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Similar Harm Means Similar Claims: Doing Away with Davis v. Bandemer's Discriminatory Effect Requirement in Political Gerrymandering Cases

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Voter apathy is rampant in the United States, arguably due, in part, to individuals’ inability to elect representatives they believe will serve their interests. Districting schemes employed by the political party in power are one of the many mechanisms in our political system that perpetuate voter frustration. Bizarre looking districts are drawn by both political parties following each decennial census to preserve their domination at the polls. These politically gerrymandered districts lead to the maintenance of the interests of the force in power to the detriment of the will of the majority. What follows is “reduced voter participation, reduced willingness to support government, and reduced quality of governance.” This is due to the fact that “[i]f a particular rule works to the systematic disadvantage of one group over another, members of that disadvantaged group are less likely to think the rules, and any policies produced by them, are legitimate.”


This result is contrary to our system of democracy, which purports to represent the will of the majority while giving special attention to minority concerns, a system which boasts promises of the electorate's ability to change the composition of government to better serve its interests. Politically gerrymandered districts "create a sense of disenfranchisement . . . that one's territory is unrepresented." It would seem this result would be closely scrutinized by the judiciary, and plans subversive to the majority would be struck down. However, recent Supreme Court decisions have left it nearly impossible to invalidate a politically gerrymandered district.

To strike down a district as an unconstitutional political gerrymander, plaintiffs must demonstrate both discriminatory intent and discriminatory effect on the part of the legislature that designed the district. This test is impossible to meet because discriminatory intent may not only be presumed in the partisan context, it is in fact permissible. Discriminatory effect, however, requires evidence that claimants have less opportunity to participate in the political process and to elect candidates of their choice. The extensive protections afforded voting rights today make it unlikely this result will be realized. Thus, while allowing districts to be drawn by partisans in a partisan manner without a meaningful check may not literally disenfranchise the majority will, it does effectively exclude the majority's interests from representation at all levels of government.

The test to invalidate a district as a political gerrymander under the Equal Protection Clause of the Fourteenth Amendment differs from that necessary to strike down a district as a racial gerrymander. In Shaw v. Reno, the Court held that racially gerrymandered districts can be invalidated by a showing of discriminato-

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4 Id.
5 See Davis v. Bandemer, 478 U.S. 109 (1986) (holding a showing of both discriminatory intent and effect necessary to invalidate a district as an unconstitutional political gerrymander); Shaw v. Reno, 509 U.S. 630 (1993) (holding that only discriminatory intent need be demonstrated to invalidate a district as an unconstitutional racial gerrymander).
6 See Bandemer, 478 U.S. 109, 128 (1986) ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." (quoting Gaffney v. Cummings, 412 U.S. 735, 752-53 (1973))).
7 See id. at 133.
ry intent alone. Discriminatory intent is established by proving a
district was drawn with the purpose of creating a racial classifica-
tion.

Constituents of both politically and racially gerrymandered
districts suffer representational harm. Therefore, the requirement
of showing discriminatory effect in political gerrymandering cases
should be eliminated, and the test to invalidate these two types of
districts should be the same. Representational harm is the injury
suffered by a group when it is placed into a majority-minority
district where it is not a member of the group the district was
created to benefit. The resulting injury is that representatives elect-
ed from these districts ignore the interests of the citizens who are
not members of the minority group the district was intended to
benefit. The representatives believe they have been elected only to
serve members of the district’s dominant minority group.

The Court has refused to acknowledge the application of rep-
resentational harm in the political gerrymandering context. However, it may be argued that representational harm is present in that
case, and the injuries suffered by individuals in both politically
and racially gerrymandered districts are the same.

meaningful representation cannot be attained until a uniform
test for these two claims is established and politically gerryman-
dered districts can be declared invalid. Until this is accomplished,
it will remain impossible for any group, majority or minority, to
elect legislators who are truly committed to representing the inter-
est of the people who have elected them. Effective representation
of interests will arguably lead to a corresponding increase in confi-
dence and satisfaction with our political system.

10. See id. at 649.


12. Representational harm was identified in Shaw, 509 U.S. at 648:
When a district obviously is created solely to effectuate the perceived common inter-
est of one racial group, elected officials are more likely to believe that their prima-
ry obligation is to represent only the members of that group, rather than their con-
stituency as a whole. This is altogether antithetical to our system of representative
democracy.

Id.

13. See id. The Court described the message sent by a racial gerrymander as not only
the perpetuation of racial stereotypes, but also that elected representatives of racially ger-
rymandered districts must represent only members of the minority group the district was
created to benefit, to the detriment of other constituents’ concerns. See id.

without actual proof to the contrary, that the candidate elected will entirely ignore the in-
terests of those voters”).
This Note argues the necessity of eliminating the element of discriminatory effect from claims of political gerrymandering. As such, an extensive analysis of the development of the tests of discriminatory intent and effect in both racial and political gerrymandering claims is necessary, and accomplished in Part I. Part II of this Note discusses the notion of representational harm and suggests that it is applicable in both the racial and political gerrymandering contexts. Part III argues that in light of the similarity of the resulting harm in these cases, the element of discriminatory effect should be eliminated from claims of political gerrymandering, and proof that a district is an unconstitutional political gerrymander should turn on a showing of discriminatory legislative intent alone. Finally, this Note will close with suggestions for merging the two standards in future cases.

I. BACKGROUND

A. Early Redistricting Claims: How the Supreme Court Entered the Gerrymandering Thicket

In *Gomillion v. Lightfoot*, the Supreme Court opened the door to the resolution of reapportionment claims. Plaintiffs, black residents of the city of Tuskegee, challenged the constitutionality of the "strangely irregular" twenty-eight sided district created by the Alabama legislature out of the geographically square shaped city. Plaintiffs claimed the district was created in order to exclude black voters from its boundaries, thereby violating the Fifteenth Amendment. The Court declared the district an unconstitutional interference with the right to vote under the Fifteenth Amendment. It held that when a legislature "singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment... The inescapable human effect of this essay in geometry and geography is to despoil
colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.\textsuperscript{20}

Subsequently, in \textit{Baker v. Carr},\textsuperscript{21} the Court held reapportionment to be a justiciable question under a claim of violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{22} Shortly after its decision in \textit{Carr}, the Court then developed the "one person, one vote" standard in \textit{Reynolds v. Sims}.\textsuperscript{23} This standard held that equipopulous districts are required under the Fourteenth Amendment.\textsuperscript{24} The Court reasoned, "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."\textsuperscript{25}

This backdrop of early reapportionment litigation set the stage for the schism that developed between political and racial gerrymandering cases and the disparate tests of discriminatory intent\textsuperscript{26} versus discriminatory intent and effect.\textsuperscript{27}

\textsuperscript{20} Id. at 346-47. This was a departure from \textit{Colegrove v. Green}, 328 U.S. 549 (1946) in which the Court held malapportionment issues to be nonjusticiable. In \textit{Colegrove}, the district in question was challenged under a claim of vote dilution, as opposed to disenfranchisement. See \textit{id.} at 550; see also infra note 38 and accompanying text (discussing the difference in these claims). After \textit{Gomillion}, however, the Court found it had opened itself up to resolution of these claims, despite the warnings of Justice Frankfurter that "[c]ourts ought not to enter this political thicket." \textit{Colegrove}, 328 U.S. at 552.

\textsuperscript{21} 369 U.S. 186 (1962).

\textsuperscript{22} See \textit{id.} at 197.

\textsuperscript{23} 377 U.S. 533 (1964). Although at this point the Court had confined itself to resolution of claims of unequal district population, and stayed away from the question of whether districts drawn solely for racial or political purposes were justiciable under the Fourteenth Amendment. See \textit{id.}

\textsuperscript{24} See \textit{id.} at 568.

\textsuperscript{25} Id. However, the Court noted that while the Equal Protection Clause "requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable . . . [m]athematical exactness or precision is hardly a workable constitutional requirement." \textit{id.} at 577.

\textsuperscript{26} Necessary to establish a claim of racial gerrymandering brought under the Equal Protection Clause. See \textit{Shaw v. Reno}, 509 U.S. 630, 649 (1993).

\textsuperscript{27} Necessary to establish a claim of political gerrymandering. See \textit{Davis v. Bandemer}, 478 U.S. 109, 127 (1986).
B. Racial Gerrymandering

1. Early Cases and Tests Based on Challenges Under the Voting Rights Act and Equal Protection Clause

Districts are challenged as illegal racial gerrymanders under the Voting Rights Act of 1965 and the Equal Protection Clause of the Fourteenth Amendment. The Voting Rights Act of 1965 was passed pursuant to Congress’ power under the Fifteenth Amendment which provides that the right to vote “shall not be denied or abridged . . . on account of race, color or previous condition of servitude.” Until recently, its enactment had the effect of shifting the arena from which these claims were brought from challenges under the Equal Protection Clause of the Fourteenth Amendment, to violations of the Act itself and the Fifteenth Amendment. Although this Note’s focus assesses the proper standards to be applied in deciding reapportionment claims under the Equal Protection Clause, an understanding of litigation under the Voting Rights Act is instructive.

a. The Voting Rights Act

The Voting Rights Act of 1965 sought to equalize African-American and white voting strength by eliminating exclusionary measures such as literacy tests, grandfather clauses, and good char-
acter provisos, employed by states to prevent blacks from voting. These invidious tactics were utilized by states after the enactment of the Fifteenth Amendment and evidenced that a "number of states . . . refused to take no for an answer and continued to circumvent the fifteenth amendment's prohibition [against disenfranchisement] through the use of both subtle and blunt instruments, perpetuating ugly patterns of pervasive racial discrimination."

Section 5 of the Rights Act outlines preclearance measures states must follow in redrawing district boundaries. Section 5 has

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33 See South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (stating the Act's goal as to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century"); see also Shaw v. Reno, 509 U.S. 630, 639 (1993) (documenting the list of oppressive tactics employed by states to prevent blacks from voting).


