbitrary. Indeed, this was Justice Stewart's complaint when he accused the Court of privileging the personal right to vote over the efforts of local government to represent regional needs, communities of interest, or political subunits.

Districting justifies the representation of this artificial group using a theory of virtual representation. "Virtual" representation works like "constructive" in "constructive possession." It means "as if" or "pretended" representation. In contrast to direct representation or bottom-up representation, virtual representation relies on the concepts of (1) indirect representation, (2) representation of similar interests elsewhere, and (3) top-down representation. While the theory of virtual representation theoretically could be justified by any one of these concepts, the three assumptions generally are interrelated. Each of these assumptions is critical to the validity of virtual representation.

First, virtual representation assumes that the district winner indirectly represents the district losers. For this to hold true, the election winner must do an adequate job of representing all those who reside within the district, including his or her political opponents. This assumption is based on the golden-rule principle that the winner will not tyrannize the losers because the winner may become the loser in the next election. Because the winner realizes the value of political stability, the winner will also represent the losers. Thus, in the long run, the losers' votes are not permanently wasted because they operate to hold the winners in check.

The second assumption of virtual representation is that the district losers technically are represented by similarly situated voters elsewhere in the political system. In this assumption, voters are represented when other voters -- who are like them -- vote in other districts and succeed in electing their candidate of choice. This reasoning assumes that similarly situated voters are fungible and groups "district voters" by characteristics they share with "nondistrict voters." Because of these group characteristics, district losers are vicariously represented by winners in other districts for whom they...
would have voted had they been given the chance. As a result, the second assumption sees voters as represented based on certain "group" characteristics that can be externally predetermined for a ten-year period (between census counts) at the time of reapportionment and that can be measured jurisdiction-wide, rather than district-wide. Again, the district losers' votes technically are not wasted because district losers are represented by someone, albeit not someone for whom they voted.

The third virtual representation assumption is that the district itself is a cognizable group that is represented ultimately as a community of the whole. This incorporates the proposition that a district has some independent existence apart from the discrete individuals who form an electoral majority. This is the historical claim that the district itself has a political or group identity.

This argument relies on a top-down view of representation. Living in Pennsylvania, I am represented by two United States Senators even if I am under eighteen years old, mentally incompetent, or disenfranchised based on noncitizenship or a criminal conviction. The assumption is that the district, and hence all its residents, are serviced whenever anyone is elected to represent the district. The key element of representation is equal access to the elected representative who is available to each constituent as a result of her status as a district resident. Each of the voters within the district is represented, even those who voted for a losing candidate as well as those who did not or could not vote. Because voting is primarily symbolic of personal status within a coherent community, virtual representation argues that no one's vote is wasted.

Every voter in a district is presumed to be represented simply because her territorial constituency is represented. The voter within a territorial constituency is represented because she has someone to turn to in case of personal constituency service needs. She is presumed to be represented even if she did not vote for the winning candidate. The fact that she wasted her vote is ignored because she is nevertheless "geographically" present within the political subdivision. No stock is placed in the fact that she did not vote for the representative. She is simply represented through the direct representation of her needs and her geographic nexus to the representative's supporters.

If districting is to be justified by virtual representation, the entire theory of districting depends upon the juxtaposition of territorial constituencies and interest constituencies. Drawing district boundaries presumably defines communities of interest. District lines determine a set of associations between the voter and a particular representative as well as among the voters themselves. It is only because voters within a particular district are deemed unlikely to have opposing interests that the notion of a personal relationship between the voter and the representative can survive. Voters are presumed fungible, meaning they are essentially indistinguishable on some critical threshold issue. The representative otherwise would be unable to service disparate personal needs without compromising the interests of other constituents.

These virtual representation assumptions are related to two somewhat inconsistent premises of liberal individualism. One is the value of majority rule. The district majority governs with legitimacy because the district is a coalition of shifting "factions" whose multiplicity of interests will keep any one from dominating. The factions demonstrate that the district is not homogeneous, but the winner will virtually represent the losers because the losers are not permanent; the winner may be the loser at the next election. The first premise of liberal individualism thus shares the first premise of virtual representation. It posits that individuals who vote for losing candidates are adequately represented by the winning candidate and have as much opportunity to influence that candidate as do other voters in the district.

The second premise is that representation is primarily a personal relationship between the
representative and her constituents. In this context, the representative does not know how a particular constituent voted and will service her needs in the hopes of recruiting or sustaining her allegiance. Adherents of the personal relationship perspective do not deny that the representative is more likely to represent faithfully the interests of those who voted for her; they simply suggest that the needs of each constituent also will be met because a district constituency establishes a relationship [*1611] between the voter and her personal representative without regard to the voter's actual electoral preference. 88

This premise, however, unlike the majority-rule premise, is based on a view of relative homogeneity within the district. Because the district constituents have similar needs and interests, it is possible for one representative to service adequately all constituents. 89 If the constituency has such common interests, one would expect a relatively unanimous constituency. By contrast, the majority-rule assumption relies on a more fractured constituency to balance the majority's urge to dominate. The personal relationship perspective and the majority-rule premise are, therefore, in some tension. They define voting by reference to competing notions of fungibility and personal access on the one hand and distinct interests on the other.

As a consequence, the virtual representation assumptions do not fit neatly within a one-dimensional view of representation based on liberal individualism. In fact, the rational individual who serves as the focal point of individualism would often take actions that are wholly inconsistent with virtual representation. The most apparent inconsistency is the idea that one's interests can be effectively represented by someone whom the voter, when given the choice, rationally determined did not reflect her interests. There is something distinctly unliberal in the view that indirect representation of interests is preferable to direct representation of groups or interests as defined by the voters themselves. 90 If the voter who goes to the polls is represented by the person against whom he or she votes, then the representation of the majority of the people becomes a representation of the whole people. 91 The voter is defined not by a rational individual choice but by the majority's choice.

[*1612] Another inconsistency is the notion that the voter will be motivated to participate when she will be adequately represented by whoever is elected. Voting will simply become a habit, a civic duty, although it yields no direct results. In such a scenario, the rational individual would choose not to vote because of the small likelihood of casting the decisive vote. 92

Yet another inconsistency is produced by the virtual representation assumption that wasted votes -- those cast for a losing candidate -- do not reflect the absence of representation because the territory defines the community, the group as well as its interests. This view suggests that mere geographical subdivisions have interests distinct from those of the people who inhabit them. 93 Because individualism posits that the rational individual will act in her own self-interest, this external determination of the interests represented is inconsistent with individualism.

Perhaps most inconsistent with the theory of autonomous, rational individuals is virtual representation's notion of fungibility. Virtual representation, explicitly in the second assumption and implicitly in the third, assumes that individuals are interchangeable based on some externally observed characteristics. Accordingly, individual choice is subordinated to the choices made by the majority, and the individual must allow someone in another district to act on her behalf.

In these often unstated but related ways, districting conflates the view that territorial constituencies virtually represent discrete individuals who reside therein with the view that territorial constituencies group like-minded voters. Related to each of the virtual representation assumptions, therefore, is the corollary that we can use proxies, in this case geography, for determining voter interests. Such proxies merge voters' own definitions of their interests with the self-interest of political incumbents or with the
interests of a homogeneous territorial district majority. The use of such proxies reveals the fundamentally group-based nature of representation -- a feature that is inherent in, but inadequately recognized by, our contemporary system of representation.

For example, where representation is only virtual rather than direct, those who vote for the losing candidate may find that their interests are not represented at all. The constituency is presumed to be a group based on a single choice -- the decision where to reside. This one choice may not be a real choice for some; for others it may not satisfactorily carry all the weight being assigned. Or the assumption that the geographic constituency [*1613] is not dominated by a highly organized majority may simply be wrong as a matter of fact. 94

It is important to recognize, therefore, that the districting debate is not only about representing groups. It also may be about representing groups or individuals unfairly. If voting reflects the voter's conscious choice rather than simply representing the voter's state of belonging, then winner-take-all districting in fact wastes votes of both individuals and groups. First, it makes certain there are political losers in each district. Those who vote -- as individuals or as a group -- for the losing candidate do not obtain any direct political representation. They did not initiate, and they cannot alone terminate, the representational relationship. 95 In response, an individual-rights advocate might argue that the individual who votes for a losing candidate is adequately represented by the winning candidate and has "as much opportunity to influence that candidate as other voters in the district." 96 This, of course, only makes sense if one assumes both that election results count for very little and that representation is exclusively about individual access to representatives chosen by others. 97

In response, districts could be made more homogeneous to reduce the number of wasted votes. But this alternative demonstrates the second way that winner-take-all districting wastes votes. When more people vote for the winning candidate than is necessary to carry the district, their votes are technically wasted because they were unnecessary to provide an electoral margin within the district and they could have been used to provide the necessary electoral margin for a like-minded partisan in another district. In other words, packing voters in homogeneous districts wastes votes because it dilutes their overall voting strength jurisdiction-wide. 98

The third way districting wastes votes is apparent if we consider voting broadly. I have suggested that voting is not simply about winning elections. The purpose of voting is to influence public policy. Accordingly, I have elsewhere proposed a concept, which I labeled "proportionate interest representation," to describe the importance of an equal opportunity [*1614] to influence public policy, not just to cast a ballot. 99 This concept reflects both the equality and empowerment norms that I discussed earlier, because the right to cast an equally powerful vote subsumes the right to participate directly in the choice of representatives who then presumably enjoy an equal opportunity to influence legislative policy. 100

If voting is understood as a means of exercising policy influence, districting tends to limit that influence. Winner-take-all districting gives the district majority all the power. It creates an incentive, therefore, to seek electoral control of a district. But electoral control of a district may isolate minority partisans from potential allies in other districts. In this way, districting wastes votes because it forces minorities to concentrate their strength within a few electoral districts and thereby isolates them from potential legislative allies.

For example, race-conscious districting attempts to provide disadvantaged racial groups the equal opportunity to participate by drawing majority minority geographic districts. Proponents of this strategy assume that electoral control -- becoming a district majority -- works as a proxy for interest.
But creating majority black districts also means creating majority white districts in which the electoral success of white legislators is not dependent on black votes. In this way, race-conscious districting may simply reproduce within the legislature the disadvantaged numerical and racial isolation that the majority minority district attempted to cure at the electoral level.

Where blacks and whites are geographically separate, race-conscious districting isolates blacks from potential white allies -- for example, white women -- who are not geographically concentrated. It "wastes" the votes of white liberals who may be submerged within white, Republican districts. As a consequence, districting may suppress the development of cross-racial legislative coalition building. Because majority black districts are necessarily accompanied by majority white districts, black representatives may be disenfranchised in the governing body. In this third sense, districting wastes votes because it fails to ensure legislative influence.

The wasted-vote phenomenon makes gerrymandering inevitable. 101 [*1615] Because winner-take-all districting awards disproportionate power to electoral majorities, it inflates the advantage of district control. This inflated power quotient drives the apportionment process and leads some, myself included, to conclude that on some level all districting is gerrymandering. Gerrymandering is inherent in the districting process, which in essence is the process of distributing wasted votes. 102

Where incumbent politicians seek safe districts to ensure their re-election, they may be inclined to gerrymander, i.e., waste the votes for their likely opponent. Where political or racial partisans seek legislative control, they may be inclined to gerrymander, i.e., pack the minority party or minority race into a few districts to diminish their overall influence. 103 Or they may fracture the likely supporters of the minority party or minority race, spreading out their votes among a number of districts and ensuring that they do not comprise an electoral majority in any district. 104 These votes are counted, but they are essentially irrelevant in influencing the electoral or governing process.

The gerrymandering phenomenon illustrates once again the group nature of districting. Gerrymandering depends on assumptions about voters' likely behavior based on externally observed or supposed group characteristics or perceived common interests. Although the use of electoral districting has been defended based on the virtues of individual representation, assumptions about the nature of groups likely form the theoretical underpinnings of this election method.

I have tried to show that district representation weakens the connection between the voters' votes and the voters' representative by wasting votes. Unless all the voters in the district vote for the winning candidate, some of their votes are wasted. In addition, if a candidate only needs fifty-one percent of the votes to win, but the district is homogeneous and electorally noncompetitive, then all votes for the winning candidate over fifty-one percent are also technically "wasted." The point is that the voter is deemed represented whether she votes for the losing candidate, is an unnecessary part of the winning candidate's victory margin, or fails to vote at all.

The concept of wasted voting reveals the one-dimensional quality of the virtual representation assumptions. Yet wasted voting is only one of the ways that district representation minimizes the connection between voting and representation. The winner-take-all aspect of territorial [*1616] constituencies also tends to over-represent the winning party and to deny the losing party a voice on behalf of their specific interests in the legislative forum where public policy is finally fashioned. In addition, territorial constituencies both submerge and subsume the concept of group representation. They also subsume individual definitions of relevant group identity in favor of individual residential decisions.
The artificial nature of these geographic associations suggests the limitations of the view that individual representation is the cornerstone of the right to vote. Territorial constituencies do not realize individual autonomy for at least three reasons. First, many people do not exercise real choice in deciding their place of residence. Second, even where residential decisions are conscious and discretionary, they do not capture the range or salience of interests which voters may hold. Third, the one-person, one-vote requirement of equipopulous districting makes districting even more artificial. If the major constraint on the drawing of district lines is the number of people within each district, district lines cannot conform to naturally occurring areas of common interest. When incumbents exercise enormous control over the districting process, including the custody of census data and the access to computer technology, communities of interest may become mere re-election opportunities. This is the threat to functional interest representation that various Justices have predicted over the years in their dissents to strict population equality principles.

The key point is that criticisms leveled at race-conscious districting as a means of group representation should in fact be directed at the process and the theory of geographic districting itself. In the next Part, I attempt to show that when commentators criticize race-conscious districting, they are really finding fault with the assumptions behind districting in general. It is districting itself which is anomalous, because geographic definitions of group identity, especially within subdistricts, are often so artificial.

[*1617] II.

