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THE SUPREME COURT, 1993 TERM: [E]RACING DEMOCRACY: THE VOTING RIGHTS CASES.

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SUMMARY:
... Race is an issue that continues deeply to divide American politics. ... Because the Court did explicitly take account of race in *De Grandy* and *Holder,* however, the 1993 Term undercuts critics of the Voting Rights Act who challenge any kind of race-consciousness in drawing districts or providing minority group representation. ... For Justice Thomas, the immorality of group representation justified extreme judicial action: ignoring traditional rules of stare decisis, Justice Thomas proposed overruling *Thornburg v. Gingles,* the Supreme Court decision that established a vote dilution claim under the Voting Rights Act. ... In an ironic twist, Justice Thomas's approach, which repudiates racial minority group representation in the cause of race-neutrality, is not itself race-neutral. ... Implicit in Justice Thomas's argument that race is not a political category may be the concern that racial group members who do not share the dominant political viewpoint of the racial minority group will be ignored by representatives chosen by the minority group. ... In my opinion, one premise of the Voting Rights Act is the essential democratic role that minority racial group representation plays in dispersing authority throughout the political process. ... Each voter is given the same number of votes as open seats. ...

TEXT:
[*109] The American people are infected with racism -- that is the peril. Paradoxically, they are also infected with democratic ideals -- that is the hope.

MARTIN LUTHER KING, JR. [1]

Race is an issue that continues deeply to divide American politics. Many Americans vote along racial lines [2] or identify themselves in racial terms. [3] Americans of color still suffer disadvantage in racial, as well as economic, terms. [4] Even Supreme Court Justices who condemn the assumption that race defines political interests acknowledge the practical importance of race in drawing election districts. [5] Despite this clear evidence that race matters, however, the Supreme Court's jurisprudence offers little direct guidance on how to structure democratic competition among racial groups that seek political power and influence.

The question of group representation plays out with particular acrimony in the voting rights arena because of two competing forces: the inescapable race consciousness of the Voting Rights Act [6] and the ideological **[*110]** aversion of many federal judges to race-conscious public policy. The language of the Voting Rights Act explicitly recognizes racial categories of voters, [7] whose behavior it measures against an ideal of political equality. The Voting Rights Act, especially as amended in 1982, acknowledges that race can function as an impediment to the expression by certain groups of voters of their political preferences; accordingly, its goal is to remedy voting practices that have discriminatory results, regardless of the purposes of the practices. [8] The Voting Rights Act also uses race to frame the remedy for group-based exclusion from the political process. Race-conscious districting is currently the judiciary's remedy of choice for minority vote dilution. [9] Such districts assure politically cohesive racial minorities the opportunity "to elect representatives of their choice," [10] as guaranteed by section

2(b) of the Voting Rights Act.

The explicitly race-based approach of the statute and of judicial interpretations of it, however, directly conflicts with an emerging consensus among conservative and neoliberal commentators about the danger of any and all race-conscious decisionmaking by government. [11] Some apparently believe that a society once deliberately segregated by race cannot be deliberately integrated by race. The Supreme Court has implied that race consciousness is dangerously close to racial discrimination [12] and that racial classifications pose a "risk of lasting harm to our society" by "reinforc[ing] the belief, held by too many for too much of **[*111]** our history, that individuals should be judged by the color of their skin." [13]

This hostility toward race-conscious decisionmaking is consistent with the growing tendency since the Voting Rights Act's passage thirty years ago to think about equal opportunity in purely individualistic terms. [14] It also follows from the assumption that race is inherently divisive, even when used to address the concrete results of past racial discrimination. For some, colorblindness, and not integration of legislative bodies, is the goal. The problem with this view is that the rhetoric of individualistic, colorblind decisionmaking is impossible to reconcile with a statute that explicitly singles out racial groups for protection from political marginalization. [15]

Two voting rights cases decided during the 1993 Supreme Court Term invited the Court to resolve the conflict between individualistic rhetoric and the race-conscious Voting Rights Act. These cases presented the Court the opportunity to answer the basic question underlying this tension: should racial groups be represented because of, not merely in spite of, their group identity?

In *Holder v. Hall,* [16] the Court confronted "the question whether the size of a governing authority is subject to a vote dilution challenge" under section two of the Voting Rights Act. [17] Justice Kennedy, writing for the Court, avoided the racial subtext by holding that the black plaintiffs could not maintain a section two challenge to a single-person commission because there were no "benchmarks" against which to measure **[*112]** the dilutive voting practice. [18] In *Johnson v. De Grandy,* [19] the Court considered a vote dilution challenge to single-member legislative districts. [20] Justice Souter, writing for the Court, camouflaged the tension by holding that there can be no violation of section two when, "in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts *roughly proportional*" to their percentage of the local, as opposed to the state population. [21]

The Court failed in both cases to seize the opportunity to address openly the conflict between the rhetoric of colorblindness and the statutory language of racial group empowerment. Thus, although the Court's pragmatic approach resolved the specific controversies of the moment, the Court did not resolve the larger policy questions about group representation. As a result of the Court's tentativeness, its entire voting rights jurisprudence remains subject to attack. [22]

For example, in a stunning concurrence in *Holder v. Hall,* Justice Thomas asserted that it is erroneous to read the Voting Rights Act to "cover claims of vote dilution." [23] Justice Thomas argued that racial groups should not "be conceived of largely as political interest groups." [24] He argued that the current case law should be overturned to eliminate claims for "proportional allocation of political power according to race." [25] Theoretical assaults -- like the ones found in Justice Thomas's strongly worded concurring opinion in *Holder v. Hall* and in the amici briefs in *Johnson v. De Grandy* [26] -- called for a powerful response grounded in a democratic theory of group representation. None was forthcoming. Instead, the Court left unexplored the volcanic core of the contemporary voting rights debate -- whether groups should be represented.

[*113] This Case Comment argues that the Voting Rights Act is a statute in search of a theory. Both *De Grandy* and *Holder* illustrate the inadequacy of current voting rights jurisprudence to articulate a principled and workable strategy for enforcing the Act. That Congress has passed, reenacted, and then amended the law [27] may provide the legal authority for judicial intervention to protect minority group voting rights. But neither the Congress that passed the statute, nor the Court that has consistently upheld it, has excavated the principles of democracy in which to locate a group's statutory right to an effective vote. Because the Supreme Court has not formulated a coherent theory on which to rest the Voting Rights Act, the Act remains vulnerable to ideological challenge every time a federal court is asked, or a state voluntarily seeks, to remedy racial minority group exclusion.

The goals of the Act can and should be defended by framing them philosophically within a theory of group representation. The premise of such an approach is that group representation, as a matter of democratic theory, is not about race but about democratic political community. Because of the confluence of historical discrimination and contemporary exclusion, racial and language minority groups enjoy an exclusive right under the Act to establish a legal violation. [28] Once a violation has been proved, however, the most acceptable way to empower the particular plaintiff class would be to move to a broader conception of group representation based on interests rather than race.

Framed by a theory of group representation, the Voting Rights Act could achieve its original goal: to enfranchise victims of racial discrimination. This theory of group representation could also answer those whose criticisms of the Act are based in democratic theory. The theory of group representation, at the remedial stage, would treat all politically cohesive groups alike. Informed by such a theoretical approach, judicial intervention may be popularly understood as a means of transforming the political process to benefit all voters. The Voting Rights Act could then be implemented as it was intended -- to achieve more democracy, not less.

I. THE 1993 TERM VOTING RIGHTS CASES

Johnson v. De Grandy and *Holder v. Hall* posed the question whether section two of the Voting Rights Act of 1965, as amended in 1982, requires federal courts to maximize, or at least to ensure, the representation of minority groups. In *De Grandy,* the Court held that section two does not require maximization of minority group-dominated **[*114]** districts. [29] Similarly, in *Holder* the Court construed section two to grant a minority group the right to representation within a governing body, but not the right to challenge the size of that body, and thus refused to require minimum levels of minority group participation in government. [30] Both holdings constrain the federal judiciary's ability to enforce the Voting Rights Act. The *Holder* case, in particular, undermines Congress's decision to override local majorities whose election structures result in minority group exclusion. [31]

A. Johnson v. De Grandy

In *De Grandy,* the district court consolidated three actions filed by African American plaintiffs, Latino plaintiffs, and the Department of Justice. [32] The African American and Hispanic plaintiffs separately alleged that Florida's 1992 districting plan [33] diluted their respective groups' voting strength. [34] The 1992 plan created twenty house districts and seven senate districts located at least partially within Dade County. [35] The district court held that, under the three-pronged test of *Thornburg v. Gingles,* [36] Latinos were entitled to be majorities in eleven instead of their existing nine house districts, and ordered the legislature to redraw the lines accordingly. [37] The district court also held that the senate districts proposed by the plan diluted both African American and Hispanic voting strength. [38] But the district court did not grant a remedy for the senate districts because it found it impossible **[*115]** to

create an additional district for either group without diluting the voting strength of the other. [39]

The Supreme Court, in an opinion by Justice Souter, [40] found no statutory violation in either the house or senate districting under the 1992 plan and therefore did not reach the issue of remedies. [41] Holding that *Thornburg v. Gingles* requires a totality of the circumstances inquiry, [42] the Court affirmed the district court's decision to uphold the senate districting plan [43] and reversed the district court's holding that the house districting plan violated section two. [44] The Court's holding with respect to the house districting rested on its factual finding of rough proportionality on a local rather than a statewide basis, which it arrived at by disaggregating and comparing each protected group's *local* voting-age population with the number of arbitrarily designated *local* districts each group controlled. [45]

The Court reasoned that the State was under no duty to maximize minority districts for either blacks or Latinos. [46] Rather, the State fulfilled its obligation to give minorities an equal opportunity to participate in the political process because minority voters formed "effective voting majorities in a number of districts roughly proportional" to their respective shares of a state divined local population. [47] Thus, the *De Grandy* decision indicates that, once a majority subdivides its power or distributes decisionmaking power on a limited local basis, minorities are entitled to a fair, but not necessarily the most fair share.

