

Idealists, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia

*Erin Daly**

I. INTRODUCTION

In the 1960s, the United States Supreme Court entered the political thicket of voting rights cases in which plaintiffs challenged apportionment and districting plans. In the 1970s, the Australian High Court heard its first districting case, and in the 1980s, the Canadian courts entered the fray. This decade has seen renewed and intensified interest in voting rights as the highest courts of all three countries have issued landmark decisions in this area. With a surprising degree of consensus, the Canadian and Australian courts have held that their respective Constitutions do not guarantee that electoral districts must be of equal size; in other words, they rejected the one person, one vote standard that has been a staple of American law for nearly 35 years.¹ A profoundly divided American Supreme Court, by contrast, has held that, in addition to this equipopulosity requirement, the U.S. Constitution also requires that electoral districts be drawn without predominant attention to the race of voters.²

Although there is some common ground among these sets of cases, they ultimately exemplify three very different jurisprudential attitudes towards redistricting questions,³ and towards constitutional questions

* Associate Professor of Law, Widener University School of Law. B.A., Wesleyan University (1983); J.D., University of Michigan (1989). My thanks to David Williamson, Tony Blackshield, Robert Lipkin, and Laura Ray. I am also particularly grateful to Patrick Kelly and to Widener University's International Law Institute in Sydney, 1996.

¹ See Reference re: Electoral Boundaries Commission Act [1991] 78 D.L.R. 449; McGinty v. Western Australia (1996) 134 A.L.R. 289. Both cases rejected the requirement of equipopulosity or equipopulous districts of *Reynolds v. Sims*, 377 U.S. 533 (1964).

² See *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), and its progeny: *United States v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996) (*Shaw II*); *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996); *Abrams v. Johnson*, 117 S. Ct. 1925 (1997). These cases are collectively known as the *Shaw* cases.

³ (Re-)apportionment is the process of determining how many people should vote in each

generally. In fact, the different results in these cases are largely attributable to the jurisprudential choices each Court has made. In these cases, the Canadian Court has taken a pragmatist stance, while the Australian approach is more textualist; the American redistricting cases may be characterized as idealist. Since no Constitution mandates any particular jurisprudential model, a court adopting one approach is clearly choosing from among available options. Whatever model the court chooses determines (and is determined by) not just its approach to constitutional interpretation, but also the court's perception of its own role in the nation's political system, and its conception of the nation's electoral process. This article will describe the principal redistricting cases from each country so as to expose the particular paradigm that each court has chosen to govern its approach. The article then suggests that, for the redistricting cases that are currently occupying so much of the courts' time, the pragmatism of the Canadian Supreme Court is preferable to either the American Supreme Court's idealism or the Australian High Court's textualism.

The complicated story told by these decisions reveals how the high courts of these three countries approach each other, converge on certain issues, then turn and go their separate ways, then sometimes meet up again. Nonetheless, while the courts of Canada and Australia are acutely aware of each move made by the others, the U.S. Supreme Court plods along, seemingly oblivious to what is going on around it. This indifference to other countries' experiences is not unique to voting rights law,⁴ even though, as Justice Breyer has recently suggested, "[other countries'] experiences may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."⁵ By looking at other countries' resolution of similar issues,

district of a particular jurisdiction. (Re-)districting is the process of determining where the lines should be drawn for each district. They are distinct, but related concepts: both are used when "the governors and their political agents . . . select their electors." T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (1993). Districting seems to be the broader concept, because it includes head-counting which is a prerequisite to line-drawing; the term "districting" will thus be used to refer both to districting per se and to the combined issues raised in both processes.

⁴ But see *Washington v. Glucksberg*, 117 S. Ct. 2258, 2274 (1997), for a rare discussion of another country's experience in a majority opinion. In this case, Chief Justice Rehnquist referred to Holland's experience with assisted suicide. Even this, however, was a comparison of underlying facts, not constitutional interpretation. In *Printz v. United States*, 117 S. Ct. 2365, 2377 n.11 (1997), the Court rejected the dissent's discussion of European federated republics because "such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."

⁵ Linda Greenhouse, *Appealing to the Law's Brooding Spirit*, N.Y. TIMES, July 6, 1997, at E4.

the American courts can learn from their experiences, as other countries have learned from ours.

It is especially illuminating to study the constitutional traditions of Australia and Canada because in some ways they are so similar to our own, particularly in their underlying values: all three nations, of course, were spawned by Great Britain but unlike her, all three developed written constitutions early on. In all three countries, moreover, the constitutional systems are similar: they are among the few federated republics of the world and in each case separation of powers—particularly between the judiciary and the political branches—is a salient feature. In addition, in all three countries, representatives to one or both houses of the bicameral federal legislature are chosen by popular election, and the same is true for most state or provincial legislatures. Finally, it is worth noting (although this can only be stated in the most general terms), in all three countries, democratic governance, including equality as an essential component, is fundamental to the nations' political self-consciousness. Despite these basic similarities, each country's highest court has reached different conclusions about the degree to which their Constitutions define and guarantee equal voting rights in the context of districting.

The keystone in this area was the 1964 American case of *Reynolds v. Sims*, which propounded the one person, one vote rule.⁶ While the incontrovertible success of this rule must be acknowledged,⁷ it has resulted in a complacency of two sorts. As a psychological matter, American pride in the rule has fostered a confidence in home-grown

⁶ See *Reynolds*, 377 U.S. at 554–58.

⁷ This is a descriptive point, not a value judgment. See, e.g., DANIEL HAYS LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS 102 (1995) ("Though *Wesberry* and *Reynolds* were fiercely controversial when they were decided, the one person, one vote standard has become widely accepted in the United States."); Samuel Issacharoff, *Judging Politics: The Elusive Quest For Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1657 n.72 (and sources cited therein) (noting that "the appeal of individual equality in the political process proved so strong that these decisions did not spark an outcry similar to that arising in response to the Court's forays into the civil rights and criminal justice areas"). This article makes no claim as to whether the *Reynolds* Court was correct either as a constitutional or as a political matter. See, e.g., Jesse Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 90–91 (1984) (explaining that "in the first half decade after *Reynolds v. Sims*, despite complying alterations in virtually every state legislative and congressional district in the nation, the studies undertaken came to conflicting conclusions as to the effect of reapportionment on state policy and the extent to which reapportioned legislatures were more likely than malapportioned ones to expend funds, respond to urban needs and have a competitive political system. Subsequent empirical efforts, however, have vindicated the criticism that those who had earlier discounted the political and policy consequences of reapportionment had failed to prove their case.").

solutions that supplants the need to look outside for alternatives, particularly in matters of democracy where Americans think of themselves as the standard-bearers. Independent of American psychological isolationism, the rule's success has led to the conviction, as a substantive matter, that the one person, one vote rule is the only legitimate way to achieve true democracy. Another aim of this article, then, is to suggest that other solutions that incorporate a different array of values may also achieve some legitimate conception of democracy. These values, some of which are recognized to a greater degree in Australia and Canada, include group representation, electoral fairness, responsiveness of representatives to electors, electoral convenience, protection of political subdivisions, stability, consistency, and local traditions, among others.

Accepting that these, along with equipopulosity, may all contribute to democracy in one way or another means recognizing that democracy cannot be measured along a single continuum, with one country meriting a higher rating than another. There are too many factors that a nation might value, in varying amounts and combinations, for one approach to be deemed the best, and it is impossible to ascertain that one element is absolutely indispensable. For instance, Americans might consider that popular sovereignty can only exist where the Constitution's authority rests on the assent of "We the People." The constitutions of Australia and Canada, however, are acts of the British Parliament implemented with royal assent; yet these countries are no less committed to the principle of popular sovereignty and to the need for fair and effective representation as a means of exercising that power.

Part II of this article describes how the recent districting decisions of the three high courts valued this constellation of factors. Part III shows how these cases manifest three contrasting jurisprudential approaches (idealism, textualism, and pragmatism), and argues that it is primarily these different attitudes that explains the courts' inclinations to go their separate ways. Part IV argues that the American Court's jurisprudence and its understanding of the nature of race-conscious districting claims would be significantly enhanced if the Court incorporated the pragmatist attitude of the Canadian Court into its thinking. The article concludes with a brief hypothetical response that a pragmatist court might make to the race-conscious districting claims.

II. THE CASES: DEVELOPING THEORIES OF VOTING EQUALITY

A. *Prelude: Historical Background*

The fundamental charters of America, Australia, and Canada incorporate their British heritage, but like any self-respecting offspring, they also rebel in certain ways from that heritage. America's Constitution was the first of the three, and by far the most influential. In fact, it was the first ever to create a federal republic.⁸ Other nations attempting to unify distinct and far-flung colonies into a cohesive and sovereign unit looked to the American example, adapting many of our framers' experiments to their own purposes. The British North America Act of 1867 unified several provinces of Canada, creating the first federation within the United Kingdom; Australia's federal Constitution followed in 1900.

The roots of the three charters, however, and the relationships between America and the other two countries, go back even further. Australia and America, half a world apart, are linked inexorably by history. This has been evident from the earliest days of white occupation in each country. As one Australian newspaper noted in 1837:

Throughout the whole of their [American] history, there are certain broad features bearing no imaginary resemblance to our own [Australia's]. America was once a British dependency; Australia is so now. America was once the receptacle of those whom Britain banished from her bosom; Eastern Australia is that receptacle now. America received her manners, her literature and germ of her laws and political institutions from the British Isles; so has Australia. America at length outgrew the trammels of national juvenility, and asserted the prerogatives of mature manhood, which she in the end compelled her reluctant parent to acknowledge: it is perfectly consistent with loyalty and with common sense to predict, at

⁸ As Justice Kennedy has recently explained:

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995).

some future period, far distant no doubt as it is, Australia will pursue a similar course, and with similar success.⁹

This sense of slow yet inexorable distancing from Great Britain marked the consciousness of early white Australians. Indeed, it is said that one critical difference between America and the other two countries is that in America, independence from Great Britain was marked by swift and dramatic revolution, whereas in the latter two it has been marked by continuing evolution.¹⁰

The Australian Constitution, like America's, created a nation by unifying separate colonies—not yet states—which found themselves on the same plot of land, but far from anywhere else that mattered to them. In some ways, the Australians copied the American model with disarming specificity. For example, they established a bicameral national legislature with a House of Representatives and a Senate in which the states are equally represented,¹¹ they created a federal Supreme Court possessing constitutional as well as common law powers,¹² and they followed the American constitutional structure.¹³

The differences between the two Constitutions, however, are equally significant. Among the more obvious ones are that the form of government created by the Australian Constitution is parliamentary and so

⁹ Quoted in PHILIP BELL & ROGER BELL, *IMPLICATED: THE UNITED STATES IN AUSTRALIA* 20 (1993). Indeed, some coincidences are truly striking: "The move of the American States toward 'a more perfect union' had come just as European settlement in Australia began. The First Fleet [of convicts from England] set sail for New South Wales on May 13, 1787; the Philadelphia Convention began work the next day." Tony Blackshield, *A Tale of Two Charters, THE AUSTRALIAN*, Mar. 29, 1996, at 8 [hereinafter Blackshield, *Two Charters*]. There is even evidence of a causal relationship between the United States and Australia: "The decision to occupy Australia as a penal colony was initially an attempt to 'atone for the loss' of Britain's American colonies, which had accommodated more than 50,000 British convicts." BELL & BELL, *supra*, at 19.

¹⁰ The distinction does not appear to have significant current day-to-day impact, although it may have important jurisprudential ramifications. See *infra* notes 315–17 and accompanying text.

¹¹ While the original American Constitution provided for popular election of Representatives, U.S. CONST. art. I, § 2, and appointment of Senators by state legislators, U.S. CONST. art. I, § 3, the Australian Constitution provided for popular election of members of both houses, AUSTL. CONST. §§ 7, 24, a practice that was not adopted in the United States until the Seventeenth Amendment was ratified in 1913.

¹² This represents a significant departure from the British principle of parliamentary sovereignty which precludes judicial review of parliamentary acts.

¹³ The first three chapters of the Australian Constitution correspond to the first three articles of the American one, dividing the government into three separate but interdependent branches. Furthermore, the Australian Constitution "adhered to the American pattern of listing specific areas in which alone the new federal parliament had power to make laws—leaving an unspecified residue of general lawmaking power to the states." Blackshield, *Two Charters, supra* note 9, at 8. Compare AUSTL. CONST. § 51, cls. i–xxxix with U.S. CONST. art. I, § 8, cls. 1–18.

does not partake of the more extreme separation of powers that the American presidential system entails¹⁴ and it contains no Bill of Rights (although some individual rights have been included).¹⁵ Perhaps even more important are differences in authority and constituency. Australia's Constitution was passed as an Act of the Imperial Parliament which, theoretically at least, means that sovereignty rests in England, not in Australia.¹⁶ Furthermore, the relevant constituent groups are the states: the Australian Constitution opens with "We the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessings of the Almighty God, have agreed to unite Be it therefore enacted by the Queen's most Excellent Majesty . . . as follows:— . . ."¹⁷ This resembles the United States' Articles of Confederation more than its Constitution, which self-consciously opens with "We the People of the United States"¹⁸ As presently in force, then, the Australian Constitution seems to be ambiguous as to whether its ultimate source of authority is the people of Australia (as one would expect to find in a republic) or the Queen of England. As one pair of scholars has written, "[t]o the extent that the constitution of a government retaining allegiance to a foreign monarch can be based on that of a democratic republic, the Australian system of government was derived from that of the U.S."¹⁹ In 1986, the British Parliament passed the Australia Act,²⁰ which might have resolved some of these incongruities. The Act formally severed any remaining links between the Parliament of Britain and the parliaments of the Australian states and the Commonwealth.²¹ The full implications of the Act have been hotly debated in Australia, the ultimate question being the extent to which the Act either prospectively or retroactively

¹⁴ "Both systems seek to guard against excessively powerful executive government. [¶] The [Australian] model does this by keeping the ministry in the legislature and responsible to it; the American model does it through 'checks and balances'; playing off institutions against one another. In practice, governments have grown more powerful under both systems." Blackshield, *Two Charters*, *supra* note 9, at 8.

¹⁵ See AUSTRAL. CONST. § 41 (right to vote); § 80 (criminal trial by jury); § 116 (freedom of religion); § 117 (right to interstate travel).

¹⁶ See Commonwealth of Australia Constitution Act, 1900, ch. 12 (Austl.) (Covering Clauses).

¹⁷ Commonwealth of Australia Constitution Act, 1900, ch. 12 (Austl.) (pmb.). *But see* Communique of Constitutional Convention, Feb. 2–13, 1998, available at <<http://www.dpmc.gov.au/convention.html>> (proposing that if Australia becomes a republic, the preamble to the Australian Constitution contain introductory language in the form of "We the people of Australia").

¹⁸ U.S. CONST. pmb.

¹⁹ BELL & BELL, *supra* note 9, at 48.

²⁰ See generally Australia Act, 1986 (U.K.).

²¹ See *id.*

transforms the Australian constitutional regime from one whose underlying authority was ambiguous to one wholly committed to embodying popular sovereignty.²²

The questions spawned by the Australia Act have developed into a full-fledged debate over the character of the Australian nation at the beginning of the 21st century. In the first two weeks of February 1998, 152 delegates met in a Constitutional Convention in Canberra to discuss whether Australia should convert from a monarchy into a republic and, if so, when and what form the republic should take.²³ The Convention resolved that it supported, in principle, Australia becoming a republic, and that a referendum on the question be scheduled for 1999, with the new republic coming into effect by January 1, 2001, exactly one hundred years to the day after the current Constitution came into effect.²⁴ Thus, Australia is now poised to transform itself into a full-fledged independent republic.

Canada and America are linked by historical experiences, as well as by one of the world's longest common borders. Like Australian constitutional history, Canada's is marked by several evolutionary developments, rather than one momentous act. The British North America Act of 1867 created the Canadian nation (thirty-three years before Australia would be united as a nation) and gave it a Constitution that established the basic parliamentary form of government over federated provinces.²⁵ Canada did not entrench individual rights until 1982,²⁶ when the Canadian Charter of Rights and Freedoms came into effect

²² As stated in *Australian Capital Television*:

The very concept of representative government and representative democracy signifies . . . that the sovereign power which resides in the people is exercised on their behalf by their representatives. In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a statute of the Imperial Parliament enacted in the exercise of its legal sovereignty; the Constitution was not a supreme law proceeding from the people's inherent authority to constitute a government The Australia Act 1986 (U.K.) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people. The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people.

Australian Capital Television v. Commonwealth (1992) 177 C.L.R. 106, 137-38 (Mason, C.J.).

²³ See Final Communique of Constitutional Convention, <<http://www.dpmc.gov.au/convention.html>>.

²⁴ See *id.*

²⁵ See generally North America Act, 1867, 30 & 31 Vict. (U.K.).

²⁶ The Canadian Parliament passed a Bill of Rights in 1960, but this can be repealed by ordinary

by Proclamation of Queen Elizabeth II.²⁷ Like the American Constitution, then, fundamental Canadian law consists of a basic document setting forth the organic law, and amendments thereto amplifying, sometimes in profound and radical ways, the relationship between individuals and their government.

Many of the rights found in the U.S. Constitution and its amendments (as authoritatively interpreted) also found their way into the Canadian Charter.²⁸ Yet, in many ways, the Charter resembles the American Constitution less than the Australian Constitution does. It tends to be more thorough and more explicit than either the American or Australian Constitutions, leaving less for future judges to fill in.²⁹ By the time Canada adopted its Charter, it knew what the nation was and what the Charter was trying to achieve; it had centuries of experience in trying to reconcile individual and social rights, made all the more complex by the competing claims of unity by many citizens, of separatism by French Canadians, and of special participation rights by Abo-

legislation of Parliament and does not override other acts of Parliament nor does it disturb the principle of parliamentary sovereignty. Furthermore, it is limited in scope as it applies only to federal and not provincial legislation. It can be (and has been) suspended during national emergencies. See 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *Canada* 6–7 (Albert P. Blaustein & G.H. Flanz eds., 1991 & Supp. 1997); see also Clare F. Beckton, *Pre-Charter Constitutionalism*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* at 19–22.

²⁷ The Canada Act, 1982 (like the Australian Constitution) was an Act of the British Parliament. See Canada Act, 1982, ch. 11 (U.K.). The Act contains the Canadian Charter of Rights and Freedoms [hereinafter Charter] (in part I of Schedule B, which is known as the Constitution Act, 1982). The Canada Act also renamed the British North America Act, 1867, as the Constitution Act, 1867. See *id.*

²⁸ See, e.g., Charter, *supra* note 27, § 2 (freedom of religion, freedom of expression, freedom of the press, freedom of assembly, freedom of association); § 3 (right to vote); § 6 (right to travel); § 7 (right to life, liberty, the security of the person); § 8 (right against unreasonable search and seizure); § 10 (right to counsel); § 11 (right to speedy trial, against self-incrimination, procedural due process, against ex post facto laws, against double jeopardy); § 12 (right against cruel and unusual punishment); § 15 (right to equal protection).

²⁹ Compare, e.g., Charter, *supra* note 27, § 15(1) ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability") with U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws") and *Leeth v. Commonwealth* (1992) 174 C.L.R. 455, 467, 469 (finding no express or implicit constitutional guaranty of equal treatment for equals in criminal sentencing procedures) and *Kartinyeri v. Commonwealth* (1998) HCA 22 at ¶ 56 (noting "that there is no general requirement that Commonwealth laws should have uniform operation throughout the Commonwealth, nor is there any general impediment to the Parliament distinguishing between the different needs or responsibilities of different people or different localities.") (Gummow & Hayne, JJ.) *opinion found at* <http://www.austlii.edu.au/au/cases/cth/high_ct/1998/22.html>.

iginal Canadians. Having been adopted relatively late in the nation's history, the Canadian Charter suggests the wisdom and moderation of maturity, rather than the youthful idealism of a people constituting themselves as their first act of nationhood.

Whether the framers of these constitutions accepted or rejected specific aspects of the American Constitution, there is no dispute that it was a most influential model. One critical question raised by the voting rights cases, then, is the extent to which the American Supreme Court's interpretation of the U.S. Constitution controls other Courts' interpretations of theirs. The answer, it turns out, is not very much.³⁰ The next three sections will describe how the three Courts have approached the question of electoral equality in the redistricting context and how they have converged and diverged at various points.³¹

B. *The American Experience: Origins of Absolutism*

The history of the U.S. Supreme Court's districting jurisprudence is well known and need be described here only cursorily. For most of the nation's history, the Court did not hear challenges to states' power to draw district lines for their own elections or for federal elections under

³⁰ As a matter of international law, no judicial decision can control another country's courts in the sense of binding them. Litigants in Canada and particularly in Australia, however, have argued that the U.S. Supreme Court's interpretation of similar or identical constitutional provisions should at least be very persuasive to those courts. *See, e.g., McGinty*, 134 A.L.R. at 321-22 (Toohey, J.). What is surprising is not that these claims are ultimately rejected, but that they are taken as seriously as they were. In some instances, the authority of American law is treated as if it were incorporated. *See, e.g., Kartinyeri*, HCA 22 at ¶ 89 (Gummow & Hayne, JJ.) ("the doctrine of *Marbury v. Madison* ensures that courts exercising the judicial power of the Commonwealth determine whether the legislature and the executive act within their constitutional powers.").

³¹ I have attempted to organize this article in roughly chronological order by country. This has proven difficult because of the way events stretch over time and overtake one another. It is impossible to say, for instance, whether the Australian Constitution of 1900, was adopted before or after the Canadian Constitution of 1867 and 1982. The rough chronology of relevant events is as follows: U.S. Constitution 1789; British North America Act 1867; Fourteenth Amendment 1868; Australian Constitution 1900; first U.S. reapportionment cases 1962-64; first Australian reapportionment case 1975; Canadian Charter of Rights and Freedoms 1982; Australia Act 1986; first Canadian reapportionment case 1991; Australian representative government cases 1992; the *Shaw* cases 1993-97; second Australian reapportionment case 1996; Australian Constitution Convention (for republic) 1998. At the very least, it seems clear that America's was the first of the three constitutions and that the American reapportionment cases were the model for cases in the other two countries. Thus, the American experience is discussed first in this part and the next. For purposes of describing the cases, it seems more appropriate to discuss Australia last because its 1996 decision was influenced by the American and Canadian cases. In Part III, however, where jurisprudential attitudes are discussed, it seems more appropriate to address Australian textualism before Canadian pragmatism because the former is necessary for a complete understanding of the latter, whereas the opposite is not true.

Article I, Section 4.³² In 1962, the Court changed course and decided in *Baker v. Carr* that electoral malapportionment presented a justiciable issue that was not barred under the political question doctrine, although the Court did not in that case identify how it would measure the constitutionality of districting plans.³³

Baker was decided against a backdrop of rampant malapportionment throughout the nation. Even by mid-century, enormous urbanization had changed the face of many states, arguably imposing upon state legislators an affirmative duty to conform electoral maps to the new demographic realities. But state legislators had traditionally represented rural communities and were slow to give up their power to benefit urban dwellers. The combination of urban growth and legislative intransigence was increasing overrepresentation of rural interests at the expense of cities.³⁴ As then-Senator John F. Kennedy wrote in the *New York Times Magazine*:

the urban majority is, politically, a minority and the rural minority dominates the polls. Of all the discriminations against the urban areas, the most fundamental and the most blatant is political: the apportionment of representatives in our Legislatures and (to a lesser extent) in Congress has been either deliberately rigged or shamefully ignored so as to deny the cities and their voters that full and fair proportionate voice in government to which they are entitled. The failure of our governments to respond to the problems of the cities reflects this basic political discrimination Our legislatures still represent the rural majority of half a century ago, not the urban majority of today.³⁵

The problem was particularly pernicious because, as Kennedy explained and as plaintiffs in all the early cases recognized, since state

³² See *Colegrove v. Green*, 328 U.S. 549, 555–56 (1946).

³³ See *Baker v. Carr*, 369 U.S. 186, 198–99 (1962).

³⁴ As the Court said in *Lucas v. Forty-Fourth Colorado General Assembly*, 377 U.S. 713, 729 (1964): “Divergences from population-based representation in the [state] Senate are growing continually wider, since the underrepresented districts in the Denver, Pueblo, and Colorado Springs metropolitan areas are rapidly gaining in population, while many of the overrepresented rural districts have tended to decline in population continuously in recent years.” In Maryland, for instance, 75% of the state’s population lived in the five most populous subdivisions in 1960, while one-quarter lived in the remaining 19 counties. See *Maryland Committee v. Tawes*, 377 U.S. 656, 664 (1964). That case arose because the 75% urban residents controlled one-third of the state senate seats, while the remaining quarter controlled two-thirds of the senate. See *id.* at 665.

³⁵ John F. Kennedy, *The Shame of the States*, N.Y. TIMES (Magazine), May 18, 1958, at 37.

legislators had no incentive to act, there would be no relief if the courts abstained.³⁶ The problem transcended racial politics and pervaded the nation, crossing the Mason-Dixon line.³⁷ Thus, despite well reasoned and convincing dissenting opinions, the Court simply had no choice but to break the "rural stranglehold."³⁸

1. The Germinal Cases

The first voting rights case after *Baker v. Carr* was *Gray v. Sanders*, which set the tone for the Court's subsequent districting jurisprudence.³⁹ The *Gray* plaintiffs challenged Georgia's county unit system, which essentially functioned as an electoral college, with the effect of overvaluing the rural vote.⁴⁰ The Court's opinion in *Gray* is absolutist (though not textualist) in its interpretation, unrestrained in its assertion of authority over the states, and individualist in its orientation. These themes—not to mention the slogan "one person, one vote,"⁴¹ which originated in *Gray*—have marked the Court's districting jurisprudence for the last 35 years; in the recent *Shaw* cases, they have resurfaced with a vengeance.

The District Court in *Gray* would have upheld any county unit system "if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral college."⁴² But the Supreme Court took a harder line.⁴³ No system is permissible, the Court said, that "in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than

³⁶ "Reform of our state legislatures depends upon the unselfishness of our state legislators. They are both the perpetrators and the beneficiaries of the present malapportionment." *Id.* at 40. Kennedy continued: "[a]ppeal to the courts is an unlikely avenue of relief, for the Supreme Court has made clear its belief that such change depends basically upon political, not judicial processes." *Id.* (referring to *Colegrove*, 328 U.S. 549). See also *Reynolds*, 377 U.S. at 554 (discussing impracticability of political resolution and finding judicially enforceable right to voter parity). Coincidentally, most of the reapportionment cases decided on the merits were argued in November 1963, within days of President Kennedy's assassination.

³⁷ Within nine months of the courthouse doors opening in *Baker v. Carr*, litigation challenging state apportionment schemes had been instituted in thirty-four states. See *Reynolds*, 377 U.S. at 556 n.30. All regions of the country were represented in the first group of cases to be decided with *Reynolds*.

³⁸ See *id.* at 543; cf. *Lucas*, 377 U.S. at 736–37 (judicial remedy not contingent on exhaustion of political remedies).

³⁹ See generally *Gray v. Sanders*, 372 U.S. 368 (1963).

⁴⁰ See *id.* at 370.

⁴¹ *Id.* at 381.

⁴² *Id.* at 378 (quoting *Gray v. Sanders*, 203 F. Supp. 158, 170 (1962)).

⁴³ See *id.* at 384 (Harlan, J., dissenting).

other larger rural counties.”⁴⁴ This was true despite (or perhaps because of) the long history of this scheme in Georgia, and it was true despite the constitutional electoral college on which the Georgia system was modeled. The Court would simply accept no excuse for valuing one person’s vote more than another’s.

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.⁴⁵

The Court’s holding that the Fourteenth Amendment governed plaintiffs’ vote dilution claim seems more by default than for any affirmatively compelling reason.⁴⁶ The Court noted that the Fifteenth Amendment prohibits discrimination against blacks, and the Nineteenth against women, and then jumped to the conclusion that the Fourteenth must prohibit discrimination on every other ground, although there is nothing in the Fourteenth Amendment that would appear to speak to the issue.⁴⁷ Indeed, the Court went beyond the Constitution to the Declaration of Independence and Lincoln’s Gettysburg Address to find authority for its particular “conception of political equality.”⁴⁸

But ultimately it was the preamble to the Constitution that provided the Court with the underpinnings of its political philosophy. “The concept of ‘we the people,’” the Court explained, “visualizes no preferred class of voters but equality among those who meet the basic qualifications.”⁴⁹ Thus, the Court linked the guarantee of an equally weighted vote directly to the principle of popular sovereignty: we can-

⁴⁴ *Gray*, 372 U.S. at 379.

⁴⁵ *Id.*

⁴⁶ *See id.* at 374.

⁴⁷ *See id.* at 379. Indeed, the existence of the other amendments might suggest the opposite conclusion. Furthermore, the Court might have, but did not, consider that the privileges and immunities clause of the Fourteenth Amendment grounded the right to equal voting power. *See* MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 122–33 (1994) (arguing for the relevance of the privileges or immunities clause of the Fourteenth Amendment); DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* (1993) (arguing for broader interpretation of privileges or immunities clause); *but see* *The Slaughterhouse Cases*, 83 U.S. 36 (1873).

⁴⁸ *Gray*, 372 U.S. at 381.

⁴⁹ *Id.* at 379–80.

not consider ourselves self-governing if we do not each share equally in our power to govern, exercised by the franchise and embodied in the words "We the People."⁵⁰

The Court was absolutist in its insistence that equal really does mean equal. It did not address the difficulties raised by either factual or textual nuances.⁵¹ In dissent, Justice Harlan argued that "[a] matter which so profoundly touches the barriers between federal judicial and state legislative authority" demands full development of a factual record, and full explanation based on the factual record, of the reasons for the Court's invalidation of a state electoral plan.⁵² Harlan's criticism is particularly apt in the context of voting rights. Voting rights may be the most fundamental of all civil rights (because they are preservative of all other rights),⁵³ but they are also contingent on "complex and subtle political factors"⁵⁴ and thus trigger heightened judicial sensitivity, if not scrutiny.

The complete lack of deference to the states was also dubious as a constitutional matter. The Constitution authorizes states to establish rules for the conduct of federal elections,⁵⁵ but it is silent on the matter of state elections, which suggests federal indifference or impotence with respect to the composition of state legislatures. On the other hand, reliance on the Fourteenth Amendment,⁵⁶ which specifically cabins state power, might have justified the Court's intervention into state politics. The problem is not that the Court reached the wrong result—it was probably justified given the states' vigorous resistance to reapportionment. The problem is that the Court ignored all the factual and legal ambiguities, steadfastly insisting on its own definition of equality.