35 See Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1994). Section 5 requires states to submit a new districting plan, or any other proposed changes regarding voting qualifications or prerequisites, to the Attorney General for approval, or seek a declaratory judgment from the United States District Court for the District of Columbia that holds a proposed districting plan valid:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race . . . [p]rovided, [t]hat such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

Id. The requirements of § 5 ensure compliance with the provisions of § 2 of the Voting Rights Act, which requires new voting practices not result in the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965 § 2, 42 U.S.C § 1973(a) (1994).
been interpreted to prohibit retrogression of racial minorities' positions with respect to their exercise of voting rights.\textsuperscript{36}

The Voting Rights Act effectively eradicated many of the invidious measures aimed at disenfranchising minorities.\textsuperscript{37} In response to the Voting Rights Act, however, the white majority began employing new and more subtle gerrymandering techniques to prevent minorities from fully exercising their voting strength.\textsuperscript{38} These measures did not result in the literal disenfranchisement of minorities at the polls, but instead strategically diluted their voting power by placing them into carefully crafted districts designed to minimize the impact of their vote.\textsuperscript{39} As these measures became increasingly prevalent, challenges to racially gerrymandered districts began to change focus from denial of the electoral franchise, to claims of minority vote dilution as the Court began to recognize that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."\textsuperscript{40}

\textsuperscript{36} See Beer v. United States, 425 U.S. 130, 141 (1976). In Beer, the Court upheld a New Orleans districting plan which resulted in blacks' holding majorities in two out of five city districts; they previously held majorities in none. See id. at 141-42. The plan was challenged under the theory of vote dilution because it did not permit blacks to elect representatives in proportion to their representation in the city's population. See id. at 136. Justice Stewart, writing for the majority, held the plan actually strengthened the voting power of racial minorities by increasing the number of minorities elected to office, and therefore could not be said to have the effect of diluting voting power. See id. at 141-42.

\textsuperscript{37} See Shaw v. Reno, 509 U.S. 630, 640 (1993) (describing the Act's effect of increasing voter registration among minorities, thereby decreasing the statistical disparity between white and black voter registration).

\textsuperscript{38} See Jeffrey G. Hamilton, Comment, Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court, 43 EMORY L.J. 1519, 1525 n.31 (1994) (giving a laundry list of such invidious tactics: "Stacking" large numbers of minority voters into single districts where slightly larger white majorities could outvote the minority population; "packing" minorities into single districts, creating a supermajority in one district to ensure the absence of minorities from other districts; "cracking" a minority's majority by splitting them into different districts).

\textsuperscript{39} See Pamela S. Karlan, Still Hazy after All These Years: Voting Rights in the Post-Shaw Era, 26 CUMB. L. REV. 287, 289 (1996) (describing the difference between disenfranchisement and vote dilution claims: disenfranchisement occurs when an individual is literally denied the right to vote, and is effectuated by invidious measures such as poll taxes and literacy tests, while dilution occurs when the votes of one group are made to count less than the votes of others through manipulation of district boundaries).

\textsuperscript{40} Shaw, 509 U.S. at 640-41 (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969)); see also Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 MICH. L. REV. 1077, 1094 (1991) (stating that voting rights litigation shifted from ensuring access to the ballot, to assuring that minorities' votes were "meaningful").
In City of Mobile v. Bolden, the Court established the dual test of requiring plaintiffs to prove both discriminatory intent and discriminatory effect for a district to be declared invalid as a racial gerrymander in claims brought under the Voting Rights Act. The decision in City of Mobile was criticized for making a claim of racial gerrymandering nearly impossible to establish, and led, ultimately, to the 1982 amendments to the Voting Rights Act. The 1982 amendments eliminated the requirement of establishing discriminatory intent; a violation of the Act could be shown by proof of discriminatory effect alone.

Shortly after its decision in City of Mobile, the Court analyzed the 1982 amendments in Thornburg v. Gingles. The Court first

41 446 U.S. 55 (1980).
42 See id. at 62. In City of Mobile, plaintiffs claimed that Alabama’s voting plan diluted black voting strength because blacks had been unable to elect minority candidates to office. See id. at 71-74. The Court, however, refused to invalidate the plan because plaintiffs failed to establish the legislature’s discriminatory intent. See id. at 77-80 (describing how discriminatory intent cannot be inferred from a non-proportional representation of minorities in the city government).
44 See id.
45 478 U.S. 30 (1986). Plaintiffs in Thornburg challenged North Carolina’s redistricting scheme, alleging that it constituted an impairment of the ability of black voters to elect representatives of their choice. See id. at 35. The violation was accomplished by the enactment of multi-member districts as opposed to single-member districts. See id. With single member districts, blacks would have held several majorities. See id. at 38.

At this point it is instructive to define some of the terminology used in this Note. Multi-member districts are districts where more than one member is elected to represent the constituency. Single-member districts are those districts which elect only one representative. See Aleinikoff & Issacharoff, supra note 1, at 589-90. Multi-member or at-large election districts result in greater injury to minority voters who do not make up a voting majority in that particular district. See id. For example, if five seats are open in an election in a multi-member district, the white majority will be able to elect all five representatives. See id. “The perceived harm is the capacity of a majority community to capture a disproportionate share of representation through its ability to vote serially for each candidate for local office.” Id.
found that the 1982 amendments obviated the necessity of showing both discriminatory intent and effect in order to prove a claim of racial gerrymandering. The Court went on to establish a new three-pronged standard by which claims of minority vote dilution in racial gerrymandering cases were to be analyzed:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. Second, the minority group must be able to show that it is politically cohesive. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

The Court held that discriminatory effect is shown, rendering a district an illegal gerrymander, when the existence of a voting bloc majority that is usually able to defeat candidates supported by a politically cohesive minority group, is demonstrated. The Court noted that claims of vote dilution will not be established by showing the complaining group failed to win in one particular election; rather, such dilution must be established over time. The Court also held that discriminatory effects can be shown by evidence that minorities prefer the same candidates at the polls and that white voters will generally vote as a cohesive bloc to defeat a minority candidate.

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46. See Thornburg, 478 U.S. at 35.
47. See id. at 50-51.
48. Id.
49. See id. at 49.
50. See id. at 57. Conversely, the Court noted that in "a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting." Id.
51. See id. The Court, however, was unable to determine the number of elections that must be looked at to determine if racially polarized voting occurred, and stated that this factor would vary depending on the circumstances. See id. at 57 n.25.
52. See id. at 56. The Court ultimately concluded plaintiffs had proven racial bloc voting, and thus, discriminatory effect of the North Carolina plan. See id. at 80. In 16 previous primary and general elections, black support for black candidates had been unwavering, and there had been little cross-over by white voters in voting for minority candidates. See id. at 59. Black support for black candidates ranged between 87% and 96% in general elections, and between 71% and 92% in 11 of the primaries. See id. However, white support for black candidates ranged only between 28% and 49% in general elections, and
The 3-prong Thornburg test was next applied in Growe v. Emison, in which Minnesota plaintiffs claimed minority vote dilution under a single-member district plan. The Court held the Thornburg test was not satisfied because plaintiffs failed to show sufficient discriminatory effects through statistical or anecdotal evidence of political cohesion or majority bloc voting. The Court emphasized that vote dilution cannot be assumed, but must be proved by specific facts.

More recently, in Johnson v. De Grady, the Court modified the test set forth in Thornburg to require a "totality of circumstances" analysis in establishing whether a districting plan has the necessary effect of causing minority vote dilution. Under the test, the focus shifts away from the necessity of producing evidence of specific racial voting bloc behavior. To establish the requisite discriminatory effects, and strike down a district as an illegal racial gerrymander, evidence of more general discriminatory practices must be produced.

between 8% and 50% in primary elections. See id. Additionally, in general multicandidate elections, black candidates were consistently ranked last or next to last by white voters, except in predominately Democratic areas where black candidates were usually ranked last among Democratic candidates, "if not last or next to last among all candidates." Id. Based on these findings, the Court concluded plaintiffs had shown existence of discriminatory effect and struck down the plan. See id. at 80.

54. See id. at 27.
55. See id. at 41. The Court's criticism of plaintiffs' offer of proof was that it contained no concrete statistical data on which to rest its assertion, and further, was accepted by the lower court as a "national phenomenon that is 'all but inevitable.'" Id. (quoting Alan Howard & Bruce Howard, The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm, 83 COLUM. L. REV. 1615, 1625 (1983)). Later that year the Court decided Voinovich v. Quilter, 507 U.S. 146 (1993), in which the Court again found the Thornburg test not satisfied when plaintiffs claimed minority vote dilution under the Voting Rights Act. The Court stressed again that the existence of majority-minority districts was not a per se violation: These districts do not "invariably minimize or maximize voting strength." Id. at 154. Rather, specific discriminatory effects must be demonstrated. See id. at 155. Since there was no evidence that the white majority actually engaged in bloc voting, the Court held "it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." Id.
56. See Growe, 507 U.S. at 40-41.
58. See id. at 1011.
b. Equal Protection Violations

Racially gerrymandered districts are also challenged under the Equal Protection Clause of the Fourteenth Amendment. The injury typically alleged by plaintiffs in equal protection claims is vote dilution, as opposed to disenfranchisement. The Court's early resolution of these claims required a showing of both discriminatory intent and discriminatory effect in order to invalidate a district as an unconstitutional racial gerrymander. In cases decided prior to *Shaw v. Reno*, the Court routinely held that plaintiffs failed to state a claim under the Equal Protection Clause, as the discriminatory effect of denial of the opportunity to participate in the political process could never be demonstrated.

In *Whitcomb v. Chavis*, one of the earliest cases alleging a district to be an unconstitutional racial gerrymander, residents of two Indiana counties challenged a districting scheme which established one county as a multi-member district for the election of representatives to the state house and senate. The plaintiffs claimed the plan diluted the votes of blacks living in the "ghetto area" of the county. The Court upheld the plan because discriminatory

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60. 509 U.S. 630 (1993). *Shaw* was the first case in which the Court held that a racial gerrymandering claim had been stated under the Equal Protection Clause. See id.

61. See, e.g., Colegrove v. Green, 328 U.S. 549 (1946) (holding that plaintiffs failed to state a claim when bringing malapportionment claim). But see *White v. Regester*, 412 U.S. 755 (1973). *White* was one early aberrational case in which the Court found a Texas reapportionment plan unconstitutional under the Fourteenth Amendment. The plan was held to dilute the voting strength of minorities by placing them into multi-member districts. See id. at 769-70. Discriminatory effects of the reapportionment scheme were demonstrated under a "totality of circumstances" test. See id. Plaintiffs provided evidence that Texas historically engaged in official racial discrimination and was presently employing electoral mechanisms in the primary process which prevented blacks from securing candidacy. See id. at 766-67. Because specific tactics employed by the State of Texas could be pointed to which had the effect of denying minorities access to the political process, the holding in *White* was unique. In addition, Professor Issacharoff argues that despite the fact the Court in *White* was able to point to specific practices in the primary process which resulted in limiting blacks' access to the political arena, the offer of proof was flawed because, among other things, the Court was "unable to specify which functional components of such elections were objectionable." Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1844 (1992). *White*’s totality of circumstances test was overruled by *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which reinstated a more rigorous test for proving discriminatory consequences of reapportionment plans.