In this Part, I argue that race is as effective as geography in functioning as a political proxy, but neither is as effective as allowing voters the opportunity to make their own local choices about the nature and salience of their interests. Semiproportional systems permit shifting coalitions to form based on voters' own determinations of their interests or their group identity. In other words, geography and race rely on representational assumptions about group association but do not suggest the necessity, standing alone, of either representing or defining group interests a particular way. Modified at-large systems, such as cumulative voting, could be viewed as preferable alternatives that allow members of racial groups, politically cohesive groups, and strategically motivated individuals to be both self-defined and represented, while minimizing the problem of wasted votes for all voters.

Race in this country has defined individual identities, opportunities, frames of reference, and relationships. Where race has been of historical importance and continues to play a significant role, racial-group membership often serves as a political proxy for shared experience and common interests. At least to the extent that an overwhelming majority of group members experience a common "group identity," those who are group members are more likely to represent similar interests. Group members also may share common cultural styles or operating assumptions.

[*1618] Group members also are more likely to be perceived by their constituents as representing them. This definition of representative as descriptive likeness or racial compatriot has a psychological component. Just as the flag stands for the nation, the presence of racial group members symbolizes inclusion of a previously excluded group. The symbolic role results from both the personal characteristics of the racial-group member and the assumption that, because of those characteristics, the racial-group member has had experiences in common with her constituents. As Hanna Pitkin writes in her groundbreaking work on representation, "We tend to assume that people's characteristics are a guide to the actions they will take, and we are concerned with the characteristics of our legislators for just this reason." Thus, many racial minorities do not feel represented unless members of their racial group are physically present in the legislature.

As a result, traditional voting rights advocates comfortably rely on race as a proxy for interests. For
example, in conventional voting rights litigation, election contests between black and white candidates help define the degree of racial polarization, i.e., the degree to which blacks and whites vote differently. 113 The idea is that the outcome would be different if elections were held only in one community or the other. The assumption of difference extends explicitly to the specific candidate elected, and implicitly to the issues that candidate, once elected, would emphasize.

The assumption of this difference between races rests in part on the claim that where black candidates enjoy protection from electoral competition with whites, black voters can ratify their choices to hold their representatives accountable. In this way, the association between race and interests is modified to the extent that voters are given a meaningful choice in both initiating and terminating a representational relationship. Voting rights advocates assume that minority group sponsorship is critical. 114 It is only where minority voters exercise electoral control, or have a meaningful opportunity to retire their representative, that race functions as a representational proxy. Thus, majority-black single-member districts take advantage of segregated housing patterns to use geography as a proxy for racial choice, racial control, and racial representation. 115

[*1619] I argued in Part I that the one-person, one-vote cases, with their focus on equalizing individual access through equalizing population, conceal the group nature of representation by districting. 116 The one-person, one-vote rule merges political interests and regional interests under the umbrella of equal access for equal numbers of people. In order to justify placing people with different political interests into one district with only one representative, the wasted vote problem is elided by discussing everything in terms of individual voters. In deference to a tradition of according individual rights a higher value, and relying on the access view of voting, adherents to population-based districting simply skip over geographic districting's implicit assumptions about group attributes.

Race-conscious districting confronts the group nature of representation more directly. It attempts to minimize the wasted vote problem for minority voters whose preferred candidates -- because of racial bloc voting by the majority -- experience consistent defeat at the polls. Where voting is racially polarized, white voters and black voters vote differently. Where blacks are a numerical minority, racial bloc voting means that the political choices of blacks rarely are successful. To remedy this problem of being a permanent loser, black political activists and voting rights litigants have sought majority black districts in which the electoral choices of a majority of blacks determined the electoral winner. 117

Yet some commentators challenge race-conscious districting on the grounds that special protection throughout the political process for the rights of minority groups is unnecessary as long as individual minority group members have a fair chance to participate formally by voting in an election. 118 For these commentators, race-conscious districting is illegitimate because the right to vote is individual, not group-based. 119 Relying [*1620] again on assumptions about fungibility and access, these observers challenge the right of minority groups to representative or responsive government. 120

Given the prominence of racial group identities, I am not persuaded by this criticism to abandon the concept of group representation. I am aware of, but not in accord with, those critics of race-conscious districting who object on moral grounds to the drawing of districts along racial lines. 121 As I suggested earlier, representation is a bottom-up process that ideally recognizes the importance of influencing public policy decisions on behalf of constituency interests. 122 Accordingly, we cannot define [*1621] political fairness merely as electoral fairness that guarantees nonbiased conditions of voting eligibility and equally counted votes. Nor do I think the only issues are whether blacks have special claims for protection or whether whites can or should represent blacks, although I think they can and do. 123

Yet, in making the argument that racial groups deserve representation, I do not rely primarily on the
political, sociological, or cultural claims involved in racial-group identity, or even on the historic context of group disfranchisement. My principal argument rests on the distinction within the political process between a claim for group rights and a claim for group representation. I argue for the latter based on the historic evidence that representation within territorial districts is implicitly about recognition of group interests, not just individual access. However, the future of such group representation -- like the future of the group itself -- lies less inside geographic boundaries and more within the cultural and political community forged by group consciousness and group identity. Empowerment -- for a group as well as for an individual -- comes from active assertion of self-defined interests. A group is represented where it has the opportunity to speak out and not just to be spoken for.

The argument for recognition of group interests makes three assumptions about representation. First, legislators should represent unanimous, not divided, constituencies. Second, each voter's vote should count toward the election of a representative. Third, the unit of representation should be psychological, cultural, and/or political rather than territorial. In other words, groups should be represented, but in ways that permit automatic, self-defined apportionment based on shifting political or cultural affiliation and interests. This would enable voters to form voluntary affiliative districts without the need for prior authorization or formal recognition of the group as one which deserves special treatment. Because such group identity would be affiliative and interest-based, group representation would encourage both coalition building among racial and political factions and grassroots political organization around issues, not just individual candidacies.

If the decision to represent groups already has been made in the adoption of geographic districting, then group representation based on racial-group association or historical oppression becomes less problematic. Whatever the alleged flaws in racial-group representation, it is racial representation within a system of geographic districts that must be analyzed. As one white Democratic congressman who represents a largely minority constituency is quoted as saying, "I'm torn about it. I do not believe you have to be of the exact same ethnic group to do a good job in representing that community. But, in the end, I think it's that community's choice." Thus, it is important to emphasize the connection between choice, accountability, and group identification. Whoever represents minority interests (just as whoever represents majority interests) should be directly, not merely virtually, accountable to those interests.

Yet some critics of race-conscious districting might attempt to distinguish race from geography as a useful political proxy. Such critics claim that geographic association, unlike race, is temporal, individualistic, and discretionary, at least for some people. There are two problems with this purported distinction. First, geography is neither discretionary nor individualized for members of disadvantaged racial groups. Rather, it reflects the very essence of limitations on choice based on group identity. Race-conscious districting can capture racial communities of interest precisely because residential ghettos are often the result of racial discrimination. As Professor Pamela Karlan writes, residential segregation reflects racial discrimination in both the private and public housing markets. Because residential segregation by definition results from the absence of choice, race-conscious districting "can serve as a proxy for a bundle of distinct political interests." A second problem is that this criticism applies only to race-conscious representation executed within a system of fixed district boundaries. Indeed, the concern can be avoided almost entirely where the voters themselves define their own interests using alternative, modified at-large systems of representation. Representation based on voluntary interest constituencies would unhitch racial-group representation from arbitrary, involuntary assignments.
The voluntary interest constituencies would be comparable to Professor Iris Marion Young's model of a "highly visible" social group with emotional, historical, and social salience defined by a sense of group identity, not just shared attributes.133 According to Young, groups exist only in relation to other groups.134 The social processes of affinity and differentiation produce groups.135 Yet group differentiation is not necessarily oppressive nor homogeneous. Group differentiation is created by multiple, cross-cutting, and shifting differences.

The group differentiation of racial minorities is a function of historical oppression, shared experience, and present inequality.136 Territorial configurations may track this phenomenon to the extent that disadvantaged racial groups are concentrated in substandard housing in urban ghettos, but differentiation by race cuts across geographic lines in many cases. Some racial-group members share a group consciousness without sharing group space. Others are dispersed in small barrios throughout the jurisdiction.137 Still others may technically be group members in terms of their racial origin or current residence but not in terms of their racial identity.138

In addition, group differentiation by race subsumes gender, age, and class differences. A racial group that is politically cohesive on civil rights or welfare policy may have some members with interests that are not shared throughout the group. On these issues, the racial group members may have more in common with group members of another race living outside their immediate geographic area. In other words, racial groups are not monolithic, nor are they necessarily cohesive.

Race in conjunction with geography is a useful but limited proxy for defining the interests of those sharing a particular racial identity. But it is the assumption that a territorial district can accurately approximate a fixed racial-group identity -- and not the assumption of a racial-group identity itself -- that is problematic. Race-conscious districting -- as opposed to racial-group representation -- may be rigidly essentialist, presumptuously isolating, or politically divisive. For example, different groups may share the same residential space but not the same racial identity. A districting strategy requires these groups to compete for political power through the ability to elect only one representative.

Yet strategies for race-conscious districting respond to important deficits in a non-race-conscious geographic districting process. Proponents of racial-group representation confront on the jurisdiction-wide level the unfairness of the indirect, virtual representation claims. In justifying race-conscious districting, voting rights activists appropriately employ the concept of racial-group identity.139 They can demonstrate that members of the racial group have distinctive interests that are often ignored by elected officials who suffer no adverse consequences at the polls.140 In this way, the activists challenge the view that voters are fungible, especially where minority group voters are consistent losers as a result of racial bloc voting by the jurisdiction majority.

Based on complaints about the way that virtual representation assumptions operate at the macro level to dilute minority voting strength, race-conscious strategies seek to control smaller, majority minority districts. By making the minority a district majority, race-conscious districting seeks to exercise the prerogatives of majority rule on behalf of a jurisdiction-wide minority. But while they challenge the fairness of jurisdiction-wide virtual representation of minority voters by the majority, proponents of race-conscious districts replicate many of the same fairness problems at the micro level.

The same assumptions about virtual representation that were the object of challenge at the macro level are now reproduced within subdistricts that the racial minority controls. The majority minority subdistrict operates on the same winner-take-all, majority rule principles. Even as an imperfect geometric "fractal"141 of a larger jurisdiction-wide majority, it carries with it the assumptions of virtual representation to justify the minority group's domination. As a consequence, race-conscious
districting raises in microcosm the theoretical questions I raised in Part I about districting itself.

An illustration of this fractal problem is a 1992 New York City congressional plan that included a Brooklyn/Queens district to represent the interests of a Latino minority. This district concentrated Latinos in a new 12th Congressional District. Several Latino activists filed as candidates in the Democratic primary. So did Representative Stephen Solarz, a white incumbent whose previous district was consolidated within one-fifth of the new "Latino" district.

The entry of a well-financed, nine-term incumbent from a largely Jewish section of Brooklyn shifted the political expectations. The primary, which had been expected to focus on issues of interest to a poor Latino constituency, turned into a debate over whether a minority group could be represented by someone of a different ethnicity. According to a Latino community organizer, "The community is saying, 'Why is it that this Jewish person who has always represented other interests than ours, comes in now saying he's going to be our savior?'" This complaint -- that the white incumbent should not enter the race -- rested on a complex, but misinformed, understanding of group representation.

The group is deemed represented where it has electoral control over the winner. The organizer's concern was that the sixteen percent white minority in the district -- not the Latino majority -- could have electoral control by consolidating their votes and converting their minority status into a plurality win. Since there were at least four Latino candidates, the white candidate would most likely win if the Latino vote were split, even though Latinos are fifty-five percent of the district's voting-age population. If the Latino majority was disaggregated into factions supporting different Latino candidates, it could have been white voters who chose the representative for the new district.

Latino activists complained that this did not give their community the choice they deserved. "The whole idea was to give our community some degree of choice, Latinos or non-Latinos who have some connection with the community. . . . [The well-financed white incumbent] doesn't fit that bill at all." The white candidate answered, "The other candidates fear that I'll win, which somewhat belies their notion that the purpose of this district was to empower the people to make a choice."

The nature of this controversy was captured by a New York Times headline that appeared before the primary: "Does Politics of Fairness Mean Only Those from Minorities Should Apply?" I propose restating the problem as follows: Does politics of fairness mean that self-defined groups are best represented by territorial districts, even those they ostensibly control? So stated, the question shifts the issue from the candidate to the constituency. By asking this new question, we can see the three incongruous assumptions inherent in racial control of territorial constituencies.

The first assumption is that because they represent a majority of the district population, the fifty-five percent Latino voting-age population is appropriately empowered to represent the entire district, although eight percent of the district is black, twenty-one percent Asian, and sixteen percent white. This assumption parallels the first virtual representation assumption: the district losers will be indirectly represented by majority winners.

Race-conscious districting is arguably necessary because the jurisdiction-wide majority is organized racially and permanently. This argument suggests that there is nothing inherently wrong with the principles of indirect representation underlying winner-take-all majoritarianism, except where the majority operates based on its prejudices. As long as the current pattern of racial bloc voting continues, the minority cannot become part of the jurisdiction-wide governing coalition. Thus, "special" smaller majorities are warranted.
The second assumption is that a Latino majority in this district will choose a representative for all Latinos in the jurisdiction. This tracks the second vicarious representation assumption that similarly situated voters can represent each other. Because Latino interests are underrepresented in other winner-take-all congressional districts, their interests in the city as a whole are now fairly represented by virtue of their electoral control over this one district. Conversely, the Asian, black, and white minorities in this one district are vicariously represented by their electoral control over other districts in the city.

Thus, Latinos who do not live in the district are virtually represented by choices made by the Latinos who do live in the district. Race-conscious districting only approximates the diversity of voter identities in the jurisdiction as a whole, but not necessarily in each district.

With the second assumption, the race-conscious districting approach does not challenge political representation based on geography; it simply suggests that specific groups should dominate specific districts in proportion to their overall state-wide or jurisdiction-wide percentage. Here, the claim is that political fairness is measured by a jurisdiction-wide baseline rather than by reference to a critique of group rights or majority domination more generally. Majority domination is acceptable as long as each group gets a chance to be represented somewhere in the jurisdiction by its own localized majority.