Another indication of the Court's absolutism was its refusal to consider the relevance of any unit of measurement other than the individual. Again, Justice Harlan pointed out, as he had in *Baker*, that "a state might rationally conclude that its general welfare was best served by apportioning more seats in the legislature to agricultural communities

⁵⁰ See *id.* at 380.

⁵¹ In this aspect as well, *Gray* presages the more recent *Shaw* cases which are striking in their inattention to the facts. See *infra* text at notes 347–62.

⁵² *Gray*, 372 U.S. at 390 (Harlan, J., dissenting) (arguing that the Court's holding, "on the basis of mere numbers, unilluminated by any factors, amounts to a judicial fiat.").

⁵³ See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see also *Reynolds*, 377 U.S. at 562.

⁵⁴ *Gray*, 372 U.S. at 388 (Harlan, J., dissenting).

⁵⁵ See U.S. CONST. art. I, § 4.

⁵⁶ See U.S. CONST. amend. XIV, § 1.

than to urban centers,"⁵⁷ but the Court insisted on treating voting as an autonomous exercise, rather than as an affiliational one; in the Court's view, popular sovereignty means that individuals, not communities, hold the sovereign power.⁵⁸

The following year, the Court decided a slew of malapportionment cases from around the country. In each case, the plaintiffs prevailed. *Wesberry v. Sanders*⁵⁹ is notable largely for having added the "as nearly as practicable" gloss on the simple "one person, one vote" command of *Gray*.⁶⁰ In *Wesberry*, the Court found that the unequal sizes of Georgia's federal electoral districts violated not the Preamble nor the Fourteenth Amendment, but Article I's mandate that Representatives be chosen "by the People."⁶¹ "To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention."⁶² What is curious about this leap from "chosen by the People" to "our fundamental ideas of a democratic government" is that it was effectuated by Justice Black, probably the most committed textualist ever to sit on the Court.⁶³ And yet, it is not at all self-evident that "chosen by the People" demands that each vote be weighted equally or that the relevant unit of measurement for the people is the individual.⁶⁴ Article I, Section 2 itself deviates from the principle of equipopulosity in significant ways.⁶⁵ And nowhere else does the constitutional

⁵⁷ *Gray*, 372 U.S. at 386 (Harlan, J., dissenting).

⁵⁸ See *id.* at 380–81.

⁵⁹ See generally *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁶⁰ *Id.* at 7–8.

⁶¹ U.S. CONST. art. I, § 2.

⁶² *Wesberry*, 376 U.S. at 8.

⁶³ See HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 109 (1996) (describing history, literalism, and absolutism as the three essential components of Black's jurisprudence); see also Charles A. Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 133, 133–51 (Stephen Parks Strickland ed., 1967) (describing Black's approach as one of "faithful adherence" to the Constitution).

⁶⁴ Indeed, this is precisely the conclusion that the Australian High Court, faced with exactly the same language, refused to make. See *infra* notes 232–34 and accompanying text.

⁶⁵ Most notoriously, Section 2 counts only free persons, but excludes "Indians not taxed" and counts "all other Persons" as three-fifths. Although this was superseded by the Fourteenth Amendment, it was the intent of the original framers that some people have more voting power than others. Furthermore, the section mandates that "each State shall have at Least one Representative," so that even among the states, some districts will have fewer electors than others. U.S. CONST. art. I, § 2, cl. 3. Beyond this, of course, stands the Senate as a paradigm of non-population based representation. See U.S. CONST. art. I, § 3.

text mention anything akin to equipopulosity or even democracy. Tellingly, the two guarantees that are super-entrenched in the Constitution—entrenched beyond just being included—are guarantees of blatant inequality: Article V provides for constitutional amendment *but prohibits* abrogating the euphemistically referred to slave trade or depriving the states of their non-population based suffrage in the Senate.⁶⁶ Recognizing the limitations of the text, Justice Black seamlessly moved on to the history of this Section. As Justice Harlan's dissent demonstrates, however, this history is at best ambiguous and, most likely, refutes the majority position—a point of which the Australian Supreme Court was to take careful notice.⁶⁷

Four months after *Wesberry*, the Court announced its opinions in six cases challenging state reapportionment schemes (or lack thereof). In each case, plaintiffs successfully argued that the electoral maps placed too few people in rural districts and too many people in urban districts.⁶⁸ In *Reynolds v. Sims*, the Court began the substantive portion of

⁶⁶ See U.S. CONST. art. V.

⁶⁷ Perhaps because of the ambiguities of Article I, or perhaps because the Fourteenth Amendment gives the Court greater leeway to intervene in state affairs generally, Justice Clark would have relied on the Equal Protection Clause even for challenges to federal districting. See *Wesberry*, 376 U.S. at 18–19. Justice Black's broader approach, however, is reconcilable with Article I's function of establishing representative government. The theory goes something like this: narrow constitutional construction is only legitimate in a democracy where the political institutions are healthy; if they are distorted, then the courts must be willing to read the text more broadly in order to do the people's work. Given the widespread electoral distortions throughout the country, Justice Black had to fathom the text's deeper meaning in order to restore the health of state legislative institutions. It is of course for this reason that Chief Justice Warren wrote that the most important case of his tenure on the Court was not *Brown* as some might have guessed, but the voting rights cases. See EARL WARREN, *THE MEMOIRS OF EARL WARREN* 306–07 (1977).

⁶⁸ See generally *Reynolds*, 377 U.S. 533 (Alabama); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) (New York); *Tawes*, 377 U.S. 656 (Maryland); *Davis v. Mann*, 377 U.S. 678 (1964) (Virginia); *Roman v. Sincock*, 377 U.S. 695 (1964) (Delaware); *Lucas*, 377 U.S. 713 (Colorado).

There are many ways to measure malapportionment. Among the most common are:

- 1) assessing the percentage of the population that is required to elect a majority of the legislative body. For instance, in Alabama in 1960, approximately 25% of the "[s]tate's total population resided in districts represented by a majority of the members" of the state legislature. *Reynolds*, 377 U.S. at 545. The ideal would be if 51% percent of the population was represented by 51% of the state's legislators. See *id.*

- 2) determining the ratio of the number of people in the most populous district to the number in the least populous, assuming one representative per district. For instance, in Alabama in 1960, each county had only one state senator, whether it had 634,864 residents or 15,417 residents, yielding a ratio of 41-to-1. See *id.* at 545–46. Where each district has the same number of voters, the ratio is 1-to-1.

- 3) determining the percentage variance from the average number of people per district. For instance, if a state has 4,000,000 voters, and 10 legislative districts, the ideal population of each district would be 400,000. A district that contains 440,000 deviates by 10% from the ideal or

its opinion by emphasizing the importance of the right to vote in this society. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."⁶⁹ Although in *Reynolds* and its companion cases, the Court relied on the Equal Protection Clause rather than the right to vote for federal representatives, the same ideology of popular sovereignty and representative democracy is evident.⁷⁰

Themes of absolutism, individualism, and judicial activism that were initially intimated in *Gray* were fully expounded in *Reynolds*. The Court's attempt to explain how equipopulosity will be judged exemplifies its excessive absolutism. Although the Court grants that "mathematical nicety" may be impossible,⁷¹ it then holds that only a standard exceedingly close to that will do.⁷² At the very least, something like *near* absolute equality is required.⁷³

The Court's intolerance of mathematical inequality is emphasized in its skepticism of the justifications that the states might assert to

average; if another district contains 360,000, the total deviation in the state is 20% or plus or minus 10%. See, e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526, 529 (1969). In Australia and Canada, and currently in the United States, this is the most commonly used method. See *Abrams*, 117 S. Ct. at 1935–36 (explaining basics of reapportionment analysis).

⁶⁹ *Reynolds*, 377 U.S. at 555. The Court said, "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections," citing "[a] consistent line of decisions by this Court" but not the constitutional text. *Id.* at 554. Although the U.S. Supreme Court does not, generally, distinguish between the Constitutional text and the Court's interpretation of the Constitutional text, the Australian High Court has made this distinction in, *inter alia*, the voting rights cases. See *McGinty*, 134 A.L.R. at 347–48 (McHugh, J.) ("it is the duty of justices of this Court to apply [the Constitution's] text and not the judicial decisions on the text.").

⁷⁰ As the *Reynolds* Court noted:

[O]ur decision in *Wesberry* was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are to be chosen "by the People," while attacks on state legislative apportionment schemes, such as that involved in the instant cases, are principally based on the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

Reynolds, 377 U.S. at 560–61. "As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Id.* at 562.

⁷¹ See *id.* at 569, 577.

⁷² See *id.* at 568.

⁷³ *Reynolds* is ambiguous both as to what the correct formulation is and as to how it will be

excuse inequality.⁷⁴ Although the Court would permit "legitimate considerations incident to the effectuation of a rational state policy"⁷⁵ to justify deviation from equipopulous districting, it immediately removed from consideration the most likely legitimate considerations.⁷⁶ The language used has been so influential on American, Australian, and Canadian courts that it is worth quoting at length:

But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960s, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.⁷⁷

The Court thereby rejected nearly every reason a state might assert for deviating from absolutely equal size districts.⁷⁸ The rationale for rigid adherence to the ideal of equipopulosity is that "all voters, as citizens of a State, stand in the same relation regardless of where they

interpreted. *See id.* at 587-88 (Clark, J., concurring) ("Whether 'nearly as is practicable' means 'one person, one vote' qualified by 'approximately equal' or 'some deviations' or by the impossibility of 'mathematical nicety' is not clear from the majority's use of these vague and meaningless phrases"). In *Lucas*, Justice Clark, unlike the majority, interpreted a deviation of "4.9% of being perfect" as within the "as nearly as practicable" mandate of *Reynolds*. *Lucas*, 377 U.S. at 741. This issue would occupy the Court in the ensuing decades.

⁷⁴ *See Reynolds*, 377 U.S. at 579-81.

⁷⁵ *Id.* at 579.

⁷⁶ *See id.*

⁷⁷ *See id.* at 579-80.

⁷⁸ *See id.* The Court did suggest that the desire to "maintain the integrity of political subdivisions" may be a legitimate interest, thereby recognizing only those associational interests that have been formalized into law by political subdivision maps. *See id.* at 580. Even here, though, the Court said, population must not be "submerged as the controlling consideration." *Id.* at 581; *see id.* at 623 (Harlan, J., dissenting).

live.”⁷⁹ Thus, “[a]ny suggested criteria for the differentiation of citizens are insufficient to justify any discrimination.”⁸⁰ Since most of these proffered criteria would be associational interests—the common bonds people develop from shared neighborhoods, work, or values—the effect of the Court’s approach is to preclude any consideration of group or associational interests.⁸¹

Indeed, the opinion is a paean to individual rights. “A predominant consideration in determining whether a State’s legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature.”⁸² The Constitution guarantees each individual the right to vote, and the right to have her or his vote counted fairly and equally.⁸³ The Constitution, under this individualist view, does not speak to people’s interests in associating and in making their electoral voices heard on the basis of these associations.

Despite the fervently individualist orientation of *Reynolds*, certain undercurrents in the Court’s opinion suggest that it was also concerned with “effective representation.”⁸⁴ Effective representation is, at least in some aspects, a group-related interest.⁸⁵ It might mean that

⁷⁹ *Reynolds*, 377 U.S. at 565.

⁸⁰ *Id.*

⁸¹ *Cf. Lucas*, 377 U.S. at 748–49 (Stewart, J., dissenting) (“I [can] not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.”).

⁸² *Reynolds*, 377 U.S. at 561. “Simply stated, 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.” *Id.* at 568.

⁸³ See U.S. CONST. amends. XV, XIX, XXVI.

⁸⁴ See *Reynolds*, 377 U.S. at 565. Much has been written about the competing interests of individual rights and fair and effective representation. See, e.g., John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984); Bernard Grofman, *Fair and Equal Representation*, 91 ETHICS 477 (1980).

⁸⁵ See *Davis v. Bandemer*, 478 U.S. 109, 166–67 (1986) (Powell, J., concurring in part and dissenting in part):

The concept of “representation” necessarily applies to groups: groups of voters elect representatives, individual voters do not. Gross population disparities violate the mandate of equal representation by denying voters residing in heavily populated districts, as a group, the opportunity to elect the number of representatives to which their voting strength otherwise would entitle them. While population disparities do dilute the weight

each person should have equal access to her representative,⁸⁶ or the same likelihood of casting a winning ballot.⁸⁷ But it might also mean that people should have effective representation based on their affiliations.⁸⁸ For instance, if farmers are to be effectively represented, they may need to be represented in the legislature in numbers that exceed their small proportional share of the population, but that match their importance to the community.⁸⁹

If this is the meaning of "effective representation," it could be not just distinct from but inconsistent with the promise of equipopulosity.⁹⁰ Indeed, the Canadian and Australian courts have concluded that mathematical equality may detract from effective representation because representation cannot be effective if it does not represent communities of interests among voters.⁹¹ The *Reynolds* Court's response to this point is that "[o]ur constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures . . . the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future."⁹² The

of individual votes, their discriminatory effect is felt only when those individual votes are combined. Thus, the fact that individual voters in heavily populated districts are free to cast their ballot has no bearing on a claim of malapportionment.

Id.; see also *Bush*, 116 S. Ct. at 2000, (Souter, J., dissenting) (noting the "basically associational character of the right to vote").

⁸⁶ See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEXAS L. REV. 1590, 1599 (1993).

⁸⁷ See Jonathan Stull, *Political Equality and Elections Systems*, 91 ETHICS 375 (1980) (discussing criteria for political equality).

⁸⁸ Representation is probably most accurately conceived as comprising both individualist and associational interests. One commentator has called this the "Janus character" of the right to vote. Albert P. Weale, *Representation, Individualism, and Collectivism*, 91 ETHICS 457, 465 (1980). See also Conference: *The Supreme Court, Racial Politics and the Right To Vote*: Shaw v. Reno and the Future of the Voting Rights Act, 44 AM. U.L. REV. 1, 76 (1993) ("it's a breath mint and a candy at the same time") (Professor Pamela Karlan speaking) [hereinafter Conference]; Aleinikoff & Issacharoff, *supra* note 3, at 588.

⁸⁹ Both apportionment and districting can achieve this purpose by ensuring that fewer farming votes will not be canceled out by a greater number of non-farming votes. "The instrumental purpose of voting—having one's preferences taken into account in choosing public officials—necessarily involves aggregating the votes of individuals to achieve a collective outcome The way in which districts are drawn often determines which voters will be able to elect their preferred candidates and which voters will have their preferences go unsatisfied." Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249 [hereinafter Karlan, *All Over the Map*].

⁹⁰ See *Reynolds*, 377 U.S. at 624 (Harlan, J., dissenting).

⁹¹ See *infra* notes 206–09, 248–49 and accompanying text.

⁹² *Reynolds*, 377 U.S. at 566. This is not completely responsive, since mathematical equality precludes any disproportionate share of power, not just giving minorities majority control. See *id.*

Court saw no need to reconcile the two principles; to the extent that they are distinct at all, the Court clearly submerged the interest in effective representation, thereby marginalizing associational interests.⁹³ In a single breath, the Court imbued the Constitution with the promise of effective representation and compromised that promise for the sake of individual rights.⁹⁴

The effect of this individualist orientation was two-fold. First, it was enormously influential on later decisions which reinforced the individualist approach and concomitantly minimized the importance of effective representation insofar as it responds to associational interests.⁹⁵ Second, it facilitated the marriage, in the *Shaw* cases, of equal protection law and voting rights law that might otherwise have been more awkward to effectuate. Because the case law did not emphasize effective representation and because equal protection law is also individualist, the Court was able to treat voting rights as one of many incidents of equal protection, without recognizing its distinctive nature.⁹⁶ Thus, in the *Shaw* cases, the Court imported its affirmative action jurisprudence into its districting cases as if no other (read associational) interest existed.⁹⁷

The third theme intimated in *Gray* and elaborated on in *Reynolds* is judicial activism. One measure of the Court's activism is the effect of the ruling on the states. As Justice Harlan suggested (still in dissent), "these decisions cut deeply into the fabric of our federalism."⁹⁸ He estimated that the ruling would invalidate the legislative schemes (not

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ But see *Bandemer*, 478 U.S. at 167 (Powell, J., dissenting in part, concurring in part); *Bush*, 116 S. Ct. at 2000 (Souter, J., dissenting) quoted at *supra* note 85.

⁹⁶ See, e.g., *Shaw I*, 509 U.S. at 642 (The "central purpose [of the Equal Protection Clause] is to prevent the States from purposefully discriminating between individuals on the basis of race."); *Washington v. Davis*, 426 U.S. 229, 239 (1976); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995) (referring to a "long line of cases understanding equal protection as a personal right."); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("... rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.").

⁹⁷ This is the thrust of much of the current scholarly dissatisfaction with the redistricting cases. See, e.g., Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CALIF. L. REV. 1201 (1996); Aleinikoff & Issacharoff, *supra* note 3, at 588. On the other hand, some commentators have applauded the Court's merging of the two areas of law, arguing that there is nothing particularly distinctive about voting rights. See, e.g., James F. Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 RUTGERS L.J. 517 (1995) (justifying *Shaw*'s reliance on race cases rather than voting rights cases). The point of disagreement would seem to lie primarily in the extent to which one recognizes that the associational character of voting distinguishes it from other interests protected under the Equal Protection Clause.

⁹⁸ *Reynolds*, 377 U.S. at 624 (Harlan, J., dissenting).

to mention delegitimize the legislatures) in all but a few of the 50 states.⁹⁹

Beyond its immediate effect, the *Reynolds* case authorized federal district courts and, to a lesser extent, state courts, to supervise apportionment of state legislatures, without any particular guidance from the Supreme Court to limit their discretion.¹⁰⁰ This legacy is still with us today.¹⁰¹ Without evident trepidation, the Court brushed aside principles of federalism and separation of powers in order to ensure the effectiveness of its proposed remedy. As noted above, there may have been ample reason in cases like *Baker*, *Reynolds*, and *Tawes* for the Court's impatience: as in the ongoing school desegregation sagas, there was little reason to expect that states would suddenly begin protecting the individual rights newly identified by the Court. On these facts, the problem lies not with the result, but with the Court's failure to link the result to the facts, to recognize that it is the egregious facts, and not the Court's whim or a predilection for bright lines, that justifies overriding federalism and separation of powers interests.

Thus, where the facts were not egregious, the Court could also impose its bright line on the state. In *Lucas v. Forty-Fourth Colorado General Assembly*, Colorado voters had actually chosen to have representation in the upper house of the state's bicameral legislature based on geographic factors. The case was therefore unusual because it could not be alleged that a minority had entrenched itself.¹⁰² Furthermore, the districts for the lower house were "as nearly equal in population as may be."¹⁰³ Thus, *Lucas* presents the closest analogy to the recent high

⁹⁹ See *id.* at 589. He also stated that the constitutions of all but eleven states "recognized bases of apportionment other than geographic spread of population, and to some extent favored sparsely populated areas by a variety of devices." *Id.* at 610; see also *Lucas*, 377 U.S. at 746 (Stewart, J., dissenting).

¹⁰⁰ See *Reynolds*, 377 U.S. at 615-21 (Harlan, J., dissenting); cf. *id.* at 586 ("legislative reapportionment is primarily a matter for legislative consideration and determination, and judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so"). While this may have been the Court's intent, it has not turned out that way.

¹⁰¹ See generally *Upham v. Seamon*, 456 U.S. 37 (1982) (requiring district courts to defer to legislative proposals when drawing electoral plans). But see *Abrams*, 117 S. Ct. at 1941 (preferring federal district court plan over state legislative proposals that the Court said were tainted by Department of Justice pressure).

¹⁰² *Lucas*, 377 U.S. at 717-20, 732-34. "*Lucas* presents that troubling case where in effect a majority of Colorado voters chose a less equipopulous districting plan than would have been required by one-person, one-vote. Chief Justice Warren finessed this issue by relying on individual conceptions of rights rather than a group-based equality claim." Issacharoff, *supra* note 7, at 1667-68 n.123.

¹⁰³ *Lucas*, 377 U.S. at 734.

court cases in Australia and Canada, where political remedies appear to be available and where population is always at least an important factor (if not the controlling factor).¹⁰⁴ Nonetheless, the Court invalidated the entire plan because the upper house districts deviated substantially from population equality and the Constitution, the Court said, stands for nothing if not the proposition that a majority of the people can not infringe on the constitutionally protected right of any citizen.¹⁰⁵ The lesson later courts have learned from these cases is not to tread carefully where federalism and separation of powers interests are at risk, but rather that these interests should not interfere with protection of individual rights, no matter the particular facts.

2. Application of the Equipopulosity Standard

The Court soon made clear that the *Reynolds* rule imposed different requirements on federal and state electoral districts. With respect to congressional districts, the Court would not accept any deviation from the mathematical ideal: “[a]s between two standards—equality or something-less-than equality—only the former reflects the aspirations of Article I, Section 2.”¹⁰⁶ Thus, a plaintiff’s proof that the deviation,

¹⁰⁴ See Reference re: Electoral Boundaries Commission Act [1991] 81 D.L.R. 16 (*Ref. re: EBCA*); *McGinty*, 134 A.L.R. 289.

¹⁰⁵ *Lucas*, 377 U.S. at 735–37 (“A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be”). The Court does not explain why this mandate applies with equal vigor where the majority is burdening itself rather than an outnumbered minority—the question that has perplexed judges and commentators in the context of affirmative action as well. In *Lucas*, as in the usual affirmative action context, the majority gave some of its power to the minority that could not otherwise get it. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528–62 (1989) (Marshall, J., dissenting); *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting) (“The Court’s concept of ‘consistency’ assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable.”).

¹⁰⁶ *Karcher v. Daggett*, 462 U.S. 725, 727 (1983) (invalidating a deviation in New Jersey’s congressional districts of less than one percent, less than the predictable undercount in the available census data). The Court suggested that reasons for rejecting any permissible variation included the arbitrariness of any standard other than absolute equipopulosity and the possibility that the legislature would aim for the outer limit. See *id.* As explained in *Kirkpatrick*, since each state has its particular history, geography, and demography, the Court had no basis for determining the extent to which these factors would justify deviation from the ideal. *Kirkpatrick*, 394 U.S. at 530–31. Rather than fixing an arbitrary standard for permissible deviation, the Court would permit no deviation at all from mathematical equality without proper justification:

[w]e reject Missouri’s argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the

however small, could have been avoided, is sufficient to shift the burden to the state to justify it.¹⁰⁷ Once the burden has shifted, the state may justify the deviation only by a legitimate (rather than substantial or compelling) justification,¹⁰⁸ but as noted, virtually no justification is even legitimate.

By contrast, the Court's application of one person, one vote to state legislative districting was downright lax. Two years after its strict congressional rule was laid down in *Kirkpatrick* and *Wells*,¹⁰⁹ the Court in *Abate v. Mundt*, upheld a county legislative plan with a total deviation of 11.9% (virtually the same as in *Wells*).¹¹⁰ Here, the Court gave deference to the "considerable flexibility in municipal arrangements"

"as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," *Wesberry v. Sanders*, the "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds*, 377 U.S. at 577.

Kirkpatrick, 394 U.S. at 530-31 (rejecting "practical politics" as justification for total population deviations of 6%). See also *White v. Weiser*, 412 U.S. 783, 797 (1973) (deviation of 4.13% invalid); *Abrams*, 117 S. Ct. at 1939-40 (upholding court-devised plan with overall population deviation of 0.35%).

¹⁰⁷ As the *Karcher* Court noted:

First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided, the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Karcher, 462 U.S. at 730-31.

¹⁰⁸ *Id.* at 732.

¹⁰⁹ *Wells v. Rockefeller*, 394 U.S. 542 (1969), invalidating New York's federal plan which contained maximum deviations above and below the mean of approximately 6.5% (for a total deviation of 12%) on the ground that:

"... to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations.

Id. at 546 (quoting *Kirkpatrick*, 394 U.S. at 531).

¹¹⁰ 403 U.S. 182, 187 (1971).

that are necessary if local governments are to “meet changing societal needs”¹¹¹ The high water mark of deference to state policies came in the 1983 Wyoming case of *Brown v. Thompson*, where the Court decided that a deviation of 89% was permissible in order to ensure that each county would have specific representation in the state’s house of representatives.¹¹² Furthermore, the standard for shifting the burden is different in state districts. The Court has held that a deviation of less than 10% is de minimis and does not even make a prima facie case of an equal protection violation.¹¹³ The Court appears most comfortable in sanctioning plans that deviate less than a total of 25% from the population quota.¹¹⁴

¹¹¹ *Id.* at 185. The Court also relied on the fact that “some local legislative districts may have a much smaller population than do congressional and state legislative districts,” and “on the long tradition of overlapping functions and [constituting the government this way] and on the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas.” *Id.* at 185, 187. Nonetheless, not all state apportionment plans after *Reynolds* were upheld. In *Swann v. Adams*, for instance, where the Court imposed on the state the burden of justifying a significant deviation from equipopulosity, it invalidated a plan with overrepresentation of 15.09% (senate) and 18.28% (house) and underrepresentation of 10.56% (senate) and 15.27% (house) where the state offered no evidence to justify it. *Swann v. Adams*, 385 U.S. 440, 443–44, 446, 447 (1967). By comparison, under the Canadian system, this might not be sufficient to shift the burden; under the Australian system, it would not raise a constitutional issue. *See also* *White v. Regester*, 412 U.S. 755 (1973) (upholding state house of representatives plan that ranged from maximum overrepresentation of 5.8% to maximum underrepresentation of 4.1%).

¹¹² *See* *Brown v. Thompson*, 462 U.S. 835 (1983). The precedential value of this case is not clear, since four justices dissented and two concurred did not read the majority as upholding a “statewide legislative plan” with an 89% maximum deviation, but as upholding the decision to give one county its own representative thereby increasing the deviation only about 23%, from 66% (what it would be without the additional representative) to 89%. *See id.* at 850 (O’Connor, J., concurring), 850–51 (Brennan, J., dissenting). The constitutionality of the initial 66% deviation was not before the Supreme Court.

¹¹³ *See Regester*, 412 U.S. at 764; *Brown*, 462 U.S. at 842–43 (opinion), 852 (Brennan, J., dissenting). Whether the burden shifts at 10% total deviation, or at any deviation that could have been avoided, the state need only justify its deviation with a rational reason. “The ultimate inquiry, therefore, is whether the legislature’s plan ‘may reasonably be said to advance [a] rational state policy’ and, if so, ‘whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.’” *Brown*, 462 U.S. at 843 (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)). *See also* *Karcher*, 462 U.S. at 731. More reasons are considered rational with respect to state legislative plans. *See also* *Gaffney v. Cummings*, 412 U.S. 735, 750–51 (1973) (deviation of 8% is minor and does not make a prima facie case under the Equal Protection Clause); *Brown*, 462 U.S. at 851–52 (O’Connor, J., concurring).

¹¹⁴ *Compare, e.g., Mahan*, 410 U.S. at 329 (upholding deviation of 16%) with *Whitcomb v. Chavis*, 403 U.S. 124, 162 (1971) (invalidating total deviation of 24.78%) and *Swann*, 385 U.S. at 443–44 (invalidating total deviation of 25.65%).

The Court has never provided a satisfactory explanation for its adoption of two different standards. It has said that:

absolute population equality [must] be the paramount objective of apportionment only in the case of congressional districts, for which the command of Art[icle] I, [Section] 2 as regards the National Legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures, but we have not questioned the population equality standard for congressional districts.¹¹⁵

Yet the Court has not explained why this should be so: that is, why do local interests prevail for representation to state houses more than for representation to Congress? Certainly good arguments for using the same standard abound: among them, that the harm of an unequally weighted vote is the same whether the vote is for a state or federal representative; that the state's sovereign interest in constituting its own legislature is not substantially different given that some states have been drawing federal district lines since 1842, longer than some others have had state legislatures; and that despite some ambiguous language in *Reynolds v. Sims*, the more straightforward reading of it and its companion cases is that the 1964 Court did not contemplate a different standard.¹¹⁶ Beyond this, one might legitimately argue that if the Court is committed to two standards, the stricter one ought to apply to state legislatures: the source of the guarantee of equal state representation (the Equal Protection Clause) explicitly guarantees equality, while the source of the guarantee of equal federal representation would seem to be more concerned with effective than with mathematically equal representation;¹¹⁷ there is a greater likelihood that state legislators will manipulate district lines to their own benefit than to the benefit of their federal counterparts; and, historically, it was the state legislatures that were more grossly malapportioned. In other words, if a 20% deviation is arbitrary and conduces to noncompliance with respect to congressional districts, it is not clear why it is acceptable for state

¹¹⁵ *Karcher*, 462 U.S. at 732-33.

¹¹⁶ See *id.* at 782 n.14 (White, J., dissenting) (arguing that there no longer remains any justification for using a different standard for legislative and congressional reapportionment, and noting that *Wesberry* and *Reynolds* "were frequently cross-cited, and the formulation 'as nearly of equal population as is practicable' appears in *Reynolds v. Sims*, 377 U.S. at 589, as well as *Wesberry v. Sanders*, 376 U.S. at 7-8.").

¹¹⁷ *Karcher*, 462 U.S. at 746-47 (Stevens, J., concurring).

districts. Alternatively, if the state has sound reasons for deviating from equipopulosity for its own legislature, why wouldn't those reasons outweigh any individual's interest in an equally weighted vote for the federal legislature at least as well?¹¹⁸

The two-tiered approach seems to be explainable on two grounds, neither related to the actual conditions that obtain when states draw district lines. One is simple frustration with the process of achieving equipopulosity.¹¹⁹ The other is the trading of one abstract standard (absolute equipopulosity) for another (federalism). In *Mahan v. Howell*, for instance, where the Court first made clear that it would apply a more lenient standard for state districts, virtually no attention was given to the question of why state legislatures are dissimilarly situated when they district for themselves or for Congress.¹²⁰ In the absence of any other explanation and given that the right to share equally in the practice of self-government is the same in either event, the difference between state and federal representation would seem to depend on some conception of federalism, not on the factual difference in representation between having a vote that is worth 10% more or less than that of another person. Federalism is an abstract principle in this context because it is not linked to any factual necessity: there is no explanation as to why it was abandoned in *Reynolds* or *Lucas* or *Karcher* and no explanation as to why it was reinvoked in *Mahan* or *Brown*. In none of these cases is the presence or absence of federalism explained in terms of achieving "fair and effective representation."¹²¹ Nor has the

¹¹⁸ One could argue that federal districts must be more constrained because each one contains more individuals so that each percentage deviation affects more people. While this may be true, it is not an argument that the Court has focused on.