63. See id. at 128-29. For a discussion of why multi-member districts result in greater potential for minority vote dilution than single-member districts, see Aleinikoff & Issacharoff, *supra* note 1, at 589-90 and *supra* note 44.

64. See *Whitcomb*, 403 U.S. at 148-49. Plaintiffs alleged the plan was discriminatory
natory effects had not been demonstrated. No evidence had been presented, the Court reasoned, that black voters "had less opportunity than did other . . . residents to participate in the political processes and to elect legislators of their choice." The Court also refused to find a constitutional violation in United Jewish Organizations, Inc. v. Carey. The redistricting plan at issue in that case split the community's Hasidic Jewish population into two separate districts to provide for two minority dominated districts, in compliance with § 5 of the Voting Rights Act. The Court found no violation of the Fourteenth or Fifteenth Amendment, as neither "mandates any per se rule against using racial factors in districting and apportionment." The Court also emphasized that because white-majority districts had been preserved in other parts of the state, the plaintiffs had not suffered dilution of their voting strength.

3. Shaw v. Reno and Beyond

It was against this backdrop of litigation that the Court decided Shaw v. Reno. In Shaw, the Court, for the first time, held that the plaintiffs had stated a claim under the Equal Protection Clause in a racial gerrymandering claim. However, the claim was an "analytically distinct" one, whereby the injury alleged was neither

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because the ghetto population was underrepresented. The proportion of elected legislators who lived in the ghetto was less than "the ghetto's proportion of the population, less than the proportion of legislators elected from Washington Township, a less populous district, and less than the ghetto would likely have elected had the county consisted of single-member districts." Id.

6. See id. at 160.

66 Id. at 149. The Court focused on the absence of evidence that ghetto residents were not allowed to register to vote, or were denied the opportunity to vote or participate in political party activities such as slating of candidates. See id. at 149-50. The Court concluded that "the failure of the ghetto to have legislative seats in proportion to its populations emerges more as a function of losing elections than of built-in bias against poor Negroes." Id. at 153.


68 See id. at 144, 157.

69 Id. at 161.

70 See id. at 166-68. The Court reasoned that as long as the whites were provided fair representation no grounds existed for a claim of denial of the electoral franchise on the basis of race. See id. at 166.


72 Id. at 652. The Court distinguished the claim from that in UJO, which held districts based on race by design did not result in a violation of the Fourteenth or Fifteenth Amendment. See United Jewish Organizations, 430 U.S. at 144. To distinguish the cases, Justice O'Connor, writing for the majority, argued that plaintiffs' claim in Shaw was ana-
disenfranchisement nor dilution, but rather resulted from a reapportionment plan so grotesque in shape it "rationally [could not] . . . be understood as anything other than an effort to separate voters into different districts on the basis of race."\(^7\)

In *Shaw*, North Carolina was granted an extra congressional district as a result of the 1990 census.\(^7\) The State was redistricted, and the new plan, giving African-Americans a majority of voters in the new district, was submitted to the Attorney General for preclearance pursuant to § 5 of the Voting Rights Act.\(^5\) The Attorney General rejected this plan on the grounds that it was possible to create a second majority-minority district within the state.\(^6\)

A second plan, containing two majority-minority districts, was submitted to the Attorney General. One of the newly created districts stretched "approximately 160 miles along Interstate 85 and, for much of its length, [wa]s no wider than the I-85 corridor."\(^7\) The original plaintiffs, the North Carolina Republican Party, claimed this district was an unconstitutional political gerrymander.\(^7\) This claim was dismissed, but later a second claim was filed by a different group of plaintiffs challenging the district as a racial gerrymander.\(^7\)

The Court established that the districting plan could be found, on remand, to be an unconstitutional racial gerrymander if it were "so extremely irregular on its face that it rationally c[ould] be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles. . . ."\(^8\)

\(^7\) See *Shaw*, 509 U.S. at 649.

\(^8\) Lytically distinct from that in *United Jewish Organizations*. See *Shaw*, 509 U.S. at 652. The *Shaw* plaintiffs complained the reapportionment plan in question was "so irrational on its face that it immediately offends principles of racial equality," while the plaintiffs in *United Jewish Organizations* had alleged a different cause of action: vote dilution. See id.

\(^7\) See *Shaw*, 509 U.S. at 630. Justice O'Connor noted that, "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" *Id.* at 636 (alteration in original) (quoting Joan Biskupic, *N.C. Case to Pose Test of Redistricting*, WASH. POST, Apr. 20, 1993, at A4).


\(^7\) See *Shaw*, 509 U.S. 630. In the second claim, plaintiffs were five residents of Durham County. See *id.* at 636.

\(^8\) See id. at 642; see *id.* at 647 (defining these principles as "compactness, contiguity, and respect for political subdivisions").
On remand, the State would have the burden of showing the narrow tailoring of the new districting plan and a compelling interest for its creation.\textsuperscript{81}

In its analysis of this claim, the Court expanded the notion of harm inflicted by racial gerrymandering. Traditionally, racial gerrymandering cases focused on the harms of vote dilution and disenfranchisement. \textit{Shaw} added representational harm to this list. This harm occurs because when a “district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”\textsuperscript{82}

What \textit{Shaw} did not decide was whether an intentional creation of majority-minority districts “‘without more,’ always gives rise to an equal protection claim.”\textsuperscript{83} Thus, the Court did not hold that a showing of discriminatory intent alone would always be sufficient to strike down a district as a racial gerrymander under the Equal Protection Clause.

Subsequent cases have done little to clarify what exactly will establish the necessary discriminatory intent called for by \textit{Shaw} in order to strike down a district as a racial gerrymander under the Equal Protection Clause. For instance, the bizarre shape test of \textit{Shaw} was not followed in \textit{Miller v. Johnson}.\textsuperscript{84} The Court instead looked to see if race was the “predominant factor motivating” the legislature in creating the challenged district.\textsuperscript{85} Under \textit{Miller}, bizarre shape may still be indicative of discriminatory intent, however, it is not a necessary condition. In departing from \textit{Shaw’s} bizarre shape test, the Court in \textit{Miller} attempted to broaden the evidence which will demonstrate discriminatory legislative intent.\textsuperscript{86}

\textsuperscript{81} See id. at 643-44.
\textsuperscript{82} Shaw, 509 U.S. at 648.
\textsuperscript{83} Id. at 649 (quoting Shaw, 509 U.S. at 668 (White, J., dissenting)).
\textsuperscript{84} 515 U.S. 900 (1995) (striking down a redistricting plan created by the State of Georgia which sought to create a majority-minority district of African-Americans by connecting metropolitan Atlanta with a county located 260 miles away).
\textsuperscript{85} See id. at 916.
\textsuperscript{86} The Court stated: “The plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” Id. In order to prove race was the predominant motivating factor, “a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by ac-
While Miller’s "predominant motivating factor test" attempted to more broadly define standard set forth in Shaw, most commentators agree that Miller served only to confuse lower courts as to what test should be applied to establish the necessary discriminatory intent in order to invalidate a district as an unconstitutional racial gerrymander.

In the more recent cases of Bush v. Vera and Shaw v. Hunt ("Shaw II"), the Court further defined what constitutes a showing of discriminatory intent. In Bush, the Court held unconstitutional three newly created majority-minority districts under the predominant motive test of Miller. The Court found race to have been the predominant motivating factor behind the districts' creation as the evidence proved that racial data were the factors most heavily relied on in the districts' formation.

In Shaw II, the Court struck down the North Carolina reapportionment plan first brought to the Court in Shaw v. Reno. Applying strict scrutiny, the Court stated that "drawing racial distinctions is permissible where a governmental body is pursuing a 'compelling state interest.'" However, the reapportionment plan must be "'narrowly tailored to achieve [that] compelling interest.'" In addressing the element of discriminatory intent, the Court held that "a racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the

tual shared interests, to racial considerations." Id. However, the Court noted that bizarre shape could still be "persuasive circumstantial evidence" of the legislature's intent to create a racially gerrymandered district. See id. at 913 (where the Court held the district invalid due to circumstantial evidence of the district's shape and demographics).

See 509 U.S. at 649 (questioning "whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim" (quoting Shaw, 509 U.S. at 668 (White, J, dissenting))).

See Blissman, supra note 31, at 537-38 (arguing that Miller effectively undermined the appearance test in Shaw, and that a new problem arises when a district is irregular in shape, but not sufficiently bizarre to trigger the Shaw test; Miller leaves the courts confused as to what degree the legislature is permitted to consider race in reshaping its districts).

See id. at 1951-52.
See id. at 1955.
See id. at 1955.
Id. at 1902 (quoting Goodman v. Lukens Steel Co., 482 U.S. 656, 661 (1987)).
Id. (quoting Miller v. Johnson, 515 U.S. 900, 920 (1995)).
discriminatory classification. Writing for the majority, Justice Rehnquist found that North Carolina's plan had not been narrowly tailored to accomplish the state's interest, as it failed to meet the criteria set forth in *Thornburg*. To date, the Court has failed to develop a manageable standard by which to evaluate racial gerrymandering claims. The alternative discriminatory intent tests, *Miller*’s predominant motive test, and *Shaw*’s bizarre shape test have left lower courts in a state of confusion as to how to evaluate racial gerrymandering claims. Further, the Court has left states “walking a tightrope.” If legislatures create majority-minority districts, they face lawsuits under the Equal Protection Clause. If they do not create such districts, they face claims for failing to comply with the Voting Rights Act.

C. Political Gerrymandering

Political gerrymandering was held to be a nonjusticiable political question in early cases. Slowly, however, the Court became

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96. Id. at n.4 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)).

97. See id. at 1898. Justice Rehnquist reasoned that because the plan was not drawn to remedy past effects of discrimination it was not narrowly tailored. See id. Justice Rehnquist also noted that the plan could not have been drawn to comply with § 5; creating a new majority-minority district before preclearance has been granted is not mandated by the Section. See id. Finally, the district was not narrowly tailored to comply with § 2 of the Voting Rights Act, as it was not “geographically compact” as required under *Thornburg*. See id.