[*116] *B.* Holder v. Hall

The plaintiffs in *Holder v. Hall* belonged to a minority group (African Americans) that had never been able to elect any of its members to the single-person commission that governs Bleckley County, Georgia. [48] They challenged the county's sole-commissioner form of government under section two and under the Fourteenth and Fifteenth Amendments. [49] The district court applied the three-part *Gingles* test [50] to the section two claim and held that the plaintiffs met the compactness prong of the test but failed to establish that their minority group was politically cohesive or that whites usually voted as a bloc. [51] The Eleventh Circuit reversed on the statutory claim, finding that the plaintiffs satisfied all three *Gingles* factors. [52] The Supreme Court granted certiorari to review the statutory claim [53] and reversed and remanded. [54] In an opinion by Justice Kennedy, the Supreme Court held that Bleckley County's single-person county commission was not subject to challenge under section two. [55] The five-Justice majority, cobbled together in three separate opinions, [56] gave three different explanations for refusing to apply section two to Bleckley County's form of government. Justice Kennedy determined that section two does not cover the size of a governing body because sizes vary so widely that no standard exists for comparison. [57] Justice O'Connor agreed with this rationale but argued that a practice subject to scrutiny under section five of the Voting Rights Act [58] might also be subject **[*117]** to a section two dilution challenge. [59] Justice Thomas concurred but called for a "systematic reassessment" of the Court's interpretation of section two. [60] In dissent, Justice Blackmun responded that the proposed five-member commission presented a reasonable benchmark because such a commission was specifically authorized by the Georgia legislature, is the most common type of governing body in Georgia, and was adopted by Bleckley County itself for its school board. [61]

C. Implications

The opinions in these two cases are in tension. On the one hand, *De Grandy* suggests that proportionality of representation is "a relevant fact in the totality of circumstances" and is to be considered with regard to a section two claim. [62] On the other hand, according to *Holder,* if a jurisdiction sets the size of the governing body so low that it permits group representation only for the dominant racial group, unrepresented minorities have no cause of action under section two. [63]

In the prior Term's *Shaw v. Reno* decision, [64] the Court recognized the role of race in American democracy but sought, in the name of majoritarian democracy, to place limits on the use of race as a primary factor in allocating representation. Because the Court did explicitly take account of race in *De Grandy* and *Holder,* however, the 1993 Term undercuts critics of the Voting Rights Act who challenge any kind of race-consciousness in drawing districts or providing minority group representation. [65] Thus, if *Shaw v. Reno* marks the voting rights precipice, the Court blinked in its 1993 Term. In another sense, however, the Court continues to defer to the political chorus of local white majorities who underrepresent, or even refuse to represent, racial minorities. This indifference to the way racism undermines representative **[*118]** democracy contradicts the inclusive conception of democracy that informs the statute. [66]

Although the Court affirmed the general race-conscious thrust of voting rights jurisprudence, [67] the Court's opinions are impoverished by their failure to approach minority group representation from a more general understanding of representative democracy. The Court failed to answer directly the broader questions of democratic theory and the rhetoric of colorblindness that Justice Thomas raised in his provocative *Holder* concurrence.

II. JUSTICE THOMAS'S RADICAL RECONSTRUCTION

Concurring in *Holder,* Justice Thomas's goal was to reconstruct the Voting Rights Act, especially as amended in 1982, to remove the right to group representation from the statute. [68] Justice Thomas's project -- to shrink the statutory meaning of voting to the single act of casting a ballot -- was not a conventional attempt at statutory construction, but a radical reconstruction of the law. [69]

Justice Thomas acknowledged that courts have consistently interpreted the Voting Rights Act to protect more than the formal right to register and vote. [70] The statute refers to an "effective" vote and establishes the right of members of a protected class to enjoy the same "opportunity to participate" *and* "to elect" representatives of their choice as do other members of the electorate. [71] The Senate Report that accompanied the 1982 amendments to section two contains ninety-two references to vote dilution and the representation of minority groups in its 108 pages. The report explains:

[*119] There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. . . . [The] federally protected right [to vote] suffers substantial dilution . . . [when a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted. [72]

Although the legislation was passed by overwhelming bipartisan congressional majorities and signed into law by a conservative Republican President, [73] Justice Thomas dismissed such legislative history "gloss" [74] as "a series of partisan statements about purposes and objectives." [75]

Instead, Justice Thomas focused exclusively on the Act's text. According to Justice Thomas, reviewing courts have distorted the statutory definition of voting, which "include[s] all action necessary to make a vote *effective,*" by "seiz[ing]" on the word "effective" and "pluck[ing]" it "out of context." [76] Justice Thomas did not say exactly what might be the proper context for understanding Congress's use of the word "effective." But he overlooked an obvious possibility: when Congress first passed the Act in 1965, the Supreme Court was using the term "effective" in its one person/one vote opinions. At the time, constitutional one person/one vote complaints alleged a systematic plan to "discriminate against a *geographical class* of persons." [77] Voters assigned to urban and suburban districts complained that, because of the *size* of their districts, their votes were less effective than votes cast in more sparsely populated rural districts. [78] In *historical* context, the **[*120]** term thus referred to the post-election concern for the "weight" or "influence" of a geographic grouping of votes, and not merely to formal

access to a voting booth. [79]

Nevertheless, Justice Thomas decided that an effective vote means simply the individual ability to cast a ballot. Justice Thomas justified his departure from thirty years of statutory construction primarily on political theory grounds. [80] In Justice Thomas's view, the Supreme Court opinions that construe the statutory language "all action necessary to make a vote effective" [81] are philosophically wrong-headed [82] and essentially reflect nothing more than a "political decision" that the purpose of a vote or, more precisely, of a fully effective vote, is to control seats in an elected body. [83] According to Justice Thomas, this measure of efficacy equates voting power with control of single-member districts. [84] This standard uses geographic districts to allocate political power, an approach that, to Justice Thomas, is "not a requirement **[*121]** inherent in our political system." [85] He also pointed out that, even within geographically districted governing bodies, votes that do not control a seat may nevertheless be an influential "'swing' group of voters" [86] or be cast in "minority 'influence' districts." [87]

The idea of vote dilution embodied in the Voting Rights Act -- the concept that groups can be arbitrarily deprived of political clout by the way an election structures and allocates political power -- is for Justice Thomas simply that: an idea. It is a question of political theory on which reasonable people may differ. For Justice Thomas, the Act is equally compatible with an alternative theory of democracy, one in which the right to vote conveys only symbolic, not necessarily real privileges. [88] In such a "republican arrangement," as long as minorities can vote, they have all the political power they are due; if voting is the extent of political rights, the government should not intervene when "numerical minorities lose." [89]

The professed jurisprudential virtue of Justice Thomas's formulation is that it avoids "immers[ing] the federal courts" in the "hopeless project" of choosing between competing political theories [90] and limits federal judicial intervention in local election matters. Justice Thomas's interpretation of the statute, however, itself rests on a particular political theory. Justice Thomas's political theory, or at least the theory he imputed to the Congress that enacted the Voting Rights Act, is that political equality is satisfied by the simple condition of universal suffrage. [91] His position -- that the statute should be limited **[*122]** to claims that challenge direct denial of the right to cast a ballot -- rests on a political theory of individualized democracy. [92]

Thus, Justice Thomas must argue for more than a Frankfurter-like judicial abstention. If he wants courts to interpret the Act as consistent with one political theory rather than another, Justice Thomas must make a different case. This he tries to do by arguing that the conventional view of the Act as embodying the concept of group representation is not only a dangerous political choice; [93] it is also an immoral choice, because it treats racial groups as if they were political interest groups. [94] On this account, racial group representation emphasizes irrelevant differences, such as race, and suppresses relevant differences, such as the dissenting ideology of "double minorities." [95] For Justice Thomas, the immorality of group representation justified extreme judicial action: ignoring traditional rules of stare decisis, [96] Justice Thomas proposed overruling *Thornburg v. Gingles,* [97] the Supreme Court decision that established a vote dilution claim under the Voting Rights Act. [98]

Justice Thomas's approach neglects the fact that representative democracy is neither exclusively individual nor discrete but is relational **[*123]** and inherently group-based. [99] Further, although Justice Thomas offered a theory of exit for minority group members who choose to emphasize their individual identity, he offered nothing to explain or empower those whose *chosen* identity is group-based. [100]

In an ironic twist, Justice Thomas's approach, which repudiates racial minority group representation in

the cause of race-neutrality, is not itself race-neutral. He posited that blacks and Latinos can serve as influential "swing votes" when in the minority. If true, this premise should also apply to double minorities, who dissent from the prevailing views of their racial group. [101] Yet Justice Thomas seems to assert, to the contrary, that minority racial group representatives will not represent all of their constituents, at least not to the same extent as white politicians elected from single-member, multi-racial districts. [102]

Implicit in Justice Thomas's argument that race is not a political category [103] may be the concern that racial group members who do not share the dominant political viewpoint of the racial minority group will be ignored by representatives chosen by the minority group. This is a claim that, even when racial groups are treated as political interest groups, they will function in contravention of their own political interests. They will refuse to bargain. They will refuse to form coalitions. **[*124]** They will simply stamp their feet and demand racial group recognition but will not negotiate for racial group influence.

The political theory that underlies this reconstruction of the Voting Rights Act is not just race-conscious. It is similar to the patronizing attitude toward people of color associated with the first Reconstruction following the Civil War. It exploits many of the very stereotypes about blacks that Justice Thomas tried so hard to dislodge.

Alternatively, Justice Thomas may be arguing that dissenting racial minority voters deserve special protection from other minority voters. Yet given his views that numerical minorities lose in a majoritarian democracy, he can hardly argue that the jurisprudence of minority voting rights should be governed by special preferences to double minorities. [104]

Beyond these theoretical concerns, Justice Thomas's formalistic approach to political participation is an unpersuasive exercise in statutory construction, even to critics of the Voting Rights Act, and certainly to a majority of the Court. [105] Justice Thomas arrogated to himself the task of reconstructing current law and chose for the Congress a political theory of limited access. Notwithstanding Justice Thomas's discomfort with judges' implementing certain "political choices," [106] Congress, by the terms of the Voting Rights Act, chose to involve the judiciary in precisely this way.