¹¹⁹ See, e.g., *Gaffney*, 412 U.S. at 749–50 ("That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so"). Justice White argued in his dissent in *Karcher* that, as a result of *Kirkpatrick*, "[m]ost estimates are that between 25 percent and 35 percent of current house district lines were drawn by the courts." *Karcher*, 462 U.S. at 778 (quoting A.B.A., CONGRESSIONAL DISTRICTING 20 (1981)). The Court continues to be unable to control judicial oversight of redistricting, and it continues to be ambivalent towards judicial participation in this quintessentially legislative function. Litigation increased inordinately after the 1990 redistricting. See Issacharoff, *supra* note 7, at 1690 n.236 (as of December 20, 1992, "36 of the 49 states that redistricted after the 1990 Census and the District of Columbia are or have been involved in litigation over their congressional or state legislative redistricting lines. In addition, Iowa has been involved in litigation over access to the database and software used in its process, although the lines themselves were unchallenged. To date, 114 lawsuits have been filed, with more suits expected.").

¹²⁰ See 410 U.S. 315 (1973).

¹²¹ See *Karcher*, 462 U.S. at 775 (White, J., dissenting).

Court articulated any normative rule for when federalism interests should control in future cases.¹²² Federalism just seems to appear and disappear like a rabbit pulled at whim from the Court's constitutional hat.

What the Court's approach lacked in justification, it made up for in clarity. States knew how to abide by the Court's rulings and did so with little difficulty.¹²³ To the extent that state legislators continued to have less-than-honorable designs, they were able to achieve their personal or political goals while still adhering to the *Reynolds* rule (thanks in part to improved computer technology which permitted states to experiment with alternative plans while comporting with the Court's standards).¹²⁴ The equipopulosity rule may even have facilitated the age-old practice of gerrymandering. Indeed, the Court was slow to recognize that rigidly insisting on the *Reynolds* standard would solve one aspect of the problem of unfair representation, but might exacerbate others.¹²⁵ In his concurrence in *Karcher*, Justice Stevens argued that the Court ought to be more attentive to other kinds of harms caused by manipulation of voting districts against which the Equal Protection Clause also protects.¹²⁶

3. Gerrymandering

Although the Court has been deciding gerrymandering cases since the early 1960s,¹²⁷ the last few years have seen unprecedented judicial

¹²² For the present Court's ambivalence toward federal courts drawing districting plans, compare *Grove v. Emerson*, 507 U.S. 25, 33 (1993), requiring "federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself" with *Lawyer v. Dept. of Justice*, 117 S. Ct. 2186 (1997), permitting district court to adopt redistricting plan without invalidating state legislature's plan.

¹²³ See *supra* note 7.

¹²⁴ See, e.g., *Karcher*, 462 U.S. at 752 n.10 (Stevens, J., concurring), 785 (Powell, J., dissenting) ("The plain fact is that in the computer age, this type of political and discriminatory gerrymandering can be accomplished entirely consistently with districts of equal population."); Issacharoff, *supra* note 7, at 1654. In North Carolina, where the *Shaw* claim arose, "[s]even of the districts have a population of 552,386, and the other five districts have a population of 552,387." Pope v. Blue, 809 F. Supp. 392, 395 (W.D.N.C. 1992).

¹²⁵ "[E]xcept in the minds of the most naive, there was no assurance that giving city people adequate legislative representation would necessarily bring the solution of urban problems. But it did seem clear that a solution would not be reached without such representation." Carl Brent Swisher, *History's Panorama and Justice Black's Career*, in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 1, 32 (Stephen Parks Strickland ed., 1962).

¹²⁶ *Karcher*, 462 U.S. at 747 (Stevens, J., concurring), 786-90 (Powell, J., dissenting).

¹²⁷ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 339 (1960) (holding that Alabama violated

attention to what the Court has described as "racial gerrymandering."¹²⁸ These cases all emerged after the 1990 round of redistricting: when the 1990 Census authorized a number of states to create additional congressional districts, state legislatures created some districts in which racial minorities constituted a majority of voters.¹²⁹ While this enabled racial minorities who constituted cohesive voting blocs to elect the candidates of their choice, it also created a large class of white voters who would be in the minority in their districts. In *Shaw v. Reno*, the Court held that these voters stated a cause of action for unlawful race discrimination because the districts they were put in were drawn with attention to voters' race.¹³⁰ The Court said that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause

the Fifteenth Amendment when it redrew Tuskegee's city limits to exclude virtually every black voter). In later cases, the Court would decide that *Gomillion* was more properly conceived as an Equal Protection case, thus reinforcing the treatment of voting as an incident of equality rather than as a value in and of itself. See *id.* at 349 (Whittaker, J., concurring); *Whitcomb*, 403 U.S. at 127; *City of Mobile v. Bolden*, 446 U.S. 55, 86 (1980) (Stevens, J., concurring in judgment); *Karcher*, 462 U.S. at 748 (Stevens, J., dissenting); *Shaw I*, 509 U.S. at 645.

¹²⁸ This is unfortunate nomenclature, because it renders a complex process unidimensional, and focuses attention, perhaps unduly, on group interests defined by race. As Justice Stevens has recognized, "[i]n the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders . . . the motivation for the gerrymander turns on the political strength of members of the group, derived from cohesive voting patterns, rather than on the source of their common interests." *Karcher*, 462 U.S. at 749–50 (quoting *Mobile*, 446 U.S. at 88 (Stevens, J., concurring in the judgment)); see also *Cousins v. City Council of Chicago*, 466 F.2d 830, 852 (7th Cir. (Stevens, J., dissenting), cert. denied, 409 U.S. 893 (1972)). Describing the districts at issue in the *Shaw* cases simply as racial gerrymanders denies that they were drawn to effectuate political gains, as well as to unify people of similar interests based on political and socio-economic ties. For instance, these were the first districts ever drawn in North Carolina and Louisiana to unify the less affluent. See Conference, *supra* note 88, at 35; see also Frank P. Parker, *Factual Errors and Chilling Consequences: A Critique of Shaw v. Reno and Miller v. Johnson*, 26 CUMB. L. REV. 527, 531 (1996) [hereinafter Parker, *Factual Errors*] (describing the commonalities among people within the challenged districts in Georgia).

¹²⁹ A number of theories have been asserted to explain the sudden increase of these districts after 1990. The most likely suspects are far-sighted Republican strategists who sought to destabilize the Democratic party in the South; rigorous enforcers of the Voting Rights Act, 42 U.S.C. § 1973c (1988 ed.), in the Department of Justice; incumbent state legislators; black caucuses at both the federal and state levels; and liberal interest groups such as the American Civil Liberties Union. See *Miller*, 515 U.S. at 905–11; *Abrams*, 117 S. Ct. at 1929–33 (describing the provenance of the various proposed districting plans); Conference, *supra* note 88, at 56; Karlan, *All Over the Map*, *supra* note 89, at 269–71. Professor Parker also attributes some responsibility to the press and even to the Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Parker, *Factual Errors*, *supra* note 128, at 528. Although most of these majority-minority districts were drawn to create an effective African-American voting bloc, some were designed to benefit other racial minorities as well. See, e.g., *Bush*, 116 S. Ct. 1941 (invalidating majority-Hispanic district).

¹³⁰ *Shaw I*, 509 U.S. at 630.

may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."¹³¹ Such a claim would be subject to strict scrutiny, requiring the state to justify with a compelling interest any reapportionment plan that appeared to be substantially motivated by consideration of voters' race.¹³²

In subsequent cases, the Court refined what has been called the constitutional tort of "wrongful districting."¹³³ In *Miller v. Johnson*, the Court explained that the plaintiff must prove that:

race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, 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 actual shared interests, to racial considerations.¹³⁴

In *United States v. Hays*, the Court established that only voters living in the allegedly gerrymandered district had standing to bring such a claim.¹³⁵ The Court has now closed the circle by holding, on the merits, that districts in North Carolina and Texas which had been challenged as racial gerrymanders did not survive strict scrutiny.¹³⁶

A *Shaw* claim is valid regardless of the race of the plaintiffs—indeed the *Shaw* plaintiffs did not identify their race in their complaint¹³⁷—al-

¹³¹ *Id.* at 649.

¹³² *Id.* at 658 ("If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the . . . plan is narrowly tailored to further a compelling governmental interest").

¹³³ Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 289, 289 (1996) [hereinafter Karlan, *Still Hazy*].

¹³⁴ *Miller*, 515 U.S. at 916.

¹³⁵ *Hays*, 515 U.S. at 737. "Where a plaintiff resides in a racially gerrymandered district . . . [she or he] has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Id.* at 744–45. The Court did not explain why reliance on racial criteria constitutes unequal treatment or why such unequal treatment is of constitutional stature, and even if it is, why it only violates the rights of those who were districted in and not those who were districted out. *See id.* at 750 (Stevens, J.).

¹³⁶ *See Bush*, 116 S. Ct. at 1951; *Shaw II*, 116 S. Ct. at 1899.

¹³⁷ *Shaw I*, 509 U.S. at 641.

though, as with any affirmative action program, whites are far more likely to challenge the state action than are racial minorities. And it is valid regardless of whether the plaintiffs' votes were in fact diluted; thus, plaintiffs need not show any actual injury to their right to vote.¹³⁸ Nor need plaintiffs show that *they* were placed in their district because of their (white) race; they need only show that others (blacks) were. Thus, they need not allege or prove invidious intent.¹³⁹ This significantly reduces plaintiffs' burden because invidious intent has historically been one of the most difficult burdens for minority plaintiffs to carry in challenging racial discrimination.¹⁴⁰ The alleged harm here is that the line drawers thought too much about some voters' race at the expense of other criteria.¹⁴¹ As so conceived, a *Shaw* claim looks more like an affirmative action claim than a voting rights claim; indeed, the Court relied more on affirmative action cases like *Richmond v. J.A.*

¹³⁸ Conference, *supra* note 88, at 51.

¹³⁹ *Shaw II*, 116 S. Ct. at 1900; *see also* Parker, *Factual Errors*, *supra* note 128, at 532 ("... plaintiffs [in *Shaw I* and *Miller* did not] allege or prove racially discriminatory purpose or effect"). In most cases invidious intent would be impossible to prove because the race of the plaintiffs will have been irrelevant to the districting decision. A racially gerrymandered district will have been designed by, first, determining the number of people who should be in a congressional district according to the principle of equipopulosity; second, determining the number of minorities needed to gain an electoral victory; third, identifying where such minorities live and drawing lines around their homes; and fourth, filling in the remainder of the district's population with whoever lives nearby (with due attention to such other factors as incumbency protection and residence, partisan balance of power, etc.) but with no attention to their race. *See, e.g., Bush*, 116 S. Ct. at 1954. Once more than 50% of the voting population in the district is selected according to the desired criteria, the traits of the remaining voters do not matter. Thus, the plaintiffs in a *Shaw* claim are those most likely to be placed in the district *without* regard to their race. *See* Karlan, *Still Hazy*, *supra* note 133, at 290. Even if some regard were given to plaintiffs' race, it is unlikely that the lines would have been drawn because of their adverse effect on people of plaintiffs' race, as is usually required in non-affirmative action equal protection cases. That is, one does not include a white voter in a majority-minority district because being in the district will devalue her vote. *See generally id.* at 302 n.86 (noting that *Shaw* claims are unlikely to meet the standard for intent set out in *Personnel Admin. v. Feeney*, 442 U.S. 256, 279 (1979)). The Court's response to the *Feeney* criticism is that no invidious discrimination need be proven because the districts are so bizarrely shaped that they are inexplicable on grounds other than race. *Shaw I*, 509 U.S. at 643-44 (quoting *Arlington Heights v. Metro Housing Devel. Corp.*, 429 U.S. 252, 266 (1977)). This is both factually and legally incorrect. The district shapes are attributable to political, non-racial motivations, and even if they were racially motivated, this standard substitutes invidious discriminatory intent for mere race-consciousness.

¹⁴⁰ *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁴¹ *See Shaw II*, 116 S. Ct. at 1900 (stating that since "a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts ... [t]he constitutional wrong occurs when race becomes the 'dominant and controlling' consideration.") (citing *Shaw I*, 509 U.S. at 645-47 and *Miller*, 515 U.S. at 911-12, 916).

Croson Co.,¹⁴² and later *Adarand Constructors v. Peña*¹⁴³ than on *Wesberry v. Sanders*. The *Shaw* Court did not explain why it was supplanting voting rights law with equal protection law, except to say, *ipse dixit*, that the *Shaw* claim was “analytically distinct” from a traditional voting rights claim.¹⁴⁴

The decision to treat districting claims like equal protection claims rather than like voting rights claims reveals how the three principal themes of *Gray* and *Reynolds* reverberate throughout the *Shaw* cases. The contemporary Court’s absolutism is evidenced in its refusal to consider the factual subtleties of various types of race consciousness. All governmental race consciousness should be subjected to strict scrutiny, the Court says, because it constitutes impermissible racial stereotypes that “bear[] an uncomfortable resemblance to political apartheid.”¹⁴⁵ This is true regardless of the intent or the effect of the government’s awareness of race (here, to enhance minority representation in Congress) and regardless of the political motivations (the white majority benefiting the black minority). Although the Court has tried to soften the impact of this rule by suggesting that not all race consciousness will fall under the strict scrutiny guillotine,¹⁴⁶ *Shaw II* and

¹⁴² 488 U.S. 469 (1989) (plurality opinion) (applying strict scrutiny to a municipal program to set aside a percentage of city contracts to minority businesses).

¹⁴³ 515 U.S. 200 (1995) (applying strict scrutiny to a federal set-aside program).

¹⁴⁴ *Shaw I*, 509 U.S. at 652. This language seems to be most acceptable to those who already agreed that equal protection law should control. See, e.g., Blumstein, *supra* note 97, at 592–93 (finding analytical distinction to be warranted by principle and precedent). A cynic might suggest that the only distinction is that a *Shaw* claim is a voting rights claim without an injury. I make the point only to illustrate how the Court missed an opportunity to explain its rationale; I leave to others the task of assessing whether or not the claims are distinct by any analytically coherent measure.

¹⁴⁵ *Shaw I*, 509 U.S. at 647.

¹⁴⁶ See *id.* at 642 (stating that “this Court never has held that race-conscious state decisionmaking is impermissible in all circumstances.”); see also *Adarand*, 515 U.S. at 237 (suggesting that strict scrutiny is not fatal in fact). The Court has not identified any interest that counts as compelling. Justice O’Connor has argued that the need to avoid violations of Section 2 of the Voting Rights Act is a compelling governmental interest, although she needed a separate opinion in which to say it. *Bush*, 116 S. Ct. at 1968. Furthermore, it raises the question of whether the Court should accept actual or reasonably anticipated violations of Section 2 as the prompt. In his dissent in *Abrams*, 117 S. Ct. at 1943, Justice Breyer criticizes the prohibition on all race consciousness except as necessary to avoid actual violations. This rule, Breyer argues, precludes race consciousness where it furthers the remedial purposes of the Equal Protection Clause. It also further embroils the district courts in redistricting because it permits race consciousness only where a court has determined that a violation would occur, rather than where a legislator reasonably believed a violation would occur. Finally, the “actual violation” standard contains no “simple, administrable stopping place—a principle that could serve the same function in this context as does the one-person-one-vote rule in the context of reapportionment.” *Id.* at 1950. Of course, none of this resolves the narrow tailoring question.

Bush demonstrate that there is virtually no difference between saying that strict scrutiny applies to a plan and invalidating it. Despite abundant evidence indicating that other factors, at least as important as race, motivated the legislatures in these cases, and that even if race were the predominant factor, the challenged districts were narrowly tailored to serve the compelling interest of alleviating centuries-old race discrimination in North Carolina and Texas, a divided Court in both cases struck down the districts as impermissible race consciousness.¹⁴⁷

Using the framework of equal protection rather than voting rights law also achieved two collateral goals that echo the *Gray* and *Reynolds* cases. It permitted the Court to cast the claim solely in terms of individual rights, without referring to "effective representation" at all.¹⁴⁸ The only concern here is that individuals not be treated differently because of race; there is no discussion at all of the purpose of districting in the first place or the value to society as a whole of enhanced minority representation.¹⁴⁹ Finally, since the Fourteenth Amendment condones federal court intervention in state affairs, relying on the Equal Protection Clause permitted the Court to devalue federalism interests; by contrast, both Article I, Section 2 and especially Article I, Section 4 delegate power to the states, arguably imposing on the Court some obligation to be deferential. The Court's rejection of deference, along with its exclusive commitment to individual rights and to absolutism distinguish its approach from that of both the Canadian Supreme Court and the Australian High Court to the detriment of American voters, the legitimacy of the political process generally, and the Court's own stature.

¹⁴⁷ *Shaw II*, 116 S. Ct. at 1899; *Bush*, 116 S. Ct. at 1951.

¹⁴⁸ See, e.g., *Shaw II*, 116 S. Ct. at 1906 (the "right to an undiluted vote (to cast a ballot equal among voters), belongs [not] to the minority as a group [but] to its individual members." citing 42 U.S.C. § 1973 ("the right of any citizen")).

¹⁴⁹ Districting was designed to help any minority interest that would otherwise be perpetual losers by the winner-take-all nature of statewide elections. As the Court itself has explained on various occasions, "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Bandemer*, 478 U.S. at 128 (quoting *Gaffney*, 412 U.S. at 752–53). One problem with *Shaw* is that, in treating race differently, it prevents political minorities who identify on the basis of race (as opposed to political minorities who identify, for instance, on the basis of common farming interests) to reap the benefits of districting. For racial minorities, it is winner-take-all throughout the state and, by definition, they are never sufficiently numerous to take all.

C. *The Canadian Cases: Fulfilling the Charter's Purpose*

In the last few years, courts all over Canada have been called upon to decide whether the district boundary lines drawn by election commissions violate Canada's constitutional guarantee of the right to vote.¹⁵⁰ Although Canada had a form of constitutional democracy since 1867,¹⁵¹ the Canadian Charter of Rights and Freedoms (Charter) came into effect only in 1982.¹⁵² The explicit protection for individual rights in the Charter inaugurated what one judge has called the "judicialization of society," in which, as has been the case in the United States since before de Tocqueville visited, every important issue is ultimately determined by a court.¹⁵³ This is a role which, in Canada, "the judiciary did not seek but which has been thrust upon us" by the Canadian Charter.¹⁵⁴ It is no surprise then that sooner, rather than later, the Canadian courts would have to decide questions of apportionment and districting.¹⁵⁵ And it would not be too long before the Canadian Supreme Court would issue a definitive decision, establishing the general principles by which these questions should be decided and guiding the lower courts.

The Supreme Court case was from Saskatchewan. In many respects, the underlying facts were typical of the Canadian experience and, in at least one fundamental respect, typical of the American experience

¹⁵⁰ Appellate courts in Alberta, British Columbia, Prince Edward Island, and Saskatchewan have heard such cases since 1986. See Alberta: Reference re: Electoral Divisions Statutes Amendment Act 1993 (Alta.) [1994] 119 D.L.R. 1 (*Alberta 1994*); Reference re: Electoral Boundaries Commission Act (Alta.) [1991] 83 Alta. L.R. 210, 86 D.L.R. 447; Lac la Biche (Town) v. Alberta [1993] 102 D.L.R. 499 (Alta. C.A.); British Columbia, re: Dixon and Attorney-General of British Columbia [1986] 31 D.L.R. 546 (B.C.S.C.) (*Dixon 1986*), *on remand*, re: Dixon and Attorney-General of British Columbia [1989] 59 D.L.R. 247 (B.C.S.C.) (*Dixon 1989*); Prince Edward Island: Charlottetown (City) v. Prince Edward Island [1996] 142 D.L.R. 343 (P.E.I.S.C.) (*PEI 1996*); MacKinnon v. Prince Edward Island [1993] 104 Nfld., P.E.I.R. 232 (P.E.I.S.C.), 101 D.L.R. 362; Saskatchewan: Reference re: Electoral Boundaries Commission Act (Sask.) [1991] 5 C.R.R. 1 *sub nom.* Carter v. Saskatchewan (Attorney General) [1991] 2 S.C.R. 158, 94 Sask. R. 161, 81 D.L.R. 16.

¹⁵¹ See Constitution Act (1867) (the former British North America Act).

¹⁵² See *supra* note 25 and accompanying text.

¹⁵³ *Dixon 1986*, 31 D.L.R. at 548. This provincial case held that districting claims are justiciable under Section 3 of the Canadian Charter; it is analogous to *Baker v. Carr*.

¹⁵⁴ *Id.* at 548. See also Connor v. Finch, 431 U.S. 407, 415 (1977) (referring to judicial authority over districting plans as an "unwelcome obligation."); *Lawyer*, 117 S. Ct. at 2196 (Scalia, J., dissenting).

¹⁵⁵ While in America, the two issues were severed, the Canadian courts have considered them jointly, so that a question about whether boundary lines were drawn consistently with the Charter requires consideration both of the number of people in each district (or riding as it is called) and of where on the map the lines were drawn.

as well. Almost all of the Canadian cases arise out of the provincial legislatures' failure to adjust electoral boundaries to reflect increasing urbanization and concomitant loss of population in traditionally well-represented rural areas. Although in no case has the legislatures' recalcitrance been as extreme as was that of some American legislatures in the 1950s and 1960s, the same impulses are at work. For instance, in Saskatchewan, by the time of the 1989 redrawing of boundary lines, "[t]he rural areas ha[d] 53.0% of the seats and 50.4% of the population. Urban areas ha[d] 43.9% of the seats and 47.6% of the population."¹⁵⁶ In Alberta, 60% of the people lived in metropolitan areas, but were represented by only 51.8% of the Legislative Assembly or 43 out of 83 seats.¹⁵⁷ Indeed, in most cases, it was noted that the legislatures had been moving toward valuing urban and rural votes equally, albeit not as quickly as some (urban voters) would have liked.¹⁵⁸ The *Alberta* Court referred to this as "[t]he political prudence that encourages gradual but steady change," with which it had some but not unlimited patience.¹⁵⁹ Furthermore, in Saskatchewan, as in other provinces, the rural preference had proven decisive in recent elections; in 1986, the Saskatchewan Conservatives, whose base is largely rural, had won a second mandate, gaining 38 seats, as against the New Democratic Party's 25 seats, even though the latter received more votes.¹⁶⁰

1. The Electoral Boundaries Commission Act

Unlike most American jurisdictions, most Canadian provinces use independent electoral boundary commissions to draw boundary lines, although such commissions are not required by the Charter.¹⁶¹ These commissions, which have been used for more than thirty years in

¹⁵⁶ *Ref. re: EBCA*, 81 D.L.R. at 42 (Opinion of McLachlin, J.). All references to this case are to the opinion of McLachlin, J., unless otherwise noted. Justice McLachlin wrote for four other members of the Court; Justice Sopinka agreed with her result and "substantially with her reasons," (Sopinka, J., concurring); two other justices dissented. *Id.* at 20. In addition to writing the main opinion in this case, Justice McLachlin also wrote one of the most significant provincial court opinions as Chief Justice of the British Columbia Supreme Court. *See Dixon 1989*, 59 D.L.R. 247.

¹⁵⁷ *Alberta 1994*, 119 D.L.R. at 5.

¹⁵⁸ *See, e.g., PEI 1996*, 142 D.L.R. at 347.

¹⁵⁹ *Alberta 1994*, 119 D.L.R. at 19 ("... the idea of achievement of full electoral rights over time, but with all deliberate speed, warrants judicial restraint.").

¹⁶⁰ Brian Bergman & Dale Eisler, *A Hard, Cold Choice*, *McLEAN's*, Mar. 18, 1991, at 19.

¹⁶¹ *Ref. re: EBCA*, 81 D.L.R. at 21 (Sopinka, J.) ("It was not necessary for the Saskatchewan legislature to create an independent commission, and, had it simply legislated the impugned

Canada,¹⁶² vary in their autonomy depending on the extent to which they comprise sitting members of the Legislative Assembly for which the redistricting was conducted, and on the degree of detailed instruction they are given by those legislatures.

In many cases, the enabling legislation is quite specific in its instructions to the independent commission. For instance, in Saskatchewan, the Electoral Boundaries Commission Act (Electoral Act) "required the electoral commission to create 29 urban, 35 rural, and two northern ridings."¹⁶³ Interestingly, the fact that the legislature predetermines

boundaries, the process itself would not have been subject to judicial scrutiny."). Indeed, in Prince Edward Island, the first boundary proposal was made by a commission consisting of five sitting members of the legislature and three non-members which received "much public participation," while the second one (which was ultimately accepted by the legislature) was made by a provincial government employee who "more or less locked himself away and did not consult anyone or receive representation from anyone" during the month he worked on the plan. *PEI 1996*, 142 D.L.R. at 345-46. The Court implicitly upheld the former process and explicitly upheld the latter. See also *Alberta 1994*, 119 D.L.R. at 19 ("We accept that there is no authority to say that the Charter mandates an independent commission"). Commissions are common in the British tradition. "[T]here would be scope for embarrassment if politicians were to be required to redraw those boundaries without independent advice." *Regina v. Boundary Comm'n for England, ex parte Foot and Others* [1983] 1 Q.B. 600, 2 W.L.R. 458, 464, 1 All E.R. 1099. American districting processes seem to run the gamut. Compare *Abrams*, 117 S. Ct. at 1944 (Breyer, J., dissenting) (describing "most redistricting efforts [as] the culmination of committee meetings, public hearings, examination of various districting proposals, and many hours spent with an extremely sophisticated computer") with ROBERT BORK, *THE TEMPTING OF AMERICA* 88-90 (1990) (recounting his experience as a special master designing a Connecticut reapportionment plan with 2 graduate students and the census tracts).

¹⁶² *Alberta 1994*, 119 D.L.R. at 7.

¹⁶³ Electoral Boundaries Commission Act, S.S. 1986-87-88, ch. E-6.1, § 14 [hereinafter Electoral Act]; see *Ref. re: EBCA*, 81 D.L.R. at 40. Large portions of some Canadian provinces are extraordinarily sparsely populated. These districts are usually guaranteed representation not in accordance with their numbers, and are thus exempt from any equipopulosity requirement that might otherwise apply. In doctrinal terms, it is said that although the representation in these ridings violates the right to vote guaranteed in Section 3 of the Charter, the violation is justified under Section 1 of the Charter which acknowledges "reasonable limits" on Charter rights to the extent that they can be "demonstrably justified in a free and democratic society." See *Dixon 1989*, 142 D.L.R. at 270. See also discussion of Sections 1 and 3, *infra* notes 183-89 and accompanying text. Thus, the two northern ridings mandated by the Electoral Act were upheld by the lower court and not challenged in the Supreme Court even though they constituted approximately the northern half of the territory of the province and had 50% fewer voters than the provincial average. See *Ref. re: EBCA*, 81 D.L.R. at 40. These ridings were found to be:

in a class by themselves. The geography of these sparsely settled regions clearly demonstrates a pressing and substantial need for two northern constituencies. The creation of these constituencies is certainly rationally connected to the concept that these vast, underpopulated areas need effective representation. In short, the creation of the two northern ridings meets all the requisite conditions and they are justified under [Section] 1 of the Charter.

the number of urban and rural ridings is not per se unconstitutional; it only becomes problematic if the particular designation violates the constitutional right to vote by disproportionately favoring one group.¹⁶⁴ In Alberta, for instance, the legislature had determined that there should be 43 urban seats and 40 rural seats, which would not have been suspicious but for the fact that 60% of the population lived in urban areas.¹⁶⁵ Thus, the rural minority was able to minimize substantially its numerical disadvantage.¹⁶⁶

The Saskatchewan Act further established that "the voter population of each constituency [must be] within plus or minus 25% of the provincial quotient."¹⁶⁷ This latitude is common in Canada: legislation in Newfoundland, New Brunswick, Quebec, Ontario, Alberta, Yukon, British Columbia, and Prince Edward Island, as well as federal law permits total deviations of up to plus or minus 25% of the provincial quotient or average.¹⁶⁸ In Saskatchewan, for example, where the

Id. at 27–28 (Cory, J., dissenting).

¹⁶⁴ *Ref. re: EBCA*, 81 D.L.R. at 21. "[W]hile [Section] 14 of the Electoral Boundaries Commission Act, which mandates a fixed number of rural and urban ridings, could have resulted in producing variations from the objective which were so extreme as to amount to a breach of the right to vote, it did not have that effect in this case." *Id.* (Sopinka, J., concurring). Justice Cory, however, noted in dissent that both earlier and subsequent versions of the Act under review omitted "any reference to the numbers of urban and rural ridings." *Id.* at 24, referring to Constituency Boundaries Commission Act, 1972, S.S. 1972, ch. 18 and the Electoral Boundary Commission Act 1991, S.S. 1991, ch. E-6.11, §§ 9, 11. This suggested to Justice Cory and to Chief Justice Lamer that the challenged legislation unduly constricted the "independent" commission. *See id.*

¹⁶⁵ *Alberta 1994*, 119 D.L.R. at 9.

¹⁶⁶ *See id.* America tends to shy away from what could be called either "precommitment strategies," (Issacharoff, *supra* note 7, at 1668) or quotas or unscrupulous gerrymandering. Furthermore, depending on the axes along which the predeterminations are made, the United States shies away from even proportional or less than proportional representation. For instance, in the *Shaw* cases, what seems to bother the Court is the Justice Department's insistence on establishing a predetermined number of minority opportunity districts not that the plan would result in disproportionate representation for minorities. For instance, whereas in Georgia, blacks constitute 27% of the population which would equate to 3 out of 11 districts, the Court objects to even 2 out of eleven districts being designated as minority opportunity. Thus, even where the majority is favored and even where the predetermination is made pursuant to a general federal law, the American Court resists permitting such a priori designations. *See Miller*, 515 U.S. 900; *Abrams*, 117 S. Ct. 1925.

¹⁶⁷ *See Ref. re: EBCA*, 81 D.L.R. at 40, 42. Section 20 of the Act requires the commission first to determine the "constituency population quotient" by dividing the voter population of the entire province by the number of constituencies or districts. *See id.* at 42; Electoral Act, § 20(a). It further mandates that no southern constituency should vary from this quotient by more than 25% and neither of the northern ones should vary by more than 50%. *See Ref. re: EBCA*, 81 D.L.R. at 42; Electoral Act, § 20(a).