99. Karlan, *supra* note 39, at 289 (arguing this “tightrope” has left legislatures confused as to what course of action to employ when faced with the necessity of redistricting and charged with violations regardless of what course is employed); see also Frank R. Parker, *Factual Errors and Chilling Consequences: A Critique of Shaw v. Reno and Miller v. Johnson*, 26 CUMB. L. REV. 527, 535 (1996) (comparing this concept to the psychiatric term “double bind,” whereby individuals receive conflicting messages about how to behave causing them to feel subjected to conflicting obligations).

100. See Karlan, *supra* note 39, at 289 (stating that compliance with the Voting Rights Act will trigger suits for Equal Protection violations, while noncompliance will result in suits under §§ 2 and 5).

101. See, e.g., Colegrove v. Green, 328 U.S. 549, 556 (1946). Justice Frankfurter warned the Court not to enter the “political thicket” with regard to these claims. See id.
less adverse to hearing political reapportionment claims,\textsuperscript{102} and eventually held them to be justiciable in \textit{Davis v. Bandemer}.\textsuperscript{103}

In \textit{Bandemer}, Indiana Republicans passed a reapportionment scheme following the 1980 census, calling for both single and multi-member districts. Consequently, in the following election the Republicans retained control of the state legislature, despite the fact that Democrats received a majority of the popular vote.\textsuperscript{104} The disparate results were achieved by "stacking" and "splitting"; that is, stacking Democrats into districts which had strong Democratic majorities, and splitting the other areas of Democratic support into districts in which Republicans held safe majorities.\textsuperscript{105} In order to invalidate the district, the Court required that plaintiffs demonstrate

\textsuperscript{102} See Reynolds v. Sims, 377 U.S. 533 (1964) (articulating the "judicially manageable standard" of "one person, one vote," although holding that political gerrymandering remained nonjusticiable); Baker v. Carr, 369 U.S. 186, 217 (1962) (holding malapportionment claims justiciable, but political gerrymandering claims nonjusticiable, as there is a "lack of judicially discoverable and manageable standards for resolving [these claims]"); in \textit{WMCA, Inc. v. Lomenzo}, 382 U.S. 4 (1965), the Court maintained the nonjusticiability of these claims, although Justice Harlan warned "that . . . partisan 'gerrymandering' may be subject to federal constitutional attack under the Fourteenth Amendment." \textit{Id.} at 6. In \textit{Gaffney v. Cummings}, 412 U.S. 735 (1973), the Court raised the constitutionality of political gerrymandering for the first time, although the issue was not resolved. In \textit{Karcher v. Daggett}, 462 U.S. 725 (1983), the Court declared it may be ready to declare political gerrymandering to be a justiciable question. In his concurrence, Justice Stevens listed three elements plaintiffs must demonstrate in claim of political gerrymandering in order for the case to be justiciable:

1. They belong to a politically salient class, . . . whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries. . . .
2. In the relevant district or districts or in the State as a whole, their proportionate voting influence has been adversely affected by the challenged scheme. . . .
3. [They can establish] a prima facie showing that raises a rebuttable presumption of discrimination.

\textit{Id.} at 754-55. (Stevens, J., concurring).

\textsuperscript{103} 478 U.S. 109 (1986). Holding political gerrymandering to be justiciable, the Court stated that there existed "judicially discernable and manageable standards by which political gerrymander cases are to be decided." The Court reasoned that it could not hold the claim beyond its jurisdiction merely because the controversy was dubbed a "political one." \textit{Id.} at 122. The majority explained that "[t]he courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated political exceeds constitutional authority." \textit{Id.} (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

\textsuperscript{104} In the House races, Democrats received 51.9\% of votes and 43 seats, while Republicans received 48.1\% of votes and 57 seats. \textit{See id.} at 115. In the Senate races, Democrats received 53.1\% of votes and 13 seats, while Republicans received 46.9\% of votes, and 12 seats. \textit{See id.} Additionally, in Marion and Allen Counties, Democrats received 46.6\% of votes, but Republicans received 86\% of the seats. \textit{See id.}

\textsuperscript{105} See \textit{id.} at 116-17 (stating that these tactics evidenced clear intent on the part of Republicans to disadvantage Democrats by giving Republicans safe majorities in the districts in question).
not only discriminatory intent on the part of the legislature against a political group, but also actual discriminatory effect on that group.106

In describing the burden plaintiffs must meet to establish discriminatory intent, Justice White explained that in the political gerrymandering context, discriminatory intent is always present and unavoidable.107 Regarding the element of discriminatory effect, Justice White wrote that because the Constitution does not mandate proportional representation, merely showing that a particular party has lost an election will not establish discriminatory effect.108 Discriminatory effect is established when "there is evidence that excluded groups have 'less opportunity to participate in the political processes and to elect candidates of their choice'"109 or when "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. . . . [There must be] evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."110

The Court struck down the plaintiffs' claim, finding an absence of discriminatory intent on the part of the Republicans. This was despite testimony from the Speaker of the House conceding that the explicit purpose behind drawing boundaries in this manner was to give Republicans an electoral advantage.111 The Court also found no actual discriminatory effects.112

106. See id. at 127.

107. See id. at 127-29. However, Justice White observed that while "discriminatory intent may not be difficult to prove in this context does not, of course, mean that it need not be proved at all to succeed on such a claim." Id. at 129 n.11.

108. See id. at 132-33.

109. Id. at 131 (quoting Rogers v. Lodge, 458 U.S. 613, 624 (1982)).

110. Id. at 133. This may be manifested in a lack of opportunity for a group to participate in party deliberations, to slate or nominate their candidates, or to register to vote. Additionally, election results from one year alone, as plaintiffs provided in this case, are insufficient to establish discriminatory effect. See id.

111. See id. at 117 n.5 (stating that the Speaker testified that in forming district boundaries Republicans "wanted to save as many incumbent Republicans as possible").

112. See id. at 134 (explaining that the factual findings of the district court did not satisfy the threshold requirement of establishing discriminatory effect).
III. REPRESENTATIONAL HARM IN GERRYMANDERING

Shaw v. Reno\textsuperscript{13} described the harm inflicted by racial gerrymandering as representational, that is, the conscious disregard with which the elected representative of a majority-minority district treats the interests of individuals who reside in his or her district, but who are not members of the minority group the district was created to benefit.\textsuperscript{14} The Court stated: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."\textsuperscript{15}

Justice Stevens' dissenting opinion in Miller v. Johnson\textsuperscript{16} helped define the concept of representational harm in the racial gerrymandering context by describing two elements needed to establish such a claim. First, most minority voters must support the same candidate.\textsuperscript{17} Second, the elected representative must ignore the interests of his or her non-minority constituents.\textsuperscript{18}

In subsequent cases, the Court sought to severely restrict claims of injury based on representational harm. United States v. Hays\textsuperscript{19} held that only individuals living within racially gerrymandered districts endure representational harm, while individuals living outside such districts remain unaffected by these practices.\textsuperscript{20} Furthermore, in Davis v. Bandemer\textsuperscript{21} the Court did not address the existence of representational harm in the political gerrymandering context.\textsuperscript{22}

\textsuperscript{13} 509 U.S. 630 (1993).
\textsuperscript{14} See id. at 648. The Court argued districting plans which mandate results corresponding to the racial population of an area "emphasiz[e] differences between candidates and voters that are irrelevant in the constitutional sense." Id. (quoting Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting)).
\textsuperscript{15} Id.
\textsuperscript{17} See id. at 930.
\textsuperscript{18} See id. Standing in a case of representational harm, Justice Stevens argued, "ultimately depends on the very premise the Court purports to abhor: that voters of a particular race 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" Id. (Stevens, J., dissenting) (quoting Shaw, 509 U.S. at 647). However, it should be noted the majority in Miller did not apply Justice Stevens' elements in concluding plaintiffs had proved representational harm, but rather concluded that "[a]s residents of the challenged Eleventh District, all appellees had standing." Id. at 909.
\textsuperscript{19} 515 U.S. 737 (1995).
\textsuperscript{20} See id. at 739.
\textsuperscript{21} 478 U.S. 109 (1986).
\textsuperscript{22} See id. at 132.
These cases squarely contradict the holding set forth in Shaw, which did not condition the injury of representational harm on its occurring in the racial gerrymandering context. While Shaw held that representational harm is assumed in the instance of racial gerrymandering, Bandemer implied such harm either had to be affirmatively demonstrated, or was nonexistent, in politically gerrymandered districts.

Additionally, Shaw did not require that plaintiffs reside in the challenged district in order to have been injured by representational harm. In fact, as Professor Karlan notes, the most “remarkable aspect of Shaw was its complete disregard for standing requirements.” None of the Shaw plaintiffs lived in the challenged First Congressional District, and only two of the five resided in the Twelfth, the second challenged district.

While Hays and Bandemer seek to minimize the reach of representational harm, this injury extends beyond the racial gerrymandering context and impacts residents of politically gerrymandered districts as well. Additionally, the harm extends beyond residents of the gerrymandered district and reaches those who remain in the original district from which the gerrymandered district was created. Since the harm is identical in both racial and political gerrymandering contexts, it is necessary to evaluate these claims under the same standard. Therefore, the prong of discriminatory effect should be eliminated as an element of proof from political gerrymandering claims.


'The individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense.

(quotining Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting)).

124. Karlan, supra note 39, at 290; see also Aleinikoff & Issacharoff, supra note 1, at 642-43, (asking: “If neither justiciability nor standing will bar potential challenges to the nonbizarre use of race in redistricting, is there any stopping point short of the ‘strict-scrutiny-all-the-way-down’ model?”). Aleinikoff and Issacharoff argue that such a slippery slope will lead to the application of strict scrutiny to all race-conscious districting under the Fourteenth Amendment. See id.

125. See Shaw, 509 U.S. at 637 (describing that while two of the plaintiffs would vote in the twelfth district, three of the plaintiffs resided in the second district, which was not challenged).
A. Representational Harm: Who is Injured?