The third assumption is that the 12th Congressional District is a minority district without regard to the actual intra- or inter-minority conflict within the district. The third assumption presumes political cohesion based on the fiction that the district has an identity independent of the actual constituents. It also presumes equal access for constituency service within the district and relies on the claim that a minority identity ensures a minority ideology. Minority group interests will define the district identity and anyone who represents it.

The Asian, black, and white minorities are presumed to be represented because of their choice to live near Latinos. Stated differently, because Latinos are not as residentially segregated as other racial groups, they can represent the interests of their multicultural neighborhood as a whole. Their neighbors' interests are represented both for personal constituency service and for their territorially defined common interests.

The third assumption is related to the top-down view of representation. Like the virtual representation view that the district has an independent identity, the 12th Congressional District is a "Latino district." As a so-called minority district, it has an identity independent of the actual tensions present, the level of political cohesion, or the political participation rates of its constituents. In this way, race-conscious districting incorporates a static, somewhat monolithic, view of representation that, after the initial drawing of a majority minority district, diminishes the subsequent importance of broad authority from a consenting group of participants.

For example, Latinos within the district arguably are represented by any one of the four Latino candidates, even where a majority of the Latino residents vote for a losing candidate. The issue of choice is submerged within a presumption of ethnic solidarity in the majority Latino population district, even if Representative Solarz did not compete. This is because the district is a Latino district, and the elected representative will therefore service all constituents equally, especially other Latinos.

Yet a top-down view of representation does not encourage broad-based political participation among
the district constituency. Nonvoters are represented equally with voters. Because representation is viewed primarily as a means of distributing constituency service and benefits and is primarily based on a common group identity, there is little incentive to monitor actively the public policy positions the representative takes within the governing body. Under this top-down view, elections serve not to initiate an interactive relationship, but to ratify an open-ended one.

In this way, the assumption of "minority district as independent identity" ignores issues of multiple, cross-cutting, and shifting differences. This is an empowerment strategy designed primarily to increase the proportion of minority-group legislators. Because of the success of individual minority-group members, the group as a whole is empowered. As I have argued elsewhere, however, empowerment is not based on assumptions about phenotypic representation. Voters also must be directly given the opportunity and the information necessary to define their interests for themselves.

These three assumptions, of course, invite the criticism that race-conscious districting arbitrarily reduces voters to their ethnic or racial identity and then only represents that characteristic in a way that isolates or balkanizes the population. But the real complaint is not with the race consciousness of the districting, but with the districting process itself. The race-conscious districting assumptions simply replay the same virtual representation assumptions that are used to justify territorial constituencies in the first place.

Thus, the race-conscious districting assumptions are neither unique nor necessarily contextual. For example, the winning candidate might be the one Latina who appeals to all the different ethnic and racial groups within the district, winning with a five-percent plurality of Latino support and a solid majority of white, black, and Asian votes. Although this individual might be Latina in identity, she would not in fact be elected directly by Latinos to represent their interests.

In fact, the successful candidate was Nydia Velazquez, a former representative of Puerto Rico to New York, who polled thirty-three percent of the vote, compared to twenty-seven percent for Mr. Solarz. According to The New York Times, Ms. Velazquez's margin of victory came from overwhelming Latino support in Brooklyn and from strong support from the black community. She reportedly benefited from an endorsement by the city's black mayor, David Dinkins, and from the "firestorm" of criticism that erupted when Mr. Solarz decided to run in the newly drawn district.

One might argue, then, that Ms. Velazquez's election affirmed the second and third assumptions of virtual representation. Because Latinos supported her within the 12th District, Latinos throughout New York City are now vicariously represented even though they could not vote for her. In addition, Ms. Velazquez's black support confirmed the viability of the third assumption that the 12th District is a bona fide "minority district." The first virtual representation assumption is not directly implicated by the election because it depends upon post-election behavior of the elected representative.

Four other Latino candidates competed in the primary. Elizabeth Colon polled twenty-six percent; Ruben Franco polled eight percent; Eric Ruano Melendez and Rafael Mendez each received three percent of the vote. Although I do not have the actual precinct totals, these figures do not rebut the possibility that a majority of Latino voters (especially those living in Queens) actually preferred someone other than Ms. Velazquez. Similarly, they do not deny the possibility that blacks, who are only eight percent of the District, may have supported Ms. Velazquez, but Asians and whites may have preferred someone else.

Because Asians, at twenty-one percent, are the second-largest group in the District, it may not be appropriate to presume that interminority political cohesion extends to all of the District's minority
voters. The other aspect of the third assumption -- that this is a genuine Latino district -- is also not clear, since a majority of Latinos may have preferred someone other than Ms. Velazquez.

The validity of the first assumption, that the electoral majority will now indirectly represent all the electoral minorities, also remains to be seen. It is currently a theoretical claim based on the operation of golden-rule reciprocity in conjunction with other assumptions about the individual nature of voting and representation. The District's political reality, however, may defy the theory that the district minority -- those who wasted their votes -- will act as a potent political check on a shifting district majority. For example, I noted the possibility that the election returns suggest distinct group interests that exist among and within the Asian, black, and [*1631] white district community. The votes of these subgroups may, as a practical matter, become permanently wasted.

Indeed, over the ten-year term of the District, the Latino majority may act cohesively and return the Latina incumbent to office. Re-election of the incumbent may occur with decreasing turnout as a percentage of all the District's population, but with increasing support among those who do vote simply because she is the incumbent. This is consistent with evidence that minority candidacies generate relatively high voter turnout the first time a viable minority candidate competes. Turnout, however, tends to go down when constituents realize that the election of a single minority incumbent changes very little of their day-to-day lives. 166

But the fact that the Latina is now an incumbent gives her tremendous resource advantages over any future opponents. Some may argue that her continued re-election reduces polarization within the district, as the other non-Latina voters see Ms. Velazquez work on their behalf. On the other hand, her predictable re-election success may exacerbate rather than reduce intergroup conflict. The District's complicated racial, ethnic, and linguistic mix is not reflected in the ethnic or racial group membership of its representative. The fact that the district winner in a multi-ethnic district has a psychological, cultural, and sociological connection primarily to one ethnic or racial group may alienate other groups over time.

If Asians, for example, feel consigned to permanent minority status within the minority district, they may bide their time until redistricting in the year 2000, when the legislature decides how many minority districts should be created and who should control them. The fight to be "the group" who gets the district, and with it all the power, pits minorities against each other. The fact that some members of the other minority groups in the 12th District can only cast wasted votes for ten years encourages each group ultimately to think in terms of its own moral, historical, and pragmatic claims to exclusive or primary district representation. Where representation becomes the lottery of competing oppression, no one wins.

Only the second assumption, at least on the psychological level of vicarious representation, is solidly supported by the election of Ms. Velazquez. This is based on evidence that those minority group members who do not vote for group members nevertheless feel "represented" by them. 167 This phenomenon reflects the continued vitality of racial group identity. Many group members feel most represented by one of their own.

Even if the second vicarious representation assumption is true, one could maintain that people are represented without regard for whom they [*1632] choose to vote simply because of where they choose to live or who they are. Latinos in Queens living a few blocks outside the 12th District, who cannot vote for Ms. Velazquez, will continue to "waste" their votes within the districts in which they reside. Their votes, which under some other district configuration might help elect an additional, or simply a different, Latino, are submerged within their non-Latino district.
Because their votes will be wasted, nondistrict Latinos are not encouraged to participate directly in the process of self-government. The process of voting itself may become meaningless. Districting ignores this problem with wasted votes by embracing group representation based on territorial contiguity and indirect representation.

Because geographic districting wastes votes, neither minority groups nor majority voters are fairly represented. Districting fails to deliver on its virtual representation assumptions, even where districts are drawn to maximize minority voting strength. Districting is not justified by the individual representation value because each voter's vote does not count to the greatest extent possible toward the election of a representative. Districting is not supported by the group representation value because legislators do not represent unanimous constituencies, and they therefore find it either hard to govern or easy to excuse unaccountability. The tensions -- between values of individual and group representation; between direct and indirect representation; between top-down and bottom-up representation; and between wasted and effective votes -- permeate virtual representation, even within race-conscious geographic districting.

For this reason, modified at-large systems used in corporate governance, such as cumulative voting, should be considered. Under a modified at-large system, each voter is given the same number of votes as open seats, and the voter may plump or cumulate her votes to reflect the intensity of her preferences. Depending on the exclusion threshold, politically cohesive minority groups are assured representation if they vote strategically. Similarly, all voters have the potential to form voluntary constituencies based on their own assessment of their interests. As a consequence, semiproportional systems such as cumulative voting give more voters, not just racial minorities, the opportunity to vote for a winning candidate.

Racial-group interests become those self-identified, voluntary constituencies that choose to combine because of like minds, not like bodies. Legitimate interest constituencies are formed among groups of individuals who share similar opinions or identities. These interest constituencies are less fixed than under territorial districting. Nevertheless, racial minority groups may still choose collectively to elect representatives. But now the minority voters' choices are based on their own conception of identity, which may be defined in racial terms because it is either racially apparent, racially derived, or a function of historical treatment by the numerically superior racial majority.

Thus, even if voting is thought to be a concept of individual autonomy, the recognition of voluntary choices to affiliate or form associations minimizes wasted voting while transcending "artificial groups" based solely on residence or race. On the other hand, if voting is seen as a group-representation concept, representation systems should minimize wasted votes in order to realize maximum influence and empowerment. Under either view of voting and representation, a semiproportional system is preferable because it minimizes wasted votes and defines voting behavior based on choices exercised by the voters themselves.

Additionally, if racial group identity is a value that deserves representation, territorial constituencies are an imperfect proxy. If racial group membership is thought to be affiliative yet involuntary in the sense that history, culture, and social pressures combine to define one's membership, it is equally important to provide openings within the political process for self-defined group representation. Territorial constituencies do not do this, because they fail to maximize opportunities for group political empowerment and individual group members' participation and self-expression.

As a result, whether representation is considered essentially an individual or a group activity, the
principle of one-vote, one-value is necessary to protect voters' interests. Everybody's vote should count for somebody's election. Voters are directly represented only if they actively choose who represents their interests.

In this sense, I am arguing for a more expansive account of the representational relationship for all voters. In order to achieve political equality and political fairness, an electoral system should give voters the direct opportunity to initiate and terminate their own representational relationship. It is not enough that some voters choose for everyone or that everyone has an equal chance to be the only electoral winner or electoral loser. Voting [*1635] should become a positive-sum experience in which all voters actively participate in selecting their representative.

On the assumption that each participant should enjoy an equal opportunity both to participate and to influence, the concept of one-vote, one-value describes the idea that each voter should elect someone to represent her interests. This new view of the representational relationship draws on the concepts of equal opportunity to participate and equal opportunity to elect representatives of one's choice that are embodied in the 1982 Voting Rights Act amendments. It arguably would expand the statutory view of the representational relationship in a way that benefits all voters.

The courts, however, have been hesitant to employ a one-vote, one-value system as a remedy under the Voting Rights Act. In Granville County, North Carolina, black voters challenged the at-large method of electing the county commission. Blacks, who comprised forty-four percent of the county's population, had never been able to elect any person to the five-member commission. The defendant-commissioners conceded that black voters were not represented on the county's at-large commission. They also admitted that if the county were districted, and if two additional commissioner seats were added, blacks would be able to elect one of seven commissioners, giving the forty-four percent black population "electoral control" over fourteen percent of the commission. The single-member districting remedy failed to capture much of the black community, which was dispersed throughout the county.

The plaintiffs proposed, and the district court approved, retention of the staggered term, at-large method of election with a threshold lowering, semiproportional modification that allowed voters to cast only three votes for the five open seats. When the modified system was employed, three blacks were elected to the seven-person commission.

[*1636] The Fourth Circuit in McGhee v. Granville reversed and restricted the relief granted based on a narrow definition of the causal relationship between what the plaintiffs challenged and the available relief. The court ruled that single-member districts were the only appropriate remedy. Since the plaintiffs challenged at-large elections that prevented black candidates from getting elected, the exclusive remedy was to create single-member districts in which black candidates were likely to get elected. Even if all or many black voters did not reside in the newly configured majority-black districts, their remedy was limited to the "virtual" representation they received from districts that enjoy black electoral success.

By articulating its analysis of vote dilution exclusively in terms of single-member districts, the courts have tended to promulgate single-member districts as a talismanic liability and remedial threshold. At the same time that courts have moved closer to a single-member district, black electoral success standard, they have clearly established "descriptive" proportional representation as the ceiling. The Court in Thornburg v. Gingles, for example, reversed a finding of dilution in District 23 where it appeared that black voters enjoyed "proportionate" representation because a black was consistently elected over a twelve-year period. The Court did not discuss the fact that in District 23 black voters
had to employ "bullet voting" to elect the black candidate and thus forfeited their chance to influence which whites would be elected. Nor did the Court address the evidence that the black who was elected was actually chosen by the white voters and had to "sail trim" his legislative positions accordingly.

Despite judicial reluctance to adopt alternative remedies, the principle of one-vote, one-value satisfies the representational needs of voters in two ways that districting does not. First, it extracts the unfairness of wasted votes from winner-take-all solutions. Votes that would have been wasted in a winner-take-all system are redistributed to voluntary constituencies consistent with the actual level of their political support. Second, it allows voters to choose their representational identity. Rather than imposing a group identity on a given geographic constituency, this system gives voters the opportunity to associate with the identity that fits their own view of psychological, cultural, and historical reality. Thus, racial and other politically cohesive groups could be represented in proportion to their actual strength in the electorate rather than in proportion to their geographic concentration. As a result of political organization, voter education, and strategic voting, any politically cohesive group that is numerous enough to meet the local threshold of representation could mobilize to gain representation.

Ultimately, what the one-vote, one-value principle does is to transform the unit of representation from a territorial or racial constituency to a political or psychological one. This affirms Iris Young's view of the social group as one based on self- and historical-identification, and it rejects representational groups based simply on the joint possession of externally observable attributes or the choice of a residence.