¹⁶⁸ *PEI 1996*, 142 D.L.R. at 355. The Court further noted that Manitoba permits variations of only plus or minus 10% and the Nova Scotia limit is 15%. *Id.*

provincial quotient was 10,147, the most populous district contained 12,567 voters, while the least populous district contained 7,684.¹⁶⁹

Beyond establishing these numerical parameters, the Electoral Act also imposed various qualitative restraints on the commission. Specifically, having authorized the commission to deviate from the population quotient, it further defined the purposes for which such deviation may be used:

§ 20: A commission, in determining the area to be included in and in fixing the boundaries of all proposed constituencies: . . .

(b) may use the allowable variation from the population quotient . . . to accommodate:

(i) the sparsity, density or relative rate of growth of population of any proposed constituency;

(ii) any special geographic features including size and means of communication between the various parts of the proposed constituency;

(iii) the community or diversity of interests of the population, including variations in the requirements of the population of any proposed constituency; and

(iv) other similar or relevant factors.¹⁷⁰

Thus, under this scheme, a commission may deviate from the provincial quota by up to 25%, but only for any of these broadly enumerated criteria.

2. The Court's Analysis

If there is a constitutional right to equipopulous districts in Canada, it would be found in Section 3 of the Charter.¹⁷¹ Before analyzing this

¹⁶⁹ *Ref. re: EBCA*, 81 D.L.R. at 47.

¹⁷⁰ Electoral Act, § 20, *quoted in Ref. re: EBCA*, 81 D.L.R. at 42-43; *see Aleinikoff & Issacharoff, supra* note 3, at 625 (reprinting analogous state statutes used in Montana and Hawaii).

¹⁷¹ Every court that has considered the question, has analyzed it under Section 3's right to vote; no court has analyzed the claim under Section 15 of the Charter which guarantees equal rights. *See Charter, supra* note 27, § 15 ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"). This contrasts with the American Court's treatment of voting rights under the Fourteenth Amendment and its explicit (and *post hoc* in the case of *Gomillion*) rejection of the Fifteenth Amendment as grounding voting rights.

particular constitutional provision, however, the Court first surveys the general jurisprudential principles that will guide its interpretation.

a. *Understanding the Charter*

Justice McLachlin's approach is clearly stated at the outset. "The content of a charter right is to be determined in a broad and purposive way, having regard to historical and social context."¹⁷² Here the Court quotes Justice Dickson (later to become Chief Justice):

In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts.¹⁷³

The metaphor most commonly used to describe the Canadian Constitution, including the Charter, is that of "a living tree capable of growth and expansion within its natural limits."¹⁷⁴ This metaphor is, as it were, deeply rooted in Canadian jurisprudential tradition, deriving from an opinion of the Imperial Privy Council interpreting the 1867 Constitution.¹⁷⁵ This doctrine has been widely accepted so its implica-

¹⁷² *Ref. re: EBCA*, 81 D.L.R. at 32.

¹⁷³ *Id.*, quoting *Regina v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, 18 D.L.R. 321, 359-60 (Opinion of Dickson, J.) (interpreting the constitutional guarantee of freedom of conscience and religion).

¹⁷⁴ *Ref. re: EBCA*, 81 D.L.R. at 32. Professor Swinton, of the University of Toronto, calls this phrase "over-used." Katherine Swinton, *Federalism Under Fire: The Role of the Supreme Court in Canada*, 55 LAW & CONTEMP. PROBS., 121, 126 (1992).

¹⁷⁵ *Edwards v. Attorney General (Canada) re: Section 24 of the B.N.A. Act* [1930] 1 D.L.R. 98, 106-07, [1929] 3 W.W.R. 479, 1 App. Cas. 124, 136 (P.C. 1930) (appeal taken from Supreme Court of Canada [1928] 4 D.L.R. 98) (Opinion of Lord Sankey).

tions are worth considering.¹⁷⁶ First, the "living tree" doctrine precludes a stringently originalist interpretation of the Charter: "[The] meaning of the concept of the [constitutional provision] is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter."¹⁷⁷ The Court neither categorically rejects historical evidence nor permits it to delimit its interpretations; rather it uses such evidence to inform its decision.¹⁷⁸ "The right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy underlying the historical development of the right to vote—a philosophy which is capable of explaining the past and animating the future."¹⁷⁹ History is a guide, not a master.

Another implication of the "living tree" metaphor is "the general principle that practical considerations must be borne in mind in constitutional interpretation."¹⁸⁰ Here, the Court cites a variety of Canadian cases as well as Justice Frankfurter's opinion in *McGowan v. Maryland*, in which he refers to the "practical living facts" to which a legislature must respond.¹⁸¹ Although this maxim applies to all constitutional interpretation, the Court points out that it is "nowhere more

¹⁷⁶ In this case, for instance, the majority opinion, which upheld the legislation, used this broad approach; the dissenters interpreted the constitutional guarantee even more broadly. *See also* Reference re: An Act to Amend the Education Act, 40 D.L.R. 18, 40 (1987) (Howland, C.J.O. & Robins, J.A., dissenting) ("If any doubt exists as to whether an exception to the guaranteed fundamental rights and freedoms is authorized by the Charter, the doubt must be resolved in favour of the application of the Charter and not the extension of the exception.").

¹⁷⁷ *Ref. re: EBCA*, 81 D.L.R. at 33 (citation omitted).

¹⁷⁸ "History is important in so far as it suggests . . . the philosophy underlying the development of the right to vote in this country . . ." *Id.* at 38.

¹⁷⁹ *Id.* at 33.

¹⁸⁰ *Id.*

¹⁸¹ *Ref. re: EBCA*, 81 D.L.R. at 33 (quoting *McGowan v. Maryland*, 366 U.S. 420, 524 (1961) (Separate Opinion of Frankfurter, J.)). The passage reads as follows:

Neither the Due Process nor the Equal Protection Clause demands logical tidiness. No finicky or exact conformity to abstract correlation is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial re-examination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded.

Id. at 523–24. The appeal of the passage, however, is mitigated by Frankfurter's reliance on *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding prohibition against female bartenders). *See also Ref. re: EBCA*, 81 D.L.R. at 38.

true than in considering the right to vote, where practical considerations such as social and physical geography may impact on the value of the citizen's right to vote."¹⁸² The legislature's presumed responsiveness to the practical living facts counsels the Court against unnecessary interference.

Finally, the Court removes all doubt that a strict interpretation might be possible by quoting another influential opinion by former Chief Justice Dickson:

The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.¹⁸³

The Court's reference to a "free and democratic society" is taken from Section 1 of the Charter which subjects the rights and guarantees set out in the rest of the Charter "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹⁸⁴ Not surprisingly, this Section is very controversial. On one view, it is a burden-shifting provision: once a violation of a substantive provision is found, the burden shifts to the government to justify its breach.¹⁸⁵ But Section 1 is also read, not just as an evidentiary rule, but as "a second level of constitutional guarantee, supporting, rather than departing from the values contained in the crystallized rights and freedoms."¹⁸⁶ This possibility suggests an important difference between

¹⁸² *Ref. re: EBCA*, 81 D.L.R. at 33. This, of course, contrasts sharply with the American Court's persistent inattention to the factual background of the cases.

¹⁸³ *Id.* (quoting *Regina v. Oakes* [1986] 1 S.C.R. 103, 26 D.L.R. 200, 225 (Dickson, C.J.C.)).

¹⁸⁴ Charter, *supra* note 27, § 1.

¹⁸⁵ See, e.g., *PEI 1996*, 142 D.L.R. at 350 ("The onus of establishing that there is a breach of [Section] 3 of the Charter is upon the person alleging the breach. If a breach is established, the onus is then upon the government to show that the legislation is justified under [Section] 1 of the Charter and if no justification is shown the legislation is held to be invalid."); see also *Dixon 1989*, 142 D.L.R. at 270. See generally Michael P. Ritter, *The Charter of Rights and Freedoms*, in 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 26, at 27 (Section 1 "implicitly sets out a code of evidence indicating the respective burdens to be borne by the parties in litigation and further provides that any 'fundamental freedom' can be overridden where the circumstances dictate.").

¹⁸⁶ Lorraine Weinrib, *Canada's Charter: Rights Protection in the Cultural Mosaic*, 4 CARDOZO J.

the American and Canadian attitudes toward governmental power. The burden-shifting structure of our Court's constitutional jurisprudence—infringement of a presumptive right is permissible if it is narrowly tailored to a compelling purpose—suggests an adversarial relationship between the government and the individual. If the government wins, the individual loses.¹⁸⁷ The Canadian Supreme Court, however, has read the burden-shifting provision of its Charter, Section 1, as a careful balancing of co-existing values; “[u]nder this interpretation, democracy, individual dignity, and equality might flourish in the enjoyment of the stipulated guarantees, or in rare cases where justified, in their limitation.”¹⁸⁸ Opening the Charter itself with this provision indicates that the Charter envisions a constellation of values that mutually reinforce, rather than exclude, each other. Many of the Canadian Supreme Court's first cases under the Charter—the *Marburys* and the *McCullochs* of Canadian constitutional law—attempt to further that vision.¹⁸⁹ The *EBCA* Court takes this philosophy seriously and returns to it throughout the various individual opinions.

b. *The Meaning of the Right to Vote*

Having established the principles that govern constitutional interpretation generally, the Court narrowed its gaze by focusing on Section 3 itself. Section 3 says:

INT'L & COMP. L. 395, 409 (1996) [hereinafter Weinrib, *Canada's Charter*]. This characterizes Section 1 as an appropriate burden-shifting provision that recognizes law's multiple constituencies.

¹⁸⁷ This is true even when there is no presumptively protected constitutional right and any rational reason justifies infringement.

¹⁸⁸ Weinrib, *Canada's Charter*, *supra* note 186, at 409.

¹⁸⁹ See, e.g., *Regina v. Keegstra* [1990] 3 S.C.R. 697 (upholding a hate speech prohibition); *Ford v. Quebec (A.G.)* [1988] 2 S.C.R. 712, 54 D.L.R. 577 (invalidating Quebec's French-only sign law), both discussed in Weinrib, *Canada's Charter*, *supra* note 186, at 395. Critics of Section 1 argue that it precludes the very possibility of law under a system of separation of powers by requiring virtually unconstrained judicial balancing. See Karen Selick, *Rights and Wrongs in the Canadian Charter*, in *RETHINKING THE CONSTITUTION: PERSPECTIVES ON CANADIAN CONSTITUTIONAL REFORM, INTERPRETATION, AND THEORY* 115 (Anthony A. Peacock ed., 1996) (“Section 1 gives judges not only the power but the positive obligation to determine, in the context of particular cases, the general rules that are to govern a free and democratic society. They are authorized not only to judge, but to make law.”). Although this may be a fair criticism in principle, or even as applied in many cases, it does not seem to apply to the *EBCA* decision or to the other districting cases decided under the Charter which exhibit deference to legislatures.

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.¹⁹⁰

The question the Court needed to answer was whether “the right to vote” guarantees either absolute equality (meaning that a person’s vote is “as nearly as practicable” worth as much as another’s)¹⁹¹ or relative equality. If it guarantees absolute equality, then the statute’s permissible deviations of up to 25% would clearly violate the constitutional right. If it guarantees only relative equality, then the Court would need to determine whether permitting deviations of 25% still provided relative equality. If it guarantees neither, then it cannot constrain the Electoral Act.¹⁹² The Court viewed the issue as a choice between two competing conceptions of the underlying purpose of Section 3:

[t]hose who start from the premise that the purpose of the section is to guarantee equality of voting power support the view that only minimal deviation from that ideal is possible. Those who start from the premise that the purpose of § 3 is to guarantee effective representation see the right to vote as comprising many factors, of which equality is but one.¹⁹³

This brief passage says a lot about how the Court approached its task. It may be worth noting initially that the Court graciously views both options as reasonable,¹⁹⁴ but one (the latter) will ultimately turn out to be more consistent with all the justices’ understanding of Charter rights.¹⁹⁵

On a substantive level, this passage reinforces the view that interpretation is fundamentally a purposive exercise. The Court does not spend time analyzing the text because the specific words of Section 3 shed no more light on complex questions than the words of many American constitutional provisions. One still is left with the task of assessing what

¹⁹⁰ Charter, *supra* note 27, § 3; see *Ref. re: EBCA*, 81 D.L.R. at 32.

¹⁹¹ *Wesberry*, 376 U.S. at 7–8.

¹⁹² As then British Columbia Supreme Court Chief Justice McLachlin said in the *Dixon* case, “[i]n particular, does [the right to vote in Section 3] comprehend equality of voting power, and if so, is the equality of voting power absolute or relative? If it is not absolute, what limits are there on deviation from parity of voting?” *Dixon 1989*, 142 D.L.R. at 255.

¹⁹³ *Ref. re: EBCA*, 81 D.L.R. at 34.

¹⁹⁴ Cf. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1191, 1193–98 (criticizing the “immoderate tone of statements” of American federal court opinions).

¹⁹⁵ The dissent does not dispute this characterization of the issue. See *Ref. re: EBCA*, 81 D.L.R. at 34.

"the right to vote" means with respect to a particular law. In addition, both options recognized by the Court incorporate the notion of equality as an essential ingredient of an effective right to vote.¹⁹⁶ Indeed the Saskatchewan statute, like the others, instructed the independent commission to use as its baseline the provincial quotient (the number of people to be represented by one member of the Legislative Assembly) thereby recognizing equipopulosity as the starting point.¹⁹⁷

What distinguishes the options is whether equality is the *sine qua non* of an effective voting right or whether it is one of several factors to be considered in determining whether the right to vote has been violated. Curiously, the Court puts the choice in distinctly American terms: if the critical right is to equality of voting power (as an abstract value), then only absolute equality will do. This means voter parity or one person, one vote is required. If, however, the critical right is to effective representation, then the right to vote is preserved if several elements are present, of which equality is but one. In this case, the right to vote may be secured even if the legislature has deviated from what the Court refers to as the "ideal" of absolute equality, if the deviation has preserved other essential values.¹⁹⁸ It may be worth considering the two alternatives not as opposites but as two ends of an equality continuum.¹⁹⁹ The Canadian courts have recognized that absolute voter parity may not be possible and that some deviation from the ideal is inevitable and must be countenanced even under the most rigid interpretations.²⁰⁰ In the end, though, the terminology is similar, whatever the

¹⁹⁶ Even the challengers did not "deny the importance of equality in a meaningful right to vote" but "urged that equality was but one of many [relevant] factors." *Id.* at 34–35.

¹⁹⁷ See Electoral Act, § 42.

¹⁹⁸ In terms of the interplay between Sections 1 and 3 of the Charter, under the former approach (that taken by the Saskatchewan Court of Appeal), any deviation from voter parity constitutes a violation of Section 3 which must be justified under Section 1. Under the latter approach, Section 3 is violated if the deviations are so gross as to deny relative equality or if the deviations from absolute equality do not further the goal of effective representation. Only in these circumstances will the government be compelled to justify the deviation under Section 1. See *Ref. re: EBCA*, 81 D.L.R. at 34. In this case, the provincial appellate court found that the purpose of Section 3 was equality, that the deviations exceeded permissible limitations, and that considerations of geography, historical boundaries, and community interests did not meet Section 1's requirements for justification. See *id.*

¹⁹⁹ Viewing the alternatives as points on a continuum that are perhaps not so far apart (rather than as opposites) may permit a sensible reconciliation of the *Reynolds* Court's insistence on both absolute equality and fair and effective representation.

²⁰⁰ As noted above, some American states have managed to create equipopulous districts. These statistics, however, may say more about computer-age precision than real-world accuracy. Between the time the plan is enacted and the time of the election, people have turned 18, died, and moved in and out of the district, so at best, the plan is equipopulous at the irrelevant moment that it

aspirations or the reality: the Canadian version of “as nearly as is practicable”²⁰¹ is with “minimal deviation”²⁰² which is similar to “within practicable and rational limits.”²⁰³

Justice McLachlin and the justices who agreed with her rejected the argument that the purpose of enshrining the right to vote in the Charter was to ensure absolute equality and instead adopted the view that its purpose was to ensure “effective representation”.²⁰⁴

[o]urs is a representative democracy. Each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative.²⁰⁵

The Court then focused on the relationship, in actual practice, between absolute parity and effective representation. Far from realizing the goals of Section 3, the Court said, undue attention to parity would actually *detract* from it. In the Court's view, it would often be necessary to consider such factors as “geography, community history, community interests and minority representation . . . to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.”²⁰⁶ To insist on voter parity, the Court explained, “might de-

was last modified before enactment. Accuracy is especially doubtful to the extent that American jurisdictions rely on figures of total population, rather than registered voters. *See also Boundary Comm. for England ex parte Foot and Others* [1983] 1 Q.B. 600, 2 W.L.R. 458, 471, 1 All E.R. 1099 (“Practicability is not the same as possibility Practicability not merely connotes a degree of flexibility: it contemplates that various matters should be taken into account when considering whether any particular purpose is practicable, i.e., capable in practical terms of achievement”) (discussing the requirement that districts be, as nearly as practicable, equipopulous). Here again, the American attraction to idealism leads us to believe that absolute equipopulousness is possible, and permits us to ignore the murkier reality of life. *But see Abrams*, 117 S. Ct. at 1940 (refusing to order a new plan because no new plan could “reflect Georgia's true population distribution” given the population shifts that would have occurred in the six years since the census).

²⁰¹ *Wesberry*, 376 U.S. at 7–8.

²⁰² *Ref. re: EBCA*, 81 D.L.R. at 34.

²⁰³ *McGinty*, 134 A.L.R. at 312 (Toohey, J.).

²⁰⁴ *Ref. re: EBCA*, 81 D.L.R. at 35.

²⁰⁵ *Id.* (emphasis in original).

²⁰⁶ *Id.* at 36, 35 (quoting the nation's first Prime Minister, Sir John MacDonald, speaking in Parliament in 1872, to introduce an “Act to re-adjust the Representation in the House of Commons”: “. . . it will be found that . . . while the principle of population was considered to a very great extent, other considerations were also held to have weight; so that different interests, classes and localities should be fairly represented, that the principle of number should not be the only one.”).

prive citizens with distinct interests of an effective voice in the legislative process" as well as of effective assistance from their representatives in their "ombudsman" role.²⁰⁷ Referring to the concerns listed by former Chief Justice Dickson, the Court said, "[r]espect for individual dignity and social equality mandate that citizens' votes not be unduly debased or diluted. But the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that other concerns also be accommodated."²⁰⁸

The conclusion that absolute equality is not to be gained at the expense of other important factors, however, is not without its limitations. Even those courts upholding plans that deviated from absolute equality recognized that "at some point" the deviations might be so great that they would violate even the more lax "relative equality" standard endorsed by the Canadian Supreme Court.²⁰⁹ Another limitation is that deviations are permitted only if they can be shown to "contribute to better government of the populace as a whole, giving due

²⁰⁷ *Id.* at 38.

²⁰⁸ *Id.* at 39.

²⁰⁹ As one court said, deviations from the quotient "cannot be permitted to continue if Alberta wishes to call itself a democracy." *Alberta 1994*, 119 D.L.R. at 17. This point is made with noticeable regularity in the Australian jurisprudence. See, e.g., *Ex Rel. McKinlay v. The Commonwealth* (1975) 135 C.L.R. 1, 36 ("At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It can not be determined in the abstract." (McTiernan and Jacobs, JJ.); see also *McGinty* 134 A.L.R. at 311 (Dawson, J.). Justice Toohey, in the *McGinty* case, indicated that the difference between the American willingness to establish precise outer limits and the Australian and Canadian reluctance to was a matter of comity:

Unlike the United States, the Canadian courts appear to have balked at identifying a ratio beyond which there is such an imbalance as to invalidate the electoral system The courts must exercise restraint in this area, in particular not seeking in effect to say how boundaries should be drawn or prescribing specific ratios that are acceptable [A]n approach in broad terms gives proper recognition to the respective roles of the legislature and the court. The task of the court is to identify and give effect to the constitutional principle at issue.

McGinty, 134 A.L.R. at 330, 388 (Gummow, J.). As the British Appeals Court has said in a similar situation, "[w]e are prepared to accept the theoretical possibility that in a given instance the disparity between the electorate of a proposed constituency and the electoral quota might be so grotesquely large as to make it obvious on the figures that no reasonable commission which had paid any attention at all to [the equipopulosity requirement] could possibly have made such a proposal." *Boundary Comm. for England, ex parte Foot and Others* [1983] 1 Q.B. 600, 2 W.L.R. at 477, 1 All E.R. 1099. The American response might be that a bright line is more deferential to states because it is more clear and thus leaves less room for judicial discretion; the American cases, however, have not been particularly deferential to the states.

weight to regional issues within the populace and geographic factors within the territory governed.”²¹⁰ Although the “list is not closed,”²¹¹ some justifications clearly would not pass this test. For instance, it is unlikely that the Court would permit deviations for the purpose of enhancing one party’s advantage, for incumbency protection, or for fear of offending a powerful element of the constituency.²¹² It also is clear that most courts will require proof of clearly articulated justifications for deviating from absolute voter parity.²¹³

These principles mean that electoral plans under Section 3 must do more than allocate the same number of voters to each district. “The concept of absolute voter parity does not accord with the development of the right to vote in the Canadian context and does not permit of sufficient flexibility to meet the practical difficulties inherent in representative government in a country such as Canada. In the end, it is the broader concept of effective representation which best serves the interests of a free and democratic society.”²¹⁴ The goal of effective representation must always be borne in mind; this goal permits deviations from absolute equality if the result is better government.

²¹⁰ *Ref. re: EBCA*, 81 D.L.R. at 22 (Cory, J., dissenting) quoting *Dixon 1989*, 142 D.L.R. at 267; see also Electoral Boundaries Commission 1988 Final Report at 4 quoted in *Ref. re: EBCA*, 81 D.L.R. at 30 (“Clearly the Act by necessary inference implies that such voter population quotient must be the benchmark for all constituencies. The right of the Commission to depart from that quotient is not an absolute one. It is entitled to depart therefrom only for the reasons set forth in the Act and only to the extent that the special circumstances properly permit, and the legislation requires.”). See also *Alberta 1994*, 119 D.L.R. at 12 (“there is no permissible variation if there is no justification.”); see also, e.g., *Connor v. Finch*, 431 U.S. 407 (1977) (discussing justifications for deviation).

²¹¹ *Ref. re: EBCA*, 81 D.L.R. at 36.

²¹² See, e.g., *PEI 1996*, 142 D.L.R. at 348 (“Despite the fact that there may be instances that justify deviations, the fact remains that the less deviations there are the less opportunities there will be for political opportunism.”); see *Alberta 1994*, 119 D.L.R. at 3 (“There can be many valid reasons for disparity, but they do not include a fear of the future by electors whose electoral divisions might be subject to surgery to assure other electors their constitutional rights”). The court also noted that “[c]ritical reference was made to the two smallest electoral divisions, which happened to be the seats of the chairman and the vice-chairman of the committee.” *Alberta 1994*, 119 D.L.R. at 12. Unlike in America, incumbency protection and party politics are not traditional districting principles.

²¹³ “The courts, and the people, have rejected the notion of mechanical one-person, one-vote equality. That does not mean we can or should accept significant disparities without reasoned justification . . .” *Alberta 1994*, 119 D.L.R. at 17.

²¹⁴ *Ref. re: EBCA*, 81 D.L.R. at 39.

c. *Applying the Standard*

An overriding concern of every Canadian court which has assessed the constitutionality of an electoral plan is the problem of judicial interference in an essentially legislative function.

It is important at the outset to remind ourselves of the proper role of courts in determining whether a legislative solution to a complex problem runs afoul of the Charter. This court has repeatedly affirmed that the courts must be cautious in interfering unduly in decisions that involve the balancing of conflicting policy considerations.²¹⁵

The commitment to judicial restraint derives both from the separation of powers principle that a court should not do the legislature's work and from the practical effects of invalidating an electoral plan on which upcoming elections were to be based.²¹⁶ In Alberta, the Court of Appeal was clearly irritated with the political excuses proffered by the government to justify the deviations from voter parity. Nonetheless, the Court on several occasions invoked the principle of judicial restraint because it did "not see the democratic value in creating a political crisis."²¹⁷ Thus, in the name of judicial restraint, deviations from voter parity may be permitted even when the court is skeptical of their legitimacy.

In the Saskatchewan case, the Supreme Court evaluated both the process (that is, the legislation, the Commission's adherence to the restrictions in the legislation, and the legislature's subsequent adjust-

²¹⁵ *Id.* (citations omitted); see also *Dixon 1986*, 31 D.L.R. at 548 (holding that the constitutionality under the Charter of a legislative districting plan is justiciable); *PEI 1996*, 142 D.L.R. at 361 ("More effective representation is possible, however, at this time there should be judicial restraint.").

²¹⁶ See *Baker*, 369 U.S. at 302-07 (Frankfurter, J., dissenting).

²¹⁷ *Alberta 1994*, 119 D.L.R. at 18. The Court said, "[w]e again invoke the need for judicial restraint about interference in the electoral process. We do not think the existing inadequacy is large or glaring enough to invalidate the existing legislation. To do so would be a major disruption in the electoral process. In 1993, Alberta had a general election based on these boundaries." *Id.* This contrasts sharply with the American courts' willingness to assert their constitutional authority over the states. The most recent development in the continuing saga in North Carolina, for instance, is the Supreme Court's refusal to permit the state to conduct elections (scheduled for three weeks hence) based on the gerrymandered districts. According to the New York Times, "The refusal to postpone the order jeopardizes a Congressional primary election scheduled for May 5. 'Federal courts have now thrown North Carolina's elections into chaos and the real loser in all this are the voters,' Attorney General Mike Easley of North Carolina said." *High Court Backs Ruling on North Carolina Race*, N.Y. TIMES, Apr. 14, 1998, at A16.

ment of the Commission's proposal) and the result (that is, the plan).²¹⁸ It found that "[t]he process, viewed as a whole, was fair" because the legislation did not impair the independence of the Commission.²¹⁹

With respect to the resulting map, the Supreme Court found that the deviations from absolute equality were not excessive. Although overall, "[u]rban ridings generally have somewhat more voters than the quotient and rural ridings generally have somewhat fewer," the discrepancies were "not great and there are a number of exceptions" where the rural ridings were overpopulated.²²⁰ Furthermore, the number of seats in the legislature representing the rural population was roughly in proportion to the population.²²¹ Finally, the Court considered the reasons for the deviations:

[I]t may be useful to mention some of the factors other than equality of voting power which figure in the analysis The material before us suggests that not only are rural ridings harder to serve because of difficulty in transport and communications, but that rural voters make greater demands on their elected representatives, whether because of the absence of alternative resources to be found in urban centres or for other reasons.²²² Thus, the goal of effective representation may justify somewhat lower voter populations in rural areas. Another factor which figured prominently in the argument before us is geographic boundaries; rivers and municipal boundaries form natural community dividing lines and hence

²¹⁸ There was some difference of opinion among the justices as to whether the process needed to be independently scrutinized. Justice Sopinka noted in his concurrence that since no independent commission is constitutionally required, there is no guarantee for any particular process; thus, only the result is justiciable. See *Ref. re: EBCA*, 81 D.L.R. at 21 (Sopinka, J., concurring). Justice Cory's dissenting opinion focused on the legislation, and argued that it violated the absolute equality standard inherent in the Constitution, even though the resulting "distribution map may appear to have achieved a result that is not too unreasonable." *Id.* at 27. For the pragmatist understanding of ends versus means, see generally Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

²¹⁹ *Ref. re: EBCA*, 81 D.L.R. at 43.

²²⁰ See *id.* at 42.

²²¹ *Id.* at 42–44.

²²² The Prince Edward Island court was much more skeptical of this justification. It suggested that perhaps rural residents were more demanding of their representatives because the smaller number of constituents in rural districts permitted them that luxury; but this traditional advantage to rural residents at the disadvantage of urbanites did not justify its perpetuation. *PEI 1996*, 142 D.L.R. at 348.

natural electoral boundaries. Yet another factor is growth projections. Given that the boundaries will govern for a number of years—the boundaries set in 1989, for example, may be in place until 1996—projected population changes within that period may justify a deviation from strict equality at the time the boundaries are drawn.²²³

The Court then looked at three ridings with the greatest deviations. In one, the differential was justified on the ground of adhering to natural boundaries, in another on the ground of expected population loss, and in the third on the basis of communities of interest.²²⁴ The Court discussed this last justification at greater length, noting that “[i]n so far as the election map may separate certain dormitory communities from adjacent rural ridings, it is not self-evident that such communities should be joined with the communities where the residents worked. Their interests may differ from those of the community in the urban riding, and their inclusion might sweep in truly rural residents.”²²⁵ Thus, communities of interest or social affiliations among voters are acceptable justifications for deviating from the ideal of absolute voter parity.²²⁶ The Court concluded that since the deviations were not great and were justified by legitimate interests tending to work to the benefit of good government, there was no violation of Section 3. Therefore, it was unnecessary to consider Section 1.²²⁷

D. *The Australian Odyssey: Guaranteeing and Defining Representative Democracy*

Unlike the American story which developed over thirty-five years in a roughly linear fashion, or the Canadian story which sprang up recently and seems to have been expeditiously resolved, the Australian story runs in fits and false starts. The most important opinion was the High Court’s 1996 decision in *McGinty v. Western Australia*.²²⁸ Understanding *McGinty* requires a little familiarity with previous constitutional decisions regarding Australian electoral processes.

²²³ *Ref. re: EBCA*, 81 D.L.R. at 44.

²²⁴ *Id.* at 44–45.

²²⁵ *Id.* at 45.

²²⁶ *See id.*

²²⁷ *Id.*

²²⁸ *McGinty*, 134 A.L.R. at 289.

1. The Background

a. *The First Malapportionment Challenge: McKinlay*

The first malapportionment challenge to a districting scheme resulted in the 1975 decision in *McKinlay v. Commonwealth* in which the High Court rejected the plaintiffs' claim that population deviations in either direction of up to 10% from the average violated the Australian Constitution.²²⁹ In *McKinlay*, voters from three states argued that they were constitutionally entitled to federal electoral districts "as nearly as practicable of numerically equal size."²³⁰ They based their claim on Section 24 of the Commonwealth Constitution which creates a federal House of Representatives whose members must be "directly chosen by the people of the Commonwealth."²³¹

Six of the seven justices on the Court rejected the argument, largely on the ground that nothing in the text of the Constitution required, or even permitted, that interpretation. Chief Justice Barwick²³² could not accept either of the plaintiffs' alternative arguments. Section 24 did not explicitly require that representatives be "chosen by *all* of the *people*."²³³ Neither did it imply a requirement of equipopulosity.²³⁴ Section 29, he explained, authorized the states to establish "the boundaries of the electoral divisions within the States and the number of members to be chosen by any division" and nothing in the Constitution limited that discretion "until the Parliament should otherwise provide."²³⁵

²²⁹ *McKinlay*, 135 C.L.R. at 57.