Representational harm affects not only those living within a gerrymandered district, but also those living outside the district in the surrounding communities. Ensuring the election of a minority candidate by means of constructing a twisting, turning district may effectively promote increased minority representation in government, but at the same time destroys natural communities which have been formed by the conscious migration of individuals into areas comprised of people with common interests.126

Individuals naturally choose to live in areas in which they have something in common with their neighbors, such as race, religion, political affiliation, or educational values.127 Charles Tiebout has argued that where an individual resides is a conscious decision based on his or her preference for government expenditures and provision of public services.128 Tiebout argues that consumers analyze localities in terms of the expenditure patterns adopted by local governments, and decide where to live according to which communities best satisfy their preferences regarding the provision of goods and services.129 Social factors also play a large role in personal relocation decisions.130 Districts formed to ensure the election of minority candidates, or candidates from particular political parties, destroy the communities that people consciously choose

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126 See CHARLES M. TIEBOUT, SUPPLEMENTARY PAPER No. 16, THE COMMUNITY ECONOMIC BASE STUDY 13 (1962) (describing community economic base studies, which are mechanisms for analyzing individual communities in terms of their economic activities in order to enhance the quality of decision making by officials by empowering them to tailor their decisions to the specific behavior and needs of local interests).
127 See Hamilton, supra note 38, at 1568 (arguing that race should not be the only factor considered when creating districts as it is “only one factor among many in determining the identity of individuals,” and that other factors play an equally critical role in how people define themselves and what they have in common with others).
128 See Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON 416, 418 (1956) (arguing that the availability and quality of public services, such as education, is the determinative factor in an individual’s decision of where to live).
129 See id. Tiebout argues there is a difference between central and local provisions of public goods. Central provision of goods reflects the government’s adjusting its expenditures to meet the perceived preferences of its citizens. The local level of provision is the level at which expenditure levels are set. It is this latter category, Tiebout argues, that consumers most seriously consider in deciding where to live. See id.
130 See id. at n.12 (arguing that a variety of non-economic factors also play a large role in people’s decision as to which community to join; the fact that the consumer desires “to associate with ‘nice’ people” plays a large role when deciding which community best reflects one’s preferences).
to join. This, in turn, prevents the communities’ unified voice from being heard in the political process.

Representational harm injures individuals by removing them from the communities they have consciously chosen to join, for representational purposes, and placing them into gerrymandered districts. The injury of representational harm is also suffered by those individuals left behind in the diluted community, who now have a smaller citizen base to fight for their interests. When gerrymandering removes people from their chosen communities and places them into majority-minority districts, individuals from neighboring areas must be added to the community from which they were removed to satisfy districting population requirements. The result is the creation of districts comprised of fragmented communities.

Individuals forced into such districts may find their interests ignored by the elected representative. This is attributable to the fact that these added people constitute only small parts of the newly created districts. A representative who finds his or her views at odds with a small portion of his or her constituency has no incentive to ensure that the concerns of these individuals are adequately represented. This result would not follow if the original community had remained intact; the citizens then could have effectively banded together to petition the representative to promote legislation reflecting their collective interests.

The Court rejected this theory of representational harm, however, in *United States v. Hays*, where it held that plaintiffs who were not residents of the challenged racially gerrymandered district did not have standing to sue. In *Hays*, the 1990 census reduced the number of congressional seats to which Louisiana was entitled from eight to seven, and the district boundaries were redrawn to create two majority-minority districts. District 4 of the plan was oddly shaped, and plaintiffs challenged its constitutionality. The

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132. See Shaw v. Reno, 509 U.S. 630, 648 (1993) (explaining that when a district is created for the benefit of one racial group, elected officials will believe their primary obligation is only to that group).
134. See id. at 739.
135. See id. at 740.
136. See id.
district court found the plan to be unconstitutional, and the State appealed.\textsuperscript{137}

The Supreme Court chose to resolve the question by turning to the issue of standing, although it was not raised by any of the parties.\textsuperscript{138} The Court concluded that because plaintiffs did not reside in the challenged district, they did not suffer the representational harm as defined by Shaw.\textsuperscript{139} The Court reasoned that only individuals able to allege injury as a direct result of having personally been denied equal treatment have standing to assert claims.\textsuperscript{140} The Court concluded that plaintiffs had presented nothing more than a generalized grievance against conduct of which they did not approve and that they had not been directly affected by the districting plan because they did not reside in the challenged district.\textsuperscript{141}

\textit{Hays} presumes that those who do not reside in a challenged district are not injured by the gerrymandering that created the district. However, the Court noted that a plaintiff residing outside the district may be injured if he or she is able to show he or she was personally denied equal treatment.\textsuperscript{142}

\begin{footnotesize}
\begin{enumerate}
\item The Court stated it was obligated to consider the issue of standing, """'even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.'""' \textit{Hays}, 515 U.S. at 742 (quoting FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230-31 (1990)).
\item See id. at 745 (stating that ""'where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference')."
\item See id.
\item See id.; see also Jack Pritchard, Note, United States v. Hays: A Winnowing of Standing to Sue in Racial Gerrymandering Claims, 47 MERCER L. REV. 955, 961 (1996) (interpreting the Court as holding that those living inside the district were directly injured by the plan, while those residing outside the district were only indirectly affected).
\item See \textit{Hays}, 515 U.S. at 746. This standard is difficult, but not impossible to surmount, it should be noted, as seen in \textit{Johnson v. Mortham}, 915 F. Supp. 1529 (N.D. Fla. 1995). In \textit{Johnson}, plaintiffs filed suit alleging a majority-minority district violated the Equal Protection Clause. See id. Citing \textit{Hays}, the court imposed a rigorous standard for proving harm to individuals living outside the challenged district before permitting parties to intervene in the action. See id. at 1539-40. One of the few motions the court granted was that of Andrew Johnson, who lost his seat in the 1992 congressional elections due to the redistricting. He was gerrymandered out of the district but ran for the seat under the Qualifications Clause of the Constitution, which permits the election of a representative who does not live in the district being represented. See id. The court denied most other motions to intervene, establishing that the standard for proving harm when an individual lives outside a challenged district is difficult to meet. See id. at 1538 (denying the motion
\end{enumerate}
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The holding in *Hays* changes the notion of representational harm set forth in *Shaw v. Reno*.[143] In *Shaw*, the Court did not condition representational harm on whether the plaintiffs resided in the challenged district, but stated that the harmful effects of racial gerrymandering reach all people in a state[144] by "reinforc[ing] racial stereotypes and threaten[ing] to undermine our system of representative democracy."[145] Justice Stevens' concurrence in *Hays* supports this view.[146] He argued that standing did not depend on whether plaintiffs were residents of the challenged district, but whether plaintiffs put forth a showing of discriminatory effect that resulted in denial of their right to participate in the political process.[147]

Contrary to *Hays*, residents both inside and outside gerrymandered districts are harmed and thus have standing to seek redress. First, as is supported by *Hays*, those placed in racially or politically gerrymandered districts are obviously placed at a disadvantage. They are forced to participate in electing representatives from a community with which they may share little in common, and in which representatives are free to disregard their interests due to the impossibility of their vote affecting the outcome of an election.[148]
One counter-argument to this theory of representational harm is that individuals brought into majority-minority districts who are not members of the minority group benefitted by the district are not discriminated against because of their race. Rather, these individuals are taken into the districts for the sole purpose of meeting the equal population requirements. As Professor Karlan puts it, "whether they are white, Asian, Hispanic, or purple with green spots has no bearing on their assignment to a particular district." Because race has not been considered in including these individuals in the district, they have not been injured by the racial classification. Under this premise, Karlan concludes, white voters placed in majority-minority districts have not been injured because they are the "least likely" to have been personally injured by a racial classification.

This argument is refuted by turning to the theory of communities of interest, discussed above. Voters placed into a majority-minority district, who are not members of the racial group the district was created to benefit, suffer from representational harm because of a racial classification. While they themselves have not been placed into the district because of their race, they are still victims of representational harm. They have been placed into a district where it is certain their votes "do not, and should not, count." These individuals are politically paralyzed by their inability to elect an official who will represent their interests. The final result is the elected representative's awareness that he or she may continually disregard these constituents' concerns without jeopardizing his or her chances for re-election.
Second, and notwithstanding the Court's holding in Hays, individuals left in the original district are also harmed by the creation of the gerrymandered district. \(^{154}\) People living in close proximity to one another usually possess similar political and social interests. \(^{155}\) Dividing communities based on racial or political classifications results in the creation of areas lacking a cohesive core of citizens with common interests. \(^{156}\) It is inherently more difficult for a representative to ascertain the interests of the community when there is a great degree of diversity among its residents. \(^{157}\) As Justice Powell articulated in Karcher v. Daggett, "[a] legislator cannot represent his constituents properly—nor can voters from a fragmented district exercise the ballot intelligently—when a voting district is nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State." \(^{158}\) Thus, when a community of interest is carved up

\(^{154}\) See Issacharoff & Goldstein, supra note 148, at 64 ("[A] decision to include one kind of person is fundamentally also a decision to exclude other kinds of people."). Issacharoff and Goldstein also argue that when a line is drawn between neighbors for racial reasons it is not possible "to believe that one but not the other has had its representational opportunities conditioned on the basis of race." Id. at 63. See Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding that where the boundaries of the challenged district were drawn to include almost all the whites in Tuskegee, but almost no blacks, sufficient evidence of racial motivation existed and the district was struck down); cf. Powers v. Ohio, 499 U.S. 400 (1991) (holding unconstitutional in a criminal case the use of race-based peremptory strikes in jury selections; under third party standing principles the criminal defendant had standing to sue although the juror's rights were violated); Ryan Guilds, A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access, 74 N.C. L. REV. 1863, 1898 (1996) (arguing that the Court in Hays applied an inconsistent analysis from the standard applied in Powers in concluding the harm alleged was nothing more than a generalized grievance, and criticizing the Court for its failure to explain why voters in Hays lacked a cognizable injury).

\(^{155}\) See Blissman, supra note 31, at 542 (arguing that in communities of interest, the citizens are effectively represented by one individual because they all have generally the same political and social needs; once such a community is destroyed through apportionment a community is created which possesses no common interests among its residents).

\(^{156}\) See Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting) (arguing that "[w]hen racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist").

\(^{157}\) See Blissman, supra note 31, at 541 (asserting that the goal of attaining adequate representation of a district's residents is thwarted when the district is comprised of such a diverse group of citizens that it becomes impossible to ascertain their interests, which may, at times, be in direct conflict).