One-vote, one-value makes the assumption that each voter should enjoy the same opportunity to influence political outcomes. No one is entitled to absolutely equal influence; but by the same token, no one is entitled to grossly disproportionate influence or a monopoly on control. The majority should enjoy a majority of the power, but the minority should also enjoy some power too. Thus, one-vote, one-value measures opportunities for fair participation using a baseline of actual participation and real political strength.

The principle of one-vote, one-value, as realized through cumulative voting, also restores the link between representation and voting by ensuring that legislators represent unanimous, not divided, constituencies. Representation becomes the process of bottom-up empowerment based on self-defined expressions of interest. Moreover, assuming voters vote strategically, votes are not wasted either by voting for losing candidates or by packing voters into safe districts. The legislative body can reflect fairly the range of opinions and interests within the public at large, including racial minorities who can be represented based on their electoral strength. Gerrymandering becomes unnecessary and can no longer be used to enhance the disproportionate power of incumbents to ensure their own re-election or to exaggerate the political control of the party in power. Finally, local political organizations may be given the space and the possibility of success. Such parties can fill the needs for political mobilization, voter education, and legislative monitoring that largely go unfilled in our current system.

Thus, by restoring the link between representation and voting, alternative election systems encourage voter participation. They also can broaden the range of debate by allowing local political organizations to emerge and interest-based political coalitions to form. These coalitions would not be limited to neighborhood communities of interest, certain racial groups, or particular elections, but would contain dynamic possibilities for regional, reciprocal, or cross-racial political cohesion. The race-conscious context of districting might be retained, but only on an election-by-election, issue-by-issue, voter-by-voter basis.
Of course, semiproportional systems of representation can be criticized for their tendency to destabilize the electorate by either promoting stalemate or creating chaos. I have elsewhere identified many of these concerns, some of which still need to be addressed more fully. In brief, alternative election systems raise legitimacy concerns about paralysis, stability, and efficiency, all of which need to be taken seriously. On the other hand, for those who feel excluded, legitimacy is derived from broad-based consensual authority. Self-government by consensus that recognizes the views of minorities is legitimate and enduring.

In balancing the fears of balkanization against observations about existing alienation, I conclude that exclusiveness is a greater evil than controversy, that passivity does not equal contentment, and that differences need not be permanently enshrined in the electoral configuration. Modified at-large election systems encourage continuous redistricting by the voters themselves based on the way they cast their votes at each election. Whatever differences emerge, therefore, are those chosen by the voters rather than imposed externally on the voters based on assumptions about demographic characteristics or incumbent self-interest. These voter generated differences may infuse the process with new ideas; diversity of viewpoint can be enlightening. Finally, the modified at-large system may simply reflect a necessary transition phase from power politics to principled politics. But, whether it succeeds in that respect, it at least has the benefit of infusing the process with more legitimacy from the perspective of previously disenfranchised groups.

I do not mean to denigrate concerns that the proliferation of political interest constituencies may undermine consensus, exacerbate tension, and destabilize the political system. These concerns reflect a preference for conflict resolution that camouflages rather than identifies political differences. My preference, however, is first to recognize salient differences and then to work with those differences to achieve positive-sum solutions. My idea is that politics need not be a zero-sum game in which those who win, win it all. My idea is that where everyone can win something, genuine consensus is possible.

There is, in addition, a concern with one-vote, one-value principles that I have not previously considered. In my focus on wasted votes, I have not yet examined the effect of one-vote, one-value approaches on communities with large numbers of noncitizens, age-ineligible citizens, or people with other conditions that disable them from voting. For example, concerns about the representation of noncitizens are prominent in the Latino community. Concerns about the disproportionate number of young citizens are also relevant to the black community. Thus, each of these communities has a special profile in terms of the number of people each voting member of the community ultimately represents. This is a virtual representation problem within the electorate itself.

Since districting is based on population rather than on turnout or registration rates, people who do not vote at all are nevertheless represented. This idea is encompassed by the third virtual representation assumption -- that the district identity is independent, yet consuming, of all constituents. Even if one cannot vote, one's interests are presumably represented by those who can. For minority communities whose population is in greater need of government service, access to representatives based on population may be more fair than access to representatives based on turnout. A voluntary interest constituency composed of like-minded voters devalues the interests of elements within the constituency who cannot or do not vote.

Of course, the same criticism can be leveled at safe districting. Although its population base extends top-down representational access to non-voters, these constituents are stuck with whomever the majority of district voters choose. In other words, safe districting assumes that nonvoters and voters are fungible in that the voters indirectly represent the interests of the nonvoters. Accordingly, children
are only indirectly represented by the representatives chosen by adults on their behalf.

Admittedly, changing the structure of electoral units is an incomplete solution even to those problems on which I have previously focused. Because of its potential disruption, it is also a solution worth considering only where the existing election system unfairly distributes political power in a way that is itself disruptive or illegitimate. As for the problem of differential participation rates, I can speculate about three possible responses. First, like districting systems, one-vote, one-value election systems require some subdistricting. Except in very small cities or towns, some multi-member subdistricts would be required both to reduce the complexity of the ballot and to promote access for local communities of interest. In New York City, for example, boroughs might be appropriate multimember districts for borough-wide cumulative voting. This might accommodate the concern that representatives have a local constituency for whom they are responsible without regard to who actually voted for them.

Second, although interest representation based on one-vote, one-value does not directly protect nonvoters any better than districts, it does create an environment in which they, as well as voters, are encouraged to participate directly. By participation I refer to the broad range of bottom-up activity relating to the political process. I specifically disavow an emphasis exclusively on election-day voting. Because semiproportional systems rely on voluntary interest-group constituencies, they reward local political organizing efforts more than systems with predetermined constituencies. Representation is earned in proportion to political activity and actual turnout rather than fixed population or majoritarian aggregating rules. This means that local political organizations, with an activated grass roots base, can actually win elections.

Nonvoters can participate in the organizing and monitoring efforts of local political organizations and thus actively assert their own interests. Nonvoters can participate in all the pre- and post-election day activities of the political organization. In this way, one-vote, one-value encourages representation directly of interests, not just of voters. Nonvoters can directly support a local organization that articulates their interests rather than passively rely on the presumption that they benefit from choices made by those who virtually vote their interests.

Third, the commitment to consensus politics implicit in the one-vote, one-value approach benefits voters and nonvoters, majorities and minorities. It infuses the process with receptivity to new ideas. It promotes a new definition of stability based on inclusiveness, not quietude. It creates positive-sum possibilities rather than limiting participation to winners and inevitable losers. With its focus on coalition-building and consensus, it does not assume that conflict is better suppressed than voiced. Nor does it assume that politics need always be zero-sum.

One-vote, one-value represents a new vision of political participation. It assumes that empowerment comes from opportunities for the active assertion of one's own interests -- speaking out, not just being spoken for. One-vote, one-value attempts to mediate directly the tension between individual and group representation that characterizes the districting process at each level. Thus it is more fair both to individuals and to groups.

III. Conclusion

The controversy over racial-group representation offers us an opportunity to re-examine the political fairness of our district-based electoral system. I posit that a system is procedurally fair only to the extent that it gives each participant an equal opportunity to influence outcomes. I call this principle one-vote, one-value. This is a measure of procedural, not substantive, legitimacy. According to this
principle, outcomes are relevant only to the extent that they enable us to measure degrees of input, not to the extent they achieve some objective, substantive notion of distributive justice.

The challenge to racial-group representation is actually a criticism of a different kind of group representation: representation based on homogeneous geographic constituencies. Race-conscious districting is simply one expression of a larger reality: winner-take-all districting. Both justify wasting votes with often unstated assumptions about the group characteristics of district voters. In other words, the criticism of racial-group representation is, at bottom, a criticism of winner-take-all districting in which the district boundaries and the incumbent politicians define the interests of the entire district constituency.

I conclude that group representation is as American as winner-take-all districting; that the two are conflated in criticisms of race-conscious districting; and that consideration of alternative means of representing racial groups can shift the debate about political fairness. By directly confronting the problem of wasted voting, we may make the system more legitimate from the perspective of previously disenfranchised groups, and more fairly representative of issue-based groups who previously have been aggregated and silenced within the majority.

I have proposed a new view of the representational relationship that is more protective of all voters' ability and more conducive to all voters' initiative to choose directly who represents them. By critically examining certain fundamental assumptions about representation, I hope to revive our political imagination. "Change the way people think," said South African civil-rights martyr Steven Biko, "and things will never be the same." Or as Professor Robert Dixon declared almost 25 years ago:

[N]ow that the first round of reapportionment has been accomplished, there is need to talk "one man-one vote" a little less and to talk a little more of "political equity," and of functional components of effective representation. A mathematically equal vote which is politically worthless because of gerrymandering or winner-take-all districting is as deceiving as "emperor's clothes."

FOOTNOTES:

n1 ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 22 (1968) (emphasis added).

n2 I use the term "race-conscious districting" to describe the practice of consolidating the number of minority group members in a single or a few winner-take-all subdistricts. Yet, in a racially polarized environment, the process of districting is inevitably race-conscious. See Lani Guinier, The Representation of Minority Interests: The Question of Single-Member Districts, 14 CARDOZO L. REV. 1135, 1135 n.2 (1993) (arguing that winner-take-all districts ultimately enable one group or another to dominate, meaning there is a racial consequence to the demographic constitution of all racially mixed districts if voting is racially polarized). See also infra notes 116-117 and accompanying text.


n4 Jim Sleeper, Rigging the Vote by Race, WALL ST. J., Aug. 4, 1992, at A14. Sleeper admits he has taken many of his ideas about the Voting Rights Act from ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? (1987). Id.
n5 Sleeper, supra note 4, at A14.

n6 Id.

n7 See ABC News Special: The '92 Vote (ABC television broadcast, Nov. 3, 1992), available in LEXIS, CMPGN Library, ABCNEW File. It may be worth noting for the record that Ms. Roberts's mother, Lindey Boggs, was arguably "redistricted" out of a seat in Congress in response to a successful lawsuit under the Voting Rights Act. See Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983).

n8 See Shaw v. Reno, 113 S. Ct. 2816, 2828 (1993) ("For these reasons, we conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different jurisdictions on the basis of race, and that the separation lacks sufficient justification.").

n9 Major Garrett, Frosh Planning to Clean House, WASH. TIMES, Nov. 22, 1992, at A1, available in LEXIS, Nexis Library, WTIMES File; see Kenneth J. Cooper, New Member Seen Boosting Urban Caucus, WASH. POST, Nov. 13, 1992, at A11. I use the term "integrated" to describe a racial composition close to 50% black and 50% white.

n10 See 42 U.S.C. § 1973(b) (1988) (prohibiting representation where racial groups are given "less opportunity than other members of the electorate to participate").

n11 See, e.g., THERNSTROM, supra note 4, at 237-38 (arguing that efforts to compensate for every potential source of inequality can only lead to a covert system of reserved seats comparable to India's system for caste representation).

n12 See JIM SLEEPER, THE CLOSEST OF STRANGERS 159 (1990) ("Liberals and black civil rights activists thus shifted from demanding equality of individual opportunity which entails color-blind respect for a person's merits and rights beneath the skin, to demanding equality of condition, which submerges individual dignity beneath a color-based emphasis on the putative 'rights' of historically deprived ethnic groups.").

n13 See supra note 2.

n14 See Sleeper, supra note 4, at A14.

n15 This is essentially the argument that there is a dominant "culture of whiteness" that is a unifying -- even if unconscious -- experience for some and an exclusionary experience for those who are not white. See Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times, 104 HARV. L. REV. 525, 529-31 (1990).

n16 Cf. Lena Williams, Blacks Reject Gay Rights Fight as Equal to Theirs, N.Y. TIMES, June 28, 1993, at A1, A10 (quoting Andrew Hacker, professor of political science and author of TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL, as saying that "[b]y every measure I have seen, race runs deeper and does more damage than any other bias").

Many recent court decisions document the racial tension that exists in this country. See, e.g., Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse -- Wisconsin, Inc., 991 F.2d 1249, 1254 (7th Cir. 1993) (stating that race pervaded a conflict between Native Americans and
Wisconsin residents over fishing rights, with Wisconsin protestors "hurl[ing] vile racial insults" and mocking "Indian culture and traditions"; Cella v. United States, 1993 U.S. App. LEXIS 15124 (7th Cir. 1993) (finding that a sailor experienced emotional stress arising out of racial tensions on board ship); Holthaus v. Board of Educ., 986 F.2d 1044, 1045 (6th Cir. 1993) (recounting the history of racial tension and race relations problems at a Cincinnati-area high school where the football coach was dismissed for telling the team that they were "starting to act like a bunch of niggers"); Woods v. Graphic Communications, 925 F.2d 1195 (9th Cir. 1991) (upholding the district court's finding that Woods, a worker at a packaging plant, was subject to racial hostility and physical abuse and that the Graphic Communications Union intentionally failed to take any action to alleviate the problem).