²³⁰ *Id.* at 14.

²³¹ AUSTL. CONST. § 24.

²³² The Chief Justice wrote only for himself, although five justices agreed with his conclusions, four of whom wrote separate opinions.

²³³ *McKinlay*, 135 C.L.R. at 17–21 (Barwick, C.J.).

²³⁴ *Id.* at 17. Rejecting the argument that the Constitution implied a right to equipopulosity, the Chief Justice relied on traditional and extant restrictions on the franchise which the states established, and which the Constitution did not disturb, including the historical disenfranchisement of women and people of color, and the current disenfranchisement of minors. *Id.* at 18–19. He further referred to the composition of the Australian Senate which, like the American one, comprises an equal number of Senators from each state regardless of wide population disparities. *Compare* U.S. CONST. art. I, § 3, cl. 1 *with* AUSTL. CONST. art. V. *McKinlay*, 135 C.L.R. at 18.

²³⁵ AUSTL. CONST. § 29. Barwick noted that Section 29 of the Constitution "left it in the first place to each State to determine the boundaries of the electoral divisions within the States and the number of members to be chosen by any division." *McKinlay*, 135 C.L.R. at 19. *Compare* AUSTL. CONST. § 29 ("Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members

Several of the justices did read Section 24 more broadly, finding that it "calls for a system of representative democracy."²³⁶ Representative democracy in this context entails "the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected."²³⁷ But many different kinds of electoral systems are capable of giving effect to electors' choices. It is not obvious that any particular element is indispensable or, even if one were, that absolute voter parity would be it. In Justice Stephen's view, the denial of absolutely equal electoral divisions, therefore, could not constitute a per se violation of the guarantee of representative democracy.²³⁸ So long as what the state and federal Parliaments decide comports with some conception of representative democracy, it is the province of the elected branches to select the means.²³⁹ This refusal to "perfect embodiment of some particular model of democratic principles" is completely consistent with the constitutional tradition which was, after all "an essentially practical and political affair, achieved after much negotiation and the outcome of extensive compromise."²⁴⁰

The plaintiffs further argued that, even if the Court did not read the constitutional text to require voter parity, it should nonetheless adopt the *Wesberry* rule which was by then firmly entrenched in the American landscape.²⁴¹ The plaintiffs placed "considerable reliance"²⁴² on the American cases which, they said, applied because Section 24 of the Australian Constitution had adopted the precise language of Article I of the American Constitution.²⁴³

of the House of Representatives may be chosen, and the number of members to be chosen for each division . . .") with U.S. CONST. art. I, § 4 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators").

²³⁶ See *McKinlay*, 135 C.L.R. at 62 (Mason, J.) ("the system of democratic representative government provided for by our Constitution").

²³⁷ *Id.* at 56 (Stephen, J.).

²³⁸ See *id.* at 56-57.

²³⁹ See *id.* at 59.

²⁴⁰ *Id.* at 58.

²⁴¹ See *McKinlay*, 135 C.L.R. at 22-25 (Barwick, C.J.).

²⁴² *Id.* at 22.

²⁴³ Compare U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .") with AUSTR. CONST. § 24 ("The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth . . ."). The U.S. Constitution makes no mention of districting and it was not statutorily required until 1842.

Although the argument was taken seriously, several of the Justices went to pains to distinguish the American cases: the Court acknowledged the similar language, but rejected the meaning the U.S. Supreme Court had superimposed on that language. Even those justices who agreed that equality is a proper goal believed that *Wesberry's* "as nearly as practicable" standard "goes beyond what we would accept as applicable to our Constitution."²⁴⁴ *Wesberry's* interpretation of Article I, Section 2, the Australian Court said:

depended heavily, if not almost entirely, upon the view taken by the majority of American history and of statements made in the constitutional conventions preceding the adoption of that Constitution. It is evident on reading the views of the minority in that case that there is, to say the least, great doubt as to the validity of the view of that history and of those statements taken by the majority.²⁴⁵

Thus, the Court was clearly skeptical of the historical basis of the *Wesberry* Court's reasoning and refused to adopt it.²⁴⁶ Furthermore, like the Canadian Court, the Australian Court considered significant reliance on the statements of constitutional framers to be a distinctively American phenomenon.²⁴⁷

²⁴⁴ *McKinlay*, 135 C.L.R. at 39–40 (McTiernan and Jacobs, JJ.) (suggesting that the strictness of the American standard "developed from the presence of the Fourteenth Amendment," the Equal Protection Clause of which there is no counterpart in the Australian Constitution). All the justices explicitly rejected the American precedents, except Justice Murphy, the lone dissenter who argued that the American precedents should be followed. *Id.* at 65. See *infra* note 254.

²⁴⁵ *Id.* at 23.

²⁴⁶ "[I]t is simply not correct to say that provisions in our Constitution should receive the same construction as that given to similarly worded provisions in the United States Constitution which have a different context and a different history, more particularly when the suggested construction is of recent origin, reversing an interpretation previously accepted." *Id.* at 63 (Mason, J.). Indeed, the Australian justices rely more extensively on the "powerful dissenting judgment" of Justice Frankfurter in *Baker*, 369 U.S. at 302–07 than on any majority opinion in this line of cases. See, e.g., *McKinlay*, 135 C.L.R. at 45 (Gibbs, J.); see also *McGinty*, 134 A.L.R. at 375 (Gummow, J.) (relying on the "celebrated" dissenting judgments of Justices Frankfurter and Harlan in the early apportionment cases).

²⁴⁷ *McKinlay*, 135 C.L.R. at 23. The distinction is explicable in terms of jurisprudence as well. Since the Canadian and Australian Constitutions were acts of Parliament, they are considered as statutes for purposes of interpretation and little if any attention is paid to legislative intent. Since Americans consider their Constitution to have a non-statutory character, they do rely on framers' intent to a far greater extent. See *infra* notes 386–89 and accompanying text (discussion of canons of constitutional interpretation). It will be interesting to see if the Court's approach to constitutional interpretation changes if the transformation to a republic results in new constitutional language such as "We the People . . ." in the preamble.

The Australian Court not only rejected any claim of a constitutional requirement of absolute voter parity, it affirmatively found that unequal district sizes may yield even more equitable results. In an argument reminiscent of the Canadian Supreme Court's argument in the *EBCA* case, the Australian High Court explained that the challenged electoral plan "made a real endeavour to secure equality of voting *value*" because it permitted deviation from absolute equipopulosity within a range and for particular enumerated reasons.²⁴⁸

I am unable to accept the view that mere equality of numbers of people in a division provides equality of voting value [T]o ignore community of interest in the creation of electoral divisions and to insist on mere equality of numbers will be likely, in my opinion, to produce inequality rather than equality of voting value.²⁴⁹

Like their colleagues, Justices McTiernan and Jacobs also accepted that equality is the "objective to be sought,"²⁵⁰ but their understanding of equality diverged from the American definition. They argued that such factors as community of interests and geographic boundaries may constrain legislative self-dealing and arbitrariness more effectively than the equipopulosity requirement.²⁵¹ Considering such factors may result in unequal district sizes, but it *avoids* "any unnatural divisions of the kind which are found in gerrymandering."²⁵² Indeed, the impugned legislation permitted deviation of up to 10% but only for five enumerated reasons, beginning with the grouping together of electors with common interests.²⁵³ Ultimately, adherence to what the Canadian

²⁴⁸ *McKinlay*, 135 C.L.R. at 25 (emphasis added).

²⁴⁹ *Id.* This passage was cited by the British Columbia Supreme Court in *Dixon 1989*, 59 D.L.R. at 264 (Opinion of McLachlin, J.).

²⁵⁰ *McKinlay*, 135 C.L.R. at 37.

²⁵¹ See *id.* This opinion mirrored the Canadian view that absolute equality is desirable but not at the expense of other values, resulting in a rule that deviation within a reasonable margin is acceptable but only for the purpose of enhancing representation. *Id.*

²⁵² *Id.*

²⁵³ According to the Electoral Act:

In making any proposed distribution of a State into Divisions, the Distribution Commissioners shall give due consideration, in relation to each proposed Division, to—

- (a) community of interests within the Division, including economic, social and regional interests;
- (b) means of communication and travel within the Division;
- (c) the trend of population changes within the State;
- (d) the physical features of the Division; and
- (e) existing boundaries of Divisions and Subdivisions, and subject thereto the quota

Court called the single “philosophic ideal” of equipopulosity was neither warranted by the words or implications of the constitutional text nor was it even desirable.²⁵⁴

b. *The Free Speech Cases: An Interpretive Blip?*

For a time, the *McKinlay* case had settled the question of whether the Constitution guaranteed representative democracy. Although some justices flirted with the idea, the majority suggested either that it did not or that if it did, the guarantee did not have significant substantive content, except perhaps at the margins.²⁵⁵ Eleven years later, however,

of electors shall be the basis for the distribution, and the Distribution Commissioners may adopt a margin of allowance, to be used whenever necessary, but in no case shall the quota be departed from to a greater extent than one-tenth more or one-tenth less.

Electoral Act, § 19, *reprinted in McKinlay*, 135 C.L.R. at 76–77 (Murphy, J., dissenting).

²⁵⁴ Justice Murphy wrote a long and thoughtful dissent in which his admiration for the American system (and for the judicial philosophy of Justice Douglas in particular) was evident. He eschewed the literalist approach of the majority, noting that “Great rights are often expressed in simple phrases,” *McKinlay*, 135 C.L.R. at 65, and argued for Marshall-like expansiveness. “. . . it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.” *Id.* at 68 (quoting *Jumbunna Coal Mine N.L. v. Victorian Coal Miners’ Ass’n* (1908) 6 C.L.R. 309, 367–68).

He quoted at length from Justice Black’s opinion in *Wesberry*, as well as from *White v. Regester*, *Gray*, and *Reynolds*. See *McKinlay*, 135 C.L.R. at 66–68. He argued that the principles described therein applied in Australia for a number of reasons. First, the logic of equipopulosity is sound on its own terms. See *id.* Second, both Australian and American constitutionalism are characterized by the “democratic theme of equal sharing of political power.” *Id.* at 71. Third, any standard of equality that is not absolute is arbitrary and unmanageable. *Id.* at 70–71. Fourth, the absence of any political solution to malapportionment, by definition, renders any equality standard unenforceable outside the courts. *Id.* at 71–72.

²⁵⁵ The controversy discussed in this section is not whether or not the Australians have a system of representative democracy—clearly they do—but whether and in what ways the Constitution imposes the conditions for such a system. If the Constitution does not require representative democracy, the question of whether and how to have it is left entirely to the political process. A justice adopting this position would say that the text of the Constitution means exactly what it says, nothing more. A justice finding a constitutional guarantee of representative democracy would read between the lines of the explicit constitutional commands and find that the underlying significance of those commands is to entrench a system of representative democracy. This justice would say that the necessary elements of a representative democracy that are denoted in the Constitution carry with them other elements that must be inferred, all of which are judicially enforceable.

Perhaps the best analogy in American constitutional jurisprudence is the controversy over whether federalism-based limits on Congressional power are textually based or judicially enforceable. See, e.g., *Printz*, 117 S. Ct. at 2376–78 (enforcing the Tenth Amendment). The crucible of the controversy is the Court’s interpretive stance; the ultimate failure of the constitutional guarantee of representative democracy in Australia is a testament to that Court’s literalism.

the British Parliament enacted the Australia Act, 1986, which ended British parliamentary sovereignty over Australia. This, it was argued, effectively shifted the sovereign authority of the Australian Constitution from the British monarchy to the Australian people. In a series of cases in 1992²⁵⁶ and 1994,²⁵⁷ plaintiffs relied on the Australia Act to make a congerie of arguments for the purpose of establishing an implied constitutional right to free expression. Plaintiffs argued that popular sovereignty means that the people control their governors. In Australia, they argued, this is done through the mechanism of representative government. Representative government implies popular elections (which the Constitution explicitly guarantees) which require an informed populace which, in turn, requires free speech.

Perhaps surprisingly, the Australian High Court agreed. In *Nationwide News v. Wills*, the Court struck down a federal law criminalizing the use of words "calculated to bring a member of the [Industrial Relations] Commission into disrepute as a member of the Commission."²⁵⁸ While this would clearly contravene the First Amendment's prohibition against viewpoint discrimination and protection of government criticism,²⁵⁹ the Australian Constitution has no express counterpart to the First Amendment. Thus, in order to find the law invalid, the Court had to infer broader rights than appear on the face of the Constitution. To this end, a majority of the Court adopted the reasoning of Justice Stephen in *McKinlay*, finding that the Constitution mandates representative democracy and guarantees rights necessary for the effectuation of such a system.²⁶⁰ The flaw in the doctrine of representative democracy that Justice Stephen had identified—the difficulty of giving content to the right—was not extensively addressed in the free speech cases of this period. The Court suggested that, wherever its borders lie, its core certainly encompasses the right to free political expression. As Chief Justice Mason said:

²⁵⁶ See *Nationwide News Pty. Ltd. v. Wills* (1992) 177 C.L.R. 1; *Australian Capital Television*, 177 C.L.R. 106.

²⁵⁷ See *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104; *Stephens v. West Australian Newspapers Ltd.* (1994) 182 C.L.R. 211; *Cunliffe v. Commonwealth* (1994) 182 C.L.R. 272.

²⁵⁸ *Nationwide News*, 177 C.L.R. at 24 (Mason, C.J.). See *Industrial Relations Act*, § 299 (1) (1988) (Commonwealth).

²⁵⁹ See, e.g., *Schacht v. United States*, 398 U.S. 58 (1970) (invalidating a law preventing the wearing of military attire if it would bring the military into disrepute); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²⁶⁰ *Nationwide News*, 177 C.L.R. at 50.

the representative democracy ordained by our Constitution carries with it a comparable freedom for the Australian people and that freedom circumscribes the legislative powers conferred on the Parliament by the Constitution. No law of the Commonwealth can restrict the freedom of the Australian people to discuss governments and political matters unless the law is enacted to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose.²⁶¹

Justices Deane and Toohey reinforced the principle that representative democracy was as much a part of the Constitution as were the unstated, but undeniably enforceable, principles of federalism and separation of powers.²⁶² According to these justices, representative government was manifested in the Constitution in two ways:

In implementing the doctrine of representative government, the Constitution reserves to the people of the Commonwealth the ultimate power of governmental control. It provides for the exercise of that ultimate power by two electoral processes. The first is the election of the members of the Parliament in which is vested the legislative power of the Commonwealth and which, under the Cabinet system of government which the Constitution assumes, sustains and directly or indirectly controls the exercise of the executive power which the Constitution formally vests in the Crown. The second is . . . the amendment of the Constitution itself.²⁶³

Justices Deane and Toohey further noted that the people can exercise these rights “by direct vote.”²⁶⁴

While one can point to qualifications and exceptions, such as those concerned with the protection of the position of the less populous States, the general effect of the Constitution is,

²⁶¹ *Id.*

²⁶² *Id.* at 69–70 (Deane and Toohey, JJ.) (explaining that these three “main general doctrines of government . . . underlie the Constitution”). Some protection for political expression is a necessary incident of a representative government based in popular sovereignty because “[t]he people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person.” *Id.* at 72.

²⁶³ *Id.* at 71.

²⁶⁴ *Id.*

at least since the adoption of full adult suffrage by all the States, that all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control.²⁶⁵

In *Nationwide News*, four of seven justices found a constitutional mandate for representative government which entails the freedom (within limits) of communication; in *Australian Capital Television v. Commonwealth*, an additional justice agreed that the law there at issue (regulation of political broadcasts) violated the principle of representative government.²⁶⁶

In the defamation cases of 1994, plaintiffs argued that the newly identified right to free speech required that the stringent standards of the American case of *New York Times v. Sullivan*,²⁶⁷ govern defamation actions involving public figures or public officials, lest the right be diluted by frequent or frivolous libel suits against critics of the government. Again, the plaintiffs did remarkably well, although the Courts in all three cases were badly split. The Court explicitly modeled its new rule on the *Sullivan* case, adopting some but not all of the components of the *Sullivan* standard.²⁶⁸

The free speech cases did not directly overrule *McKinlay*, nor did they, in the main, even disturb that decision's holding that the Constitution did not require that each vote have the same value. But in three important ways, they suggested the possibility that the Court might reconsider *McKinlay*: a majority of justices in these cases relied on the Australia Act to give popular authority to the Australian Constitution, they found in the Constitution an enforceable right to representative democracy, and they indicated an openness to relying on American precedents. Armed with these decisions and the new Act, plaintiffs in

²⁶⁵ *Nationwide News*, 177 C.L.R. at 72.

²⁶⁶ Justice McHugh believed that the constitutional principle of representative government derived from Section 7 (relating to election of senators) and Section 24 (relating to election of representatives), but not from any more amorphous emanations of the Constitution. Thus, the right of free expression was limited to processes relating to elections, including nominating, campaigning, and voting. *Australian Capital Television*, 177 C.L.R. at 232 (McHugh, J.). The "Constitution embodies a system of representative government which involves the conceptions of freedom of participation, association and communication in respect of the election of the representatives of the people. Under the Constitution of the Commonwealth of Australia, those freedoms have been elevated to the status of constitutional rights." *Id.* at 233.

²⁶⁷ *Sullivan*, 376 U.S. 254.

²⁶⁸ See *Theophanous*, 192 C.L.R. 104.

McGinty v. Western Australia tried, but failed, to have *McKinlay* reversed.²⁶⁹

2. *McKinlay* redux: *McGinty v. Western Australia*

The *McGinty* case challenged apportionment for *state* legislatures. Thus, it was similar to the Canadian cases and its counterpart in American law would be *Reynolds v. Sims*, not *Wesberry v. Sanders*. The plaintiffs—all members of one or the other branch of the state legislature²⁷⁰—thus had multiple hurdles to overcome. For purposes of federal constitutional law, they had to prove, first, that the federal Constitution guaranteed representative democracy, either by its terms or by virtue of its underlying principles. Then they had to prove that such representative democracy included the guarantee of equally weighted votes. Finally, they had to prove that the federal constitutional provisions applied to the states (through something like the American concept of incorporation, albeit without the vehicle of a due process clause). Because a majority of the Court rejected the first and second propositions, most justices did not answer the third.²⁷¹

Western Australia probably has one of the most unequal population distributions in the world. Approximately 900,000 people inhabit 975,920 square miles, 74% of whom live in the metropolitan area of Perth.²⁷² Two acts were challenged: (1) a 1947 law requiring the Electoral Distribution Commissioners to establish a population quotient for each of the state's districts and permitting deviations from that quotient of plus or minus 15% and (2) the 1987 amendments to that Act which allocated 34 seats (or roughly 60%) in the Legislative Assembly to the Metropolitan area and 23 seats to the other areas of the state.²⁷³ As amended in 1987, the law gave the non-Metropolitan areas a disproportionate share of the power: 26% of the people would control 40% of the Assembly seats.²⁷⁴ The large and rapidly increasing metropolitan population in combination with the 15% permissible deviation

²⁶⁹ *McGinty*, 134 A.L.R. at 304 (Dawson, J.).

²⁷⁰ *Id.* at 363 (Gummow, J.).

²⁷¹ Plaintiffs also argued that the Western Australia state Constitution guaranteed equipopulosity.

²⁷² This is as if the population of greater San Francisco lived in an area three times the size of Texas, concentrated in one spot on the coast.

²⁷³ See *McGinty*, 134 A.L.R. at 292.

²⁷⁴ *Id.* at 330–32 (Toohey, J.).

reinforced the disparities to the point where one district had 291% of the number of voters in another.²⁷⁵

It is important to recognize, however, that although these disparities are significant, they are also anomalous. Unlike the United States in the 1960s, malapportionment in Australia is not rampant; in fact, at present, only Western Australia's legislature is significantly malapportioned.

Although the gap between the largest and smallest electoral divisions in all Australian States has narrowed considerably over the last century, the governments of Australia have consistently legislated for inequalities in representation, inequalities which have generally favoured the non-metropolitan areas. Nevertheless, by 1984, only the electoral divisions of Queensland and Western Australia could be said to be significantly malapportioned. Subsequently, the malapportionment of the Queensland electoral divisions, except for five special districts, has been brought into line with electoral distributions in other States. Even in Western Australia, the gap between the largest and smallest electorates, in terms of the number of electors, has been continually narrowing throughout this century.²⁷⁶

Nor are federal districts significantly malapportioned. Although *McKinlay* relieved the Commonwealth government of the constitutional obligation to apportion equally, federal law requires relative equipopulosity.²⁷⁷ As the Commonwealth indicated as an intervener in *McGinty*, "this is not merely the work of a benign legislature, but observance of a constitutional imperative."²⁷⁸ Thus, although *McKinlay* says the Constitution does not fetter the government, the Commonwealth Attorney

²⁷⁵ See *id.* at 292. The disparity between the most and least populous districts for purposes of electing representatives to the Legislative Council, the state's upper house, was 376%. See *id.* at 293. Although Justice Dawson accepted the view that a districting scheme might be so grossly disproportionate that elections held thereunder would not represent the people's preferences, he noted that it would have to be an "extreme situation markedly different from that which exists" in this case. See *id.* at 311. While the percentages are substantial, the disparity in numbers is not great: the most populous electorate had 26,580 enrolled voters and the least populous had 9,135 enrolled voters.

²⁷⁶ *Id.* at 357 (McHugh, J.) (noting the pattern of evolutionary democracy that is similar to Canada's and different from America's).

²⁷⁷ Commonwealth Electoral Act, §§ 59, 73 (1918) (Commonwealth).

²⁷⁸ *McGinty*, 134 A.L.R. at 365 (Gummow, J.).

General believed it does, and therefore asked the Court to overrule *McKinlay*.²⁷⁹

The electoral landscape with which the Court was confronted, then, did not reveal a crisis demanding judicial interference for failure of political solutions. Indeed, twice in the time since *Reynolds* was decided, Australian voters had been asked, *and had declined*, to amend their Constitution to require explicitly equipopulous districts (within plus or minus ten percent). The rejection was based either in satisfaction with the present malapportionment, or the rate at which legislatures are remedying malapportionment, or with skepticism that the federal government could do a better job.²⁸⁰

a. *The Constitutional Text Does Not Demand Voter Parity*

Like the justices of the *McKinlay* Court, the majority of *McGinty* justices noticed that, far from requiring voter parity, the Commonwealth Constitution seems to demand *inequality* in various ways.²⁸¹ For instance, the amendment process requires that, for most amendments, a majority of voters *in a majority* of states ratify a proposed amendment;²⁸² for amendments that disproportionately affect one state, that state's residents have veto power.²⁸³ If sovereignty means the ability to control the government and if, in a constitutional setting, sovereignty is exercised through the power of amending the Constitution, "the Australian people do not have equal shares in that sovereignty," the Court said.²⁸⁴ That inequality inheres in other provisions does not

²⁷⁹ See *id.*

²⁸⁰ See Australian Electoral Commission 1988 Cat. No. 88 0683 6 (on file with author). In the 1988 referendum, the proposed language would have repealed Section 29, which gives state and federal parliaments unfettered discretion over electoral boundaries. The arguments against the amendment were based largely on federalism. See *id.* at 15 (urging voters to vote "no" because it "would give the High Court unprecedented new powers to intervene directly in State polls" and characterizing the initiative as a federal "power grab" to restrict local control over local elections). In 1974, the proposal was rejected by a majority of voters in all states except New South Wales, the most populous state. *McGinty*, 134 A.L.R. at 356 (McHugh, J.). In 1988, the total "no" vote was 62% with a majority in all states voting against it, and only the Australian Capital Territory favoring it. *Id.* at 357.

²⁸¹ See, e.g., *McGinty*, 134 A.L.R. at 349 (McHugh, J.) (calling inequality one of the Constitution's "striking features").

²⁸² AUSTL. CONST. § 128.

²⁸³ See *McGinty*, 134 A.L.R. at 349 (noting that the fewer votes of residents of less populated states would equal the greater number of voters of more populated states). Cf. *Moore v. Ogilvie*, 394 U.S. 814 (1969) (invalidating Illinois law requiring that nominating petitions of new political parties be signed by a minimum number of voters in nearly half the counties of the state).

²⁸⁴ *McGinty*, 134 A.L.R. at 349 (McHugh, J.), 379 (Gummow, J.). Other examples of inequality

prove that the framers intended malapportionment but it does suggest that, at a minimum, they would have expressly rebuked it in Section 24 if they had meant for it not to apply.

But Section 24 is silent on the question of districting. Beyond establishing that representatives must be chosen directly by the people, it says nothing about how this choice should be made. As Chief Justice Barwick had said in *McKinlay*, "in my opinion, the expression 'directly chosen by the people' is merely emphatic of two factors: first, that the election of members should be direct and not indirect as, for example, through an electoral college and, secondly, that it shall be a popular election. It is not an indirect reference to any particular theory of government."²⁸⁵ The basic requirement that the people directly choose is consistent with a range of electoral systems: "first past the post voting," preferential voting, voting in districts or as one electorate, selection by occupation or by locality are all possibilities, none of which can be said to be compelled by Section 24 at the exclusion of the others.²⁸⁶ Furthermore, as was discussed in *McKinlay*, Section 29 expressly gives the federal or state parliaments discretion as to how to conduct elections for the House of Representatives.

As an alternative to the textual arguments, plaintiffs urged the Court to follow the American cases. The identical language of the American and Australian Constitutions, plaintiffs argued, compelled identical interpretations.²⁸⁷ The American position turned out to be difficult for the Australian Court to avoid: it confronted the justices not only as a historical model but, because it has been so influential to political scientists in the last thirty years, it appears to be the modern norm as well.²⁸⁸ Nonetheless, the *McGinty* Court, like the *McKinlay* Court, and like the Canadians, ultimately rejected the argument.²⁸⁹ Although these Courts did not follow the American example, they apparently felt

include the "senate floor" rule which establishes that, regardless of population, no state shall have fewer than six senators, AUSTL. CONST. § 7, and the inequality in franchise rights of the various states at the time of federation, which the Constitution expressly sanctioned as applicable to federal elections, rather than requiring universal suffrage. *Id.* at § 30; see *McGinty*, 134 A.L.R. at 353-54 (McHugh, J.) (discussing various colonies' franchise requirements).

²⁸⁵ See *McGinty*, 134 A.L.R. at 299, quoting *McKinlay*, 135 C.L.R. at 21. See also *McGinty*, 134 A.L.R. at 382 (Gummow, J.) (relying on historical background of Section 24).

²⁸⁶ See *McGinty*, 134 A.L.R. at 351 (McHugh, J.).

²⁸⁷ Compare AUSTL. CONST. § 24 with U.S. CONST. art. I, § 1, cl. 2. See *supra* note 243.

²⁸⁸ See *McGinty*, 134 A.L.R. at 356 (McHugh, J.).

²⁸⁹ This contrasts with the defamation cases where the Court adopted much of the American Court's reasoning, without even the benefit of comparable textual guarantee. See, e.g., *Theophanous*, 182 C.L.R. 104.

obligated to consider the argument seriously. The Australian Court reiterated the reasons for rejecting the American model stated in *McKinlay*, largely on historical grounds, and found the Canadian solution much more persuasive.²⁹⁰

b. *The Constitution Does Not Imply a Right to Representative Democracy*

The plaintiffs then argued that a constitutional right of representative democracy that guarantees free political expression must also secure absolute voter parity because both rights are necessary for a polity to exercise its sovereignty.²⁹¹ Chief Justice Brennan summarily distinguished the two rights without explanation.²⁹² But this cursory treatment of the free speech cases fails to account either for the broad promises those cases contained or for their appealing underlying logic—appealing especially to American sensibilities. Ultimately, the shift back towards textualism can be explained only as a change of heart on the part of a majority of the Court, informed by certain jurisprudential concerns.

Part of the Court's reluctance to endorse a guarantee of representative democracy or representative government undoubtedly stems from the ill-defined contours of that term, as Justice Stephen had first suggested in *McKinlay*. Throughout the cases, the various justices have conceived of "representative" in significantly different terms, although in the free speech cases there was sufficient overlap (though not identity) to forge a majority. In Justice Dawson's view, it embodies the requirement that regular elections provide voters with a true (informed) choice. Justice McHugh recognized representative democracy as it existed in 1900, at the time of federation when the Australian nation was created by the adoption of the Constitution. Then-Chief Justice Mason, in the *Australian Capital Television* case, believed it signified a concept as wide as "government by the people through their representatives" which embodies the principle of popular sovereignty.

²⁹⁰ *McGinty*, 134 A.L.R. at 308–09 (quoting *McKinlay*, 135 C.L.R. at 25 (Barwick, C.J.) and discussing *Ref. re: EBCA*, 81 D.L.R. 16); *Wesberry*, 376 U.S. 1. The Court also cited American cases from *Baker to Shaw I*.

²⁹¹ See 134 A.L.R. at 310–11 (Dawson, J.), 345–47 (McHugh, J.), 365 (Gummow, J.).

²⁹² The Chief Justice simply said that all of the free speech cases "were concerned with the freedom of communication required to allow 'the people' to perform their constitutional function of choosing their Parliamentary representatives. None of these cases was concerned with equality of voting power." *McGinty*, 134 A.L.R. at 296–97.

Justice Toohey, along with others, conceived it to require that "all citizens of the Commonwealth who are not under some special disability are entitled to share *equally* in the exercise of those ultimate powers of governmental control."²⁹³

These differences are so fundamental that they defy the very possibility of identifying a unified conception of representative government. As Justice Toohey said, "[i]t is one thing to say that the Australian Constitution contains an implication of representative democracy. It is another to give content to that implication."²⁹⁴ A jurist who is apprehensive about giving content to a constitutional principle may be reluctant to recognize the principle at all either because it is so open as to be impossible to define or because the difficulty suggests that the effort is more political than judicial.²⁹⁵ Justice McHugh explained his reluctance this way:

To decide cases by reference to what the principles of representative democracy currently require is to give this Court a jurisdiction which the Constitution does not contemplate and which the Australian people have never authorised. Interpreting the Constitution is a difficult task at any time. It is not made easier by asking the justices of this Court to determine what representative democracy requires. That is a political question and, unless the Constitution turns it into a constitu-

²⁹³ *McKinlay*, 135 C.L.R. at 36; see *McGinty*, 134 A.L.R. at 318-19 (Toohey, J.) (providing a summary of various justices' positions).