Despite the gaps in its reasoning, Justice Thomas's opinion is important for two reasons. First, Justice Thomas demonstrated the centrality of political theory to an understanding of minority vote dilution. As Justice Thomas argued, vote dilution claims require the federal judiciary to develop theories of the basic principles of democratic self-government. The question of defining minority vote dilution can only be answered by reference to a theory that defines effective participation in representative government. Second, Justice Thomas provided an enduring rationale for future challenges to the Act. Although the **[*125]** dissents in *Holder* and the majority in *De Grandy* recognized the broad remedial goal of the statute, none of the other opinions in those cases took Justice Thomas's challenge to articulate a theory of democratic representation from which a principled and workable strategy for enforcing the Act might emerge. [107]

III. TOWARD A THEORY OF INTEREST GROUP REPRESENTATION

This Case Comment argues that, in order to legitimate the Voting Rights Act within the contemporary discourse of race, the Act must be considered from the perspective of a broader theory concerning the democratic representation of groups. [108] First, group representation is not only consistent with, but is the very essence of representative democracy. Second, although race may be constitutive of identity, it should be treated as a political, not a biological category. Finally, in choosing remedies to guarantee representation opportunities for politically cohesive racial groups, courts should select remedies that

also have the potential to empower other politically cohesive groups. This is especially true when successful voting rights challenges by racial minority groups expose more systematic problems with current political arrangements.

A. The Essentially Democratic Character of Group Representation

Group participation in political life is consistent with fundamental democratic principles. Theories of both communitarian democracy and democratic pluralism insist that democracy is sustained by the intermediate groups or associations that provide collective bases for political action.

Communitarianism posits that the very essence of democracy is community, a collection of individuals with a collective consciousness or common cultural and social experiences. [109] According to communitarianism, democracy is most fruitful when intermediate groups or local communities disseminate information, facilitate debate, and promote interaction among citizens.

Group participation is also essential to the pluralist conception of democracy as free competition among interest groups. Pluralism views the democratic process as a series of coalitions, negotiations, bargains, **[*126]** and compromises among groups, which ultimately result in group winners and group losers. [110] In a pluralist analysis, shifting alliances between groups help ensure that no one dominant group monopolizes power. [111] Groups provide minorities an opportunity to organize effectively with other minorities to veto objectionable policies, or at least to moderate majority tyranny. In this way, collective political action can enhance the power and influence of the individual. [112]

Even if one accepts that group participation is central to American politics, the question remains whether group participation is or should be fundamental not only in the electoral process, but also in post-election politics. To answer affirmatively suggests an instrumental, rather than a merely symbolic conception of voting. In my view, the right to vote essentially consists of three different rights: the right to cast a ballot, the right to cast a ballot that "counts," and the right to cast a ballot that embodies a fair chance to influence legislative policy-making. [113] Despite the Supreme Court's frequent emphasis on the individual in voting rights jurisprudence, the Court has also recognized that electoral rights embody "a constellation of concepts," and that, as one moves from ballot access to influencing legislative policy, "voting loses its purely individual character." [114] In other words, the right to vote **[*127]** should be enjoyed both by individuals and by groups throughout the political process as well as at the ballot box.

Representative democracy is premised on the notion that one representative can assert the collective interests of a group of voters. [115] By anointing one individual to stand in for a group, representative democracy thus depends on the aggregation of voters. In America, voters are aggregated largely through single-member electoral districts, which subdivide the larger whole to empower local, geographically based groups. [116] Districts are geographic units represented by a single individual who is presumed to speak for and to serve a constituency with common interests defined by physical proximity. [117] Territorially based electoral districts are compatible with federalism which, as both a political principle and an institutional structure, seeks to balance competing group attachments and to facilitate geographically based political autonomy. [118] If it is consistent with democratic principles to allocate electoral representation to geographically defined groups, it should be consistent with democratic principles to base representation upon other types of groups as well. This is especially true given that geography may not be the most salient characteristic on which to base group representation. [119]

[*128] In my opinion, one premise of the Voting Rights Act is the essential democratic role that

minority racial group representation plays in dispersing authority throughout the political process. A violation of the Act can be established by a showing that "members of a [protected racial] class . . . have less opportunity than other members of the electorate to participate in the political process *and to elect representatives of their choice*." [120] A violation does not require evidence that an individual has been denied equal electoral participation; a violation can be based upon proof that members of a racial group have been given less political and electoral opportunity.

Justice Thomas's formalistic view of political participation is thus in tension with the apparent group-based, election and post-election focus of the Voting Rights Act. The Act's promise to minority racial groups that they will be protected from electoral systems that afford them "less opportunity . . . to elect representatives of their choice" [121] is vacuous if, as Justice Thomas suggests, it encompasses no more than protection of the right to cast individual ballots. Although the Act expressly states that there is no right to "descriptive" or proportional representation by the actual members of a racial group, [122] the Act provides that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." [123] This language is a strong indication that the foundation of the Voting Rights Act is a political theory that includes representation of, not just voting by group members. [124]

[*129] *B. Protecting Racial Group Representation*

The Voting Rights Act enumerates certain protected classes and creates a cause of action whereby members of those classes can invoke the judicial process to help ensure equal representation for their groups. [125] Because the Act's provisions include only racial and language minorities, many of Justice Thomas's objections to the Act stem from his perception that the Act affords preferential treatment to those minority racial groups it protects. But such objections to preferential treatment do not go to the broader question: is group representation consistent with democratic principles? If the answer to that question is "yes" -- and the Court's constitutional jurisprudence, as well as democratic theories of pluralism and communitarianism, suggests that it is -- then the Act's protection of group representation is not inconsistent with democratic ideals. Moreover, if the empirical evidence, including the history of racial discrimination in the United States, demonstrates that racial minorities, as a group, have been traditionally underrepresented, then the special protections afforded to those groups under the Act are justified. [126]

In the Voting Rights Act, Congress did not create race as a category; Congress simply acknowledged its political salience. [127] Since race is a political cue for both whites and people of color, it is not surprising that race also correlates with voting behavior in many jurisdictions. [128] In light of America's racial history, in many parts of the country race functions as a proxy, albeit a crude one, for the political interests of disadvantaged groups. [129] Minority groups that have been discriminated against deserve representation. Intervention under the Act is justified when a minority group has been excluded *as a group* because of prejudice.

But racial group identity is not merely a reaction to disadvantage or oppression. Racial group members have an immutable characteristic that society uses as a basis to discriminate, which ties members **[*130]** together by common experience, and which encourages members to socialize and to marry each other. Providing equal representation for underrepresented minority groups would not only begin to remedy historical oppression of certain groups, but might also create incentives for their increased political participation. Such participation has the potential to diversify debate on issues of public importance and to legitimize democracy by presenting a greater range of views in the legislature to mirror or model an integrated society. [130] At their most compelling, claims for minority group representation seek to generate greater confidence in the fairness and accountability of government to

the interests of all underrepresented citizens.

In other words, minority group representation is not purely cultural, historical, or biological; it also has a political component. Group members may identify collectively along a common axis and organize to promote common interests in ways similar to other political associations. [131]

Yet there are crucial differences between racial minorities and other political interest groups. A social or political interest group member comes to the group as a matter of choice. Identifying with the group is an affirmation, validation, or mirroring of a chosen identity. On the other hand, members of a racial, ethnic, or religious minority do not necessarily choose their minority group identity. [132] Racial or ethnic groups are relevant because, as a sociological fact, individuals define, understand, and identify themselves and their interests (and are defined, understood, and identified by others) in part in terms of their racial or ethnic group membership. Racial, religious, ethnic, or language minority group membership, however, does not exclusively form the person -- the experience is complex. [133] Some group members prefer to deny or to disassociate from their group identity. **[*131]** Others dissent from the prevailing views of most group members but, at the same time, wish to affiliate as group members.

To return to the questions posed by the cases, should race be considered in determining the fair representation of minority groups? Some, such as Justice Thomas, say that racial minorities should not be treated as groups in the electoral process because their members are adequately represented as individuals when formal, legal barriers to ballot access have been eliminated. Historically, designating racial groups was both a barrier to their participation and a definition of their existence. Thus, on this account, to recognize racial minority groups formally creates the potential for reimposing discrimination. [134] While a racial group may choose to identity itself privately, publicly it should have no function or formal status.

Others might argue that there is no right to fair representation for any non-geographic group, and therefore that racial groups deserve no special protection. But to respond, as Justice Thomas seems to, that, because the experience of race is complex and potentially divisive, it simply does not exist -- or should be ignored -- is to forbid racial generalizations, whether or not they are accurate. Ultimately, this decision to ignore race treats racial minority groups differently from other groups, whose existence the political system encourages.

I propose an alternative view. I argue that the underrepresentation of racial and language minority groups is a problem because it disables groups that function politically from playing an important democratic role. Exclusion of a racial or language minority group exposes a deep fissure in the American democratic bargain, which purportedly reconciles majoritarian preferences with minority interests. The challenge is to remedy that flaw without necessarily requiring a single minority identity or reinforcing racial group boundaries as impenetrable.

However defined and redefined, contextualized and complicated, the almost irrefutable existence of something like a racial minority group identity suggests that a vital political system must accommodate those who *choose* that identity. To make room, however, does not mean to evict other identities. To this end, a racial minority group should be represented to the extent that its members in fact act collectively. Mere assumptions about alleged uniformity should be insufficient to justify measures to ensure group representation. This approach acknowledges that one's racial group is not the only club to which one belongs. Collective group preferences might be measured by using innovative electoral schemes like cumulative voting and proportional **[*132]** representation. [135] In this view, unity is defined as collaboration rather than as sameness. Group representation becomes a dynamic, interactive process that makes political stability more likely.