Recent articles in newspapers across the nation detail the depth and extent of these tensions. See, e.g., Adelle M. Banks, Pastor Shows His True Faith in Integration; New Hope Community Church Leaders Practiced What They Preached by Moving to Eatonville and Offering Services That Appeal to Many Cultures, ORLANDO SENTINEL, June 27, 1993, at B1 (relating the observation by clergy that cross-cultural churches often revert to one culture after struggling with racial tensions); Dennis Duggan, Shrug Is City's Bomb Shelter, NEWSDAY (Long Island, N.Y.), June 29, 1993, at 18 (describing New York as a city that is "living at the edge of explosive racial tensions"); Shelley Emeling, Parrish Says He's Paying Dues To Run for Governor, ATLANTA CONST., July 2, 1993, EXTRA, at A3 (mentioning attempts by a state senator to diffuse racial tension in Lincoln County, Georgia, after allegations were made that children were segregated on school buses); Denise Hamilton, Tension Between Asian and Latino Students in the Alhambra School District Has Climbed to a Fever Pitch. Occasional Violence Has Officials Scrambling to Bridge Racial Rifts on Campus, L.A. TIMES, June 10, 1993, at J1 (describing racial tensions between Asian and Latino students in the Alhambra, California school district); John Hiscock, Mushroom Rustlers Shoot It Out, DAILY TELEGRAPH (London), July 1, 1993, at 14 (stating that much of the tension sparking war among Oregon's rare mushroom pickers is racial); Sari Horwitz, No Reprieve for Schools, WASH. POST, June 16, 1993, at A1, A29 (describing a hearing leading up to the recommendation to close 40 Washington, D.C. schools that pitted neighborhoods against neighborhoods in a painful public display of racial and socioeconomic tensions); Melanie Lewis, Teachers Cite Woes in Poll, DALLAS MORNING NEWS, June 11, 1993, at 34A (noting that 40% of Texas teachers identify student gangs, racial tensions, and drug abuse as significant problems); Larry Rohter, As Hispanic Presence Grows, So Does Black Anger, N.Y. TIMES, June 20, 1993, at 1, 27 (discussing the growing economic, racial, and ethnic barriers between blacks and Hispanics in Miami); Leonel Sanchez, Racial Tensions Simmering in Ramona, SAN DIEGO UNION-TRIBUNE, June 13, 1993, at B1 (reporting the racial tensions brewing at a San Diego area high school); Selma City Council Soon to Show Black Majority (NPR radio broadcast, June 16, 1993) (observing that racial conflict in Selma, Alabama is far from over); Richard Simon, Anglo Vote Carried Riordan to Victory, L.A. TIMES, June 10, 1993, at A25 (indicating poll among voters in Los Angeles mayoral race showed deep racial divisions); Mary Lynn Smith, The Long Arm of the Law Gets Some Feet As Well, STAR TRIBUNE (Minneapolis), June 12, 1993, at 1B (quoting a city council member as saying that there are "racial and people tensions" in a St. Paul, Minnesota neighborhood); Jason Vest, Pushing Buttons on the Phone, WASH. POST, June 24, 1993, at C1 (describing calls "in which phone pranksters pose as Asian social workers and play off the bigotry of residents in Garden Grove, Calif., a community wrought with racial tension"); Dean K. Wong, 4 Arraigned in Fight at S. Boston Project, BOSTON GLOBE, June 30, 1993, at 23 (stating that racial tensions at a Boston housing development increased after black and white students clashed outside South Boston High School); Iris Yokoi, Rights Panel to Focus on L.A. Strife, L.A. TIMES, June 13, 1993, City Times section, at 3 (announcing that the U.S. Commission on Civil Rights was convening public hearings to discuss racial and ethnic tensions in Los Angeles as part of the Commission's nationwide investigation into what federal officials call a "resurgence of racial and ethnic tensions in the United States" over the past ten years); Lee Hancock & Doris Quan, Corsicana
Rally by KKK Sparks Fights; Five Arrested, DALLAS MORNING NEWS, June 20, 1993, at 1A (reporting that a Ku Klux Klan rally spawned fistfights and shouting matches between blacks and whites).

n17 By legitimacy I mean the perception that the process is fair, even from the perspective of adversely affected parties.

n18 By this definition, the majority in Shaw misuses the term gerrymandering to describe a 54% black district that, as the majority concedes, was drawn to remedy a century of racial exclusion and that, as the majority also acknowledges, did not arbitrarily enhance or diminish the political power of any group. See Shaw v. Reno, 113 S. Ct. 2816, 2824, 2832 (1993) (mentioning North Carolina's checkered race-relations past and noting that the plaintiffs did not claim that the redistricting would lead to the dilution of the European-American vote). Calling the district a racial gerrymander is simply inaccurate since it does not "arbitrarily allocate disproportionate political power" to any group. As the majority recognizes, all districting takes race into account. Id. at 2826. Thus, this district, by its very terms, did nothing more than take race into account to create a racially competitive or racially integrated district. Its offense, to the extent the Court identifies the nature of the new constitutional injury, was that its "bizarre" shape was aesthetically unappealing to white voters and "stigmatizing" to black voters. Id. at 2824-25. Although Justice O'Connor thundered against "political apartheid," the claim that the district separated voters by race is not supported by the district's own racial composition, which is the most integrated district in the state. Id. at 2827; see supra note 9.

In terms of aesthetics, O'Connor is quite correct that drawn on a map, the shape of the district is "bizarre." Id. But the relevant inquiry is not the district's shape but its feel: does it reflect an effort to connect voters who have a relevant community of interests? Cf. Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459 (M.D. Ala. 1988) (concluding that a district is sufficiently compact if it has a "sense of community"). The evidence in this case and others demonstrates that blacks in North Carolina are politically cohesive. Thus, the evidence of persistent racial bloc voting and racial appeals in North Carolina means that it is not an assumption, but a fact, that blacks function as a racial as well as a political group. To call this fact a racial stereotype takes all meaning from the term, which is about prejudging, not observing.

n19 See U. P. Auerbach, The Reapportionment Cases: One Person, One Vote -- One Vote, One Value, 1964 SUP. CT. REV. 1, 55, 56. One-vote, one-value means each voter should enjoy the opportunity to vote for someone who gets elected. Each voter should be able to choose, by the way she casts her votes, who represents her.

n20 A recent example is Chilton County, Alabama, where the first Republican and the first black were elected to the county commission when the county implemented a modified at-large system of election using cumulative voting. Jim Yardley, 1 Voter, 7 Votes? County Boosts Minority Clout, ATLANTA J. & CONST., Oct. 23, 1992, at G5. Because the balance of power on the commission is now closely divided between white Republicans and white Democrats, even if voting is racially polarized the black Democrat may become an influential swing vote.

n21 By representation of racial groups, I do not mean to suggest that only members of a group can represent its interests, that members of a group are necessarily racially similar, or that racial group members are necessarily homogeneous in thinking or interest. See infra note 123 and accompanying text.

n22 Descriptive representation defines representation as based solely on representative physical
characteristics or representative identity. It does not envision an interactive or a dynamic view of the representational relationship. Cf. infra notes 106-15 and accompanying text.

n23 See infra notes 168-74 and accompanying text. I employ the term "proportional" to mean fairness rather than an unduly numerical or strictly quantitative measure of political equality. See Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 VA. L. REV. 1413, 1459 n.170 (1991) (finding the "spirit of the proportionality principle" in my son's conclusion that the proper result of a four-to-two vote against hide-and-seek in favor of tag is that "[t]hey will play both," tag coming first).

n24 In this sense I take issue with Judge Chapman's dissent in Collins v. City of Norfolk, 883 F.2d 1232, 1244-51 (4th Cir. 1989) (Chapman, J., dissenting), cert. denied, 498 U.S. 938 (1990). Judge Chapman suggests that vote dilution, which he defines exclusively in terms of electoral access, has nothing to do with the ideas of certain candidates. For him, "[r]epresentativeness in a Voting Rights context concerns access, and it does not create a right to the representation of certain ideologies." Id. at 1246. Chapman seems to suggest that ideological representation necessarily requires a "political litmus test" of minority-preferred candidates in which "there are 'proper' black political attitudes, and therefore under the Voting Rights Act some ideas are worth more than others." Id.

The one-vote, one-value standard does employ a political rather than a racial litmus test, but it allows the voters themselves to determine, at each election, what political attitudes they want represented.

n25 See Sanford Levinson, Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?, 33 UCLA L. REV. 257, 263 (1985) ("The liberal side is manifested by [Chief Justice Warren's] statement that '[t]he right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.'" (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964))).

n26 See, e.g., Wesberry v. Sanders, 376 U.S. 1, 18 (1964) ("While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.").

n27 For the liberal, "the ultimate unit is not class, estate, rank or interest, but the independent, rational man. . . . The people are a mass, an entity, and, ideally, act as one. Yet they achieve that unity of action by a series of individual acts of mind stimulated by common discussion." Samuel H. Beer, The Representation of Interests in British Government: Historical Background, 51 AM. POL. SCI. REV. 613, 634 (1957). But even those who argue that it is the individual who is being represented concede that the individual's vote is influenced by group affiliations. See, e.g., Auerbach, supra note 19, at 55, 56.

The right to vote also bears purely symbolic significance. See JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 27 (1991) (arguing that civic significance comes from having the right to vote, not from actually casting a ballot).

n28 The Court has described voting rights as "individual and personal in nature." Reynolds, 377 U.S. at 561. The Court continued, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." Id. at 562.

n29 John Low-Beer has distinguished the right to an equally weighted vote, which is implicated in
reapportionment cases, from the right to an equally meaningful vote, which is implicated in gerrymandering cases. John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 164 n.3 (1984); cf. *Reynolds*, 377 U.S. at 579 (defining the "equal-population principle" as the standard for equal weighting); *Terry v. Adams*, 345 U.S. 461, 484 (1953) (finding that "an empty vote cast after the real decisions are made" did not provide a meaningful right to vote).

The equal population principle is, however, an imperfect approximation of equally weighted voting because district size is based on population, rather than on voting age population or registered voters. Cf. *Mahan v. Howell*, 410 U.S. 315, 322 (1973) ("[P]opulation alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, § 2."). If one-person, one-vote is satisfied by such population-based reapportionment, I would argue that this principle views representation as equal access to a representative, whether the voter voted for the representative or even voted at all. I have argued elsewhere that equally weighted voting really means an equal opportunity to influence the processes of government. See Guinier, *supra* note 23, at 1422. Under this view, the right to fair and effective representation subsumes both equally weighted voting and equally powerful voting.

\(^{n30}\) See Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act -- Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1636 (1983) (arguing that the one-person, one-vote rule, which ensures each voter an equally weighted vote, is a fundamental requirement of representative democracy in the United States).

\(^{n31}\) See id. at 1633 (discussing the reapportionment cases' articulation of a political equality norm). Fair and effective representation envisions an equality norm -- the right of all citizens to equal treatment as citizens in a democracy. In addition, the equality norm says that every *person* has an equal right to government services. An equal right to government services is not the same as a right to equal government services. In this sense, I am equating the right to services with a right of access to the benefits of government.


\(^{n33}\) See *supra* note 29 and accompanying text; *see also* Garza v. County of Los Angeles, 918 F.2d 763, 766 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (concluding that deliberately minimizing minority political power may violate both the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment); Alex A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1821 (1992) (arguing that the reapportionment cases, taken together, stand for a broad notion of equality among citizens' respective influence on the political process, encompassing both equality of participation through equipopulous districts and equality of success whereby each citizen has an equal shot at getting a satisfactory result).

\(^{n34}\) The Supreme Court developed its one-person, one-vote jurisprudence in response to the disproportionate power exercised by a political minority. *See Gray v. Sanders*, 372 U.S. 368, 379 (1963) (expressing dissatisfaction with an electoral system that gives disproportionate weight to rural votes and to votes from less populous counties). The Court found a constitutional right to population-based apportionment on the theory that the majority of the population should have a majority voice in the legislature. *Cf. Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (noting that denying the majority the right to control the legislature would far surpass the dangers of any possible denial of minority rights). Of course, minority interests should also be represented. In fact, concern with representing group interests was a major theme of Justice Stewart's famous dissent in *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 744-65 (1964) (Stewart, J., dissenting). Stewart's group interests were
determined by the state, not by the individual voter, in part because he perceived federalism concerns to be the missing element in the requirement of strict population equality. *Id.* at 744-45. Stewart's repeated references to the legitimacy of group interests as recognized by the state, *id.* at 748-49, 759, 765, reflect, however, an implicit faith in state government to provide a voice to minority interests.

Some argue, however, that the one-person, one-vote principle was designed primarily to restore a competing principle: majority rule or majority legislative power. *See* Gordon E. Baker, *The Unfinished Reapportionment Revolution*, in *POLITICAL GERRYMANDERING AND THE COURTS* 11, 14 (Bernard Grofman ed., 1990) (asserting that the outcome of an insistence on voter equality is "conditioned majoritarianism"). Yet majority rule need not mean that a simple majority inexorably prevails. Even if it does, there is a big difference between the majority winning legislative power and the majority controlling all the legislative power. I have argued elsewhere that winner-take-all majority rule is often fundamentally at odds with traditional notions of democracy. *See* Guinier, *supra* note 23, at 1441-43 (arguing that winner-take-all majority rule based on a prejudiced majority is itself illegitimate).

n35 *See* Baker v. Carr, 369 U.S. 186, 299 (1962) (Frankfurter, J., dissenting) ("[T]he discrimination relied on is the deprivation of what appellants conceive to be their proportionate share of political influence."). A recent essay by a political science scholar makes the same point: ":[W]hen disproportionality is great and when attitudes and interests differ radically across groups -- as with rural/urban differences of the 1950s or current racial/ethnic differences -- corrective steps must be taken if our system is to be regarded as fair." BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 133 (1992).

n36 The empowerment norm is also explicated in the Voting Rights Act of 1965, as amended in 1982. *See* 42 U.S.C. § 1971(b) (1988) (protecting voting rights for racial minorities against intimidation, threats, or coercion). As such, the Act is informed by the goals and strategies of the civil rights movement, which pushed for its passage in 1965 and which has been successful in extending and amending the Act in 1970, 1975, and 1982. The empowerment norm views political participation and *the right to participate throughout the political process* as critical to democratic legitimacy. In other words, it is not enough that people get certain formal or symbolic rights. What is critical is that citizens are given the opportunity and incentive to exercise those rights to promote their interests. What legitimates representative government is the fact that citizens knowingly *choose* who represents them and that citizens have the opportunity not only to elect but to retire those who do not represent them effectively.

n37 *See* Low-Beer, *supra* note 29, at 177. Low-Beer notes that individuals can be represented only insofar as they share certain interests:

No meaningful voting right can be defined exclusively in individual terms. A legislator inevitably votes on behalf of the collective as well as the individual interests of her constituents. Only the provision of personal services or the sponsoring of a private bill involves purely personal representation.