\(^{158}\) 462 U.S. 725, 787 (1983). For a discussion of possible remedies to representational harm, see Issacharoff and Goldstein, supra note 148, at 55. One remedy to representational harm in the racial gerrymandering context that has been suggested by Professors Issacharoff and Goldstein is to draw racially gerrymandered districts not to give minorities
to create a majority-minority district, those left behind are injured just as much as those brought into the gerrymandered district, although in a different way: They are injured by the inclusion of their neighbors in the district and by the corresponding division and dilution of an otherwise cohesive community with shared political and social concerns.

B. Representational Harm Is Injurious in Politically as Well as Racially Gerrymandered Districts

The concept of communities of interest applies to the partisan context as well. One commentator has argued that communities of interest are generally "homogeneous in class and partisanship," and that people who live in defined communities tend to share political preferences. It follows that representational harm applies in political gerrymandering cases. For example, if a community has a sufficient majority to elect a Democrat, and Republicans divide the community as part of a political gerrymander, they will destroy a cohesive community of interest and prevent the Democrats from being represented by an official whom they would otherwise elect. This results in the election of a representative who will ignore the concerns of district-filling people not of the same political affiliation as the representative.

Since the incumbent from the politically gerrymandered district knows he or she represents an area which has been crafted so that a majority of the residents share his or her political views, the representative has no incentive to acknowledge other voters' concerns: "Safe districts remove the incentive to grant political concessions to constituent interests or create electoral coalitions [that] ensure representation of diverse points of view." In fact, grant-
ing the minority party’s point of view deference in a gerrymandered district would be foolish. The representative would risk offending the constituents whose support the district was designed to guarantee.

This harm is inflicted on both those living within the gerrymandered district and those living outside it. Both are deprived of the voting strength of individuals with whom they share common interests. This can be regarded as a form of vote dilution; forcing people into districts where it is impossible for their votes to count obviously decreases their power to influence the political process. It is contemplated in drawing these district lines that these filler people will have no hope of influencing an election; the results are predetermined.

The Court, in *Davis v. Bandemer*, rejected the notion that representational harm is suffered by voters who have been placed into politically gerrymandered districts. Despite the harm articulated in *Shaw*—that representatives elected from gerrymandered districts ignore the interests of filler people—*Bandemer* held that this harm is not present in political gerrymandering. The Court stated that when a group loses an election they are “deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. . . . [It] cannot . . . [be] presume[d] . . . that the candidate elected will entirely ignore the interests of those voters.”

Despite the Court’s insistence that representational harm does not occur in the political gerrymandering context, the obvious result of any group’s attaining political power is that its policies and goals will be implemented to the detriment of the views of the

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164. See id. at 132.
165. Id. at 132; see also Parker, *supra* note 99, at 534-35 (arguing that the entire notion of representational harm goes against the core of our political system because it calls for proportional representation, which is not a constitutional right: “[W]e assume that the representative who is elected . . . will serve the constituency as a whole and not merely the voters who elected him or her”).
losing party." Concurring in part in Bandemer, Justice Powell pointed out:

[I]t defies political reality to suppose that members of a losing party have as much political influence over state government as do members of the victorious party. Even the most conscientious state legislators do not disregard opportunities to reward persons or groups who were active supporters in their election campaigns. Similarly, no one doubts that partisan considerations play a major role in the passage of legislation and the appointment of state officers.67

Clearly then, when a particular political group loses an election, its interests are largely disregarded in the formulation and passage of legislation. In one sense, this result is contemplated by our system of government which operates under a "spoils system" of election. However, a result not contemplated arises when political gerrymandering is used to effectively manipulate the exact outcome in a given election; the losing party is consistently and effectively denied the opportunity to have a meaningful chance at electing the representative of its choice.68

This result does not literally deny voters the opportunity to participate in the political process (the discriminatory effect element Bandemer contemplates);69 however it is impossible for a competitive election to take place in districts which are designed to guarantee incumbent retention.70 In this sense, voters in these

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66. See Dworak-Fisher, supra note 161, at 148 (arguing that in any type of gerrymandering the result of manipulating district boundaries is the undermining of the "collective will"). See generally Bernard Grofman, Toward a Coherent Theory of Gerrymandering: Bandemer and Thomburg, in POLITICAL GERRYMANDERING AND THE COURTS 29, 49 (Bernard Grofman ed., 1990) (arguing that differences in policies between political parties reflect "mediating mechanisms" through which voter preferences are gauged and that disregard of a party's interests by the party in power translates into voter discrimination).


68. However, it should be noted that the harm in political and racial gerrymandering cases can be distinguished based on the stigma which attaches to a racial classification. Shaw v. Reno, 509 U.S. 630, 647 (1993), described this stigma as the assumption that all members of a racial classification "think alike, share the same political interests, and will prefer the same candidates at the polls." It can be argued that no such stigma is present in a classification based on political affiliation.

69. See Bandemer, 478 U.S. at 131 (stating that "[o]nly where there is evidence that excluded groups have 'less opportunity to participate in the political process and to elect candidates of their choice'" are discriminatory effects shown (quoting Rogers v. Lodge, 458 U.S. 613, 624 (1982))).

70. The goal of incumbent retention in the reapportionment process has developed into
districts are denied the right to meaningfully participate in the political process. Their votes are rendered ineffectual in a system in which the outcome is already set. Not only does this prevent representation of the minority party’s interests, it serves to undermine the meaningfulness of the electoral system in the minds of minority party voters in a politically gerrymandered district. They come to realize that their votes do not matter, and that their prospects of influencing the political process are slim.

This harm also results in the racial gerrymandering context, when individuals are forced out of their communities of interest and into districts with people with whom they share nothing in common. The harm suffered by these groups is the same: Each group is placed into a district in which it is almost certain their votes will not enable them to elect candidates of their choosing. As a result, and as Shaw contemplates, a substantial risk exists that their interests will be wholly ignored by the elected representative.

one of the permissible traditional districting criteria defined by the Court in Miller v. Johnson, 515 U.S. 900 (1995). See, e.g., Pamela S. Karlan, Just Politics? Five Not So Easy Pieces of the 1995 Term, 34 HOUS. L. REV. 289, 311 (1997) (arguing that “[t]he key ‘tradition’ is for the ins to keep themselves in and the outsiders out” through incumbent retention and maintenance of the political party in power); Pamela S. Karlan & Daryl J. Levinson, Why Voting Is Different, 84 CAL. L. REV. 1201, 1205-06 (1996). Miller defined traditional districting principles to be adhered to in the reapportionment process as “compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests.” Miller, 515 U.S. at 916.

Computer technology has made the ability to predict the outcome of a given election much more accurate. Justice Harlan stated in his dissent in Wells v. Rockefeller, 394 U.S. 542, 551 (1969), that a “computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues”; see also Michelle H. Browdy, Computer Models and Post-Bandemer Redistricting, 99 YALE L.J. 1379, 1387 (1990) (arguing that while automated redistricting by computer may provide objective standards for legislative use in redistricting, great potential exists to use this resource as a means to attain politically desirable results for incumbents).

See Morrill, supra note 2, at 238 (stressing that the meaningfulness of electoral districts is critical in the eyes of voters, as these are entities with which residents identify and are therefore not just “merely passing conveniences for the holding of elections”). But see Melvyn R. Durchslag, United States v. Hays: An Essay on Standing to Challenge Majority-Minority Voting Districts, 63 U. Cin. L. REV. 341, 367-69 (1997) (arguing federal congressional districts need not conform to communities of interest to the extent such adherence is mandated at the state and local level: it is “irrelevant to the articulation of national policy that congressional districts have some distinct sense of communal identity”). Professor Durchslag stated, however, that state and local districting schemes should adhere to communal boundaries because state legislative policy is formed reflecting the uniqueness of state political subdivisions. See id.
IV. SUGGESTIONS AND IMPLICATIONS FOR THE FUTURE

A. Eliminating the Element of Discriminatory Effect in Political Gerrymandering Cases and Working Toward a Shaw-like Application of Discriminatory Intent

Justice Stevens argued that "[i]n the line drawing process, racial, religious, ethnic and economic gerrymanders are all species of political gerrymanders." Many other commentators have also argued that political and racial gerrymanders are really the same cause of action. The similarity of these claims lies in the harm suffered by the victims. In both racial and politically gerrymandered districts, the residents who are not members of the group the district was created to benefit are at a substantial risk that the representative elected will ignore their interests, giving deference only to the concerns of the majority party or group the district was intended to benefit. Since this representational harm occurs in both types of gerrymandering claims, these cases should be evaluated under the Equal Protection Clause by the same standard.

To prove racial gerrymandering under the Equal Protection Clause, plaintiffs need only establish evidence of discriminatory intent. However, as established by Bandemer, both discriminatory intent and effect must be shown to invalidate a district as a political gerrymander, a much higher standard. This additional element of discriminatory effect, the Court said, is not evidence that the contesting group lost an election, or that election of its candidates is difficult. Rather, it is "evidence of a continued frustration of the will of a majority of the voters or effective denial

174. See Hamilton, supra note 38, at 1545 (arguing that political and racial gerryman- dering raise similar constitutional questions; both claims have ties to partisan politics and therefore both should be deemed per se unconstitutional under the Equal Protection Clause); LeRoy D. Percy, Political and Racial Gerrymandering: A Proposal for Comparable Causes of Action, 65 Miss. L.J. 385 (1995) (arguing that since both claims arise under the same principle of equal protection they should be accorded similar treatment; however, he argues the standard of evaluating racial gerrymandering claims should be raised to require a showing of discriminatory effect).
176. See id. Whether the effect element has been entirely done away with, however, is unclear. "We express no view as to whether ‘the intentional creation of majority-minority districts, without more,’ always gives rise to an equal protection claim." Id. at 649 (quot- ing Shaw, 509 U.S. at 668 (White, J., dissenting)).
178. See id. at 132.
to a minority of voters of a fair chance to influence the political process. This standard has proven a nebulous one, leaving courts and commentators perplexed as to what must be demonstrated to prove this "continued frustration."