The fundamental question posed by vote dilution cases is how much a minority citizen's vote should be worth in a representative democracy. [136] Given the increasing ambivalence with which the present Court treats the statutory basis for protection of racial and language groups, it may make sense to reframe the question more broadly. Rather than the implicitly preferential suggestion that racial minority groups should be represented, the question could be whether racial minorities should be treated like other political groups. In other words, can remedies be devised to allow voluntary interest groups to be represented in proportion to their electoral strength?

C. Remedies Based on a Theory of Fair Representation for Voluntary Interest Groups

In the debate about the fairness of the Voting Rights Act's protection of racial group representation, concerns about special treatment of minority racial groups can be alleviated if federal courts take care in constructing remedies for Voting Rights Act violations. Although only certain racial and language minority groups are statutorily entitled to allege a violation of the Voting Rights Act, court-imposed remedies for such violations can and should take into account the need to protect representation for non-racial minority groups as well. Just as the district court in *De Grandy* was unwilling to impose a plan that benefited either African Americans or Latinos at the expense of the other group's ability to achieve group representation, [137] courts devising vote dilution remedies would be within their authority to consider the representation needs of groups other than those entitled to protection under the Act. [138] Such remedies "value" every citizen's vote equally, **[*133]** meaning everyone's vote would presumably count toward the election of someone. [139]

I call this principle of democratic representation "one vote/one value." [140] When racial minority groups prove a violation of the Act, they essentially establish that the principle of one vote/one value has been thwarted; they are unable, because of prejudice, to elect representatives of their choice. However, the ideal of one vote/one value can only be realized in a system of universal group representation in which everyone is given the opportunity to identify with a "chosen" group based on real interests -- not merely on geography or arbitrary racial characteristics. [141]

A violation can only be proved under the Act based on evidence of racial or language minority group exclusion. However, at the remedial stage, judicial intervention should be justified in terms of one vote/one value principles of democratic group representation. [142] Elsewhere I have explored alternative remedies that are consistent with a one vote/one value universal approach. For example, non-districted solutions, such as cumulative voting, recognize group identity only to the extent that voters choose to act upon it politically. [143] Each voter is given the same number of votes as open seats. In a multi-seat election, voters can aggregate their votes to reflect the intensity of their preferences. Because voters, depending on their interests, can form coalitions that cut across racial lines, this form of political arrangement diminishes the likelihood of reifying race as a fixed, political category. Members of different racial groups who enter into such alliances are more likely "to find confidence-building measures that build trust and overcome antagonism." [144]

[*134] Indeed, much of my work is dedicated to finding electoral arrangements that empower racial minorities by building cross-racial alliances. I have argued, for example, that a remediation strategy based on the principles of proportional representation for *all* politically cohesive groups is a less arbitrary means of recognizing race as a social and political category than is our current, geographically based system. Only racial groups that demonstrate actual political cohesion are represented, and then only to the extent that they in fact mobilize members of the electorate to cast their multiple votes in support of a common set of interests. These interests may or may not be racially based, and those who support them may or may not be racially similar. Race, in this sense, becomes a

political, not a biological cue. It is chosen, not inherited.

No one needs to decide in advance what a group is. The voters make that decision by the way they cast their ballots. No one needs to decide between competing groups. The voters choose by the way they participate. No one needs to decide whether a minority group identity is the only or primary identity. The voters do that by the way they vote. In this way, a solution to the problem of the exclusion or underrepresentation of racial and language minority groups becomes an indirect opportunity to protect other groups. Such a solution is more likely to gain broad-based political support because it creates equal representative opportunities for all political interest groups. Group representation becomes the connective tissue linking *all* the people to their elected representatives.

Race-conscious redistricting -- the conventional remedy under the Voting Rights Act -- is problematic because it appears to give special protection only to racial minority groups. But if other groups, such as women, were to examine the way in which geographic districting underrepresents their interests, they might begin to understand that the exclusion of racial minorities is symptomatic of flaws in winner-take-all districting as a system for allocating representation of everyone. [145]

A balanced assessment of each potential judicial remedy would address the ensemble of its properties in the context of three criteria. First, does the court's plan fully remedy the violation of a protected group's statutory rights? Second, does the remedy protect the rights of all voters to gain representation? In other words, is the remedy consistent with a theory of fair representation for all politically cohesive **[*135]** groups? Third, is the remedy consistent with concerns of federalism and local majority rule? [146]

I believe a conservative, majoritarian Supreme Court is more likely to respect the national majority's effort to protect racial minority voters when the enforcement effort proceeds in terms of universal remedies to protect all numerical minority groups, whether defined in terms of race, political affiliation, or geography. Federalism, after all, also empowers minority groups -- regional or geographic minorities. Although the local minorities in Bleckley County, Georgia and Dade County, Florida are racial rather than geographic, the Court should begin to explain that protecting those minorities is not preferential treatment based on race but is similar, equal treatment based on numerical minority group status and is consistent with the universal one vote/one value principle.

In the cases at hand, dilution of the racial minority's voting strength was arguably the result of the ability of incumbent politicians to distribute power arbitrarily through a system of winner-take-all districts *(De Grandy)* and by the refusal to district at all *(Holder).* If so, it would be as anomalous to defer to incumbent politicians in denying any remedy to the racial minority plaintiffs as it would have been in *Baker v. Carr,* in which race was *not* an issue, to defer to legislators who were riveted to their seats and had refused to reapportion in the absence of judicial intervention. [147] Deference to such local majorities may simply pervert democracy in the name of inverted federalism. These local, geographic majorities are actually regional minorities, who deserve no special deference if they arbitrarily constitute themselves as a permanent, monolithic group or overrepresent themselves to avoid sharing power with other racial, regional, or political groups. [148]

If the Supreme Court had construed minority group representation as a fundamental tenet of democracy instead of as a special exception to it, it likely would have adopted a different approach in both *Holder* and *De Grandy.* In *Holder,* the Court might have found the plaintiffs' **[*136]** claim to be covered by the Voting Rights Act had it viewed their attempt to expand the size of the commission as an effort to improve democracy rather than circumvent it. If the Court were to intervene in Bleckley County to effectuate the one vote/one value remedial goals of the Act, the result of its intervention

would potentially benefit not only the racial minority plaintiffs, but other politically cohesive minority groups as well. Implementing the Voting Rights Act would thus preserve the democratic process within Bleckley County itself.

Likewise, in *De Grandy,* the Court need not have overruled the district court's finding of a violation in order to evade the messy problem of allocating political power between competing minority groups. Informed by a theory of fair representation, the Court might have realized that racial divisions would not have been exacerbated by enforcing the Voting Rights Act, but rather stemmed from the state majority's decision to award power by artificial geographic units such as winner-take-all single-member districts. [149]

The facts of *De Grandy* illustrate the underlying flaws in the Court's current approach to the Voting Rights Act. Both the black and Latino plaintiffs had competing, mutually exclusive, *but legitimate* claims for representation. This circumstance exposes the problems with incumbent-controlled, single-member districting as a means of apportioning political power. Instead of declaring a new standard of "rough proportionality," measured on an arbitrary regional basis, the Court should have affirmed the finding of a violation and then directed the lower court to seek a remedy for the affected areas that would have been less divisive and would have ensured greater political accountability to choices made by voters rather than to those made by elected officials.

Consistent with one vote/one value ideals, an alternative approach to allocating power might be a multi-seat district that uses cumulative or limited voting. Voters within that multi-seat district would essentially subdistrict themselves by the way they cast their ballots; the allocation of political power between blacks, Latinos, *and whites* would depend *at each election* on the organization and mobilization efforts of each group. Individual members of a racial group who did not feel aligned with that group in that particular election would be free to express their preferences by voting with other groups. Under universal group representation, local democracy would become a dynamic method of governance open to all significant groups rather than a battle **[*137]** for total victory in the control of winner-take-all, single-member districts.

CONCLUSION

A remedial theory of fair representation for all groups based on the principle of one vote/one value is necessary to provide stability and coherence to current voting rights doctrine. On the one hand, historical prejudice against, and continued underrepresentation of cognizable, protected racial and language minority groups presently justifies judicial intervention under the Voting Rights Act. The statute is intended to remedy the exclusion of these minority groups. On the other hand, remedies that appear to give preferential treatment to racial groups threaten the so-called colorblind vision espoused by an increasingly conservative federal judiciary. In order to reconcile the race consciousness of the Act with the rhetoric of race-neutrality, I propose that courts embrace the concept of group representation as a universal remedial principle of democratic accountability and legitimacy. Specifically, at the remedy stage of a voting rights case, courts should prefer universal remedies that have the potential to empower all politically cohesive groups, instead of just the plaintiff class. In this way, intervention under the Act, although limited to historically justified claims brought by racial and language minorities, would also be forward-looking. By examining creative solutions beyond single-member geographic districting, voluntary interest group representation encourages remedies that increase the accountability of elected officials to all of their constituents and that allow the Court to respond to critics of the Act in a manner that is empirically accurate and theoretically coherent. Thus, the legal claims of racial minorities are not resolved to benefit racial minorities alone but to make politics better for everyone.

Race remains an important political affiliation in many parts of America, but it need not be the only important political affiliation. As Henry Louis Gates, Jr., has written, "I want to be black but not only black." [150] We can recognize race without reinforcing separatist, monolithic views of racial groups. We can recognize race without erasing democracy. Representing racial minority groups fairly need not be special treatment. Representing racial minority groups fairly can be to treat those groups the same as other viable community-based organizations and political constituencies. While this may require a rethinking of equal protection analysis, [151] on the other side of the equation lies the possibility of more democracy for all types of minority interest groups.