²⁹⁴ *McGinty*, 134 A.L.R. at 319.

²⁹⁵ See also *id.* at 347:

The result seems to be that the Constitution contains by implication a principle of representative democracy that is not confined to restricting the powers of the federal or state legislatures, nor does it necessarily confer any rights on individuals. It appears to be a free-standing principle . . . [¶] This [position] may be the logical consequence of the way the majority of the justices of this Court have now formulated the principle, but, to my mind, it only demonstrates that no such principle can be deduced from the Constitution by applying the standard techniques of statutory interpretation to a constitutional instrument.

Id. In American jurisprudence, substantive due process may provide the best example of this problem. As the U.S. Supreme Court has recently reiterated, "we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Glucksberg*, 117 S. Ct. at 2267 (quotations omitted) (refusing to find physician-assisted suicide to be a fundamental right); see also *Griswold v. Connecticut*, 381 U.S. 479, 511 (1965) (Black, J., dissenting); *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2874-75 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

tional question for the judiciary, it should be left to be answered by the people and their elected representatives acting within the limits of their powers as prescribed by the Constitution.²⁹⁶

The majority of justices seems to have found the concept of representative democracy simply too unwieldy to permit what our jurisprudence might refer to as “judicially discoverable and manageable standards.”²⁹⁷ Furthermore, Chief Justice Brennan refused to invalidate a law simply because it might be said to contravene a principle extraneous to the Constitution itself.²⁹⁸

c. *A Guarantee of Representative Democracy Would Not Include Voter Parity*

The *McGinty* Court further explained that even if representative democracy did exist in the Constitution, it did not require that individual votes be of absolutely equal value. In an extensive and scholarly discussion, Justice McHugh approached the question from a historical perspective. He explained that, far from mandating voter parity, representative government in both England and Australia at the time of federation (1900) was seen as enabling representation of “communities and economic interests rather than individual electors,”²⁹⁹ although he noted that this gave way to the view, accepted in *Reynolds* that, “[l]egislatures represent people, not trees or acres. Legislatures are elected by voters, not farms or cities or economic interests.”³⁰⁰ McHugh showed that *Reynolds* reflected the outmoded view of British radicals of the 1830s which had largely fallen out of favor since then.³⁰¹ Given the significant disparity in voting power throughout Australian colonial

²⁹⁶ *McGinty*, 134 A.L.R. at 348 (McHugh, J.). Justice McHugh’s decision to renounce the free speech cases seemed to rest on the view that while the concept of representative democracy could be cabined as applied to federal law as in *Nationwide News* and *Australian Capital Television*, when applied to the common law of defamation, its boundaries seemed to disappear. *See id.* at 346–47.

²⁹⁷ *See Baker*, 369 U.S. at 217. The political question doctrine is not recognized as such in Australian constitutional law.

²⁹⁸ “It is logically impermissible to treat ‘representative democracy’ as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed.” *McGinty*, 134 A.L.R. at 295–96.

²⁹⁹ *McGinty*, 134 A.L.R. at 352 (McHugh, J.). *See also* Guinier, *supra* note 86, at 1604–05 (recounting history of concept of representation as community-based).

³⁰⁰ *McGinty*, 134 A.L.R. 289 at 352 (McHugh, J.) quoting *Reynolds*, 377 U.S. at 562.

³⁰¹ *McGinty*, 134 A.L.R. at 352 (McHugh, J.).

history and at the time of federation, it would be anomalous to assume the framers meant to change the status quo but did not say so.³⁰²

Justice Dawson noted that there "are hundreds of electoral systems in existence today by which a form of representative government might be achieved."³⁰³ Different systems will balance variously the competing values of representative government—such as stable and effective government, fair representation, wide choice of representatives, and contact between the electorate and the representatives—such that each system may organize slightly differently in order to achieve its own goals within the general rubric of representative government.³⁰⁴ Beyond what its terms mandate, however, the Constitution does not ordain a particular organizational structure.³⁰⁵ Given that representative democracy comprises competing values, the legislature must have discretion to balance those values against the interest in absolute equality.³⁰⁶ "If it is rationally open to the federal or State Parliaments to conclude that, consistently with representative democracy, other factors concerning parliamentary representation must be weighed against the theory of equal representation for equal numbers, the plaintiffs' case based on representative democracy must fail."³⁰⁷ This openness to various conceptions of representative democracy is acknowledged in the phrase "until Parliament otherwise provides," which is said to "accommodate the notion that representative government is a dynamic rather than a static institution and one that has developed in the course of this century."³⁰⁸

³⁰² See also *id.* at 367–68 (Gummow, J.) (documenting electoral history of Western Australia).

³⁰³ *Id.* at 307 (Dawson, J.). See also *Lucas*, 377 U.S. at 748 (Stewart, J., dissenting) ("My own understanding of the various theories of representative government is that no one theory has ever commanded unanimous assent among political scientists, historians, or others who have considered the problem").

³⁰⁴ *McGinty*, 134 A.L.R. at 307 (Dawson, J.) (quoting VERNON BOGDANOR, *THE PEOPLE AND THE PARTY SYSTEM* 209 (1981)). See also *McKinlay*, 135 C.L.R. at 56 (Stephen, J.) ("The electoral system, with its innumerable details including numbers and qualifications of representatives, single or multi-member electorates, voting methods and the various methods, including varieties of proportional representation, whereby the significance and outcome of the votes cast may be determined; in each there is scope for variety and no one formula can preempt the field as alone consistent with representative democracy.").

³⁰⁵ *McGinty*, 134 A.L.R. at 310 (Dawson, J.) ("the system of representative government which, without mentioning it by name, the Constitution prescribes is that for which it provides.").

³⁰⁶ See also *id.* at 376–78 (Gummow, J.) (discussing and quoting at length JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861)).

³⁰⁷ *McGinty*, 134 A.L.R. at 356 (McHugh, J.).

³⁰⁸ *Id.* at 383 (Gummow, J.).

Furthermore, even if a legislature decided that the primary value is electoral equality, it must be permitted to consider factors other than the number of voters in each district. Echoing the insight of Justice Stevens in *Karcher v. Daggett*, Justice Dawson explained:

There are other ways, perhaps more significant, in which the value of a vote may be affected as, for example, where electoral divisions are defined in such a way as to allow one party in a two party system to return a majority of representatives with less than a majority of the total votes, which may occur whether or not malapportionment also exists. Disproportion of this kind may be intentionally caused by a gerrymander.³⁰⁹

Thus, even if the Constitution guaranteed equipopulosity, the plaintiffs might still be denied representative democracy if the districts were gerrymandered or otherwise manipulated.³¹⁰ These problems could be avoided by eliminating the practice of districting which would ensure equal voting power at least within each state. But as Justice Dawson realized, districting permits recognition of communities of interests which can enhance equality of voting value.³¹¹ Eliminating districting would defeat the purpose of representative democracy. On the other hand, the goal of “effective representation of all citizens”³¹² could be achieved by permitting deviations from voter parity “as an appropriate and adapted means of taking account of geographic boundaries, community or minority interests or some other matter which bears on effective parliamentary representation, such as the dispersed nature of the population in remote areas.”³¹³ In the end, a majority of the Australian Court found that the impugned legislation balanced the competing values sufficiently well to satisfy the only actual constitutional requirement, that the representatives be chosen directly by the people.³¹⁴

³⁰⁹ *Id.* at 307 (Dawson, J.) (citing *Bandemer* and *Shaw I*), 358 (McHugh, J.), 366–67 (Gummow, J.).

³¹⁰ *See also id.* at 336 (Gaudron, J.) (suggesting that conditioning the franchise on membership in a particular political party would violate assumptions implicit in the right to have representatives “chosen by the People”).

³¹¹ 134 A.L.R. at 308–09 (Dawson, J.).

³¹² *McGinty*, 134 A.L.R. at 322 (Toohey, J.).

³¹³ *Id.* at 337 (Gaudron, J.).

³¹⁴ Since a majority of the Court found that there was no implied or explicit constitutional guarantee of electoral equality, these justices did not need to reach the question of the federal constitution’s application to the states. *Id.* at 300 (Barwick, C.J.) (“In my opinion, the Commonwealth Constitution contains no implication affecting disparities of voting power among the

III. JURISPRUDENTIAL ATTITUDES

The three Courts have reached different conclusions about the constitutional authority for a right to equal voting power and the kind of equality, if any, such a right entails. This section will explore the jurisprudential differences among the three decisions and suggest why each Court adopted the model it did.

It does not appear that the jurisprudential differences can be adequately explained simply by reference to the differences in each country's constitutional text. Each Constitution expressly guarantees a different set of rights but there seems to be little connection between a particular collection of rights and the Court's holding. The presence of a voting right is critical in Canada yet irrelevant in Australia; its absence is also irrelevant in the United States. The presence of an equality right is critical in the United States and irrelevant in Canada; its absence may be important in Australia. The presence of a right to choose federal electors is important in the United States but not conclusive in Australia; its absence is irrelevant in Canada. And the right against discrimination in voting, embodied in the Fifteenth Amendment, seems irrelevant to all countries. Clearly, the presence or absence of any particular textual guarantee is not determinative of the Court's acceptance of an equal voting right.

Another possibility for the contrasting jurisprudential approaches to electoral equality is the distinctive historical traditions of each country. This is a slightly more intriguing option, largely because the Canadian and Australian courts rely on the historical differences between their countries and America to justify departing from the American model. The principal historical difference relied upon is the way in which the former colonies moved away from Great Britain and toward greater

holders of the franchise for the election of members of a State Parliament"), 311 (Dawson, J.), 375 (Gummow, J.). The Chief Justice merely pointed out that Section 24 created and established the terms for the federal House of Representatives and it was in the section of the Constitution dealing with the structure of the federal government, not the part dealing with states and their constitutions. *Id.* at 300 (distinguishing Chapter I ("The Parliament") from Chapter V ("The States") of the Commonwealth Constitution). Even Justice Toohey, who argued for the relevance of representative democracy at the federal level, found that it would not apply to state elections. *See id.* at 324-28, 327 ("Any guarantee of voting equality in Commonwealth elections will not be affected by State electoral laws permitting inequality in State elections."). Nor did the Court find that state constitutional or statutory law, which used the same language as Section 24, guaranteed voter parity either explicitly or implicitly. *McGinty*, 134 A.L.R. at 313-15 (Toohey, J.); *but see id.* at 328-29 (Toohey, J.).

democracy—in America by revolution and in Australia and Canada by evolution.³¹⁵

[T]he American colonies had not only made unilateral declarations of independence but had done so in revolt against British institutions and methods of government. The concepts of the sovereignty of Parliament and of ministerial responsibility were rejected in the formation of the American Constitution. Thus, not only does the American Constitution provide for a presidential system, but it provides for checks and balances based on the denial of complete confidence in any single arm of government.

In high contradistinction, the Australian Constitution was developed not in antagonism to British methods of government but in co-operation with and, to a great extent, with the encouragement of the British Government [T]here was no antipathy amongst the colonists to the notion of the sovereignty of Parliament in the scheme of government.³¹⁶

This passage raises several distinct but related issues that have implications for constitutional interpretation. The most discreet is simply the question of timing. Even before becoming a nation, the first thing Americans did was declare their absolute and immediate independence from Britain, proclaiming a sovereignty that has remained inviolable to this day. Australians and Canadians, by contrast, are more comfortable with the measured process of evolutionary independence which develops over centuries as needs arise.

Justice McLachlin has suggested that the instantaneity of the birth of the American nation has implications for constitutional interpretation.

³¹⁵ This is shorthand for the argument that American autonomy derives from a deliberate act of rebellion, abruptly breaking the new world from the old, authorizing deviations from past practice in preference to more modern, more democratic, more enlightened ways, while the Australian and Canadian federations are engaged in an ongoing process of self-actualization, with more or less jolting changes taking place every so often. Even now, Australia and Canada are linked to Britain in subtle ways that America has not experienced in more than 200 years. The likeness of Elizabeth II on Australian and Canadian currency and stamps indicates some difference in current attitudes towards Britain between these countries and the United States. In a country that will not even pay its dues to the United Nations out of concern for the integrity of its sovereignty, it is hard to imagine the likeness of a foreign monarch on United States currency. The current debate in Australia over the possibility of converting to a republic is one more step in this evolutionary process.

³¹⁶ *McKinlay*, 135 C.L.R. at 23–24.

[D]emocracy in Canada is rooted in a different history than in the United States: Its origins lie not in the debates of the founding fathers, but in the less absolute recesses of the British tradition. Our forefathers did not rebel against the English tradition of democratic government as did the Americans; on the contrary, they embraced it and changed it to suit their own perceptions and needs.³¹⁷

While Americans owe their sovereignty to the impassioned rhetoric of the founders, Canadians have forged their national identity from experience and traditions that have developed over time. It is not surprising then, that Americans rely to a much greater degree than either the Canadians or the Australians on the speeches and writings of the framers. This, in turn, reinforces our acceptance of absolutism. As Justice McLachlin explains, the American fascination with the constitutional debates "meant that at least in theory the ideals of equality can be seen as having been embraced from the outset in an absolute fashion, something that never occurred either in England or Canada, where gradual change and accommodation of other factors has been the norm."³¹⁸

The argument is that Canadians and Australians are more likely to look to experience and practice for guidance in constitutional interpretation and to accept the subtleties and compromises they are likely to find there. Americans, by contrast, are likely to look to impassioned rhetoric for guidance and to accept its propensity for absolutism and idealism. Whether or not this is true in all areas of law, it does seem to reflect the different jurisprudential choices that each Court has made in the cases discussed here. The Canadian Court itself has said that its watchword is "[p]ragmatism, rather than [American] conformity to a philosophical ideal."³¹⁹

Other historical differences may also suggest different jurisprudential choices. Perhaps the most significant difference among the three countries is that the American system of government resulting from independence from Great Britain is presidential while in Australia and Canada it is parliamentary. These systems differ in numerous ways, but for present purposes it suffices to comment on one: the British system of parliamentary sovereignty, with its characteristic trust of the govern-

³¹⁷ *Ref. re: EBCA*, 81 D.L.R. at 37.

³¹⁸ *Dixon 1989*, 59 D.L.R. at 263 (McLaughlin, J.).

³¹⁹ *Id.* at 262; *Ref. re: EBCA*, 81 D.L.R. at 37.

ment may be contrasted with American constitutionalism which is marked by distrust of the government.³²⁰ As the Australian High Court has noted, the American Constitution required a complex system of checks and balances, and probably would not have been ratified without the promise of a Bill of Rights.³²¹ By contrast,

[i]t is very noticeable that no Bill of Rights is attached to the Constitution of Australia and that there are few guarantees. Not only are the powers given to the Parliament plenary but there is a large number of provisions in the Constitution which leave to the Parliament the power of altering the actual constitutional provisions. In other words, unlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility.³²²

While a parliamentary system assumes the validity of the acts of Parliament, the American theory of popular sovereignty assumes the validity of the will of the people. And this, of course, also has implications for constitutional interpretation. In America, the Constitution is viewed as the embodiment of popular sovereignty, the bulwark against governmental oppression. The distinctively oppositional nature of the American Constitution vis-à-vis the government means that the Court is justified in giving the Constitution broad application. If the Court will not help, no one will. The Australian and Canadian Constitutions are, at least formally, acts of Parliament which are presumed to be consistent with other acts and with popular will; there is no warrant for particularly expansive interpretation that would pit the government against the people.

³²⁰ The paradigm expression of parliamentary sovereignty or parliamentary supremacy may be found in Blackstone: "... if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 91 (1765), cited in ANTONIN SCALIA, A MATTER OF INTERPRETATION 130 (1997). Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (asserting the power of the Court to invalidate laws repugnant to the Constitution and adopting the views of Edward Coke articulated in *Dr. Bonham's Case*, 8 Co. Rep. 114a, 118a, 77 Eng. Rep. 646, 652 (K.B. 1610)).

³²¹ *McKinlay*, 135 C.L.R. at 24.

³²² *Id.* Notwithstanding the homage to the legislature, the Court did invalidate certain aspects of the laws under review (relating to the census). *Id.* at 26–35.

The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence in the parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers. Thus, discretions in parliament are more readily accepted in the construction of the Australian Constitution.³²³

Out of deference to the principle of separation of powers, enhanced as it is by parliamentary sovereignty, the Australian High Court in *McKinlay* and *McGinty* refused to read the Constitution as if it implied restrictions on the legislature beyond those that are express.³²⁴ Evolutionary history, and the parliamentary form of government, the majority seems to be saying, demands textual literalism. In so finding, the Court firmly rejected any argument that American precedents (particularly those dealing with the structure of government) are persuasive.³²⁵

Again, Justice McLachlin's remark about reliance on evidence of framers' intent is relevant.³²⁶ Americans are distinctively willing to consult the writings of the framers to aid in understanding the terms of the Constitution. This may reflect a greater level of comfort with idealism but it also indicates that we treat our Constitution as something other than a regular statute, or even a very important statute. It is, in the American system, *sui generis*. By contrast, the Australian Constitution and the Canadian Charter are laws that need to be construed as such. Evidence of framers' intent is no more relevant than evidence of legislative intent in construing a statute.³²⁷ Moreover, such writings may by oversimplification mask the multifarious meanings of the words which are informed by the political compromises that led to

³²³ *Id.* at 24. *But see Kartinyeri*, HCA 22 at ¶ 98 (Kirby, J., dissenting) ("It is nothing to the point that the Constitution derives its force from an Imperial enactment. It is nonetheless a constitution," quoting *Polites v. Commonwealth* (1945) 70 C.L.R. 60 (Dixon, J.) and arguing for greater judicial consideration of historical and other extratextual materials in constitutional interpretation).

³²⁴ "Our duty is to declare the law as enacted in the Constitution and not to add to its provisions new doctrines which may happen to conform to our own prepossessions." *Id.* at 44 (Gibbs, J.). *See also McGinty*, 134 A.L.R. at 309 (Dawson, J.) ("The wisdom of those who were responsible for framing our Constitution in recognising the political nature of such matters, and in leaving them to parliament, ought not to be overborne by drawing an implication which is neither apparent nor necessary.").

³²⁵ *McKinlay*, 135 C.L.R. at 24.

³²⁶ *See supra* note 317 and accompanying text.

³²⁷ *See supra* note 245 and accompanying text.

their use and the historical gloss superimposed on them by subsequent practice.

Whether the explanation for the differences lies in the distinctive American enchantment with fiery rhetoric, as the Canadian Court suggested, or its unique conception of the role of the Constitution as protective against oppressive government, one thing is clear: American jurisprudence in this area is peculiarly idealistic whereas Australian jurisprudence demonstrates an overriding concern for the constitutional text and the approach of the Canadian Court is more pragmatic. This section will compare the dominant feature of each Court's current jurisprudence in the area of voting equality. While these descriptions are, of course, simplifications of the complex processes involved in constitutional interpretation, they may be useful in focusing attention on some fundamental distinctions among the three Courts' approaches to a similar set of questions.³²⁸

A. *American Idealism*³²⁹

American jurisprudence in the context of reapportionment and redistricting cases is marked by a distinctively idealist attitude: the Court appears more concerned with how things *should* be than with how things *are*, and virtually no attention is paid to the process of getting from how things are to how they should be, nor to the Court's role in implementing (or impeding) that transition.³³⁰ Rather than analyze the potential benefits of the accepted rule or the detriments of the rejected rule, the Court in the *Shaw* cases merely adopts a maxim that has some simple intuitive appeal—"the State may not . . . separate its citizens into different voting districts on the basis of their race"—without pausing to consider the application of such a rule in the present setting.³³¹ Did the states in fact separate citizens into different

³²⁸ These appellations are not intended to characterize the various Courts' jurisprudence beyond the reapportionment/redistricting context. Although there is reason to believe that what is true of these cases is true of other areas of the law as well, *see, e.g.*, C. Lynn Smith, *Adding A Third Dimension: The Canadian Approach to Constitutional Equality Guarantees*, 55 LAW & CONTEMP. PROBS. 211 (1992), this article does no more than suggest this as a possibility.

³²⁹ This section will focus on the redistricting (as opposed to the reapportionment) cases in part because these are of current interest to the Court and in part because they embody the themes of the earlier cases.

³³⁰ This refers to idealism in the lay sense of aspirational, not to any philosophic, or Platonic sense of metaphysical or non-material (although there is obviously a connection between the two).

³³¹ *Miller*, 115 S. Ct. at 2486.

voting districts on the basis of race? If so, did it cause any harm or did it produce benefits? If it caused harm, to whom? Was it constitutionally cognizable harm? Why? What should the cure be for such harm? The Court seems uninterested in answering these and similar factual questions.

This jurisprudential idealism has two components: it is both normative and formalist. In its normative aspect, the Court announces a new rule with a certain if-we-say-it-it-will-be-so confidence.³³² This confidence may or may not be warranted in this instance—although on at least some significant occasions, the Court's confidence has been justified.³³³ The modern supports for this confidence include the Court's success in amassing popular and ultimately federal political support for its desegregation program in the 1950s and 1960s and, most relevantly, its success in implementing the *Reynolds* mandate.

It remains to be seen whether the Court's current campaign in the districting cases will be equally successful. In these cases, the new rule is that state legislatures must be color blind when they draw electoral

³³² "Normativist theory . . .—whether it be some kind of natural rights theory, feminist or critical race theory, Dworkin's integrity theory, public choice theory, or what is called 'pragmatism' or 'practical reason'—contemplates that the process of interpretation entails the judge giving effect to her own convictions about what is right, true, or good." Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 513 (1996); see William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 722-23 (1991) (referring to the "should" quality of normativity). Eskridge and Peller conceptualize normativity as tending towards political progressivism. See *id.* However, in that "[t]he normativist judge exercises judgment or imagination in trying to figure out what the law should be in order to produce a world that the judge regards as more right, just, or simply better," Merrill, *supra* at 514, normativism is inherently neither progressive nor conservative, but can be anchored to any political agenda. In other words, if as Professors Eskridge and Peller argue, one conclusion to be drawn from law's normativity is that "law is responsible for doing something about the substantive ills of our society," Eskridge & Peller, *supra* at 748, one's understanding of what the law should be will depend on what one views as the substantive ills of our society. In the context of voting rights litigation, for instance, it will depend on whether one views race-conscious districting or lack of minority representation as the greater ill.

To the extent that normativism requires a judge to consider society's ills, it shares with pragmatism a realistic stance, and to this extent, it is an admirable jurisprudential choice. See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (emphasizing the pragmatist aspects of normativism). In the redistricting cases, however, the Court's formalism has replaced realism as the anchor: the judge's decision of what the law should do is tied not to society's actual ills but to some abstract rule that is not explained (nor, arguably, is it explainable), in terms of the real world. Again, my approval of some jurisprudential choices and criticisms of others is limited to the redistricting cases.

³³³ The first and most significant example of this is John Marshall's assertion of judicial review. See *Marbury*, 5 U.S. 137. If we act like we know what we're doing and dazzle them with some fancy rhetoric, people will come to accept it, he might have thought. And so they did.

district lines.³³⁴ With roots in Justice Harlan's venerable dissent in *Plessy v. Ferguson*,³³⁵ the principle now stands for the proposition that, "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."³³⁶ But "can" as used here must mean "should," since the Equal Protection Clause *could* mean one thing when applied to a discrete and insular minority and another when applied to a member of the self-dealing majority intent on subordinating that minority.³³⁷

³³⁴ See *supra* notes 127–49.

³³⁵ See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) ("Our Constitution is color blind, and neither knows nor tolerates classes among citizens.") (Harlan, J., dissenting).

³³⁶ *Bakke v. Regents of University of California*, 438 U.S. 265, 289–90 (1978) (Powell, J.). In other words, the Court will use strict scrutiny whether the case involves blacks complaining about invidious discrimination or whites complaining about affirmative action. See also *Adarand*, 515 U.S. at 224 ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification"). Again, "is" describes what the Court thinks the standard should be, not what it inevitably must be. See also *Miller*, 515 U.S. at 903–04.

³³⁷ For instance, if as Justice Powell has explained, "[t]he term 'gerrymandering' . . . is also used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls," *Bandemer*, 478 U.S. at 164 (Powell, J.), and if as *Shaw* reaffirms, gerrymandering is subject to the Equal Protection Clause, one could plausibly argue that redistricting to consolidate power is constitutionally suspect in a way that redistricting to diffuse power is not. In her separate opinion in *Bandemer*, Justice O'Connor also recognized that whites and blacks are not necessarily similarly situated such that identical treatment (i.e., color blindness) is warranted:

In my view, where a racial minority group is characterized by "the traditional indicia of suspectness" and is vulnerable to exclusion from the political process, individual voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering In these circumstances, . . . the Equal Protection Clause gives the federal courts [greater warrant] to intervene for protection against racial discrimination

Id. at 151. See also *Shaw I*, 509 U.S. at 677–78 (Stevens, J., dissenting):

The duty to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group. That duty, however, is not violated when the majority acts to facilitate the election of a member of a group that lacks such power because it remains underrepresented in the state legislature—whether that group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics. The difference between constitutional and unconstitutional gerrymanders has nothing to do with whether they are based on assumptions about the groups they affect, but whether their purpose is to enhance the power of the group in control of the districting process at the expense of any minority group, and thereby to strengthen the unequal distribution of electoral power.

Id. None of this is consistent with the color blindness mandate of the *Shaw* cases, and the *Shaw* Court makes no effort to respond to this argument.

Color blindness is a paradigm of normative jurisprudence:³³⁸ no one, not even those most committed to it such as Justices Thomas and Scalia, argues that it describes the current state of affairs. Thus, Justice Scalia does not—and could not—offer any support for the grand claim that “[i]n the eyes of government, we are just one race here. It is American.”³³⁹ This unambiguously reveals a preference for the normative over the descriptive. Justice Thomas, in *Adarand Constructors v. Peña*, takes the same approach. “As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution.”³⁴⁰ But the only thing more normative (and less realistically descriptive) than Justice Thomas’ reading of the Fourteenth Amendment is his authority for this statement, the opening of the Declaration of Independence which he cites and quotes.³⁴¹ The problem is not just that this normative approach fails to reflect reality, but that by supplanting reality with idealism, it prevents us from seeing the facts as they are. The Court produces an idealist bill of goods that is even better than reality.

There is significant overlap between the normative and the formalist aspects of the Court’s idealism, although the emphasis of each is different. Color blindness’s normative aspect is unappealing because it does not accurately reflect reality; its formalist aspect is unappealing because it oversimplifies reality.³⁴²

As Professor Schauer has explained, “[a]t the heart of the word ‘formalism,’ in many of its numerous uses, lies the concept of decision-making according to rule. Formalism is the way in which rules achieve

³³⁸ See A. Leon Higginbotham, et al., *Shaw v. Reno: A Mirage of Good Intentions With Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1601 n.36 (noting that the *Shaw* Court “describes the notion of a color blind constitution as an ideal”); see also *The Supreme Court, 1992 Term: Leading Cases*, 107 HARV. L. REV. 144, 199–204 (1993).

³³⁹ Compare *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in the judgment) with *Ref. re: EBCA*, 81 D.L.R. at 36 (noting the “diversity of our social mosaic”).

³⁴⁰ *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and in the judgment).

³⁴¹ *Id.* (“See Declaration of Independence (‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness’)”).

³⁴² See Lorraine Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1990) [hereinafter Weinrib, *Legal Formalism*].

their 'ruleness' precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account."³⁴³ The Court has perfected this form of formalism in the *Shaw* cases, both by focusing on rules rather than facts and by shielding itself from factors, and facts, that would be relevant to a comprehensive understanding of districting.

The procedural posture of the cases as they arrived at the Court was conducive to a formalist approach. In the first *Shaw* case, the only question before the Court was whether the plaintiffs had stated a cause of action sufficient to defeat a motion to dismiss.³⁴⁴ The Court was therefore obligated to assume the truth of the allegations in the complaint,³⁴⁵ which liberated it from the constraints that messy facts can impose. Here the Court held that a constitutional injury exists where "redistricting legislation . . . 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 and without sufficiently compelling justification."³⁴⁶

Many assumptions are implicit in this holding—assumptions that were not revisited as the factual predicates of the cases developed. The Court assumed that the irregular shape of a district is the result of (undue) attention to voters' race. It assumed that, absent attention to voters' race, the legislature would use traditional districting principles, and that these principles include contiguity and compactness. It assumed that race-conscious districting presumptively violates plaintiffs' right to equal protection but that color blind districting does not violate blacks' rights to choose representatives (under *Wesberry v. Sanders*). It assumed that race consciousness inevitably equates to segregation, discrimination, and even apartheid. It assumed, in brief, that all governmental race-consciousness is the same, whether it results in the first black person being elected to Congress in nearly 100 years or in the disenfranchisement of blacks.³⁴⁷

³⁴³ Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

³⁴⁴ *Shaw I*, 509 U.S. at 634.

³⁴⁵ Fed. R. Civ. Proc. 12(b)(6).

³⁴⁶ *Shaw I*, 509 U.S. at 642.

³⁴⁷ "If there is no dilution of white voting strength and all other things being equal, it robs the term 'racial gerrymander' of all meaning to apply it—as the *Shaw* Court did—equally to redistricting plans that deny minorities majority-minority districts and to redistricting plans that create them." Frank P. Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 40 (1995) [hereinafter Parker, *A Critique*]. Elsewhere, Parker has identified other

The central theme of the *Shaw* cases is their most formalist and least accurate assumption: that the "North Carolina plan resembles the most egregious racial gerrymanders of the past."³⁴⁸ Although the Court is willing to make this broad claim, it is not willing to review the particulars of the plan to test it. Closer attention to the facts would reveal that the plan was in fact the opposite of *Gomillion*-style gerrymandering: it was not intended to disenfranchise white voters nor did it have that effect, nor was it a product of the profoundly oppressive culture of the pre-Civil Rights era.³⁴⁹ The analogy holds true only at the most abstract, formal level: in both cases the government considered race. But the Court provocatively deduced from this generalization that this race consciousness equates to "political apartheid"—a term for which it has been rightly criticized.³⁵⁰ And it repeatedly asserted that this race consciousness constituted racial "separation" and "segregation."³⁵¹ In fact, the challenged districts were among the most integrated in the nation.³⁵²

incorrect assumptions (that Georgia created the third minority opportunity district to meet the Department of Justice's preclearance demands, and that the voters in the challenged Eleventh district did not share communities of interest) for the purpose of showing "the haste with which the Supreme Court is deciding the cases, the lack of any real deliberation, and the lack of any real understanding of what the Supreme Court is dealing with." Parker, *Factual Errors*, *supra* note 128, at 529–30.