Bandemer's requirement of demonstrating discriminatory effect has left a claim of political gerrymandering impossible to establish. In our modern political system it is inconceivable that a group would literally be denied the right to vote, or effectively be denied the right to participate in the political process, as Bandemer demands. The Court in Bandemer also stated that a continued pattern of voter frustration will suffice to prove the requisite discriminatory effect. However, the Court emphasized that such frustration cannot be established by losing one election, or even "where the losing group loses election after election." Thus, the

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179. Id. at 133. The Court stated that a group may prove they have been denied the opportunity to influence the political process by demonstrating a denial of "members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate." Id. Such a standard seems insurmountable, although several commentators have applauded the Court for articulating this test. See, e.g., Grofman, supra note 166, at 30 (arguing that the Court did in fact articulate a manageable test in Bandemer requiring a showing the district was "(1) intentional, (2) severe, and (3) predictable nontransient in its effects"). However, an equal number of scholars consider Bandemer to be the final word on the subject of partisan gerrymandering and argue the standard set forth is impossible to meet. See, e.g., Daniel Hays Lowenstein, Bandemer's Gap: Gerrymandering and Equal Protection, in POLITICAL GERRYMANDERING AND THE COURTS 64, 96 (Bernard Grofman ed., 1990) (arguing that the standard articulated in Bandemer makes it impossible for a political gerrymandering claim to succeed).

180. Andrew P. Miller and Mark A. Packman, The Constitutionality of Political Gerrymandering: Davis v. Bandemer and Beyond, 4 J.L. & Pol. 697, 724 (1988). Miller and Packman criticize this standard and highlight its confusing aspects: If losing only one election is insufficient to show discriminatory effect, what will constitute a sufficient showing? If elections are held once every two years, by the time five elections have passed the state must redistrict again as part of the decennial census. Knowing this, they argue, it is logical to deduce that between two and four elections must be lost to prove the requisite discriminatory effect; however, the Court refused to clarify this in Bandemer. See id.

181. See, e.g., Lowenstein, supra note 179, at 96 (questioning why the Court bothered to hold political gerrymandering justiciable if the test articulated, as well as political and social realities, make it impossible for the claim to succeed).

182. See Bandemer, 478 U.S. at 131; Mark A. Packman, Reapportionment: The Supreme Court Searches for Standards, 21 Urb. Law. 925, 945 (1989) (arguing that the requirement that plaintiffs prove they had been denied the opportunity to participate in the political process does not make sense because "in our two-party system those two parties are the political process").

183. See Bandemer, 478 U.S. at 131.

184. Id. at 132.
Court created an insurmountable requirement by calling for proof of discriminatory effect in a political gerrymandering case, leaving it impossible to effectively challenge such districts, and rendering political gerrymandering the “constitutional” form of gerrymandering. ¹⁸⁵

The idea that it is permissible, even constitutionally acceptable, for political parties to manipulate district boundaries to ensure retention of incumbents is repugnant to a system which purports to allow the people of a community to elect a representative who best reflects the interests of that community. ¹⁸⁶ Political gerrymandering is a practice which results in the systematic degradation of citizens’ empowerment to change the composition of government. A corresponding decrease in confidence in our electoral system arguably follows. One commentator argues: “If a particular rule works to the systematic disadvantage of one group over another, members of that disadvantaged group are less likely to think the rules, and any policies produced by them, are legitimate.” ¹⁸⁷ The standard for proving political gerrymandering in equal protection claims should therefore be lowered to that required in equal protection racial gerrymandering cases; the element of discriminatory effect should be eliminated.

In addition to eliminating the requirement of showing discriminatory effect to prove a political gerrymander, the standard by which the Court evaluates discriminatory intent in these cases must also be revised. As was seen in Miller v. Johnson,¹⁸⁸ clear evidence of discriminatory intent in creating a politically gerrymandered district must be sufficient to declare the district invalid. The


¹⁸⁴. It should be noted that the arguments, set forth in this Note challenge established notions of incumbency protection as a valid state interest. See Bandemer, 478 U.S. at 139 (recognizing incumbency protection to be a valid state interest and holding that where redistricting is done to effectuate incumbent retention, no violation of the Equal Protection Clause will result); see also Dowd-Fisher, supra note 161, at 131 (recognizing other legitimate benefits of incumbency protection, such as stability in the legislature, high quality of candidates, and the perks a senior representative is able to bring home to his or her district).

¹⁸⁵. Cain supra note 3, at 132.

¹⁸⁶. 515 U.S. 900 (1995). The Court struck down a redistricting plan not on the basis of bizarre shape, but rather because race was the “predominant factor motivating” the district’s creation. Id. at 916. As evidence of discriminatory intent, the Court held, plaintiffs could rely on “circumstantial evidence of the district’s shape and demographics or more direct evidence going to legislative purpose . . .” which would prove “that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.” Id.
analysis employed by the Court in Bandemer regarding proof of discriminatory intent rendered the element meaningless, and declared discriminatory intent to be an acceptable purpose of a legislature in creating a districting scheme.\footnote{See Bandemer, 478 U.S. at 111 (stating that “[e]ven if a state legislature redistricts with the specific intention of disadvantaging one political party’s election prospects, there has been no unconstitutional violation against members of that party”).}

In Bandemer, the deposition testimony of the Indiana Speaker of the House of Representatives clearly evidenced the legislature’s discriminatory intent in creation of the districting plan; he stated that the districting scheme was created to “save as many incumbent Republicans as possible.”\footnote{Id. at 117 n.5. One Republican Senator testified that he admitted telling a Democrat colleague, “You will have the privilege to offer a minority map. But I will advise you in advance that it will not be accepted.” Id. When asked to explain this comment the Senator stated, “I don’t make goals for the opposite team.” Id.} The Court disregarded this testimony as evidencing any meaningful showing of discriminatory intent, stating that political redistricting is intended to have substantial political consequences.\footnote{See id. at 128.} The Court stated that “[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.”\footnote{Id. at 129.}

It is necessary to bring the use of discriminatory intent in political gerrymandering cases in line with its application in equal-protection racial-gerrymandering cases. In Shaw, discriminatory intent was shown by looking at the shape of the district alone.\footnote{See Shaw v. Reno, 509 U.S. 630 (1993).} The Court stated that “[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.”\footnote{Id. at 642.} One suggestion posed by Professors Aleinikoff and Issacharoff is to presume a district unconstitutional whenever there is a significant deviation from the traditional districting principle of compactness.\footnote{See Aleinikoff & Issacharoff, supra note 1, at 621 (arguing that such an approach would prevent bizarre-looking districts from being upheld on the grounds they conformed to the equipopulation rules, but acknowledging such approach also contains weaknesses, as Shaw failed to articulate clear guidance behind the “I know it when I see it” approach). This approach would effectively preserve communities of interest by ensuring a district does not twist and turn all over the state, but is confined to several neighborhoods in close proximity to one another.}
Justice Powell’s dissent in Bandemer lends support to this proposal. He advocated “reference to the configurations of the districts, [and] the observance of political subdivision lines” in determining whether a district’s bizarre shape provides evidence of discriminatory intent. In his concurrence in Karcher v. Daggett, Justice Stevens also argued that failure to adhere to compactness is sufficient evidence of discriminatory intent to invalidate a politically gerrymandered district. He argued that mathematical methods are available for measuring the compactness of districts, and that deviation from these measurements is strongly suggestive of gerrymandering. Other commentators have argued for application of the compactness standard, agreeing that disregard for principles of compactness evidences clear intent to create a partisan gerrymander.

By constructing a compact district, communities of interest will naturally be preserved. When a district significantly deviates from the compact model, it necessarily breaks up communities of interest and can be presumed to have been constructed to effectuate an illegal gerrymander, just as Shaw contemplates.

While absolute compactness of a district may not always be possible due to population distribution and geographic features of the area, adhering to established county lines and municipal boundaries provides further safeguards against partisan gerrymandering.

196 Bandemer, 478 U.S. at 165 (Powell, J., dissenting); see also Reynolds v. Sims, 377 U.S. 533, 578-79 (1963) (stating that “[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering”).


198 See id. at 755-56.

199 See Bernard Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. REV. 77, 117-18 (1985) (developing 12 prima facie indicators of gerrymandering and naming among them the failure to adhere to standards of compactness); Hamilton, supra note 38, at 1569 (arguing that adherence to historical boundaries is the best way to control gerrymandering and ensure compact and contiguous districts that preserve communities of interest; that cities and counties should not be divided except when absolutely necessary to adhere to the one person, one vote standard). For a discussion of the merits of using a compactness standard, see generally Daniel D. Polsby & Robert D. Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 YALE L. & POL’Y REV. 301 (1991).

200 See Shaw v. Reno 509 U.S. 630, 642 (1993) (stating that when a district is “so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles,” it will be declared invalid).

dering. Justices Powell and Stevens agree and have argued that failure to adhere to these established boundaries is evidence of partisan gerrymandering.\textsuperscript{202}

Eliminating the necessity of proving discriminatory effect from a claim of political gerrymandering, and allowing discriminatory intent to be shown by the shape of the district alone, as \textit{Shaw} contemplates, will increase the ease with which politically gerrymandered districts may be invalidated. This will provide a meaningful remedy to the individuals in these areas who endure representational harm, and permit politically gerrymandered districts to be successfully challenged. A corresponding increase in voter confidence in our electoral system will arguably occur, and individuals will be inspired to participate in the political process when it is apparent that electoral outcomes are no longer predetermined.

\textbf{B. The Dangers of Racial Pretext}

The element of discriminatory effect necessary to invalidate a district as a political gerrymander should also be eliminated in light of the ease with which a district can be invalidated as a racial gerrymander. Race must be prevented from being used as a pretext for challenging districts that are actually political gerrymanders. Justice Stevens' dissent in \textit{Bush v. Vera}\textsuperscript{203} recognized this danger and advocated confronting political challenges head on, instead of allowing them to hide behind claims of racial gerrymandering.

In \textit{Bush}, the Court struck down a Texas redistricting plan which created three new majority-minority seats.\textsuperscript{204} The plurality opinion rejected the appellant's argument that the districts had been created for the purpose of incumbency protection because it found that racial data had played a greater role in constructing the district lines than had party affiliation data.\textsuperscript{205} Writing for the plurality, Justice O'Connor concluded that this was an instance where race

\textsuperscript{202} See Bandemer, 478 U.S. at 164 (Powell, J., concurring in part, dissenting in part) (arguing that one criteria in measuring the merits of a political gerrymandering claim is the plan's adherence to political subdivision lines); \textit{Karcher}, 462 U.S. at 755 (Stevens, J., concurring) (stating that substantial deviation from political boundaries is evidence of partisan gerrymandering).


\textsuperscript{204} See \textit{id.} at 1965.