FOOTNOTES:

n1 MARTIN L. KING, JR., *Showdown for Nonviolence, in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 64, 71 (James M. Washington ed., 1991).

n2 *See, e.g.,* Peter Applebome, *From Atlanta to Birmingham, Blur of Progress and Stagnation,* N.Y. TIMES, Aug. 3, 1994, at A14 ("More often than not, [votes in the New South are] cast along racial lines. . . . [B]lacks and whites have political agendas as divergent as they were 30 years ago."); *U.S. District Court Upholds 'Gerrymander' for Blacks,* N.Y. TIMES, Aug. 3, 1994, at A12 ("[I]t's not just past discrimination. . . . We've got discrimination now. There is no way that a district 28 to 30 percent black is ever going to elect a black person to Congress. People . . . will always vote along racial lines. What difference does it make whether the district looks pretty?") (quoting La. State Sen. Dennis Bagneris) (internal quotation marks omitted); *see also* Stephen M. Feldman, *Whose Common Good? Racism in the Political Community,* 80 GEO. L.J. 1835, 1848 (1992) (arguing that racial intolerance and racial group interests influence political activity much more than individualistic interests).

n3 *See infra* note 100.

n4 *See, e.g.,* Johnson v. De Grandy, 114 S. Ct. 2647, 2656, 2658 (1994) (accepting the district court's finding that Hispanics continued to suffer adverse social, economic, and political effects as a result of historic discrimination) (citing De Grandy v. Wetherell, 815 F. Supp. 1550, 1573-74 (N.D. Fla. 1992)). Current discrimination in areas such as health care, education, or employment may be probative of a Voting Rights Act violation. *See* Thornburg v. Gingles, 478 U.S. 30, 36-37 (1986) (citing S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-07).

n5 *See infra* note 12.

n6 *See* 42 U.S.C. §§ 1971-1974e (1988).

n7 *See id.* § 1971(a) (protecting classes defined by race or color); *id.* §§ 1973b(f), 1973aa-1a(e) (protecting "language minorities," defined as individuals "who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage").

n8 The 1982 amendments restored a discriminatory results standard for proof of discrimination, *see id.* § 1973(b), and thus eliminated the discriminatory intent standard imposed by the Supreme Court in City of Mobile v. Bolden, 446 U.S. 55, 66-68 (1980).

n9 *See, e.g.,* Johnson v. De Grandy, 114 S. Ct. 2647, 2658-59 (1994) (measuring the

"proportionality" of minority political power by minority control of single-member districts); Growe v. Emison, 113 S. Ct. 1075, 1082-83 (1993) (explaining the district court's creation of a majority minority district and noting that a federal district court may sometimes be justified in adopting a redistricting plan that contains such districts); Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986) (explaining that vote dilution results when minority group members are separated by district lines, causing an "ineffective majority," or are crowded into too few districts, resulting in an "excessive majority").

n10 42 U.S.C. § 1973(b).

n11 *See, e.g.,* Richard A. Epstein, *Tuskegee Modern, or Group Rights Under the Constitution,* 80 KY. L.J. 869, 875-76 (1992) (acknowledging that § 2(b)'s protection of specific classes makes it clear that the statute is not "colorblind" but suggesting that the focus of courts on maximizing protected groups' political participation constitutes reverse discrimination); Jim Sleeper, *Rigging the Vote by Race,* WALL ST. J., Aug. 4, 1992, at A14 (criticizing "ethnic gerrymandering" because "[w]e're all diminished when government constrains us to see ourselves first as members of deprived ethnic groups and only second as citizens in a common American experience").

n12 In *Shaw v. Reno,* Justice O'Connor, writing for the Court, opined that segregating voters into separate voting districts because of their race and without regard to geographic and political boundaries resembles "political apartheid." Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993). Justice O'Connor argued that race-conscious districting "may balkanize us into competing racial factions" even when used to remedy prior discrimination. *Id.* at 2832. However, Justice O'Connor did concede that race is relevant in drawing election districts. *See id.* at 2826.

n13 *Id.* at 2832.

n14 *See* Howard Winant, *Difference and Inequality: Postmodern Racial Politics in the United States, in* RACISM, THE CITY AND THE STATE 108, 123-24 (Malcolm Cross & Michael Keith eds., 1993) (arguing that the political Right is "[a]ctively engaged in political projects that would deny the significance of race" in the name of individual rights); *see also* Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331, 1378, 1380 (1988) (arguing that the civil rights movement has been more successful at eradicating formal subordination than material or economic subordination because the latter is easier for whites to reconcile with the concept of individual equal opportunity).

n15 The Voting Rights Act is one such statute. *See supra* p. 111; *infra* note 17.

n16 114 S. Ct. 2581 (1994).

n17 *Id.* at 2583-84. To show vote dilution, a Voting Rights Act plaintiff must demonstrate that the group to which she belongs is "politically cohesive." Thornburg v. Gingles, 478 U.S. 30, 51 (1986). Factors relevant to political cohesion include socio-economic similarity, agreement on important issues, bloc voting, and "whether the minorities consider themselves 'one' even in situations in which they could benefit independently." Nixon v. Kent County, 790 F. Supp. 738, 743-44 (W.D. Mich. 1992). Plaintiffs must also demonstrate that the local majority votes as a bloc, an element that may be proved by evidence that the racial majority consistently defeats the racial minority's representatives. *See Gingles,* 478 U.S. at 51; *see also* Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993) (treating blacks implicitly as a cohesive voting bloc and considering the possibility that a districting plan violated the Voting Rights Act by depriving black voters of influence districts). Thus, the Court

explicitly recognizes that racial bloc voting is the way in which a local majority can constitute itself as a "political group" to defeat the interests of the racial minority.

n18 *See Holder,* 114 S. Ct. at 2588.

n19 114 S. Ct. 2647 (1994).

n20 *See id.* at 2651.

n21 *Id.* (emphasis added).

n22 *See, e.g.,* Brief Amicus Curiae of Anti-Defamation League of B'nai B'rith in Support of Neither Party at 6 n.3, 7, *De Grandy* (Nos. 92-519, 92-593, 92-767) (arguing that recognizing and labeling a group as African American "unfairly equates the color of one's skin with a community of interest and creates unjustified stereotypes of culturally diverse minorities"). The Anti-Defamation League concluded that no racial or ethnic class is entitled to maximum "feasible" representation under the Voting Rights Act. *See id.* at 16. The American Jewish Congress, which filed an amicus brief in support of the State of Florida, argued that maximization of one group's power necessarily diminishes another group's power. *See* Motion for Leave to File a Brief Amici Curiae and Brief Amici Curiae of the American Jewish Congress and Community Relations Committee of the Greater Miami Jewish Federation in Support of Appellants at 21, *De Grandy* (Nos. 92-519, 92-593, 92-767).

n23 *Holder,* 114 S. Ct. at 2592, 2618-19 (Thomas, J., concurring in the judgment).

n24 *Id.* at 2598.

n25 *Id.* at 2614; *see also* Epstein, *supra* note 11, at 884 (claiming that the principle of the Reconstruction Amendments was to "get race out of politics").

n26 *See supra* note 22.

n27 *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, *amended by* Act of June 19, 1970, Pub. L. No. 91-285, 84 Stat. 314; Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Act of June 29, 1982, Pub. L. No. 97-205, 96 Stat. 131.

n28 *See* sources cited *supra* notes 7, 11.

n29 *See De Grandy,* 114 S. Ct. at 2659-60.

n30 *See Holder,* 114 S. Ct. at 2584, 2588.

n31 *See* 42 U.S.C. § 1973(b) (directing that a political process that is "not equally open to participation by members" of protected classes violates federal law).

n32 *See De Grandy,* 114 S. Ct. at 2651-52.

n33 On April 10, 1992, Florida's legislature passed Senate Joint Resolution 2-G, FLA. STAT. ch. 10.1001-10.1008 (1993), which redivided Florida into 40 single-member senate and 120 single-member house districts based on the 1990 Census. *See De Grandy,* 114 S. Ct. at 2652.

n34 *See De Grandy,* 114 S. Ct. at 2652. There is some political animosity between African Americans and Hispanics in the Dade County area. *See* De Grandy v. Wetherell, 815 F. Supp. 1550, 1569 (N.D. Fla. 1992) ("Hispanics and African-Americans were each politically cohesive among themselves but were not at all cohesive -- and were often at odds -- in relation to each other.").

n35 *See De Grandy,* 114 S. Ct. at 2658, 2663.

n36 478 U.S. 30 (1986). *Thornburg v. Gingles* established that a § 2 vote dilution claim requires plaintiffs to meet a three-pronged test: first, that the minority group is "sufficiently large and geographically compact to constitute a majority single-member district"; second, that the minority group is "politically cohesive"; and third, that whites constitute a voting bloc that usually operates to defeat minority candidates. *Id.* at 50-51. *Gingles* involved multimember districts, but its test is also applicable to single-member districts. *See De Grandy,* 114 S. Ct. at 2654-55 (citing Growe v. Emison, 113 S. Ct. 1075, 1084 (1993)).

n37 *See De Grandy,* 815 F. Supp. at 1563, 1580-82.

n38 *See id.* at 1574.

n39 *See id.* at 1578-80. Specifically, the district court found that the Hispanic plaintiffs' plan, which added a Hispanic supermajority senate district in the Dade County area, and the NAACP plan, which added an African American majority district in the same area, were incompatible. *See id.* at 1574-78. The Court concluded more generally that the "ideal solution" of adding one African-American-dominated and one Hispanic-dominated senate district was "not a viable option," *id.* at 1577, because the remedies were "mutually exclusive," *id.* at 1578.

n40 Justice Souter was joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, and Ginsburg. Justice O'Connor filed a separate concurring opinion. Justice Kennedy concurred in part and concurred in the judgment. Justice Thomas filed a dissenting opinion, in which Justice Scalia joined.

n41 *See De Grandy,* 114 S. Ct. at 2653.

n42 *See id.* at 2657; *supra* note 36.

n43 *See De Grandy,* 114 S. Ct. at 2663.

n44 *See id.* at 2662.

n45 *See id.* at 2651. The Court cautioned that "the degree of probative value assigned to proportionality may vary with other facts" but insisted that proportionality is relevant evidence under the totality of circumstances test. *Id.* at 2661-62. The United States government argued that measuring proportionality on a statewide basis would provide a "clear and objective measure of proportional representation," while a regional approach would allow a party to bolster its argument by adjusting regional boundaries. Brief for the United States as Appellee at 25, *De Grandy* (Nos. 92-519, 92-793, 92-567).