³⁴⁸ *Shaw I*, 509 U.S. at 642.

³⁴⁹ Cf. *Gomillion*, 364 U.S. 339. Parker, *A Critique*, *supra* note 347, at 1 (*Shaw* plaintiffs alleged neither racially discriminatory purpose nor racially discriminatory effect).

³⁵⁰ *Shaw I*, 509 U.S. at 647. See, e.g., Jaime B. Raskin, *Affirmative Action and Racial Reaction*, 38 How. L.J. 521, 528 (1995) ("By likening the Voting Rights Act-induced districts to 'political apartheid,' Justice O'Connor revealed the rhetoric-loaded but theory-barren nature of her decision. This arresting phrase has never been used by the Supreme Court to describe centuries of slavery, disenfranchisement, poll taxes, literacy tests, grandfather clauses, Jim Crow laws, or any other political exclusions visited on African Americans by white supremacy."); Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1360 (1995) (referring to political apartheid as "morally laden rhetoric"); James B. Zouras, Note, *A Color-Blind Court in a Race-Conscious Society*, 44 DEPAUL L. REV. 917, 974 (1995) (claiming that the Court used these terms more for their emotional value than for any guidance they might provide and arguing that the Court should avoid using legal terms in a sloppy and inaccurate way).

³⁵¹ Both terms are used at least nine times each in the course of O'Connor's relatively brief opinion in *Shaw I*. See 509 U.S. at 633–58.

³⁵² Thus, while the Court applied strict scrutiny because the district "rationally cannot be understood as anything other than an effort to 'segregate . . . voters' on the basis of race," *Shaw I*, 509 U.S. at 646–47, (citing *Gomillion*), it in fact cannot be understood as anything other than an effort to *integrate* voters of different races into one district and to integrate the legislature. See Karlan, *All Over the Map*, *supra* note 89, at 282 (noting that District 12 was one of the most integrated districts in the nation, with 41% whites and 56% blacks, comparing favorably with 3 other districts in North Carolina with white populations of 90% where the total white population of the state is only 75.56%); see also J. Morgan Kousser, *Shaw v. Reno and The Real World of*

Nor are the other assumptions implicit in *Shaw*'s holding warranted, particularly without further proof. For instance, the Court characterizes race conscious districting as an aberrational departure from traditional districting principles. But as J. Morgan Kousser has shown, an analysis of North Carolina's districting practice reveals that there is nothing particularly traditional or principled about the state's practice. Kousser reports that "although committees paid lip service to the value of compactness, legislators did not hesitate to sacrifice it for what they obviously considered the more important ends of protecting racial, partisan, and incumbent interests. This represented no change in *de facto* state policy. During the 1950s and 1960s, the state's congressional district[s] were derided as 'bacon strips' with 'tortuous' boundaries. The Fourth District in 1966 was contiguous only at a pinpoint."³⁵³ Viewed in this light, the district challenged in *Shaw* was aberrational not in shape, but in its intent to enhance minority representation.

Kousser also shows that districting in North Carolina was never race-neutral, regardless of the shape of the districts. "Before 1991, white congressmen openly manipulated redistricting to buttress their positions against candidates who might appeal to black voters. Second, racial, partisan, and incumbent-protecting goals interacted, often producing unlikely coalitions."³⁵⁴ Furthermore, with respect to the challenged district in particular, Kousser shows that race was hardly the "but for" cause of the irregular shape. According to the Raleigh, North Carolina newspaper, Kousser says, "the purposes of its [the plan's] authors were 'to simultaneously equalize district populations, turn 11 districts into 12, protect incumbent Democrats, inflict maximum carnage on most incumbent Republicans, and construct one district with a black majority.'"³⁵⁵ This evidence was noted by the district court on remand, but ignored by the Supreme Court. Indeed, in both 1996 redistricting cases, the Court simply disregarded substantial evidence that the irregular shapes were due not to racial but to political consid-

Redistricting and Representation, 26 *RUTGERS L.J.* 625, 634 (1995) (making same point with roughly the same figures); Parker, *A Critique*, *supra* note 347, at 25-26 (same, and noting that "a majority of the State's black voting age population—57%—was actually placed in the majority-white districts, not the two majority-black districts.").

³⁵³ Kousser, *supra* note 352, at 674 n.197 (noting that North Carolina legislators considered, but never even voted on a requirement that districts be "compact in form."); see also *Sallying Forth*, *N.Y. TIMES (Magazine)*, June 29, 1997, at 13 (noting that the equipopulosity requirement has caused many sparsely populated congressional districts to be noncompact).

³⁵⁴ Kousser, *supra* note 352, at 674.

³⁵⁵ *Id.* at 694 (citing *A Map to Boggle Minds*, *RALEIGH NEWS*, June 1, 1991, at A12).

erations. In both cases, legislatures forfeited racially balanced compact districts in favor of racially balanced irregular districts that protected incumbents.³⁵⁶

The most significant assumption the Court made in *Shaw I*, which it repeated throughout without even asking for additional evidence, was the assumption about harm. *Shaw I* is peppered with hypothetical suggestions about the kind and degree of harm that race consciousness *may* cause, but there is no evidence in that case or in the later cases that it actually does cause such harm to the plaintiffs.³⁵⁷ For instance, in *Shaw I*, the Court stated:

Classifications on the basis of race . . . *threaten* to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. . . . Racial classifications with respect to voting *carry particular dangers*. Racial gerrymandering, even for remedial purposes, *may balkanize* us into competing racial factions; it *threatens to carry us further* from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.³⁵⁸

What is important to the Court is whether the plans *may* distance us from our ideal, not whether they actually *do*. The Court cannot be faulted for taking judicial notice, or using its intuition, about the possibility that governmental activity sometimes does reinforce private prejudices. But it can be faulted for basing a cause of action on these assumptions without examining whether they are possible in the particular case or whether there are countervailing benefits, and for adhering to these assumptions after contrary evidence has been adduced. In *Miller*, for instance, the Court transforms the assumption into the

³⁵⁶ *Shaw II*, 116 S. Ct. at 1916 (Stevens, J.). In *Bush*, the tentacles of the challenged district, which rendered the shape irregular, were 70% white, so the shape would have been more or less regular but for the inclusion of additional white voters who were wanted in the district not because of their race but because of their political affiliations. 116 S. Ct. 1941; Conference, *supra* note 88, at 55; *see also Abrams*, 117 S. Ct. at 1943 (Breyer, J., dissenting) (plans with fewer minority-majority districts no more compact than those with more).

³⁵⁷ Indeed, the *Shaw* Court seems to be responding on a visceral level rather than an analytic level to what the government has done, calling the actions “unsettling” and “uncomfortable.” *Shaw I*, 509 U.S. at 641, 647.

³⁵⁸ *Id.* at 643, 657 (emphases added). *But see* Parker, *Factual Errors*, *supra* note 128, at 533 (noting that “[t]here is no more proof that racial redistricting causes racially polarized thinking and racial stereotypes, racial bloc voting or representational harms than there is proof that racial redistricting caused the O.J. Simpson verdict”).

reality effortlessly: "Race-based assignments . . . cause society serious harm. As we concluded in *Shaw*: 'Racial classifications . . . may balkanize us'"³⁵⁹ The Court then refers to these harms as "the consequences of racial stereotyping."³⁶⁰ Consequences that were once potentialities have hardened into actualities.³⁶¹ As the *Shaw* series progresses, the Court is not even addressing the alleged harms anymore, but rather considers them to have already been established.³⁶² It has declared its preference for the normative appeal of aspirational jurisprudence ("a political system in which race no longer matters") and for the formal appeal of the bright line (all race consciousness is bad race consciousness) and it has maintained its indifference to the complex realities of redistricting and to the real effects of governmental choices on people.

This idealism is consistent with an aspect of the Court's jurisprudence that appears to be distinctively American. As Thomas Grey has explained, Americans tend to view our Constitution as Scripture: "Just as Christians and Jews take the word of God as sovereign and the Bible as the word of God, so Americans take the will of the people as sovereign, at least in secular matters, and the Constitution as the most

³⁵⁹ *Miller*, 515 U.S. at 912 (quoting full passage in text).

³⁶⁰ *Id.*

³⁶¹ A parallel transformation can be mapped for the role of race in these cases. We start with the desire to diversify Congress, which prompted the Voting Rights Act, which in turn requires that covered states get approval from the Department of Justice for new electoral plans. This, in turn, may require state legislators to ensure that there are enough minorities in a given district to permit the minorities to elect a representative of their choice. Race is, therefore, one of many factors of which legislators are aware. But *Shaw* delegitimizes this by making race the defining factor (as in a "racial gerrymander") and then transmuting it into prejudice ("racial stereotype") and then, the worst of all epithets, into "political apartheid." See, e.g., *Shaw I*, 509 U.S. at 648 ("By perpetuating [racial stereotypes], a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract"). No explanation is given as to how the intent to diversify Congress turned into political apartheid.

³⁶² In *Hays*, the court stated:

We discussed the harms caused by racial classifications in *Shaw*. We noted that, in general, "[t]hey threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw I*, 509 U.S. at 643. We also noted "representational harms" the particular type of racial classification at issue in *Shaw* may cause: "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." *Id.* at 648.

Hays, 515 U.S. at 744. See also *Shaw II*, 116 S. Ct. 1894 (no discussion of harms of predominant legislative attention to race in districting); but see *Hays*, 515 U.S. at 750 (Stevens, J., concurring)

authoritative legal expression of that popular will."³⁶³ While it is true that the Constitution entrenches itself as the Supreme Law of the Land,³⁶⁴ Grey points out that Americans see their national Constitution as much more than simply the top of a hierarchy that ranks federal and state laws, treaties, executive orders, etc.³⁶⁵ Just as the Bible is more than a set of parables and stories about people who lived long ago, the Constitution is more than a set of rules and instructions by which the Government must abide. "[T]he Constitution is meant to express an arrangement vastly more complex than those underlying most legal documents: the web of society's basic institutions and ideals, its unwritten constitution It is this grand and cloudy Constitution that stands in our minds for the ideal America, earth's last best hope, the city on the hill."³⁶⁶ Like the Bible, the Constitution is aspirational, not merely prescriptive.³⁶⁷

("The majority fails to explain coherently how a State discriminates invidiously by deliberately joining members of different races in the same district; why such placement amounts to an injury to members of any race; and, assuming it does, to whom").

³⁶³ Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 3 (1984) [hereinafter Grey, *Constitution as Scripture*]. See also Anthony R. Blackshield, *Observance of Basic Law Oceans Apart*, THE AUSTRALIAN, Mar. 29, 1996, at 8 ("[T]he American reverence for the Constitution contrasts oddly with Australian experience, where opinion polls repeatedly show that many Australians—especially younger Australians—are unaware a Constitution exists.") [hereinafter Blackshield, *Oceans Apart*]. Whatever else can be said of the American education system, it cannot be gainsaid that Americans are aware of their Constitution. See also Morton J. Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655, 663 (1988) ("Constitution worship is America's secular religion").

³⁶⁴ U.S. CONST. art. VI, § 2.

³⁶⁵ Grey, *Constitution as Scripture*, *supra* note 363, at 3 (contrasting American perceptions of their national and state constitutions). Grey is certainly not the first to have made this analogy; indeed, Grey notes that the Constitution assumed a quasi-religious character upon ratification. And as far back as 1803, John Marshall was able to say that "in America, . . . written constitutions have been viewed with so much reverence." *Marbury*, 5 U.S. at 178. As Sanford Levinson has shown, Abraham Lincoln called attention to the religious aspect of constitutionalism in 1838. See Sanford Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CT. REV. 123, 124.

³⁶⁶ Grey, *Constitution as Scripture*, *supra* note 363, at 16, 19.

³⁶⁷ Hence the italicization of "constitution" in the phrase "It is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). See also Grey, *Constitution as Scripture*, *supra* note 363, at 16; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1146 (1987):

The Constitution [the Framers] were drafting was, at the beginning, neither positive law nor popularly grounded. As the summer [of 1787] progressed, the delegates began to formulate and understand two concepts crucial to understanding the Constitution as a *sui generis* form of positive law: self-referential enforceability and extra-legislative origin Both of these concepts were in direct conflict with the English version of a

Viewed this way, the Constitution demands (and Americans expect) that the Constitution's interpreters will heed the idealism it embodies; its first stated purpose is, after all, to form "a more perfect Union"—a purpose that seems to contemplate always being aspired to but never being achieved.³⁶⁸ Thus, the *Shaw* Court is being true to its role as the interpreter of the Constitution when it holds color blindness to be a constitutional aspiration without much regard to the practical realities of how to achieve color blindness or, in this particular context, to whether a little color-consciousness might not be the best means to achieve the ultimate goal. *Shaw* manifests the Court's view of itself as guardian of the Constitution's ideals, where the guardian's role is to interpret and preserve, not to implement.

This approach is certainly valuable because it continually recalls the nation's goals. Americans take seriously the ideals of the Constitution precisely because it is more than a statute, even a self-entrenching statute. They continue to revere it even though or perhaps because they cannot realize its promise. It is a valuable approach, too, because it authorizes a reading of the Constitution that goes beyond textualism but embodies the Constitution's deeper meaning and its aspirations.

But the idealism of the Constitution can be overstated, as the *Shaw* cases illustrate. When the Constitution's idealism supplants, rather than merely supplements, its functionalism, it is only achieving part of its potential. One could argue, as Justice Scalia does in his recent book, *A Matter of Interpretation*, that if idealism, and particularly formalism, are only part of the Constitution, they are the most important part.

constitution as inherently fundamental and accretionally derived from natural law and unchallenged legislative acts.

Sherry, *supra* at 1146. What seems to be important here is not that the origin of the Constitution is popular or otherwise legitimate but that it is, in its nature, wholly extraordinary without precedent or successor. In this regard, it is interesting to note that the American custom for documenting Constitutional amendments is to add on to the text without altering the original. By contrast, the Australian custom is to indicate the amending language by striking out the original. See, e.g., *Kartinyeri*, HCA 22 at ¶ 26 (quoting Section 51, clause xxvi of the Australian Constitution: "[t]he people of any race, for whom it is deemed necessary to make special laws . . .").

³⁶⁸ The Constitution does not, after all, expire when we have attained the more perfect union. In this sense, the constitutional enterprise is rather sisyphian: the point is not to achieve a more perfect union but to keep trying. Furthermore, the existential constitutionalist, which we all must be if we continue to believe in it, would say that success—not to say happiness—comes from the ongoing struggle, "for ages to come," notwithstanding the improbability of achieving a perfect union. See ALBERT CAMUS, *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 91 (1955) ("The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy").

Justice Scalia argues that law is *supposed* to be formal; it is, after all, a system of rules.³⁶⁹ But while this may be good enough for a Declaration of Independence, it shortchanges the Constitution. Law is, of course, a set of rules, but it is a set that operates in a particular social and political system. Legal rules must be relevant to the system in which they apply. The aspirations these rules embody should not be only (or even partially) spiritual.³⁷⁰ They must also be social, which means that they must work in the social world and be followed on a day-to-day basis. It is not enough for the government to agree with the ideal of equality; it must conform its behavior to that requirement. Thus, the framers designed a Constitution that was not only idealistic, but “workable” as well.³⁷¹

The Court in *Reynolds* and the other early voting rights cases seemed to recognize this dual mission.³⁷² It spoke both of the ideal of absolute equipopulosity and of the practical need for fair and effective representation.³⁷³ But the post-Warren Court has deliberately repudiated any interest in “effective” governance, or any interpretation of the Constitution mandating effective government.³⁷⁴ Indeed, the current Court has adopted what it has called (and what by now has become) “the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results.”³⁷⁵ Results are not interesting to this Court; effective is no longer a part of its constitutional lexicon. In its idealist attitude, the Court is freed from having to consider whether the rule it endorses is more likely than the rule it rejects to achieve fair and effective

³⁶⁹ “Of all the criticisms leveled against textualism, the most mindless is that it is ‘formalistic.’ The answer to that is, *of course it’s formalistic!* The rule of law is *about* form Long live formalism. It is what makes a government a government of laws and not of men.” SCALIA, *supra* note 320, at 25 (emphasis in original).

³⁷⁰ Scalia argues against living constitutionalism. See *id.* at 37–47. But could he be arguing in favor of “dead constitutionalism”? Probably not. What he has in mind is probably something more akin to spiritual constitutionalism—ever-lasting but never-changing, more ephemeral than human, more aspirational than real.

³⁷¹ “To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers’ design of a workable National Government.” *Loving v. United States*, 517 U.S. 748, 116 S. Ct. 1737, 1744 (1996). “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.” *United States v. Nixon*, 418 U.S. 683, 707 (1974) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

³⁷² See *Reynolds*, 377 U.S. 533.

³⁷³ See *supra* notes 32–102 and accompanying text.

³⁷⁴ See *supra* notes 103–46 and accompanying text.

³⁷⁵ *Feeney*, 442 U.S. at 273; see also Blumstein, *supra* note 97, at 532 (describing the “nondis-

representation for the greatest number of people or for those most deserving of constitutional protection.³⁷⁶

Simplicity is idealism's greatest asset and its worst flaw. Simplicity means that people can understand the constitutional command, but simplicity can be misleading if the facts to which the rule applies are not equally simple, as they rarely are, particularly in districting. As Daniel Farber has written:

[f]oundational grand theories aspire to make constitutional law easy by providing a single recipe for all decisions—a recipe, moreover, that will never require change, no matter how much society evolves. Foundationalist analysis supposes that the genuine conflicts that underlie many constitutional cases will dissolve. Pragmatism, however, acknowledges that there are real conflicts that have to be squarely confronted rather than finessed.³⁷⁷

In the redistricting cases, the recipe the Court has adopted is color blindness, but, so far, the Court has indicated no inclination to confront the conflicts that this principle implicates; instead, it seems to hope that the conflicts will simply dissolve. But the Court's unsupported adoption of color blindness creates, rather than dissolves, important conflicts, such as between color blindness as a mean and as an end, between individual rights and the associational character of voting, between abstract harm to the powerful majority and concrete benefits to a underenfranchised minority. Whereas idealism precludes consideration (and therefore resolution) of these conflicts, pragmatism (as will be discussed below) confronts them; the textualism of the Australian cases, meanwhile, leaves their resolution to the political process. The next section evaluates the textualist approach adopted by the Australian High Court and explains why that approach would be inappropriate if incorporated into American voting rights jurisprudence.

crimination principle as an institutionalist, process-oriented precept. Outcome is not determinative").

³⁷⁶ Clearly these are two very different questions; my criticism is not that the Court took the wrong side, but that the Court did not take either side. It simply did not consider how its rule plays out in people's lives.

³⁷⁷ Farber, *supra* note 218, at 1342.

B. *Australian Textualism*³⁷⁸

When John Marshall said "it is a *constitution* we are expounding," he made a connection between two distinct but related issues: the provenance of the Constitution (that is, the source of its authority) and the Court's interpretive stance.³⁷⁹ In *McCulloch*, Marshall resolved both questions definitively (it so far seems).³⁸⁰ The source of the Constitution's authority and legitimacy, he said, is the people of the United States, not at any particular moment or on any specific issue but in what Alexander Bickel would later call the people in the "mystic" sense of the word.³⁸¹ Constitutional interpretation, then, is a matter of giving effect to the will of the people; the Court should be generous in construing legislative necessities as constitutionally justified and should feel confident in its authority to do so. Marshall was explicit in linking the role of the Court as guardian of the people's will with broad constitutional interpretation of federal power. "Since, then, the constitutional government of this republican empire cannot be practically enforced, so as to secure the permanent glory, safety and felicity of this great country, but by a fair and liberal interpretation of its powers; since those powers could not all be expressed in the constitution, but many of them must be taken by implication; . . . no other alternative remains, but for this court to interpose its authority, and save the nation from the consequences of this dangerous attempt."³⁸²

In Australia, both issues have historically been resolved differently. As discussed above, the source of authority of the Australian Constitution is ambiguous. For most of the Constitution's life, the predominant view has been that it is properly conceived of and interpreted as an act of Parliament. As Sir Owen Dixon, one of the foremost expositors of Australian constitutional law, has explained:

The framers of our own federal Commonwealth Constitution . . . found the American instrument of government an incomparable model. They could not escape from its fascination. Its

³⁷⁸ I make no broad claim about the value of textualism either in general or in Australian law; the claim here is limited to showing that the Australian attitude can legitimately be described as textualist and that such an approach would not be appropriate if applied to American districting cases.

³⁷⁹ See *McCulloch*, 17 U.S. at 407.

³⁸⁰ But see *U.S. Term Limits*, 514 U.S. 779 (Thomas, J., dissenting).

³⁸¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 17 (1965).

³⁸² *McCulloch*, 17 U.S. at 399-400.

contemplation damped the smouldering fires of their originality. But, although they copied it in many respects with great fidelity, in one respect the Constitution of our Commonwealth was bound to depart altogether from its prototype. It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions. In the interpretation of our Constitution, this distinction has many important consequences. We treat our organs of government simply as institutions established by law, and we interpret their powers simply as authorities belonging to them by law.³⁸³

Without popular sovereignty as the defining feature, a court construing a constitution is merely acting as a common law court construing a statute; there is no obvious reason to treat a self-named constitution differently.³⁸⁴ The chief authority for this view is the 1920 landmark case of *Amalgamated Soc'y of Engineers v. Adelaide Steamship Co. Ltd.* (Engineers' Case).³⁸⁵ This case unambiguously established that the proper mode of constitutional interpretation is more consistent with strict construction than with the doctrine of implied powers adopted by Marshall.³⁸⁶ The Court followed the approach not of the Americans but of the British Privy Council. In language reminiscent of but decidedly different from Marshall's in another context, the Court said: "it is

³⁸³ Sir Owen Dixon, *The Law and the Constitution*, 51 LAW Q. REV. 590 (1935), reprinted in ANTHONY R. BLACKSHIELD ET AL., AUSTRALIAN CONSTITUTIONAL LAW & THEORY: COMMENTARY & MATERIALS 28 (1996) [hereinafter BLACKSHIELD ET AL., AUSTRALIAN CONSTITUTIONAL LAW].

³⁸⁴ There has always been an argument, based on popular participation in the drafting and ratification processes, that the Australian Constitution, like the American one, derives from popular sovereignty. See *Australian Capital Television*, 177 C.L.R. at 138 (Mason, C.J.). "Two features of the Constitution would have been important in explaining its character at the time of its enactment. First its *legal* status was derived from the fact that it was contained in an enactment of the British Imperial Parliament. Secondly, its *political* legitimacy or authority was based on the words contained in the preamble to that enactment which refer to the people of the Australian colonies having agreed to unite in a 'Federal Commonwealth' and having the authority to amend the Constitution." G.J. Lindell, *Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence*, 16 FED. L. REV. 29 (1986), quoted in BLACKSHIELD ET AL., AUSTRALIAN CONSTITUTIONAL LAW, *supra* note 383, at 29. Nonetheless, until the Australia Act, 1986, this was not the prevailing view.

³⁸⁵ *Amalgamated Soc'y of Engineers v. Adelaide Steamship Co. Ltd.*, 28 C.L.R. 129 (1920).

³⁸⁶ "[F]ollowing the decision in [the *Engineers' Case*], the notion seemed to gain currency that no implications could be made in interpreting the Constitution." *Australian Capital Television*, 177 C.L.R. at 133 (Mason, C.J.).

the chief and special duty of this Court faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed."³⁸⁷ Only if the text is ambiguous, the Court explained, should recourse "be had to the context and scheme of the Act" (meaning the Constitution).³⁸⁸ Thus, while Americans rely heavily on the notes of James Madison at the Constitutional Convention and on the speeches and writings of those who were involved with the development and adoption of the Constitution, "it is settled doctrine in Australia that the records of the discussions in the Conventions and in the legislatures of the colonies will not be used as an aid to the construction of the Constitution."³⁸⁹

This textual approach, which "depended on reading the Constitution as an Act of the Imperial Parliament, invested with the full 'parliamentary sovereignty' of that Parliament itself,"³⁹⁰ has dominated Australian constitutional jurisprudence since 1920. For instance, in the *McKinlay* case, the Court made clear that it would resolve the plaintiffs' challenge in a manner consistent with traditional canons of constitutional interpretation. "The only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole; and to find its meaning by legal reasoning."³⁹¹ In the 1996 *McGinty* case, Justice McHugh could still apply "the standard tech-

³⁸⁷ *Engineers' Case*, 28 C.L.R. at 142.

³⁸⁸ *Id.* at 149-50. Ironically, the strict construction of the *Engineers' Case* and the broad construction of *McCulloch* led to the same result; in both cases, the federal legislature was permitted to exercise broad powers over the states. In the Australian case, the Commonwealth Court of Conciliation and Arbitration had issued an award in an employment dispute which covered both private and state employers. The state employers argued that the federal power to control labor disputes did not extend to state employers notwithstanding the absence of any limiting language in the Constitution. Thus, the case can be compared to the American case of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), where the Court also refused to read into the Commerce clause a federalism-based limitation which was not explicit. Despite this similarity to *Garcia*, the *Engineers' Case* is more appropriately analogized to *McCulloch*, having had the same pivotal nationalizing effect on the young nation as *McCulloch*. See R.T.E. Latham, *The Law and the Commonwealth*, reprinted in BLACKSHIELD ET AL., AUSTRALIAN CONSTITUTIONAL LAW, *supra* note 383, at 254 (explaining that the unstated "real ground of decision was the view held by the majority that the Constitution had been intended to create a nation, and that it had succeeded . . .").

³⁸⁹ *McKinlay*, 135 C.L.R. at 17.

³⁹⁰ Anthony R. Blackshield, *Reinterpreting the Constitution*, in DEVELOPMENTS IN AUSTRALIAN POLITICS 31 (Judith Brett et al. eds., 1994) [hereinafter Blackshield, *Reinterpreting*].

³⁹¹ *McKinlay*, 135 C.L.R. at 17.

niques of statutory interpretation to a constitutional instrument.”³⁹² Justice McHugh seems to speak for the center of the Court when he explains:

The ordinary principles of statutory interpretation require that the text be the starting point of any interpretation of the Constitution. Part of the ordinary and natural meaning of the text is any implication which is “manifested according to the accepted principles of interpretation.” Implications derived from the structure of the Constitution are also part of the Constitution’s meaning but such implications may be drawn only when they are “logically or practically necessary for the preservation of the integrity of that structure.”³⁹³

In part this textualism derives from general considerations of separation of powers: out of concern for its own legitimacy, every unelected Court that functions in an otherwise democratic system takes pains to avoid the appearance that it is legislating. Thus, it confines itself to interpreting, but not enacting, the law as written.³⁹⁴

The Australia Act of 1986 presented the Australian Court with the opportunity to free itself of this textualist shackle. The Act severed almost all ties between Australia and the British Empire which, arguably, had the effect of formalizing popular authority for the Constitution: by removing the British Parliament as one of the two legs on which the legitimacy of the Australian Constitution stands, the argument goes, the Australia Act established popular sovereignty as the sole basis for the Constitution’s legitimacy.³⁹⁵ As explained by Justice McHugh:

In the late twentieth century, it may not be palatable to many persons to think that the powers, authorities, immunities and

³⁹² *McGinty*, 134 A.L.R. at 347 (McHugh, J.).

³⁹³ *Id.* at 344–45.

³⁹⁴ On occasion, the Australian Court has expressed ambivalence towards its self-imposed strict constructionism and has acknowledged that some degree of implication is necessary in constitutional interpretation (if not in all legal interpretation). Thus, the Court has also stated that “implications have a place in the interpretation of the Constitution [but] I would prefer not to say ‘making implications,’ because our avowed task is simply the revealing or uncovering of implications that are already there.” *Victoria v. Commonwealth (Payroll Tax Case)* (1971) 122 C.L.R. 353, 401–02 (Windeyer, J.).

³⁹⁵ “[T]he Australia Act 1986 (U.K.) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people.” *Australian Capital Television*, 177 C.L.R. at 138 (Mason, C.J.). See also Blackshield, *Reinterpreting*, *supra* note 390, at 31.

obligations of the federal and State parliaments of Australia derive their legal authority from a statute enacted by the Imperial Parliament, but the enactment of that statute containing the terms of the Constitution is the instrument by which the Australian people have consented to be governed. Since the passing of the Australia Act (UK) in 1986, notwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia. But the only authority that the people have given to the parliaments of the nation is to enact laws in accordance with the terms of the Constitution.³⁹⁶

The Australia Act essentially retroactively shifted the authority for the Constitution from the Imperial Parliament to the people of Australia, permitting the Court to emphasize the importance of popular—as opposed to parliamentary—sovereignty. This in turn authorized the Court to interpret the Constitution as a dynamic *constitution* rather than as a static statute. And in the free speech cases of 1992 and 1994, the Court took advantage of this authority, reading into the Constitution a guarantee of representative democracy which in turn guaranteed some measure of freedom for political communication, none of which was explicit (or even reasonably implicit) in the text. This set of cases raised the hope that Australian constitutional interpretation would begin to look more American, now that the Constitutions of both countries were similarly grounded in popular sovereignty.

But this hope proved short-lived. The *McGinty* case rejected the approach of the free speech cases notwithstanding the potential transformative power of the Australia Act. Popular sovereignty, wrote Justice McHugh, means simply that the people have delegated to the legislature the authority to act consistent with the Constitution. “But since the people have agreed to be governed by a constitution enacted by a British statute, it is surely right to conclude that its meaning must be determined by the ordinary techniques of statutory interpretation and by no other means.”³⁹⁷ At the end of the day, the Australian Court simply does not have much stomach for substantial constitutional implication—popular sovereignty or not. Thus, *McGinty* represents not only a return to the textualism of the *Engineers’ Case* but a break from the American and Australian tradition of linking constitutional author-

³⁹⁶ *McGinty*, 134 A.L.R. at 343.

³⁹⁷ *Id.* at 344.

ity with constitutional interpretation: even if the Australia Act did substitute the people for the legislature as the ultimate source of authority, *McGinty* says that this fact does not dictate the jurisprudential attitude of the Court. There are still reasons, based largely in principles of separation of powers and judicial legitimacy, to interpret any positive law strictly. However, so long as those reasons do not link the interpretations of the constitution with its provenance, they would not necessarily be appropriate for American constitutional interpretation.³⁹⁸

In *A Matter of Interpretation*, Justice Scalia argues that the kind of textualism that is popular in Australia should obtain in the United States as well, although he does not explicitly refer to the Australian experience.³⁹⁹ This experience, however, provides a case study of what is required for a textualist approach to work. Australian textualism seems to lie somewhere between what Justice Black was comfortable with and the stricter construction that Scalia now says he endorses. Justice Black's reading of the text was expansive enough to infer from the constitutional right to choose representatives a right to equal voting power.⁴⁰⁰ The Australian Court has been unwilling to do this insofar as it "involves a rejection of the principles of implication laid down in the *Engineers' Case*."⁴⁰¹ Rejecting the *Engineers' Case* is ultimately no more acceptable to the Australians than rejecting *McCulloch* would be to most Americans.