*Id.*; *see also* MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 249 (1964) (asserting that "one person, one vote" ignores "the group nature of politics" by assuming that each individual exercises her whole political power by voting); Alexander M. Bickel, *The Supreme Court and Reapportionment*, in *REAPPORTIONMENT IN THE 1970s* 57, 59 (Nelson W. Polsby ed., 1971) ("We have, since Madison, realized that people tend to act politically not so much as individuals as in groups. . . ."). *See also* V.O. KEY, POLITICS, PARTIES, & PRESSURE GROUPS 589 (5th ed. 1969)
(observing that because group affiliation is of special importance to political participation, persons with strong groups of organizational attachments are more likely to vote).


n39 See Reynolds v. Sims, 377 U.S. 533, 565 (1964) (stating that legislative bodies should be "collectively responsive to the popular will").

n40 Compare Thornburg v. Gingles, 478 U.S. 30, 77 (1986) (employing a top-down view to conclude that the presence of minority representatives would undercut a voting rights challenge) with Davis, 478 U.S. at 132 (implying a bottom-up approach by emphasizing the right to influence the political process rather than the right simply to win elections).

n41 See Reynolds, 377 U.S. at 576 (holding that the right to equal representation ensures "adequate overall legislative representation to all of the state's citizens").

n42 Baker v. Carr, 369 U.S. 186, 273 (1962) (Frankfurter, J., dissenting) (emphasis added). The dissenting opinions acknowledge the claim that the distribution of electoral strength among geographic units reflects a legislative judgment about the representation of interests. See, e.g., id. at 334 (Harlan, J., dissenting).

n43 See, e.g., Reynolds, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society. . . ."); see also Terry v. Adams, 345 U.S. 461 (1953) (arguing that a county's white primary system "strip[ped] Negroes of every vestige of influence in selecting the officials who control the local county matters").

n44 See Davis, 478 U.S. at 124.

n45 See id. at 125 & n.9 (explaining that the racial gerrymandering cases established the objective of fair and adequate group representation). Justice O'Connor's majority opinion in Shaw v. Reno, 113 S. Ct. 2816 (1993), however, may suggest that the Court will revisit this policy decision. As Justice Stevens suggests in dissent, the only group no longer entitled to fair representation now may be African-Americans. See id. at 2844-45 (Stevens, J., dissenting). If Justice Stevens's observation proves correct, such a "perverse" consequence would not eliminate the concept of group representation, which would still be available for "Polish Americans, or for Republicans." Id.

n46 See Harold F. Gosnell, Representative Democracy, in REPRESENTATION 98, 104-10 (Hanna F. Pitkin ed., 1969) (defining the process of representation as acting in accordance with the desires and needs of individual constituents).

n47 Cf. Reynolds, 377 U.S. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen."). This is the equal shares -- as opposed to the equal probability of casting a decisive vote -- condition of political equality. See Jonathan W. Still, Political Equality and Election Systems, 91 ETHICS 375, 378-79 (1981).

n48 This follows, in part, from the purely symbolic significance attached to being a voter. See SHKLAR, supra note 27, at 27 (noting that "the denial of the suffrage to large groups of Americans . . . made the right to vote," and not the exercise of the right, "such a mark of social standing") (emphasis added); Gerald L. Neuman, Rhetorical Slavery, Rhetorical Citizenship, 90 MICH. L. REV. 1276, 1278 (1992) (reviewing SHKLAR, supra note 27) (concluding that Shklar attributes social standing and
civic understanding of voting capacity as the key reasons that groups excluded from the franchise struggle to overcome that exclusion and then find that actually casting a vote is less important once voting status is established).

n49 See, e.g., Whitcomb v. Chavis, 403 U.S. 124, 154-55 (1971) (holding that the simple fact that one interest group is outvoted and consequently unrepresented in the legislature "of its own provides no basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system").


n51 In asserting the prominence of group identity and the necessity of collective action to political organization and efficiency, I do not set out a theory of group rights. Nor do I yet define the parameters of group representation. Group status could mean a collection of people with identifiable characteristics. It could also mean a collection of people with common interests. In this Paper I simply pose the preliminary issue that the concept of representation necessarily applies to the representation of a group. Once I pass this threshold question, I will need to explore the next set of questions, one of which will certainly be: What is a group?

There is in addition an important caveat to the claim here that the concept of representation necessarily applies to groups. I am not assigning value to groups over individuals. Individuals as the ultimate objects of concern do not disappear from view. Indeed, I attempt to recognize the individual by empowering each voter to choose her district, i.e., her temporary group affiliation. Indeed, by advocating the benefits of modified-at-large elections, I seek to put in the hands of the voters the degree to which they want their race or other demographic characteristic to be represented, i.e., the degree to which their group's status is salient or relevant.

n52 Low-Beer, supra note 29, at 176 n.63; see also DIXON, supra note 1, at 48-49 (contrasting proportional representation with districting based upon residency). Geographic districting necessarily advantages some groups and disadvantages others. In this sense, "all districting is 'gerrymandering.'" Id. at 462. The Supreme Court has recognized the impact that districting has on opposing groups:

It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. *District lines are rarely neutral phenomena.* They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. *The reality is that districting inevitably has and is intended to have substantial political consequences.*


is very little actual individual representation, only community representation. "As it has developed historically, the territorial survey type of apportionment has granted emphasis to community representation and especially to local real property interests." Id.

n54 For example, Justices Harlan, Clark, and White explicitly took this position. See Reynolds, 377 U.S. at 623-24 (Harlan, J., dissenting) (stating that the economic, social, and political interests of electors reflect the place where they live); Lucas, 377 U.S. at 742 (Clark, J., dissenting) (noting the indigenous interests and problems unique to Colorado's different geographic regions); see also Auerbach, supra note 19, at 37 (explaining that geographical districting is considered the most workable proxy for interest representation).


n56 A. F. POLLARD, THE EVOLUTION OF PARLIAMENT 164 (2d ed. 1926). The English Parliament was originally an assembly of the "estates" of the clergy, the baronage, and the commons. See generally WILLIAM STUBBS, 2 THE CONSTITUTIONAL HISTORY OF ENGLAND 166-203 (1875) (recounting the history of the system of estates under Edward I). Members of medieval parliaments were selected by common consent in order to represent the unanimous mind of the county or borough that was being represented. JENNIFER HART, PROPORTIONAL REPRESENTATION: CRITICS OF THE BRITISH ELECTORAL SYSTEM 1820-1945, at 5 (1992). When this method of membership selection became unmanageable, a rule of the bare majority was established by which members of parliament were elected by relative majorities if a poll was held. Id. Enid Lakeman suggests that the system evolved to capture broadly the main trends of opinion rather than exact proportions of political interest. LAKEMAN, supra note 55, at 40.

n57 PETER G. J. PULZER, POLITICAL REPRESENTATION AND ELECTIONS: PARTIES AND VOTING IN GREAT BRITAIN 32 (1967); see Beer, supra note 27, at 617 ("[The Old Whig theory, the dominant political theory of the eighteenth century,] conceived of representation as being not of individuals, but rather of corporate bodies, although not in the strict legal sense of the term."); see also PULZER, supra, at 14-15 ("In the eighteenth century, under the influence of Whig ideas, it was considered proper and desirable that representation should be by interest, even if these interests were no longer the corporations and estates of mediaeval society.").

n58 Beer, supra note 27, at 618. In contrast to this Whig view, liberals assumed that representation was of individuals rather than of "corporate bodies" or interests and could best be realized by equal electoral districts. Id. at 629-30. But while liberals in America had a pronounced suspicion of interests, their fear was based primarily on the representation of special interests. Id. at 631. But as I argue, the liberal claim that rule by the majority would defeat special interests is in fact informed by Old Whig theories of virtual representation. See infra notes 85-87 and accompanying text.

n59 "It was not merely Parliament collectively, but the individual MP who was considered autonomous." PULZER, supra note 57, at 22. Likewise, in 1774, Edmund Burke asserted: "Parliament is not a congress of ambassadors from different and hostile interests; . . . but parliament is a deliberative assembly of one nation, with one interest, that of the whole. . . ." Id. (emphasis in original).

n60 "[It] was the land rather than men that parliament represented. . . . Feudal service was always regarded as due from the land rather than from the individual tenant, and so long as the crown obtained its service it cared little who performed it." POLLARD, supra note 56, at 156.
n61 See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1083 (1980) ("The medieval town was not an artificial entity separate from its inhabitants; it was a group of people seeking protection against outsiders for the interests of the group as a whole.").

n62 *Id.* at 1084.

n63 See GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT* 16 (1966) ("In view of this English background, it is not surprising that representation in colonial America was originally based on localities."). This "representation by town" was illustrated in 1787 when the delegates gathered to create the United States Constitution and the smaller states were reluctant to yield their accustomed equality of status. *Id.* at 16-18; see also DE GRAZIA, supra note 53, at 26 ("Territorial representation, with equal representation to all men, was the ideal formula for a democratic rural society and was espoused as such . . . in America and elsewhere.").

Basing the franchise on the ownership of property also reflects this relationship. *Cf.* Minor v. Happersett, 88 U.S. (1 Wall.) 162, 172-73 (1874) (collecting state statutes that impose restrictions on the right to vote, some of which condition the franchise on property ownership); Beer, *supra* note 27, at 630 (discussing the importance of property in determining electoral participation in both Britain and the United States).

In other parts of Europe, systems developed in the nineteenth century that more directly represented political or group interests and better reflected modern notions of representation. The proportional representation systems that have gained prominence in continental Europe reflect differing voters' opinions "like a mirror image" by assigning the precise number of seats in the parliament to correspond to the number of votes cast. *ELECTORAL SYSTEMS* 12 (Wolfgang Adrian ed., 1987).

n64 Frug, *supra* note 61, at 1096.

n65 *Id.* at 1098.


n68 *Id.* at 14; *cf.* POLLARD, *supra* note 56, at 152 (arguing that modern notions of representation assume the representative is bound by the will of the represented, but asserting that the will of the people is largely fictitious). This is true whether the abstraction is defined by its political, regional, or racial group interests. *Cf.* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U.L. REV. 193 (1992) (arguing that, because representation of an absent party can never be consistent with the "right to make one's own strategic choices," nonparty preclusion in civil litigation should be based on grounds other than a representation theory); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U.L. REV. 213 (1990) (noting that American courts in the late nineteenth and early twentieth centuries viewed the representative of a class as a self-regarding litigant rather than a litigating agent with a fiduciary duty to consider group interests).

n69 See *supra* notes 27-29 and accompanying text.
n70 See Low-Beer, supra note 29, at 176 n.63. But cf. Davis v. Bandemer, 478 U.S. 109, 173 n.13 (1986) (Powell, J., concurring and dissenting) (describing as "artificial communities" those district boundaries drawn with no rationality and finding that where district lines are irrational, they limit the opportunity of citizens "to become familiar with their voting districts, where they must focus their political activities" and "affect the ability of all voters to exercise their political influence").

n71 But cf. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 82 (1978) (Brennan, J., dissenting) ("At the heart of our basic conception of a 'political community,' however, is the notion of a reciprocal relationship between the process of government and those who subject themselves to that process by choosing to live within the area of its authoritative application." (emphasis added)). Brennan's claim that residence may be an appropriate proxy for political choices, however, seems primarily directed at political subunits, not at geographic election districts.

n72 Cf. United Jewish Orgs. v. Carey, 430 U.S. 144, 158 (1977) (noting that minority communities may be divided among predominantly white geographic districts); Whitcomb v. Chavis, 403 U.S. 124, 176-77 (1971) (Douglas, J., concurring) (explaining that gerrymandering may be used "to defeat or circumvent the sentiments of the community").

n73 Hierarchical relationships refer to associations or connections between people of unequal status and/or power. See Frug, supra note 61, at 1097 (describing the hierarchical relationships in early medieval towns); cf. Dunn v. Blumstein, 405 U.S. 330, 354-55 (1972) (striking down a durational residence requirement as an improper means of assuring that all residents share a local perspective); see also infra note 115 (describing the hierarchy of geography, which disadvantages those who live in poor neighborhoods).


n75 See Mark T. Quinlivan, Comment, One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration, 137 U. PA. L. REV. 2361, 2383 (1989) (explaining that the Supreme Court would probably view decennial redistricting as a minimum requirement under the one-person, one-vote rule).

n76 See Karcher v. Daggett, 462 U.S. 725, 728 (1983) (holding that a congressional reapportionment plan with a maximum deviation of 0.7% was unconstitutional). But cf. Gaffney v. Cummings, 412 U.S. 735, 751 (1973) (establishing a lower standard for state and local plans and allowing a maximum deviation of 7.8% from mathematical equality).

n77 The Court has rejected the argument that differing interests of independent political subdivisions such as counties are sufficient justification for departure from the one-person, one-vote rule. See, e.g., Reynolds v. Sims, 377 U.S. 533, 581 (1964); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 725 (1964).

n78 See Lucas, 377 U.S. at 750 (Stewart, J., dissenting) ("The Court today declines to give any recognition to these [local] considerations and countless others, tangible and intangible. . . .").

n79 The concept of virtual representation describes how nonvoters or losing voters are represented in legislatures. See JOHN P. REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50 (1989). The English used this theory to explain how the American
colonists were represented in Parliament. *Id.*

n80 See letter from Frank Michelman, Professor of Law, Harvard University, to Lani Guinier, Associate Professor of Law, University of Pennsylvania (Aug. 26, 1991) (on file with author) ("Virtual representation is a species of the genus disfranchisement. You are virtually represented when you are disfranchised -- not procedurally counted either in the assembly or in the electoral constituency --and the excuse for the disfranchisement is some theory about how someone else will act on your behalf or in your interest.").

n81 See Reid, *supra* note 79, at 58 ("[A]lthough nonelectors might share no interests with members of Parliament, they could nonetheless expect that their interests would be represented through interests shared with the electors."); see also Simon Sterne, *The Representational Likeness, in REPRESENTATION*, *supra* note 46, at 73, 74-77 (noting that even in a representative democracy voting for representatives can lead to wasted votes).

n82 One difference between direct and indirect representation is the extent to which the voters' choice is considered paramount in defining the representational relationship. Direct representation is the representation by someone of the voters' choosing. Indirect representation, by contrast, is the representation of the voters' interests by someone for whom the voter did not vote. Another difference relates to the representative's role. Direct representation posits the representative as an agent or delegate who acts on behalf of, and at the direction of, those who selected her. Indirect representation, by contrast, incorporates a trustee concept of the representative. In a trustee relationship, the representative is public regarding and conscientious based on her own sense of the common good. For example, indirect representation assumes that the representative will act in the interests of political opponents to diffuse their opposition.