n46 *See De Grandy,* 114 S. Ct. at 2659-60.

n47 *Id.* at 2651; *cf. supra* note 45.

n48 *See* Holder v. Hall, 114 S. Ct. 2581, 2584 (1994). Bleckley County's black community leaders testified that, as a practical matter, it is futile to sponsor African American candidates for this post because blacks were only 20% of the county voting-age population. *See* Hall v. Holder, 955 F.2d 1563, 1571 (11th Cir. 1992). The plaintiffs, six black registered voters from Bleckley County and the Cochran/Bleckley Chapter of the NAACP, argued for a county commission large enough that African Americans would constitute a majority in one single-member district. *See Holder,* 114 S. Ct. at 2584-85. African Americans do have a clear majority in one of the five existing school board districts. *See Holder,* 955 F.2d at 1569 n.10.

n49 *See Holder,* 114 S. Ct. at 2584-85.

n50 *See supra* note 36.

n51 *See* Hall v. Holder, 757 F. Supp. 1560, 1582 (M.D. Ga. 1991).

n52 *See Holder,* 955 F.2d at 1568-69.

n53 *See Holder,* 114 S. Ct. at 2585.

n54 *See id.* at 2588.

n55 *See Holder,* 114 S. Ct. at 2588. Justice Blackmun, dissenting, pointed out that Justice Kennedy's view in the Georgia case is inconsistent with 30 years of precedent, which broadly construed the Voting Rights Act to overcome "a wide variety of election- and voting-related practices." *Id.* at 2619-20 (Blackmun, J., dissenting).

n56 Justice Kennedy was joined by Chief Justice Rehnquist in full and by Justice O'Connor in part. Justice O'Connor also filed a separate opinion, concurring in part and concurring in the judgment. Justice Thomas concurred in the judgment in an opinion joined by Justice Scalia. Justices Blackmun, Stevens, Souter, and Ginsburg dissented.

n57 *See id.*

n58 42 U.S.C. § 1973c (requiring preclearance for changes in voting procedures for covered jurisdictions).

n59 *See Holder,* 114 S. Ct. at 2588-89 (O'Connor, J., concurring in part and concurring in the judgment).

n60 *Id.* at 2591 (Thomas, J., concurring in the judgment); *infra* Part II.

n61 *See Holder,* 114 S. Ct. at 2622 (Blackmun, J., dissenting). Justice Blackmun acknowledged that dilution is a relative concept under which the challenged voting practice must be compared with a "reasonable and workable" alternative. *Id.* However, he argued that the problems with § 2 dilution claims in this context can be overcome by "flexible, fact-intensive" inquiries. *Id.* (quoting Thornburg v. Gingles, 478 U.S. 30, 46 (1986)). Justice Blackmun further argued that single-member commissions can be a dilutive practice. *See id.* at 2624. Justice Blackmun and the other dissenters also stressed the language of the statute, *see id.* at 2619; the many congressional reenactments that acknowledge judicial interpretations of the statute, *see id.* at 2621; *id.* at 2626-27 (Stevens, J., dissenting); the

doctrine of stare decisis, *see id.* at 2628-29; and the function of federal judges to effectuate Congress's multiple, competing purposes, *see id.* at 2625 (Ginsburg, J., dissenting).

n62 *De Grandy,* 114 S. Ct. at 2651.

n63 *See Holder,* 114 S. Ct. at 2586-88.

n64 113 S. Ct. 2816 (1993).

n65 *See Holder,* 114 S. Ct. at 2586; *De Grandy,* 114 S. Ct. at 2651.

n66 *See supra* notes 7-10 and accompanying text.

n67 *See De Grandy,* 114 S. Ct. at 2651.

n68 By locating his attack on the Court's vote dilution jurisprudence in his concurring opinion in *Holder* rather than in his dissenting opinion in *De Grandy,* Justice Thomas sought to give his views more currency.

n69 *See, e.g., Holder,* 114 S. Ct. at 2625, 2628, 2629-30 (separate opinion of Stevens, J.) (describing the "radical character" of Justice Thomas's "suggested interpretation," which may be "best described as an argument that the statute be repealed or amended in important respects").

This approach is remarkable for judges such as Justice Thomas, and his fellow concurrer Justice Scalia, who presumably believe that the Court's role is constrained by the legislative choices already made by Congress. This approach is so unconventional that Justice Thomas lost the votes of other Justices who had elsewhere expressed substantive reservations about the statute. *See* Presley v. Etowah, 112 S. Ct. 820, 830 (1992) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, Scalia, Souter & Thomas, JJ.); Chisom v. Roemer, 501 U.S. 380, 404-11 (1991) (Scalia, J., dissenting, joined by Kennedy, J.); Thornburg v. Gingles, 478 U.S. 30, 94 (1986) (O'Connor, J., concurring in the judgment, joined by Burger, C.J., and Powell & Rehnquist, JJ.).

n70 Justice Thomas recognized that current law includes the concept of vote dilution and that "a vote dilution claim necessarily depends on the assertion of a group right." *Holder,* 114 S. Ct. at 2605 (Thomas, J., concurring in the judgment).

n71 42 U.S.C. § 1973(b); *see also id.* § 1973l(c)(1) (noting that the term "voting" includes "all action necessary to make a vote effective").

n72 S. REP. NO. 417, 97th Cong., 2d Sess. 19 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 196 (quoting Reynolds v. Sims, 377 U.S. 533, 555 n.29 (1964) (quoting South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting))) (internal quotation marks omitted). Even Senators initially opposed to the amendment of § 2 admitted that "vote dilution" is based on concerns for post-election rights of groups. For example, Senator Orrin Hatch, who voted for the committee bill but dissented from the Senate Committee Report, wrote: "Instead of directing its protections toward the individual citizen as did the original Act -- and as does the Constitution -- the amendments would make racial and ethnic *groups* the basic unit of protection." *Id.* at 94, *reprinted in* 1982 U.S.C.C.A.N. at 267. In addition, an amendment to prevent the existence of at-large elections from being considered evidence of a violation of § 2 failed in committee by a vote of 13-5. *See id.* at 77, *reprinted in* 1982 U.S.C.C.A.N. at 256. At-large elections are a classic vote dilution mechanism, in which all voters get to cast a formal ballot, but

a minority of the voters may get no voice in selecting representatives.

n73 The 25-year extension of the Voting Rights Act of 1965, with an amendment of § 2, was passed in 1982 by an 85-8 vote in the Senate and by unanimous consent in the House. *See* Howell Raines, *Voting Rights Act Signed by Reagan,* N.Y. TIMES, June 30, 1982, at A16; *Voting Rights Measure Approved by Congress,* N.Y. TIMES, June 24, 1982, at B11.

n74 *See Holder,* 114 S. Ct. at 2607 (Thomas, J., concurring in the judgment).

n75 *Id.* at 2612.

n76 *Id.* at 2605.

n77 Baker v. Carr, 369 U.S. 186, 273 (1962) (Frankfurter, J., dissenting) (quoting Plaintiffs' Compl., *Baker* (No. 2724), *reprinted in* Tr. of R. at 12) (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).

n78 The concerns raised by the plaintiffs in one person/one vote constitutional dilution cases involved their inability to cast a "meaningful" or "effective" ballot. The plaintiffs did not complain about the difficulty of casting a ballot, but rather raised post-election concerns that the votes of urban and suburban voters were less "effective" or were "diluted" compared to the potential influence of votes cast by voters in less populous, rural districts. *See, e.g.,* Moore v. Ogilvie, 394 U.S. 814, 818-19 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."); 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).

Justice Thomas cites approvingly Burns v. Richardson, 384 U.S. 73 (1966), which concerned a challenge under the Equal Protection Clause to the apportionment of the Hawaiian house and senate, *see id.* at 75. The plaintiffs in *Burns* challenged the legislative failure to take into account "community of interests, community of problems, socio-economic status, political and racial factors." *Id.* at 87 (quoting Holt v. Richardson, 240 F. Supp. 724, 730-31 (1965)) (internal quotation marks omitted). In *Burns,* the Court focused again on group representation, and not just on individual ballot access. The Court held that the constitutional requirement of proving invidious discrimination had not been met because the plaintiffs did not show that the scheme operated "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* at 87-88 (quoting Forston v. Dorsey, 379 U.S. 433, 439 (1965)) (internal quotation marks omitted).

n79 *See, e.g.,* Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 673 (1964); Reynolds v. Sims, 377 U.S. 533, 565 (1964); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964); Baker v. Carr, 369 U.S. 186, 207-08 (1962). These cases involved dilution of votes as a result of population disparities among legislative districts. They were not focused, as Justice Thomas claims Congress was, only on "citizens' access to the ballot." *Holder,* 114 S. Ct. at 2604 (Thomas, J., concurring in the judgment).

n80 *See Holder,* 114 S. Ct. at 2594 (Thomas, J., concurring in the judgment). "[I]t is only a resort to political theory that can enable a court to determine which electoral systems provide the 'fairest' levels of representation or the most 'effective' or 'undiluted' votes to minorities." *Id.* at 2592.

n81 42 U.S.C. § 1973l(c)(1); *see id.* at 2626 (Stevens, J., dissenting) (citing Allen v. State Bd. of Elections, 393 U.S. 544, 565-66 (1969)).

n82 *See id.* at 2597-2600 (Thomas, J., concurring in the judgment). Although he does not tackle its implications, Justice Thomas makes use of an approach that would also dislodge the theoretical basis for constitutional one person/one vote cases. *See supra* notes 77-79 and accompanying text.

n83 *Holder,* 114 S. Ct. at 2595 (Thomas, J., concurring in the judgment).

n84 *See id.* at 2596.

n85 *Id.* at 2601. Indeed, under the logic of current voting rights jurisprudence, geographic districts may be replaced by another voting structure. Justice Thomas specifically labels cumulative voting a non-districted election arrangement that is consistent with current judicial interpretation of the Voting Rights Act and the Constitution. *See id.* at 2601 n.17.