\textsuperscript{205} See \textit{id.} at 1956 (stating that the districts were created with the intent of maximizing black voting strength as efforts were made by incumbents to retain black voters in their districts).
had been used as a proxy for determining political characteristics, and therefore, was properly subjected to strict scrutiny.\textsuperscript{206}

In his dissent, Justice Stevens argued that the record in \textit{Bush} showed this was a case of political, not racial gerrymandering. He argued that evidence existed to support the conclusion that political data had been relied on to a much greater extent than racial data, showing that the district was, in fact, a political gerrymander.\textsuperscript{207} He argued evidence that the legislature considered race when constructing the districts does not, in and of itself, prove a violation of the Equal Protection Clause. Rather, there must be evidence that “racial considerations ‘subordinated’ race-neutral districting principles.”\textsuperscript{208} Finding no evidence of such subordination, he argued that political affiliation data had been the driving force behind the districting scheme.\textsuperscript{209}

Justice Stevens believed evidence that 97\% of black voters in the challenged districts were Democrats clearly showed the scheme was politically motivated.\textsuperscript{210} However, the Court chose not to consider the party-affiliation evidence presented by appellants and

\textsuperscript{206} See \textit{id.} (arguing that if the aim of the legislature is political gerrymandering it is appropriate for the legislature to rely on political data, such as voting patterns, to construct a district which will permit incumbent retention; however, to the extent race is used to determine a community’s political affiliation, an impermissible racial stereotype has been used as a proxy for determining political identification). In reaching the conclusion that this was in fact a racial gerrymander, Justice O’Connor relied on testimony from state officials in previous litigation in which they contended that “‘race was the primary consideration in the construction of District 30.’” \textit{Id.} at 1957 (quoting Vera \textit{v. Richards}, 861 F. Supp. 1304, 1338 (S.D. Tex. 1994)). Justice O’Connor also relied on a letter written by one Congresswoman who stated that protection of incumbents was achieved by using racial data. \textit{See id.} (citing Vera, 861 F. Supp. at 1322).

\textsuperscript{207} See \textit{id.} at 1957.

\textsuperscript{208} Id.

\textsuperscript{209} See \textit{id.}. Justice Stevens discussed the district’s bizarre shape and concluded it was created to accomplish retention of two incumbents whose districts were threatened by the redistricting requirement; District 30 had been carved between these two districts so it would not take away any of the incumbents’ support. \textit{See id.} At the same time, District 30 itself twisted and turned to include within its lines the maximum amount of Democratic voters it could find. \textit{See id.} However, the “tentacles” of the district stretched out not to pull in additional black voters, but instead to include Democratic voters, only 21\% of whom were black in the most twisted arm of the district. \textit{See id.} at 1983. In other arms, the share of minorities in the district was reduced, not increased. \textit{See id.} As to the majority’s argument that using racial data as a proxy for determining political affiliation was an illegal racial stereotype, Justice Stevens argued that requiring the State to disregard correlations between race and party affiliation is “as harmful, as it would be to prohibit the Public Health Service from targeting African-American communities in an effort to increase awareness regarding sickle-cell anemia.” \textit{Id.} at 1988.

\textsuperscript{210} See \textit{id.} at 1988.
instead determined that the scheme was constructed solely with the residents’ race as the dispositive quality. Arguably, the majority characterized the districting scheme in this manner because it was clear the element of discriminatory effect demanded in Bandemer was virtually impossible to establish. Believing the district should be invalidated, the Court looked for evidence that racial factors were considered, so that it could rely on this evidence in characterizing the district as a racial gerrymander. In a footnote, Justice Stevens cautioned the majority against such an approach, stating, “I believe . . . that the evils of political gerrymandering should be confronted directly, rather than through the race-specific approach that the Court has taken.”

Because what is really a political gerrymander cannot be invalidated unless plaintiffs allege the scheme is a racial gerrymander, parties both bringing and defending these claims have incentives to attempt to emphasize or downplay the degree to which considerations of race and political affiliation played a role in enacting a reapportionment plan. Consider the predecessor case to Shaw v. Reno, in which the districting scheme eventually struck down in Shaw II was initially challenged as a political gerrymander by the North Carolina Republican Party. In Pope, the Court held that the plaintiffs failed to prove evidence of discriminatory effect as called for by Bandemer, because they did not “allege, nor can they, that the state’s redistricting plan has caused them to be ‘shut out of the political process.’” Despite dismissal of the case in Pope, the very same reapportionment plan was challenged only a few months later in Shaw v. Reno. This time

211. See id.; see also Jeffrey Rosen, Sandramandered, THE NEW REPUBLIC, July 8, 1996, at 6 (asserting that “the shape of the districts [in Bush v. Vera] was distorted by political, not racial, considerations—namely, the desire of white Democratic incumbents in the surrounding districts to keep enough black voters to protect their seats”); Terry Tang, Court’s ‘Colorblindness’ Masks a Fixation on Race, SEATTLE TIMES, June 21, 1996, at B4 (arguing that the resulting inference is that a double standard exists in permitting bizarre shaped white districts, but invalidating strangely shaped minority districts: “Gerrymandering for white incumbents is OK, but doing the same for black politicians is not.”).


217. Id. at 397 (quoting Bandemer, 478 U.S. at 132).

218. 509 U.S. at 630.
the plan was challenged as a racial gerrymander and was invalidat-
ed.\textsuperscript{219}

The lesson to challengers is this: If first your claim does not succeed, try, try again, but the second time allege that you are dealing with a racial gerrymander, not a political gerrymander. Those defending a districting plan learn a different lesson: After Shaw, defendants will emphasize the degree to which political data was relied on in developing the plan. If the Court finds the district to be a political gerrymander it will probably be upheld.

This lesson has been learned. Once the Court's decision in Shaw left states fearing that racial considerations could not play a role in district reapportionment, defendants in gerrymandering claims found themselves searching for voter registration and party affiliation data on which they could claim they relied in developing a districting plan. For instance, in Hays v. Louisiana,\textsuperscript{220} which was originated before Shaw was decided, the State of Louisiana originally admitted the plan was a racial gerrymander.\textsuperscript{221} However, in light of the implications of Shaw, decided in the interim, the State changed its arguments and attempted to show factors other than race had been relied on in creating the challenged districts.\textsuperscript{222} The State argued that political data had been strongly considered in formulating the district, but the Court dismissed this argument, recognizing it as a pretext for defending what was really a racial gerrymander. The Court stated, "[W]e have been shown no credible evidence supporting the defence witnesses' proffered motivations of party and incumbency protection and socioeconomic commonality. Their explanations ring hollow. We find them to be no more than disingenuous, post hoc rationalizations."\textsuperscript{223} The Court noted that during the trial of the case, which took place before Shaw was decided, "[d]efendants never suggested that partisan or incumbent politics played a role in the determination to create District 4."\textsuperscript{224}


\textsuperscript{220} 839 F. Supp. 1188 (W.D. La. 1993). This case was the predecessor to United States v. Hays, 515 U.S. 737 (1995).

\textsuperscript{221} See Hays, 839 F. Supp. at 1200-01.

\textsuperscript{222} See id. Such factors included respect for political subdivisions, adherence to communities of interest, religious and ethnic considerations, economic base of the community, geography, and topography. See id.

\textsuperscript{223} Id.; see Tricia Ann Martinez, Comment, When Appearance Matters: Reapportion-
Using race as a pretext to challenge a political gerrymander carries several harmful implications. Justice Stevens explained that the danger of this practice lies in the failure to recognize the evils of political gerrymandering and address them directly: "political gerrymanders are more objectionable than the 'racial gerrymanders'... [and] the evils of political gerrymandering should be confronted directly." First, legislatures will be permitted to create districting schemes wholly conscious of race, so long as they take care to get on the record only evidence that they considered political data in creating the district. This will lead to increasing numbers of racially gerrymandered districts being upheld on the grounds that there is no evidence on the record that race was a predominant motivating factor in a district's development. As Justice Stevens argued, "[I]t now seems clear that the only way that a State can both create a majority-minority district and avoid a racial gerrymander is by drawing, 'without much conscious thought.'" Of course, Shaw's bizarre shape standard will afford some protection against the most egregiously shaped districts, but in cases where bizarreness of shape is less evident, this result will certainly follow.

Second, parties in gerrymandering cases have an incentive to craft their arguments based on the knowledge that a district will invariably be upheld if it is shown to be a political gerrymander. Plaintiffs will argue that race was the predominant motivating factor behind a districting plan, while defendants will contend political concerns dominated. The danger here lies in the fact that if plaintiffs are ever to be successful in a gerrymandering challenge, they must allege the scheme is racially motivated, regardless of how obvious it is that the district is a political gerrymander. The evils of political gerrymandering will remain unrecognized, and legislatures will be permitted continually to abuse the political process to ensure incumbent retention and prevent true representation of interests in cohesive communities.

\footnotetext{225}{Id. at 1990 (quoting Bush, 116 U.S. at 1955).}
V. CONCLUSION

Political gerrymandering is an evil practice by which the dominate political party takes advantage of its position to ensure it remains in power. In guaranteeing incumbent retention, legislatures destroy individuals’ conscientiously selected communities and the chance for representation of the communities’ interests. At the same time, they engender feelings of disenfranchisement as well as a loss of respect for our electoral system.

Since our political system is premised on the notion of representative government, legislatures and courts should strive to ensure that crafted districts will in fact result in representation of interests of cohesive communities. However, the Court’s current requirement of proof of discriminatory effect in claims of political gerrymandering renders it impossible to successfully challenge such districts. The result is the invariable degradation of cohesive community interests as politicians divide communities and manipulate district boundaries to ensure re-election. This division of communities into gerrymandered districts results in the conscious disregard of the interests of the members of the area by the elected representative.

These factors contribute to the decline in confidence in our electoral system. Apathy increases as voters come rightly to believe their votes do not make a difference in a system in which election results are predetermined. To restore confidence in our political system and increase voter enthusiasm for our government, it is necessary that the electorate be able to successfully challenge politically gerrymandered districts.

Toward this end, the requirement of discriminatory effect should be eliminated as an element in political gerrymandering cases. Equal protection based racial and political gerrymandering claims must be evaluated under the same standard. Until this is accomplished, it will be impossible for true representation of individual interests to occur. Residents of politically gerrymandered districts will remain the victims of the practices of self-interested politicians.

Megan Creek Frient

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