In sum, direct representation emphasizes the voters' participation and choice in initiating and terminating the relationship. Indirect representation focuses attention on the representative's capacity to negotiate consensus.

n83 See United Jewish Orgs. v. Carey, 430 U.S. 144, 166 n.24 (1977) ("[T]he white voter who as a result of the 1974 plan is in a district more likely to return a nonwhite representative will be represented . . . by legislators elected from majority white districts."); Karcher v. Daggett, 462 U.S. 725, 759-60 n.25 (1983) (Stevens, J., concurring) ("[I]f the plaintiffs' challenge is based on a particular district or districts, the State may be able to show that the group's voting strength is not diluted in the State as a whole."); Connor v. Finch, 431 U.S. 407, 427 (1977) (Blackmun, J., concurring in part and concurring in the judgment) ("Districts that disfavor a minority group in one part of the State may be counterbalanced by favorable districts elsewhere.").

n84 See Sterne, *supra* note 81, at 77. *But cf.* Frug, *supra* note 61, at 1097 ("[W]e must be careful not to confuse the concept of association with that of democracy or equality.").

n85 See *supra* text accompanying notes 46-48.

n86 See Auerbach, *supra* note 19, at 52.

n87 See Davis v. Bandemer, 478 U.S. 109, 132 (1986) ("[P]ower to influence the political process is not limited to winning elections."). *But see id.* at 170 (Powell, J., concurring and dissenting) ("[I]t defies political reality to suppose that members of a losing party have as much political influence over state government as do members of the victorious party. Even the most conscientious state legislators
do not disregard opportunities to reward persons or groups who were active supporters in their election campaigns.


n89 See Gosnell, supra note 46, at 98, 105 (describing representative government as a mirroring of the constituents' characteristics).

n90 See supra note 82 (identifying differences between direct and indirect representation). This critical view of direct representation of interests reflects a political judgment that interests, or factions, are the bane of democracy. Therefore, interests are suspect and expression of interests should be muted or counterbalanced wherever possible. See HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 186-90 (1967). However, some commentators hold the view that

[t]he principle of representation is based upon the assumed right on the part of the citizen to take part in the business of making the laws which are to govern him; as there are practical difficulties in the way of his doing so, he must appear by deputy -- each man is entitled thus to appear by deputy. . . . [If votes are wasted in the election process] it as effectually disfranchises the citizen as though a positive law disqualified him from going to the polls; it gives him the semblance, but deprives him of the substance, of his right. Even the majorities that are represented are unfairly and improperly represented, as the voter is compelled to sink his individuality, and often times his best political opinions, for the purpose of belonging to the represented class. Sterne, supra note 81, at 76-77.

n91 See Sterne, supra note 81, at 80 (criticizing the idea that the right of the majority to govern carries with it the right of the majority to sole representation).

n92 See DIXON, supra note 1, at 53 (arguing that rational voters who did not expect their candidates to win would choose not to vote); Roger L. Faith & Robert D. Tollison, Expressive Versus Economic Voting, in PREDICTING POLITICS 231, 231 (W. Mark Crain & Robert D. Tollison eds., 1990) (explaining that in public choice theory, voting is an irrational act because it is costly and unlikely to influence the final outcome).

n93 See Sterne, supra note 81, at 77; supra text accompanying notes 84-85.

n94 See Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 748-49 (1964) (Stewart, J., dissenting) (noting the possibility that within district systems of representation, diverse groups of people may be subjected to "absolute domination by a geographically concentrated or highly organized majority").

n95 See supra note 82 (describing direct representation).

n96 Davis v. Bandemer, 478 U.S. 109, 132 (1986). But see id. at 169-70 n.7 (Powell, J., concurring and dissenting) (arguing that the plurality's finding that a "losing" voter will be adequately represented was a "leap" from the conclusion that a redistricting plan is not unconstitutional merely because it makes it harder for a group to elect its own candidate).

n97 See id. (stating that "the plurality apparently believes that effects on election results are of little import, as long as the losers have some access to their representatives").
See, e.g., Laurence H. Tribe, American Constitutional Law 1075-76 (2d ed. 1988) ("Because any vote in excess of a majority (or a plurality) is in a sense wasted, such a plan would render essentially irrelevant the ballots of many minority voters.").

See Guinier, supra note 50, at 1136-44.

See supra notes 30-34 and accompanying text.

Theoretically, of course, it might be possible to draw random, competitive districts in which no "group" was assured of electoral control. In such districts, electoral control would presumably shift depending on issues, candidates, and local electoral events. But this possibility rests on a different premise from the traditional justification for districting -- that districting presumes some group characteristics -- and simply assumes that the groups can be fairly distributed without wasting their votes in the second sense of packing. This assumption, however, still allows wasting votes in the first sense in that some voters, albeit different voters each election, waste votes by voting for a political loser. The possibility of a "political fairness" approach -- measuring fairness based on proportionate jurisdiction -- wide influence -- cannot be realized without an accurate measure of group voting strength. Cf. Davis v. Bandemer, 478 U.S. 109, 155 (O'Connor, J., concurring) (stating that allowing a "waste" of individual votes through a bipartisan gerrymander is contrary to the meaning of the Equal Protection Clause in that it confers more rights to politically powerful groups than to individuals).

See id. at 117 n.6 (describing the "familiar techniques of political gerrymandering," "stacking," "cracking," and "wasting" votes); see also supra note 38 and accompanying text.

See Tribe, supra note 98, at 1075 ("While minority voters might thus be assured of a controlling influence in those few districts, they would have no impact on the choice of representatives outside those districts.").

Id.

People with low incomes are relegated to living in deteriorating neighborhoods; affluent and middle class residential areas are generally not accessible to them. See, e.g., Housing and Urban Development Secretary Henry Cisneros' Remarks on "The Changing Federal Role in Urban Policy" at a Progressive Policy Institute Conference, Reuter Transcript Rep., Apr. 19, 1993, available in LEXIS, Nexis Library, Wires File (noting that poverty is "geographically isolated, economically depressed, [and] racially segregated" and that cities "have become warehouses of our poorest"); see also Destabilized Suburbs: Officials Confront the Shortcomings of Section 8, 7 CENT. PA. BUS. J. 18 (Sept. 1992) (observing that families receiving subsidized housing are concentrated in "Section 8 corridor" in Cook County, Illinois).

See, e.g., Davis v. Bandemer, 478 U.S. 109, 175 (1986) (Powell, J., dissenting) (warning that "[c]omputer technology now enables gerrymanderers to achieve their purpose while adhering perfectly to the requirements that districts be of equal population"); Whitcomb v. Chavis, 403 U.S. 124, 177-78 (1971) (Douglas, J., concurring and dissenting) (explaining that despite achieving "substantial equality of population within each district," lines may nevertheless be drawn so as to favor a particular political party).

See City of Mobile v. Bolden, 446 U.S. 55, 88 (1980) (Stevens, J., concurring) (arguing that despite the questionable proposition that race and interests coincide, legislators necessarily predict
voting patterns based on racial group membership); see also supra note 18.

n108 By group identity, I mean the tendency to self-identify as a group member and to perceive one's group membership as a salient feature in relationships with group and nongroup members. In another context, Professor Gerald Torres has suggested that this concept is captured by the question: Does your cultural grouping determine the narrative structure through which you organize your life? See Gerald Torres & Kathryn Milun, Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case, 1990 DUKE L.J. 625, 657-58.

n109 Studies of black and female politicians do show that they have somewhat different agendas. See Rufus P. Browning et al., Racial Politics in American Cities: Blacks and Hispanics in the U.S., in POLITICAL MOBILIZATION, POWER AND PROSPECTS (1990); see also R. W. Apple, Jr., Steady Local Gains by Women Fuel More Runs for High Office, N.Y. TIMES, May 24, 1992,§ 4, at 5 (reporting on a survey of approximately half of all state legislators which found that "even when men and women shared the same party affiliation and ideology, women were much more likely to expend their energies on health care, children's and family questions and women's rights issues"); Gwen Ifill, Female Lawmakers Wrestle with New Public Attitude on 'Women's' Issues, N.Y. TIMES, Nov. 18, 1991, at B7 (describing a study done by the Center for American Women and Politics at Rutgers University which found huge gaps between male and female legislators over issues involving women's rights, health care, and children).

n110 See Apple, supra note 109,§ 4, at 5 (citing a survey that women public officials tend more than their male counterparts of the same party and ideology to involve private citizens in the governmental process, to focus on needs of the poor, and to conduct public business in the open rather than behind closed doors).

n111 PITKIN, supra note 90, at 89.

n112 Cf. Guinier, supra note 50, at 1104 (describing the experience of black voters who consider blacks elected from other districts "their representatives").


n114 See Evelyn E. Shockley, Note, Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice, 89 MICH. L. REV. 1038, 1061-62 (1991) (explaining that in determining the relevance of a candidate's race, the "best [judicial] approach relies on sponsorship: the minority community's 'representative of choice' can only be a candidate who was sponsored by that community," and that such an approach "will satisfy proponents of a focus on civil inclusion").

n115 This use of geography as a proxy for "race" is not limited to voting rights. "Demographic redlining" for marketing direct sales also relies on information about zip codes and housing tracts from census data. JEFFREY ROTHFEDER, PRIVACY FOR SALE 102-05 (1992) (describing how sales marketing companies rely on real estate data bases to portray "likely political leanings, tastes and lifestyle of each American by his address"). Such characterizations mean that if you "[t]ell me someone's zip code, . . . I can predict what they . . . even think." Id. at 102-03.

n116 See supra text accompanying notes 47-49.
Cf. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1856 (1992) ("[T]he increased number of minority elected officials is most directly attributable to the successes of redistricting and reapportionment litigation and the resulting creation of more minority-dominated electoral districts.").

Cf. James F. Blumstein, *Defining and Proving Race Discrimination Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 636 (1983) (concluding that while minorities have the right to ballot access, there is no corresponding entitlement to racial group representation).

Id. at 712 n.378; see also Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 912 (1985) ("The right to vote is a paradigmatic individual right. Each individual has only one vote, and absent any discrimination or unfair procedures, no group of voters has a right to complain that its candidate lost."); cf. Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1305 (1992) (asserting that proponents of the individual-based model tend to oppose race-conscious affirmative action).

See *supra* notes 84-91 (employing the term "fungibility" to mean that voters are essentially indistinguishable, and the term "access" to define representation in terms of a personal relationship).

My response to this criticism is twofold. First, to some extent I agree that the current approach is divisive. Nevertheless, the right to vote is not a benefit but an essential element of our system's political legitimacy. Therefore, those who take issue with current approaches have a responsibility not just to criticize but to propose alternative solutions that protect the right of the minority to have its voice represented and heard in the legislative debate. Second, in light of recent events in Los Angeles, concerns about unnecessarily dividing society do not seem consistent with the divided society in which we already find ourselves. *See supra* note 16. These concerns fail to acknowledge the prediction from twenty years ago of the Kerner Commission Report, that unfortunately we are becoming two nations, separate and unequal. *See NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS* 1 (1968); *see also* Issacharoff, *supra* note 117 (documenting and analyzing the significance of racially polarized voting in contemporary political discourse). While concerns about balkanization are real, the solution to the problem of racial division is not to ignore the divisions but to attempt to heal them.

Other critics object to race-conscious districting on moral grounds. *See, e.g.*, T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1063 (1991) ("[T]he race of a person tells us nothing about an individual's capabilities and certainly nothing about her moral worth. Race-consciousness, from this perspective, is disfavored because it assigns a value to what should be a
meaningless variable. To categorize on the basis of race is to miss the individual."); Neil Gotanda, A Critique of "Our Constitution is Color-Blind", 44 STAN. L. REV. 1, 16 (1991) (stating that opponents of race-conscious decisionmaking believe the approach is morally inferior to a technique which ignores race as a factor). My response to this objection rests, in part, on a claim that to a greater or lesser degree, all districting is gerrymandering. In other words, the criteria for drawing district lines are arbitrary and subject to the preferences of those drawing the districts.

n121 Gotanda, supra note 120, at 16. In Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993), the majority suggests that consciously drawing districts to represent black voters as a group is problematic, although in political terms the districting plan is "fair." This is essentially a moral claim which the Court then constitutionalizes. See supra text accompanying note 8.

n122 See supra notes 37-39 and accompanying text.

n123 This particular concern is primarily hypothetical. Blacks are very unlikely to be elected from any majority white districts, and all majority black congressional districts now elect black officeholders. Bernard Grofman & Lisa Handley, The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures, 16 LEGIS. STUD. Q. 111, 117 (1991).

n124 This is not to suggest that arguments for group rights can be ignored. See, e.g., Williams, supra note 15, at 545-46 (arguing that the Court should advance the rights of minority groups to achieve the socially desirable goals of diversity and multiculturalism); Melissa Williams, Memory, History and Membership: The Moral Claims of Marginalized Groups in American Political Representation, paper delivered at the Annual Meeting of the American Political Science Association, Chicago, Illinois (Sept. 3, 1992). I simply choose not to make such an argument here.

n125 See supra notes 37-48 and accompanying text.

n126 Unanimous constituencies are those in which all voters agree on a basic definition of their interests. A unanimous constituency lets the voters choose which interest is salient and should be promoted. In a divided constituency, it is the legislator whose choice is important as she attempts to strike a balance among her supporters. Unanimous constituencies focus on the role of the voter; divided constituencies adopt a trustee view of representation. The former is a bottom-up view of representation; the latter is top-down.

The bottom-up view of unanimous constituencies assumes that voters, not legislators, should be empowered to make legislative choices, at least initially, for several reasons. First, it adopts a delegate or agency view of representation that suggests legislators represent the parts in order to avoid viewpoint monopoly. By encouraging the active assertion of diverse perspectives, the legislative process is infused with more and different ideas. This discourages monolithic control of legislative agendas by assuring the active representation of unanimous, issue-oriented constituencies. The second assumption is that compromise should occur openly after an election as part of the deliberative process of legislative debate rather than behind closed doors, where office seekers pre-"position" themselves to camouflage mutually inconsistent or divergent philosophies. In this sense, it reflects a more participatory view of fairness as the balancing of perspectives rather than as the absence of a viewpoint.