n86 *Id.* at 2596.

n87 *Id.* at 2596 n.8.

n88 This is essentially the view that voting is an important ritual, which symbolizes membership in the political community. *See infra* notes 111-114. There is some support for such a view as a matter of democratic theory. *See, e.g.,* CHARLES R. BEITZ, POLITICAL EQUALITY 40-41, 133, 150 (1989) (arguing generally that the right to vote requires an equally weighted vote but not "an equally effective" vote). However, even Professor Beitz believes that special circumstances warrant judicial intervention to protect disadvantaged groups whose ability to exercise "an effective vote" is systematically thwarted because of prejudice. *See* Charles R. Beitz, Outline Prepared for American Political Science Association Roundtable on Group Representation (Sept. 2, 1994) (unpublished notes, on file at the Harvard Law School library).

n89 *Holder,* 114 S. Ct. at 2596 (Thomas, J., concurring in the judgment).

n90 *Id.* at 2592. Echoing Justice Frankfurter in Colegrove v. Green, 328 U.S. 549, 553-54 (1946), Justice Thomas concluded that questions of democratic political theory are beyond the capacity of the federal judiciary.

n91 *See, e.g., Holder,* 114 S. Ct. at 2592 (Thomas, J., concurring in the judgment) (arguing that the "terms [of the Voting Rights Act] reach only state enactments that limit citizens' access to the ballot").

n92 *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 283 (1950) (calling individualized or direct democracy primitive mass action). Individualized democracy is best realized by referenda or initiatives in which each voter speaks for herself directly and exclusively by the way she casts a ballot. Aristotle termed direct democracy "perverted" because it fails to protect the rights and interests of the minority. *See* ARISTOTLE, POLITICS III.6.11, III.7.5 (B. Jowett trans., 1885). James Madison made a similar argument in *Federalist* No. 10. *See* THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961); *cf.* Jonathan Still, *Political Equality and Election Systems,* 91 ETHICS 375, 378 (1981) (noting that universal suffrage is simply a necessary but not a sufficient condition to realization of political equality).

n93 Justice Thomas calls it a "disastrous misadventure in judicial policymaking." *Holder,* 114 S. Ct.

at 2592 (Thomas, J., concurring in the judgment).

n94 *See id.* at 2597. Allocating political power on the basis of race, for Justice Thomas, is the moral equivalent of requiring "registration on racial rolls." *Id.* at 2599.

Justice Thomas essentially challenges the way in which race functions as a political, not just a sociological category. For Justice Thomas, racial group representation is inherently divisive. *See id.* (quoting Wright v. Rockefeller, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)). It can only "serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions." *Id.* It encourages "racially based understanding of the representative function." *Id.* (citing Shaw v. Reno, 113 S. Ct. 2816, 2828 (1993) (stating that racial classification of voters signals "to elected officials that they represent a particular racial group rather than their constituency as a whole" and thereby threatens "to undermine our system of representative democracy")). Although Justice Thomas's tone is adamant, he provides no empirical evidence to support his assertions. *Cf. infra* note 100 (citing evidence that race may in fact coincide with political interests).

n95 "Double minorities" are racial minority subsets who have views distinct from the majority of racial minority group members.

n96 *See Holder,* 114 S. Ct. at 2591 (Thomas, J., concurring in the judgment) (arguing that "a systematic reassessment of our interpretation of the Act is required").

n97 478 U.S. 30 (1986).

n98 *See Holder,* 114 S. Ct. at 2619 (Thomas, J., concurring in the judgment).

n99 *See infra* notes 111-114 and accompanying text.

n100 It seems clear that many people *do* believethat their interests coincide with group interests. The district court in *De Grandy* and the Court of Appeals in *Holder* found that the record in each case supported the claim that the plaintiff racial groups were politically cohesive. *See* Hall v. Holder, 955 F.2d 1563, 1573 (11th Cir. 1992); De Grandy v. Wetherell, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992). Justice Thomas recognized that this claim, under the political cohesion threshold in *Thornburg v. Gingles, see* 478 U.S. at 51, requires proof of a correlation between voting behavior and race. *See Holder,* 114 S. Ct. at 2597 (Thomas, J., concurring in the judgment). He dismissed this requirement as extraneous window dressing because proof of political cohesion can be established by a simple bivariate regression analysis without demonstrating the cause of the correlation. *See id.* at 2598 n.13.

n101 In other words, the criticisms about racial representation expressed by Justice Thomas presumably disable any district winner from representing the district losers. *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes,* 71 TEX. L. REV. 1589, 1611-16 (1993) (detailing my view that district representation unfairly and inaccurately assumes that the district losers are represented based on principles of virtual representation). I am skeptical that any voter is well represented by political opponents, in part because I view voting instrumentally and not merely symbolically. Justice Thomas apparently shares my concern only with regard to the internal politics within racial groups. He apparently does not share my concern with respect to other political groups or inter-racial group representation of people of color by whites.

n102 *See Holder,* 114 S. Ct. at 2599 (Thomas, J., concurring in the judgment) (noting that the

formation of racial minority districts makes it unnecessary for elected officials to be responsive to the needs of citizens not of the same race as the elected official).

n103 For Justice Thomas, race is not a political category because not all blacks think or act alike. But neither do all members of a political party think or act alike. Indeed, members of the Court have commented on the absence of any real ideological ties connecting members of national political parties. *See, e.g.,* Democratic Party v. Wisconsin Democratic Party, 450 U.S. 107, 131-32 (1981) (Powell, J., dissenting) (noting that a national political party does not have a uniform political ideology or mission).

n104 If Justice Thomas is focused on members of the racial minority who choose to exit the group, he might claim instead that these double minorities cannot be heard because racial minorities will be perceived as monolithic whether or not they are. But this, too, singles out the racial minority for special exemption from principles of majority rule. In this way, Justice Thomas proves the power of David Strauss's claim that, because race is not irrelevant, "we do not have a choice between colorblindness and race-consciousness; we only have a choice between different forms of race-consciousness." David A. Strauss, *The Myth of Colorblindness,* 1986 SUP. CT. REV. 99, 114.

In contemporary discourse, colorblindness has come to mean that mere recognition of race, except to condemn intentional racial discrimination, is dangerous. Yet because of the recognition and support our political system gives to other, non-racial groups, colorblindness, although ostensibly race-neutral, singles out race for special treatment.

n105 Justice Thomas gained only the vote of Justice Scalia for the proposition that Justice Stevens's opinion in Chisom v. Roemer, 111 S. Ct. 2354 (1991), means that § 2 only applies to ballot access cases.

n106 *Holder,* 114 S. Ct. at 2596 (Thomas, J., concurring in the judgment).

n107 The validity of the Voting Rights Act and of vote dilution claims under the Act was not directly at issue in these cases, so the dissenting Justices in *Holder* were able to fulfill their decisional duties without gracing Justice Thomas's arguments with a theoretical response. But because there was no majority opinion, an opinion by four Justices providing an alternative to Justice Thomas's political theory would have been welcome.

n108 *Cf.* Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship,* 99 ETHICS 250, 261, 273 (1989) (arguing that a democracy should assure the effective representation of its constituent groups).

n109 *See* Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African Americans?,* 107 HARV. L. REV. 1209, 1217-18 (1994); Young, *supra* note 110, at 261, 273.

n110 *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 1-37 (1991) (outlining the role of interest groups in the political process).

n111 James Madison recognized the potential power of factions and sought, through separation of powers and federalism, to prevent them from becoming tyrannical. *See* THE FEDERALIST No. 48, at 310-11 (James Madison) (Clinton Rossiter ed., 1961). For similar reasons, the Framers chose to establish a representative rather than a direct democracy. *See* Julian N. Eule, *Judicial Review of Direct Democracy,* 99 YALE L.J. 1503, 1526-27 (1990) (quoting THE FEDERALIST No. 10, *supra* note 10,

at 61-62; *see also supra* note 92 (discussing direct democracy).

n112 *See, e.g.,* Epstein, *supra* note 11, at 879 (arguing that the rights of the individual are transferred to the group itself when individuals decide to come together through voluntary association); Michael Walzer, *Multiculturalism and Individualism,* DISSENT, Spring 1994, at 185, 187, 189 (arguing that it is only in the context of associational activity that individuals learn to deliberate, argue, make decisions, and take responsibility and that individuals who are participants in a common life are stronger, more confident, and more savvy).

n113 These three distinct components of the right to vote are reflected in the different generations of voting rights litigation. *See* LANI GUINIER, TYRANNY OF THE MAJORITY 1-20 (1994). They are also described by Professor Karlan as separate, yet complementary interests in participation, aggregation, and governance. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism,* 71 TEX. L. REV. 1705, 1709-20 (1993). Participation, which involves the ability to take part in the formal electoral process by casting a ballot, is individualistic, symbolic, and outcome-independent. The aggregation interest, which means having one's preferences taken into account in choosing public officials, is collectivist, instrumental, and outcome-dependent. The governance interest, in which voting is a means for indirectly taking part in post-election decisionmaking, is also collectivist and outcome-dependent. *See id.*

n114 Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy,* 1993 SUP. CT. REV. 245, 247, 249; *see also* Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part) ("The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."); Alexander M. Bickel, *The Supreme Court and Reapportionment, in* REAPPORTIONMENT IN THE 1970s at 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. . . ."); T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 600-01 (1993) (arguing that "an individual-rights based view" has little relevance to voting rights analysis because meaningful participation in a democratic system is dependent on the power of the group to which the individual belongs). Indeed, the Court has upheld deliberate legislative manipulation of district size in pursuit of group-representation goals such as preserving the integrity of political subdivisions. *See* Mahan v. Howell, 410 U.S. 315, 329-30 (1973); Abate v. Mundt, 403 U.S. 182, 185-87 (1971).

n115 *See* Eule, *supra* note 111, at 1526-27.

n116 *See* Guinier, *supra* note 101, at 1592.