Second, it assumes that issue-based, rather than candidate-based, constituencies will be mobilized to participate throughout the political process, not just on election day. In this way it responds to the increasing levels of alienation and passivity within the electorate. Cf. Burt Neuborne, Of Sausage
Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques, 67 N.Y.U. L. REV. 419 (1992) (noting that allowing jurors to be excluded from juries because of their race leads the community to lose faith in the jury system).

n127 Some suggest that state boundaries would not survive this approach. That question is beyond the scope of this Paper. Suffice it to say that retaining states as units of representation reflects deeply embedded constitutional and tradition-bound constraints.

n128 Brownstein, supra note 120, at A1, A15.

n129 See supra notes 90-91 and accompanying text; see also Martha Minow, From Class Actions to Miss Saigon: The Concept of Representation in the Law, 39 CLEV. ST. L. REV. 269, 280-84 (1991) (surveying contemporary views of political representation and accountability).

n130 The decision to live next to someone may suggest some connection, kinship, or community of interest, but only if the decision to move was the exercise of choice within a range of options. Cf. supra note 63 (discussing the historic link between geographic and political ties); see also supra note 106.

n131 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, 177 (1989); see also Whitcomb v. Chavis, 403 U.S. 124, 131 n.8 (1971) (defining a ghetto as a residential area with a defined racial population of lower than average socioeconomic status "whose residence in the area is often the result of a social, legal, or economic restriction or custom" (emphasis added)); Wright v. Rockefeller, 376 U.S. 52, 59 (1964) (Douglas, J., dissenting) ("Neighborhoods in our larger cities often contain members of only one race; and those who draw the lines of Congressional Districts cannot be expected to disregard neighborhoods in an effort to make each district a multiracial one.").

n132 Karlan, supra note 131, at 177; see also Whitcomb, 403 U.S. at 135 (finding that ghetto residents have interests "diverging significantly from interests of nonresidents of the ghetto" (paraphrasing language of the lower court opinion that the Court overruled)).

n133 IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 43-46 (1990) (arguing that "highly visible" groups -- those who identify with a certain social status and have a common history produced by that status -- are different from "mere 'combinations of people'" -- such as voluntary clubs -- which are defined by shared attributes).

n134 Id. at 43.

n135 Id.

n136 See id. at 44, 51-52; see also supra notes 16, 18, and 106.

n137 See id. at 247 (describing the mechanisms by which this segregation is enforced).

n138 See supra note 108 and accompanying text; infra note 171 and accompanying text.

n139 See Frank R. Parker, Racial Gerrymandering and Legislative Reapportionment, in MINORITY VOTE DILUTION 85, 112 (Chandler Davidson ed., 1984) (concluding that the use of race-conscious remedies is "benign and beneficial to the minority community because it enhances their voting
strength").

n140 Cf. Chandler Davidson, Minority Vote Dilution: An Overview, in MINORITY VOTE
DILUTION, supra note 139, at 1, 10 (arguing that elected officials are often unaware of the extent of
minority support and therefore respond to strong pressure from white voters).

n141 A fractal is a set of jagged curves or surfaces that has "the same index of jaggedness when
examined at any level of minuteness or abstraction." See Louise Weinberg, The Federal-State Conflict
suggested the analogy to fractal geometry.

n142 See Alison Mitchell, In Politics, There Is Only One Language, N.Y. TIMES, July 19, 1992, at
A29.


n144 Sam Roberts, Does Politics of Fairness Mean Only Those from Minorities Should Apply?, N.Y.

n145 Id.

n146 Mitchell, supra note 142, at A29 (quoting David Santiago).

n147 Id.

n148 Id.

n149 Id. (quoting Angelo Falcon, President of the Institute for Puerto Rican Policy).

n150 Roberts, supra note 144, at B4 (quoting Rep. Steven J. Solarz). Others suggest that politics, not
principles of choice, motivated Solarz's decision. "When his polls showed he couldn't win against any
incumbent," he ran in an open district created to enhance the power of Latino residents. Id. (quoting
Fernando Ferrer, President of the Bronx Borough). Still others suggested that Solarz had an unfair
advantage based not on his ethnic background but his financial foreground. "It's not a question of what
background he is. It's the color of his money," said Herman Badillo, the city's first Latino
congressman. Id.

n151 Id.

n152 Mitchell, supra note 142, at A29. But see Joseph Berger, A Jagged Shard of Fairness Slices
Apart Voting Communities, N.Y. TIMES, Sept. 7, 1992, at A22 (citing slightly different percentages of
racial populations in this District).

n153 See supra note 81 and accompanying text; see also Guinier, supra note 23, at 1438.

n154 The assumption is that race-conscious districting is necessary to remedy race-conscious
exclusion. The exclusion is demonstrated by the unwillingness of the majority to include the minority
in its governing coalition. Evidence of this premise is provided by patterns of racially polarized voting.
See Guinier, supra note 23, at 1441 (explaining that virtual representation assumes that "[t]he 51% will
look out for the 49% minority as their proxy" because majority self-interest is consistent with the
common good; yet, where a permanent and homogeneous majority consistently exercises all the
power, that fixed majority loses incentive to look out for or cooperate with the minority, because
minority political support is unnecessary).

n155 Id. at 1442 ("[T]he operation of prejudice in a winner-take-all system denies blacks elected
from single-member districts the ability to exercise even minimal legislative power.").

n156 See supra text accompanying note 83.

n157 See supra notes 46-48 and accompanying text.

n158 In the static view, representation is neither interactive nor engaging of the electorate. When the
focus is on empowering voters by instantly emphasizing their opportunity to elect representatives of
their choice, the result is that those choices are less important once the boundary lines of the district
are set.

n159 This virtual representation assumption is also reflected in psychological or filial terms used to
describe a common cultural or ethnic heritage. Even where all members of the racial group did not
actively support a racial group member, they each are nevertheless represented by someone who is a
"role model," a source of pride, and a "sister or a brother."

n160 See Guinier, supra note 50, at 1101-34 (discussing the assumptions made by the black electoral
success model and concluding that the theory often leads to token representation).

n161 Tabor, supra note 143, at B6.

n162 See Lindsey Gruson, For Solarz, A Career Ends in Grief and Relief, N.Y. TIMES, Oct. 7,
1992, at B3 (attributing Ms. Velazquez's 1869-vote margin primarily to criticism of Solarz's decision
to run in a "Hispanic district"); New York: The Race for the House, N.Y. TIMES, Sept. 16, 1992, at B8
(listing the final election returns from the Democratic primary for the 12th district). Incidentally, Ms.
Velazquez was heavily outspent. Solarz spent $2 million in the race, about $220 for each of the 9138
A1 (noting that Solarz had a "campaign fund of $2 million, more than all the other candidates
combined").

n163 Tuesday's Primary Results, N.Y. TIMES, Sept. 17, 1992, at B6.

n164 See Tabor, supra note 143, at B6 (suggesting that Elizabeth Colon weakened Mr. Solarz by
drawing Asian and white votes).

n165 See supra text accompanying note 152.

n166 See Guinier, supra note 23, at 1434-37.

n167 See Guinier, supra note 50, at 1102-09.

n168 Under a cumulative voting mechanism, the shareholders of a corporation can multiply the
number of votes they are entitled to cast by the number of directors on the ballot and then distribute
these votes however they wish. For example, a shareholder could cast all of her votes for only one
director in one race and forgo voting in the other elections. See REVISED MODEL BUSINESS
In raising the idea of alternative remedies, I am not advocating a grand moral theory of representation. I introduce the idea of cumulative voting primarily as a means of broadening the debate about solutions to the continuing problem of racial discrimination and polarization in the political process. I do not believe that cumulative voting is a panacea. Nor do I suggest that it should be imposed on nonconsenting jurisdictions nationwide, or that it should be considered in the absence of evidence that existing electoral arrangements are operating unfairly.


In a jurisdiction with 1000 voters, 250 of whom are black, a modified at-large plan would use a threshold of exclusion of 1/11th based on the formula of one divided by one plus the number of open seats, plus one. This means that 1/11th of the voters could not be denied representation. The threshold exclusion would work out to be 91 voters (91 is 1/11th of 1000, plus 1). Here, there are 250 black voters. Blacks are more than 2/11th, but short of 3/11th, of the population.

If all voters had 10 votes and could plump them any way they wished, any candidate supported intensely (meaning receiving all 10 votes) by 91 voters would get elected.

*See* Cole, * supra* note 168, at 229. In this formula, \(V\) equals the total number of voters, and \(R\) equals the number of representatives to be elected. A minority group may assure itself of representation by having this number of voters plump their votes for a single candidate. In *No Two Seats*, I suggested the following example of a jurisdiction that is to elect ten representatives:

\[
\frac{V}{R + 1} + 1
\]

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\[
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Although the concept of one-person, one-vote focuses on the importance of representing the individual, systems of semiproportional representation represent groups and individuals better than winner-take-all equipopulous districts. In such districts, one-person, one-vote has been fulfilled, but it has not led to one-vote, one-value. The party winning 51% of the votes actually would capture 100% of the legislature seats. See SHAPIRO, supra note 37, at 222. In that scenario, 49% of the votes are wasted or lost. The votes of the 49% then do not have equal values to the votes of the 51%, because only the latter votes led to the election of someone representing the voters' interests. More votes can have equal value in a proportional representation system where the seats awarded are directly proportional to the votes cast. PULZER, supra note 57, at 48, 49; see also DIXON, supra note 1, at 525 ("Pure proportional representation maximizes the number of votes that 'count' and minimizes the number of votes that are 'lost.');

I should reiterate that my use of the term "proportional representation" is not an effort to reduce political equality to numerical head-counting or numerical shares, but describes instead the goal of political fairness or democratic fair play. I disavow the idea that political fairness is simply a function of numerical proportions or shares. Indeed, my project involves efforts to avoid binary win/lose terminology. In this sense, politics is not necessarily a zero-sum game, but a continuous process of negotiation, compromise, and consensus building toward positive-sum solutions.

See 42 U.S.C. § 1973(b) (1988) (prohibiting practices that give minority groups "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

Again, I do not argue that the 1982 amendments mandate this view. Especially in light of the Supreme Court's interpretation of the term "voting" in Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992), legislative action may be necessary in the context of § 5 to re-assert congressional intent about the scope of voting. At this point, I am simply suggesting an approach to curing political unfairness that builds on the themes that have been the subject of the debate surrounding the 1965 Act and especially its 1982 amendments: How can we ensure political equality and meaningful opportunities to participate for a group that has historically been excluded from the franchise without reinforcing the polarization the Act is designed to remedy?


Id. at 113.

Id.

Id. at 114.

Id.

Id. at 114-15 n.5.

See id. at 118 (holding that if vote dilution is established, "the appropriate remedy is to restructure the districting system to eradicate, to the maximum extent possible by that means, the dilution proximately caused by that system; it is not to eradicate the dilution by altering other 'electoral laws, practices, and structures' that were not actually challenged by the claim as made" (emphasis in
n182 Id.

n183 See infra notes 81-84 and accompanying text.

n184 See generally Guinier, supra note 50 (offering a critique of black electoral success theory).

n185 See, e.g., McNeil v. Springfield, 851 F.2d 937, 939, 942-43 (7th Cir. 1988) (holding, as a threshold requirement, that a minority must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district" (quoting Thornburg v. Gingles, 478 U.S. 30, 50 (1986)), cert. denied, 490 U.S. 1031 (1989).

n186 See Thornburg, 478 U.S. at 77 (finding that the presence of minority representation would be inconsistent with an allegation of vote dilution); see also supra note 22.

n187 Thornburg, 478 U.S. at 77.

n188 Bullet voting is a technique employed in at-large elections whereby a politically cohesive minority strategically concentrates its voting strength. Guinier, supra note 50, at 1142 n.307. By voluntarily abnegating the right to vote for a full slate of candidates and casting instead only one ballot for the "black" candidate, the minority bloc can increase the probability of electing their favored candidate. See id. Bullet voting "forces a minority to limit its vote while the majority exercises control over the full state." Id.

n189 Sail trimming refers to the phenomenon where blacks elected from majority-white multimember districts "defer to other blacks to introduce and promote controversial legislation that would affect black constituents." Id. at 1104 n.18.

n190 White voters in District 23 thus elected all the legislative representatives; without some white cross-over voting, the black candidate would not have received enough support, even with bullet voting by blacks.

n191 This is true for conservative Republicans in Democratic communities or religious minorities within the larger white electorate.

n192 See Douglas, supra note 66, at 155.

n193 YOUNG, supra note 133, at 82.

n194 See LoFrisco v. Schaffer, 341 F. Supp. 743, 750 (D. Conn. 1971) ("[I]t is hard to fault minority representation as non-democratic or impermissible as a legislative goal. . . . [I]t is not antimajoritarian to limit the power of the majority to command more power than its actual strength at the polls."). aff'd, 409 U.S. 972 (1972).

n195 See Guinier, supra note 23, at 1487-94.

n196 For example, where local county governments, such as Chilton County, Alabama have adopted a modified at-large election system, new interest constituencies have been recognized. For the first time this century, white Republicans and a black Democrat were elected to the county school board
and county commission. But, the process of self-government has not broken down. In a county that is about one-sixth black, three white Republicans, three white Democrats and one black Democrat now sit on the school board and the commission. With the balance of power held so closely between Republican and Democratic commissioners, the black representative can be an influential swing vote.

n197 Both Bernard Grofman and Pamela Karlan have helped me recognize the extent of this problem.

n198 See Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991).

n199 Recognition of this fact was behind the development of the 65% rule. See United Jewish Orgs. v. Carey, 430 U.S. 144, 164 (1977) (noting that blacks generally constitute a smaller proportion of the voting-age population than of the total population).

n200 David Myers, America's Social Recession, CHI. TRIB., July 30, 1992, § 1, at 27.

n201 DIXON, supra note 1, at 22 (emphasis added).