n117 Indeed, the focus on the shape of districts spawned by the Court's decision in Shaw v. Reno, 113 S. Ct. 2816, 2824-28 (1993), suggests that "compactness" is a proxy for normalcy and that those who live in relatively close proximity are "normally" treated as a community or group. Elsewhere I argue that geographically based single-member districts are imperfect electoral proxies for communities of interest. *See* Guinier, *supra* note 101, at 1593.

n118 *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 749-65 (1964) (Stewart, J., dissenting). Federalism concerns have led the Court to permit larger population deviations from the one person/one vote principle in state and local reapportionment than in congressional reapportionments, in part to recognize local group interests. *Compare Mahan,* 410 U.S. at 324-25 (holding that a state legislature redistricting plan should be judged according to an as equal "as is practicable" standard that is less stringent than the test for judging congressional reapportionment)

with Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969) (holding that a state must make a "good faith effort to achieve precise mathematical equality" in a congressional reapportionment).

n119 *See* Hendrik Hertzberg, *Constitution 1: Let's Get Representative,* NEW REPUBLIC, June 29, 1987, at 16 ("The communities that count are communities of interest and belief. . . . Ideology, profession, class, even racial and sexual identity -- these are the soil our roots grow in now, as much as or more than where we live."). Yet geography can still approximate the interests of some groups, such as blacks, because of their extreme spacial segregation. *Cf.* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 9-16 (1993) (tracing the history of extreme racial segregation and explaining the reasons for its perpetuation).

n120 42 U.S.C. § 1973(b) (emphasis added).

n121 *Id.*

n122 *See id.* The statute defines proportional representation as the "right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

As Justice Souter pointed out in *De Grandy,* the disclaimer denies the right to proportional descriptive representation, which is the correlation between the number of elected minority group members and voters. *See De Grandy,* 114 S. Ct. at 2658 n.11. Functionally proportional representation does not rely on the color or "description" of the elected representatives. It instead suggests a correlation between the number of representatives who are sponsored by and accountable to the minority group and the group's population percentage in the electorate. The Voting Rights Act is designed to ensure that racial minorities are fairly represented by minority-sponsored candidates of their choice although not necessarily by candidates of their race. *See id.*

n123 42 U.S.C. § 1973(b).

n124 Because the Act refers to "members" of a protected class, it is possible to read the statute in a way that resists the concept of group representation. Nevertheless, as Professor Ferejohn recently argued, although we may formally set up the electoral system by referring to individuals, groups of people use that system. John Ferejohn, Remarks at American Political Science Association Roundtable on Group Representation (Sept. 2, 1994). For example, Justice Souter's opinion in *De Grandy* affirms the importance of proportional representation of groups, although he repudiates the claim that the representational function should be performed exclusively by actual group members. *See supra* note 122.

n125 The protections of the Voting Rights Act apply only to racial and linguistic minority groups. *See* 42 U.S.C. §§ 1973, 1973b(f)(2).

n126 If voting rights remedies accomplish some widely perceived social good, such as promoting participatory democracy by holding elected officials more accountable to all their constituencies, such remedies will enjoy more popular support. This is Professor Bell's "interest-convergence" thesis. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma,* 93 HARV. L. REV. 518, 522-28 (1980); *infra* Part III.C.

n127 Congress sought to resolve the political unfairness that results when, because of racial bloc voting, race matters as an empirical fact. *Cf.* S. REP. NO. 417, *supra* note 72, at 34, *reprinted in* 1982 U.S.C.C.A.N. at 212 (rejecting the notion that the Voting Rights Act interjects race into politics

because that would be "like saying that it is the doctor's thermometer which causes high fever").

n128 *See, e.g.,* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence,* 90 MICH. L. REV. 1833, 1845-90 (1992) (describing the prevalence and function of racially polarized voting).

n129 *See* Strauss, *supra* note 104, at 114-15.

n130 *See* Melissa S. Williams, Descriptive Representation With a Difference, Paper Presented at the American Political Science Association Roundtable on Group Representation (Sept. 2, 1994) (unpublished manuscript, on file with the Harvard Law School library).

n131 *See* MARTIN L. KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 123-25 (1967) (arguing that blacks must "work passionately for group identity," meaning group unity and consciousness that enables meaningful political participation).

n132 In this sense, the status of racial minorities is comparable to that of "constitutive" cultural communities. *See* Naomi M. Stolzenberg, *'He Drew a Circle That Shut Me Out': Assimilation, Indoctrination, and the Paradox of a Liberal Education,* 106 HARV. L. REV. 581, 648-49 (1993) (describing local communities, such as the Amish, that shape self-identity by endowing their members with values and attachments); *see also* Robert M. Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative,* 97 HARV. L. REV. 4, 14-16 (1983) (describing a "paideia" or involuntary community into which members are socialized).

n133 As Henry Louis Gates writes in his memoir, "I'm divided. I want to be black, to know black, to luxuriate in whatever I might be calling blackness at any particular time -- but to do so in order to come out the other side, to experience a humanity that is neither colorless nor reducible to color." HENRY L. GATES, JR., COLORED PEOPLE: A MEMOIR at XV (1994).

n134 Conservative and neoliberal commentators fear that the state cannot be trusted to act benignly when it allocates benefits based on group identity. If such allocations are perceived as arbitrary, they could reinforce existing hostility or perpetuate feelings of racial superiority or inferiority. *See, e.g.,* ABIGAIL THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 242-43 (1987).

n135 I discuss cumulative voting below at p. 133.

n136 *See Holder,* 114 S. Ct. at 2593-94 (Thomas, J., concurring in the judgment) (stating that dilution cannot be evaluated until the court first defines how much a "vote should be worth" (quoting Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting))).

n137 *See* De Grandy v. Wetherell, 815 F. Supp. 1550, 1578-80 (N.D. Fla. 1992).

n138 The Court in *Davis v. Bandemer* said this approach is constitutionally permissible as long as the electoral system is not consistently "arranged in a manner that will degrade a voter's or a group of voters' influence on the political process as a whole." Davis v. Bandemer, 478 U.S. 109, 131-33 (1986). Even Justice Thomas conceded that such remedies are consistent with statutory and constitutional law. *See Holder,* 114 S. Ct. at 2591-94 (Thomas, J., concurring in the judgment).

Non-districted electoral schemes would potentially empower a variety of politically cohesive groups.

See GUINIER, *supra* note 113, at 114. Social and political groups can all be recognized in the remedial process, as inevitably they are in districting. This formulation of a remedial approach borrows liberally from the work of Professor Susan Sturm. *See, e.g.,* Susan P. Sturm, *A Normative Theory of Public Law Remedies,* 79 GEO. L.J. 1355, 1360-65, 1373-76 (1991).

n139 *See* GUINIER, *supra* note 113, at 71-73, 122-23.

n140 *See id.* One vote/one value seeks to combine universal suffrage and a fair probability of influencing legislative outcomes through the election of preferred representatives.

n141 To be popularly understood, the remedial claim must appear to restore the racial minority to the position it would have been in absent the discrimination. However, if white political or numerical minority groups do not feel they have their "own" representative, giving one to racial minority groups seems preferential, not remedial. Like minority voters, white voters do not necessarily share a unity of interests and may enter into multiple, cross-cutting alliances that are not reflected simply because their elected official is "white." Whites *and* racial minorities should each enjoy the opportunity to assert their most salient interests and to hold their elected officials accountable for advocating those interests.

n142 *Cf.* Tashjian v. Republican Party, 479 U.S. 208, 213-17 (1986) (finding unconstitutional a state statute limiting participation in political party primaries to party members); Epstein, *supra* note 11, at 877 (arguing that "all voluntary associations should be protected under the Constitution" without giving groups "any special status").

n143 *See* GUINIER, *supra* note 113, at 94-95.

n144 Daniel Goleman, *Amid Ethnic Wars, Psychiatrists Seek Roots of Conflict,* N.Y. TIMES, Aug. 2, 1994, at C1, C13 (noting that one way to reduce ethnic and racial conflict is to respect group differences and then to provide group members the opportunity to "express frankly their grievances, fears and anger to those in the other group").

n145 *See* DOUGLAS J. AMY, NEW VOICES, REAL CHOICES 102-03 (1993) (noting that winner-take-all districts underrepresent women); ANNE PHILLIPS, ENGENDERING DEMOCRACY 80 (1991) (arguing that women fare comparatively better in proportional representation, multi-seat elections).

n146 *See* Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself,* 4 J.L. & POL. 653, 658-59 (1988).

n147 *See* Baker v. Carr, 369 U.S. 186, 259 (1962) (Clark, J., concurring).

n148 Local majority rule is not consistent with either communitarian or pluralistic conceptions of democracy if the local majority hoards rather than disperses power. *See* Lani Guinier, *Lines in the Sand,* 72 TEX. L. REV. 315, 341 (1993) (noting that the theory behind separation of powers and checks and balances requires power-sharing to constrain the majority faction and to disperse power).

Size is itself a relative concept. But determining what is reasonable is inherent to the judicial, as well as the legislative project. Congress has delegated such reasonableness determinations to the courts by using "totality of the circumstances" language in the Voting Rights Act. 42 U.S.C. § 1973(b). Contrary to the opinions expressed by a majority of Justices in *Holder, see Holder,* 114 S. Ct. at 2588; *id.* at 2591 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2619 (Thomas, J.,

concurring in the judgment), courts are authorized and competent to decide challenges brought against the size of a governing body.

n149 The Court's standard for demonstrating political cohesiveness also reinforces the insularity of the minority. A discrete and insular minority must be a majority of a district to be politically represented. The minority becomes visible only when it is a political category -- in other words, a majority of the district. District boundaries then become "barriers" reinforcing the insularity of the minority because without those lines, the minority might become politically invisible. In this way, attempts to maximize minority majority districts both assume and potentially reinforce a monolithic minority viewpoint.

n150 GATES, *supra* note 133, at XV.

n151 *See* Stolzenberg, *supra* note 132, at 646-51.