³⁹⁸ As previously noted, the recent Constitutional Convention recommended that the republican Constitution include "Introductory language in the form 'We the people of Australia,'" which would make explicit the popular grounding of the new Constitution. Interestingly, the Convention also recommended that "[c]are should be taken to draft the Preamble in such a way that it does not have implications for the interpretation of the Constitution." See <<http://www.dpmc.gov.au/convention.html>>. Whether or not the Preamble can be contained in this way is of course an open question. In the recent case concerning a Constitutional amendment effected by popular referendum, a majority of the Court maintained its commitment to textualism ("it is the Constitutional text which must always be controlling," *Kartinyeri*, HCA 22 at ¶ 90 (Gummow & Hayne, JJ.), while the lone dissenter urged the Court to "take notice of the history of the amendment and the circumstances surrounding it in giving meaning to the amended paragraph." See *id.* ¶ 157 (Kirby, J., dissenting). Even Justice Kirby, however, towed the textualist line, "the emphasis upon the text of the document is beneficial. It tames the creative imagination of those who might be fired by the suggested requirements of changing times or by the perceived needs of justice in a particular case. The text is the law." *Id.* ¶ 132(1). Thus, even in these post-Australia Act, pre-republic times, the textualist stance remains secure.

³⁹⁹ SCALIA, *supra* note 320, at 23–29.

⁴⁰⁰ See *Wesberry*, 376 U.S. 1.

⁴⁰¹ *McGinty*, 134 A.L.R. at 345 (McHugh, J.).

On the other hand, the Australian Court's textualism does not seem as severe as Justice Scalia's position as described in his book. The Australian Court has, at least in dictum, accepted that certain changes must be read into the Constitution, even if the text has not itself been updated, whereas in Justice Scalia's view the text of the Constitution cannot change over time absent Article V amendment. Thus, whereas the Australian Court accepts that certain practices that were once constitutional could through changes in practice become unconstitutional, Justice Scalia does not. Ironically, both Justice Scalia and the Australian Court use the same example to illustrate their opposite views. Justice Scalia argues that the Nineteenth Amendment was needed to secure female franchise because no judicial interpretation of the unamended Constitution could legitimately secure this right.⁴⁰² The Australians, however, use female franchise to show that *some* implication is necessary: although at federation the Constitution permitted states to deny women the vote, and although this has never been formally amended, the Court would find that a state's denying a woman the right to vote on account of her gender in 1996 would violate the Constitution.⁴⁰³

Both American and Australian textualists recognize that a constitutional text is not necessarily self-revealing and that some extrinsic information is needed in order to understand and apply the words.⁴⁰⁴ This extrinsic evidence is meant to be both informative and constraining, limiting the possible interpretations of the ambiguous text. But two important differences in the countries' approach to such evidence present themselves. First, American textualism tends to be informed by originalism,⁴⁰⁵ whereas Australian textualism is tinged with pragmatism. Thus, the Australian Court can look outside its windows and see that there are sound reasons for malapportionment that do not impede, and may enhance, the right of Australians to choose their rep-

⁴⁰² SCALIA, *supra* note 320, at 47.

⁴⁰³ See, e.g., *McGinty*, 134 A.L.R. at 320 (Toohey, J.). This might be an unfair comparison: Justice Scalia writes from a comfortably counterfactual position since the Constitution has been amended and he will never be asked whether a state may constitutionally prohibit women from voting. One can only hope that he would, if forced, concede that such action does violate an unwritten postulate of the Constitution (although his dissent in *United States v. Virginia*, 518 U.S. 515 (1996), does not provide any basis for such a hope).

⁴⁰⁴ See Schauer, *supra* note 343, at 514 ("Some terms, like 'liberty' and 'equality,' are pervasively indeterminate. It is not that such terms have no content whatsoever; it is that every application, every concretization, every instantiation requires the addition of supplementary premises to apply the general term to specific cases.").

⁴⁰⁵ See, e.g., BORK, *supra* note 161; SCALIA, *supra* note 320.

representatives and that legislators around the country are, for the most part, conforming to the values the nation embodies. American textualism may very well come to the same conclusion, but it would do so for the wrong reasons: it would accept malapportionment because the Framers accepted it, not because it furthers any community values.

The second reason exacerbates the problems of the first. American textualism is more dependent on extrinsic evidence than Australian textualism is because of the nature of the constitutional text. In general, the words of the American Constitution on which most major cases depend are much broader than their Australian counterparts.⁴⁰⁶ In foregoing a Bill of Rights, the Australians chose to articulate their fundamental law in much narrower language. There is nothing as open ended in the Australian Constitution as a mandate that the government "shall make no law . . . abridging the freedom of speech" or that "[n]o state shall . . . deny to any person . . . the equal protection of the laws."⁴⁰⁷ Even the few comparable clauses protecting individual rights are more specific in the Australian Constitution.⁴⁰⁸ In Australian jurisprudence, therefore, a court adopting a textualist stance is much more constrained by the text itself than an American court doing the same: the balance between textual interpretation and reliance on extrinsic evidence favors the text in Australia, but favors the extrinsic evidence in the United States. Thus, an American court purporting to read the Constitution strictly may not even refer to the Constitutional language. The irony of the districting cases is that the more rigid, textualist approach of the Australian Court is much more deferential to the legislative branches than the idealist approach of the Americans. The result of Australian textualism is to permit legislative flexibility, and to express judicial trust in the legislative branches that they will conform to whatever ideals the Australian people have. As Justice McHugh explained in *McGinty*, "[i]n Australia, the framers . . . performed their task in such a way as to allow room for further legislative evolution in the system of representative government. Constitutional rigidity was, to a significant degree, avoided. But, in a sense, the

⁴⁰⁶ See RONALD M. DWORKIN, *FREEDOM'S LAW* 7 (1996) ("Many of [the clauses of the American Constitution that protect individuals and minorities from government] are drafted in exceedingly abstract moral language") [hereinafter DWORKIN, *FREEDOM'S LAW*].

⁴⁰⁷ U.S. CONST. amends. I, XIV.

⁴⁰⁸ See, e.g., AUSTL. CONST. § 116 (adding to what is protected in the religion clauses of the First Amendment the prohibition on the Commonwealth government "imposing any religious observance").

plaintiffs seek to assert and to rely upon such rigidity."⁴⁰⁹ Far from stamping the legislative practice with the seal of personal predilections, the Australian Court deferred to the popularly, and apparently fairly, elected branches. Australia's textualism was restrained when it was appropriate: the malapportionment in Western Australia was not egregious or typical and was justified by extraordinary population disparities. American textualism would rely too much on history to assure a result that would match the needs.⁴¹⁰ It is not bounded by textual specificity, nor by deference to other branches or comity. Furthermore, and probably most importantly, so long as Americans believe in their Constitution as the embodiment of popular will, there is no warrant for textualist interpretation.

C. *Canadian Pragmatism*

Of the three jurisprudential choices adopted by the Courts in these cases, the most appealing for voting rights cases is the pragmatic Canadian approach. True to its variegated nature, pragmatism does not boast of a single definition⁴¹¹ and is often defined more by what it is not than by what it is.⁴¹² There are, however, at least three major themes that can be teased out. The first goes to the meta-question of constitutional adjudication: what role the court plays in construing the fundamental law of a democracy. In Daniel Farber's terms, the overarching goal of the pragmatist court is to "play a useful role in the

⁴⁰⁹ *McGinty*, 134 A.L.R. at 374 (McHugh, J.) (distinguishing the American approach).

⁴¹⁰ See, e.g., Justice Scalia's opinion in *Printz*, 117 S. Ct. at 2365.

⁴¹¹ An inventive articulation of this is embodied in J.M. Balkin, *The Top Ten Reasons To Be A Legal Pragmatist*, 8 CONST. COMMENTARY 351 (1991). I will rely primarily on the descriptions of legal pragmatism in Farber, *supra* note 218, at 1331; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) [hereinafter Grey, *Holmes*]; Robert J. Lipkin, *The Anatomy of Constitutional Revolutions: The Role of Judicial Review in the American Communitarian Republic* (1997) (unpublished manuscript, on file with author) [hereinafter Lipkin, *Constitutional Revolutions*].

⁴¹² See, e.g., ROBERT L. HAYMAN & NANCY LEVIT, *JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES* 454 (1996) (describing pragmatism as antifoundationalist and anti-essentialist). Robert Lipkin distinguishes between two types of pragmatism, doctrinaire and reflective. "[D]octrinaire pragmatism is theory-phobic and deathly adverse to abstractions, dualisms, and formalistic methods of deciding political legitimacy" while reflective pragmatism endorses these but only if "doing so reaps sufficient pragmatic benefits." Robert Lipkin, *Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Thought*, 67 TULANE L. REV. 1561, 1622–23 (1993) [hereinafter Lipkin, *The Unfinished Revolution*]. See also Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990) (discussing pragmatism's ahistoricity and hostility to abstract theory); Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

practical tasks of democratic government”: that the court is unelected and unaccountable should not deprive it of the opportunity to contribute meaningfully to the political system.⁴¹³

The second and third themes focus on the inputs and outputs of constitutional adjudication. According to Thomas Grey, “[t]o apply the central pragmatic tenets to law means to treat it as a practical enterprise in two senses. First, law is constituted of practices—contextual, situated, rooted in custom and shared expectations. Second, it is instrumental, a means for achieving socially desired ends, and available to be adapted to their service.”⁴¹⁴ These are, of course, connected: “On the one hand, law is situated: It draws on felt necessities; unconscious intuitions; prejudices—the tacit patterns of thought inherited from the past On the other hand law is instrumental: It responds to moral and political theories; avowed intuitions of public policy—the products of future directed deliberation.”⁴¹⁵ In other words, the pragmatic jurist will think about where the law has come from (the context out of which it emerges) and where it is going (the effect it will have when applied in society).

The principal Canadian decision on districting, *Ref. re: EBCA*, exemplifies this pragmatist attitude.⁴¹⁶ Understanding how a pragmatist court can decide a districting case reveals that the pragmatist model is available to the American Court and suggests that adopting it would indeed yield better results than the Court’s current idealist approach. Reading the opinion in pragmatic terms thus sheds light on what the Canadian Court has done as well as on what the American Court could potentially do.

1. The Court’s Role

The question of how a Court thinks about what it is doing usually gets addressed, if at all, at the jurisdictional or justiciability stage of a case, so that by the time the Court is confronting the merits, it has long ceased to be self-conscious—at least explicitly. But how the Court

⁴¹³ Farber, *supra* note 218, at 1341 n.48.

⁴¹⁴ Grey, *Holmes*, *supra* note 411, at 805.

⁴¹⁵ *Id.* at 806.

⁴¹⁶ The terms “living constitutionalism” (the watchword of the *EBCA* case) and pragmatism are not exactly synonymous, although the Canadian cases conflate their salient features. Indeed, Justice Scalia suggests that the most common argument for “living constitutionalism” is a pragmatic one. SCALIA, *supra* note 320, at 44, 41. The reverse is also probably true: the best argument for pragmatism is the Canadian Court’s success with living constitutionalism.

resolves the threshold question has significant implications for how its asserts its role on the merits.

The first Canadian court to address (and affirm) the justiciability of the districting claim under the Charter began by placing itself within the system of government defined by the Charter. Lamenting the inexorable judicialization of society,⁴¹⁷ Chief Justice McEachern of the Supreme Court of British Columbia explained that the "community agreement" that the Constitution (including the Charter) embodies "imposes upon the court the responsibility to determine the reach of the Constitution *in* the organization of *our* political structure."⁴¹⁸ This presages the Canadian courts' view that courts are players inside a system of democratic governance, not referees standing outside the game looking in. Indeed, the first section of the Charter all but compels this approach. Section 1 requires the law to be consistent with the needs of a free and democratic system. By its terms, it seems to apply to judicial as well as legislative rules. As discussed previously, Canadian courts and commentators have interpreted Section 1 to create a mutually reinforcing relationship, not a rivalry, with the other sections.⁴¹⁹ Thus, Section 1 requires the Court to recognize that its own rules are as capable of enhancing or detracting from a free and democratic society as are legislative rules. It thus places both the constitution and the courts *in* the political structure, requiring the courts to accept the responsibility of playing a central (though not *the* central) role in the task of democratic governance.⁴²⁰

A court participating in the democratic system and constituting the law as it goes along will try to interact with the other institutions in the system in a constructive manner.⁴²¹ Pragmatism therefore "reduces the

⁴¹⁷ *Dixon 1986*, 31 D.L.R. at 548.

⁴¹⁸ *Id.* (emphasis added).

⁴¹⁹ See *supra* notes 172-89 and accompanying text.

⁴²⁰ *Ref. re: EBCA*, 81 D.L.R. at 32-33. In one view, of course, the Court is necessarily inside the government in the sense that it is one of the three constitutional branches of government, and the actions of the Court are clearly state action. See, e.g., *Shelley*, 334 U.S. 1; *Sullivan*, 376 U.S. 254. In another view, the Court is immune from political recriminations by lifetime appointments and salary protections. See U.S. CONST. art. III, § 1. Since the formalist argument could go either way, the Court can choose how it wishes to conceptualize itself. A pragmatist court would, and the Canadian courts did, choose to be inside the system, with all the responsibilities that that entails.

⁴²¹ As Ronald Dworkin has explained, judges "must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest." DWORKIN, *FREEDOM'S LAW*, *supra* note 406, at 10.

risk of unjustified radical intrusions into social institutions, and increases the possibility of dialogue between the Court and other segments of society."⁴²² In the context of districting, a pragmatic court will recognize that the judicial system has a prominent role to play in the process of securing meaningful voting rights for all citizens. This role is as important as, though distinct from, the role of the political branches.

This option has always been open to the U.S. Supreme Court and of course remains open today. In the past, the Court has taken advantage of it; it has been one of several social institutions that have contributed, more or less enthusiastically, to the broad-based effort to increase the opportunities especially of minorities to "participate in the political process and to elect representatives of their choice."⁴²³ In the 1950s and 1960s, Congress established national policy in landmark voting rights legislation which Congress has continued to strengthen.⁴²⁴ The Court has, for most of this period, reinforced the national policy in both statutory and constitutional rulings.⁴²⁵ The executive branch has strengthened the statutory amendments through its enforcement of the Voting Rights Act and, in the 1990s, state legislatures helped enhance representation for minorities at the state and federal level. In addition, civil rights groups have worked to fulfill the national policy of democratizing the political process.⁴²⁶ When faced with the novel question of gerrymandering for the purpose of enhancing minority participation and representation, the Court might have joined these public and private actors in promoting voting rights as well as other fundamental interests, namely equality. It might have balanced the societal, group, and individual interests and found ways to reconcile the various claims.

The *Shaw* Court has not taken this route. It has chosen to stand apart from the national policy as articulated by federal law, administrative

⁴²² Farber, *supra* note 218, at 1343.

⁴²³ 42 U.S.C. § 1973(b) (1982).

⁴²⁴ See generally Civil Rights Act of 1957; Civil Rights Act of 1964; Voting Rights Act of 1965 (as amended 1982).

⁴²⁵ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *City of Rome v. United States*, 446 U.S. 156 (1980). See also *City of Boerne v. Flores*, 117 S. Ct. 2157, 2167 (1997) (noting that after *Katzenbach v. Morgan*, "the Court continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination" and citing cases).

⁴²⁶ See generally LOWENSTEIN, *supra* note 7, at 30–32.

practice, state politics, and civil rights groups. It has even continuously refused to find that compliance with the centerpiece of the national policy, the Voting Rights Act, is a compelling government interest.⁴²⁷ Although the Court was perhaps correct in finding the *Shaw* claim to be justiciable, thus reserving the right to speak when necessary, its holding that the claim was subject to the strictest of strict scrutiny was not a constructive way to participate in democratic governance. The Court inserted itself into the *melée* not as a team player but as a referee, who instinctively yells "out of bounds" without regard to the consequences to the players or to the outcome of the game.⁴²⁸ Through rigid adherence to the principle of color blindness (but without a commitment to fair and effective representation), the Court has shown that it takes seriously its role as proclaimer of the law, but not its role as participant in the democratic process. The Court's attitude toward the other participants is not "let's see how we can collectively enhance minority voting rights" or even "let's try to enhance everyone's electoral participation" but "go back to the drawing board!"⁴²⁹ But the simple elegance of the singular ideal of color blindness has distracted the Court. As Farber explains, "a Court obsessed with theoretical consistency might be less able to play a useful role in the practical tasks of democratic government."⁴³⁰ Justice Stevens has noted in another separation of powers context that there is an alternative: "The three branches must cooperate in order to govern. We should regard favorably, rather than with suspicious hostility" legislation designed to promote good government.⁴³¹

⁴²⁷ *Abrams*, 117 S. Ct. at 1936.

⁴²⁸ And to this day, the Court continues to assert its bright line rules without regard to political consequences. See *High Court Backs Ruling on North Carolina Race*, *supra* note 217.

⁴²⁹ As the *Shaw* cases have progressed, the Court's hostility to the Department of Justice in particular has become increasingly palpable. In the most recent case in the series, the Court repeatedly refers to Justice Department "pressure," "threats," "distort[ion]," and "interference" and says it required "concessions" and "nothing less than abject surrender." *Abrams*, 117 S. Ct. at 1931, 1933, 1935. The Court discounts the significance of the Department's proposed plan because it had submitted the plan after the close of evidence "and in consequence its demographer could not be cross-examined on the question of racial motivation [although] the District Court recognized its apparent racial impetus." *Id.* at 1935. This dramatically constrains the Department of Justice which must screen districting plans for infringement of minority voting rights, but must somehow do so without "racial impetus."

⁴³⁰ Farber, *supra* note 218, at 1341. A proponent of the standard view might reply that the principle of color-blindness is so entrenched in the Constitution that the Court is justified in appealing to that principle without regard to its consequences in a particular situation. This argument, however, is based on the highly debatable premise that color blindness is constitutionally compelled where political power is being shared.

⁴³¹ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 266 (1995) (Stevens, J., dissenting) (referring

This distinction—between a court as referee and a court as player—is important in pragmatist thinking and illustrates a critical difference between the American and the Canadian attitudes.⁴³² The difference is important for a variety of reasons. First, a court that views its primary role as expounding a Constitution for its own sake (the Court's or the Constitution's) may be more likely to be seduced by elegant theories that look good on paper but that do not necessarily work.⁴³³ By contrast, a court that sees itself as part of the process of democratic governance is to that extent more likely to issue a more realistic and, therefore, more responsible opinion because of its awareness of the purpose and consequences of its decision. The pragmatist court recognizes that its judgments are not just reflective of the broader society but constitutive of it as well.⁴³⁴ Therefore, if the society values equality of voting power (i.e., non-dilution) and minority representation, then a pragmatist court would have to consider the likely impact of its proposed rule on both of these values. That compromise may be inelegant is no reason to abjure it.

to "legislation that enables the judiciary to overcome impediments to the performance of its mission of administering justice impartially").

⁴³² One might argue that the requirement that a constitutional court "play a useful role in the practical tasks of democratic government" is a kind of foundationalist value which the anti-foundationalist pragmatist should reject. The pragmatist, however, would accept the value not because it is foundationalist, but because it is good.

A distinct argument could be made that the "useful role" that our Court should play is precisely that of referee: We did not put these people on the Court for life so that they could side with the Government, but so that they could protect us from the Government. If the Incredible Hulk is on the other team, you want a neutral referee, not the Hulk's ally. For the player role to seem equitable, one must accept the possibility of a less adversarial relationship between the polity and the government which of course is one of the hallmarks of the American system of judicial review as distinct from the English system of Parliamentary sovereignty. But the argument made in this article is confined by the context of the *Shaw* claims, and in this context, every government institution save the Court is trying to empower, not oppress, the discrete and insular minority. The Court-as-bulwark is less necessary here than the Court-as-participant.

⁴³³ See Grey, *Holmes*, *supra* note 411, at 814–15. (noting the Pragmatist's willingness to abjure elegant theories in favor of more "useful" explanations). This is, of course, particularly apt in the case of gerrymandering, where the Court has given primacy to aesthetic (i.e., elegant) considerations of compactness and contiguity without explaining what "cash value" these have. See Farber, *supra* note 218, at 1341 for discussion of the term "cash value" in pragmatist thought.

It is on this ground that, according to Thomas Grey, Justice Holmes "defended the appointment of politicians as judges, which had produced Marshall, Story, Taney, and Chase, along with his contemporaries Taft and White. He feared that 'men . . . of the abstract type only exceptionally prove wise in practical affairs,'" Grey, *Holmes*, *supra* note 411, at 848. Indeed, our nominations process has been criticized for relying too heavily on sitting judges with little extra-judicial experience. Sandra Day O'Connor is the only sitting justice who was a state legislator during a reapportionment (in 1970). Kousser, *supra* note 352, at 642.

⁴³⁴ "Legal pragmatism thus understood is receptive to the classical republican conception both

Second, a court's failure to ensure that its opinions are constructive may be self-defeating. As Farber has argued, an opinion or judicial philosophy anchored to a single overriding value is unlikely to benefit from community support because it will only appeal to one group rather than to a coalition.⁴³⁵ Ultimately, it is likely to be less stable should that single reed weaken than an opinion grounded in a collection of overlapping values.⁴³⁶ As Justice Souter has explained in discussing the judicial role in substantive due process analysis, "[i]t is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise."⁴³⁷

Third, a pragmatic court is likely to issue a more flexible and, therefore, more workable rule. This too is built into Section 1 of the Canadian Charter which compels a balanced approach, recognizing that, for legal rules to work in human society, they must be flexible in accommodating the dual claims of order and freedom. This can be contrasted with the U.S. Constitution which does not explicitly mandate flexibility, or any other particular rule of construction; rather, because some provisions incorporate compromise (reasonable searches and seizures, due process) and others seem to require absolutism (no law abridging freedom of speech or establishing a religion), it seems to give the Court the choice of interpreting a clause as an absolute or

of law as a constitutive element in political life, and of politics itself as an activity of intrinsic as well as instrumental value. Together, these ideas suggest a model of lawyer as republican civil servant rather than as social engineer." Grey, *Holmes*, *supra* note 411, at 861. Again, the pragmatist is inside, not outside, the system.

⁴³⁵ "[A] judicial decision may be stronger if it does not rely exclusively on [a single source of normative support] because other widely shared values may have more decisive bearing in cases in which the implications of [that source] are ambiguous." Farber, *supra* note 218, at 1343. For instance, although color blindness may be the most important value in the allocation of drinking fountains or public swimming pools, other values may outweigh that interest in other contexts, such as the value of educational or economic opportunity in the context of educational and contracting allocation, or the value of fair and effective representation in the context of electoral districts.

Pragmatism necessarily entails balancing multiple values, insofar as it eschews foundationalism which embraces a single value. Under the Canadian Charter, Section 1 seems to require some form of balancing since it entreats the courts to reconcile in some constructive fashion the particular substantive rights at issue and the reasonable needs of a "free and democratic society." Section 1, however, does not direct the court as to which form of balancing is required (straight, weighted, and if weighted, how much and of what factors).

⁴³⁶ Indeed, although it is too early to predict ultimate defeat, it would not be surprising if a single change in Court membership upset the entire *Shaw* structure; all it would take is one additional judge who took a pragmatic approach to effective representation rather than embracing the abstract ideal of color blindness as a remedy for race-conscious districting. See *infra* notes 501-504 and accompanying text. The current majority's theory goes no deeper than that.

⁴³⁷ *Glucksberg*, 117 S. Ct. at 2275 (Souter, J., concurring in the judgment).

as requiring flexible accommodation. Indeed, the Court's adoption of a strict scrutiny/rational basis scheme for individual rights seems to recognize the need for balancing social values, although the extremism of both these points along the continuum suggests the Court's reluctance to actually balance constitutional commands. There is just enough leeway in these standards—enough possibility for the unexpected result—that the Court can comfortably say it is balancing without doing so to any serious degree. The Court's failure to find that the North Carolina and Texas plans survived strict scrutiny indicates that the standard is, if not fatal, at least very very serious.⁴³⁸ Thus, in our system, the Court can choose whether or not to craft rules that promote a free and democratic society.

A final salient difference between a referee and a player is that the player's actions are aimed at affecting the outcome of the game, whereas the referee is not supposed to care who wins and who loses as long as everyone plays by the rules. The Court as referee may sound both desirable and feasible, but it is neither. In the context of a national policy such as eradicating the effects of slavery and discrimination, it is not at all clear that the Court should be agnostic as to results. If every social institution we have (including the Constitution in the Reconstruction Amendments) speaks with a uniform voice about the desirability of a particular result, there is no particular reason for the Court to exempt itself from this chorus. Furthermore, at this point in our postmodern consciousness, it is not even clear that a Court could be truly agnostic as to results. The Court is always aware of the consequences of its ruling, whether it states so expressly or not; these are argued extensively in briefs of both parties and amici, and if a majority of justices does not understand them, dissenters, especially in the *Shaw* cases, are always on hand to explain the consequences. It strains credulity to assert that the justices who voted in the majority in the *Shaw* cases did not know or care about the political ramifications of their decisions (but that the dissenters did). So the difference between the American and the Canadian approach is not that the latter is aware of the consequences of its ruling, but that it acknowledges its awareness and incorporates into its analysis the likely consequences of its ruling.⁴³⁹ By being aware and incorporating this awareness into the

⁴³⁸ *Bush*, 116 S. Ct. 1941; *Shaw II*, 116 S. Ct. 1894.

⁴³⁹ See Schauer, *supra* note 343, at 511–12 (explaining that the gist of the criticism of *Lochner* v. *New York* “inheres in its denial of the political, moral, social, and economic choices involved in the decision, and indeed in its denial that there was any choice at all We condemn *Lochner*

analysis, the Canadian Court situates itself inside the political process. The principal manifestations of this awareness are the Court's attention to the contextuality and the instrumentality of its interpretation.

2. The Contextuality of Canadian Pragmatism

In common law terms, contextuality means situating the law in the traditions and experiences of the culture. Translated into constitutional terms, it means recognizing that the Constitution or Charter embodies the society's traditions, experiences, and shared expectations—"the story of a nation's development through many centuries."⁴⁴⁰ Whether the document is old or new, a constitutional court that pays attention to the customs and expectations that the document defines keeps itself inside the system by furthering the document's broad purposes.⁴⁴¹ The Canadian Court's first step was to establish that the purpose of Section 3 of the Charter was to ensure "'effective representation' [in which e]ach citizen is entitled to be *represented* in government."⁴⁴² The specific right to vote is an instance of effective representation which is valued because of the importance of each citizen being represented in government. The Court read the Charter provision as the concretization of a broader right rooted in a widely shared political value and, thus, upheld the Saskatchewan districting plan because it did not interfere with that underlying value and in fact promoted it.

The bright line of equipopulosity is also justifiable because it emanates from the broad purposes of the Constitution which themselves are grounded in generally accepted political theory. Whether the au-

as formalistic not because it involves a choice, but because it attempts to describe this choice as compulsion." While the *Lochner* case dramatically illustrates this point, it could be made equally of more recent Supreme Court jurisprudence.

⁴⁴⁰ Grey, *Holmes*, *supra* note 411, at 806 (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (M. Howe ed., 1963) (originally published 1881)). This is particularly true in Canada, where the Charter was adopted not in the nation's infancy but after the Nation had developed and matured for more than 100 years. Thus, one central difference between the Canadian Charter and the U.S. Constitution is that while the Constitution originally embodied what America hoped to become—its national ideals—the Charter embodies what Canada has become. Therefore, one challenge that the American Court faces is to understand the Constitution as standing not just for what the nation aspired to 200 years ago, but for what it has become since then.

⁴⁴¹ *Ref. re: EBCA*, 81 D.L.R. at 34 ("The question for resolution on this appeal can be summed up in one sentence: to what extent, if at all, does the right to vote enshrined in the Charter permit deviation from the 'one person-one vote' rule? The answer to this question turns on what one sees as the purpose of Section 3.").

⁴⁴² *Id.* at 35.

thority is Article I or the Equal Protection Clause, it is clear that a rule that promotes fair and effective representation is consistent with the most deeply embedded postulates of the governmental system the Constitution creates. As discussed above, both *Wesberry* and *Reynolds* equated equipopulosity with fair and effective representation—a conclusion that was consistent with the facts at the time.

The *Shaw* cases emerge neither from a purposeful interpretation of the Equal Protection Clause, nor from any valued theoretical foundation.⁴⁴³ The Equal Protection Clause (like the Australian conception of representative democracy) does not manifest a single incontestible purpose on which there is any significant degree of consensus (such as the support for the right of each citizen to be represented in government). Certainly, the proposition that its purpose is to ensure governmental color blindness is possible but debatable: much of the evidence, as well as the Court's precedents, suggests otherwise.⁴⁴⁴ At most, color blindness is consistent with some constitutional values, but impairs others. Color blindness is an abstract principle not rooted in any core value; its abstractness makes it both plausible and insufficient. A pragmatist would find that the American Court's attraction to this single principle which at best oversimplifies history and at worst distorts it, to be fatal.

The American Court has been harshly criticized for its commitment to a philosophical ideal at the expense of historical reality; one of the first and most articulate of such criticisms was an editorial in the *New York Times* published two days after the first *Shaw* decision was rendered:

[Justice O'Connor's] opinion wraps the legal assault on the Voting Rights Act in noble language, proclaiming "the goal of a political system in which race no longer matters." Thus she steps over the fact that we have a political history—and a

⁴⁴³ By holding that the *Shaw* claim is "analytically distinct" from a voting rights claim, the Court divests itself of the need to measure the plaintiffs' claim against the purposes of Article I's guarantee of the right to vote for federal representatives. But doing so also precludes consideration of the state's interest in its redistricting plan as a means of vindicating other voters' Article I rights.

⁴⁴⁴ It is simply too late in the day to argue, for instance, that school segregation was unconstitutional simply because it violated the neutrality principle. For contrasting views of the neutrality issue in *Brown v. Board of Education*, see Blumstein, *supra* note 97, at 528–30; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Mark V. Tushnet, *Following the Rules Laid Down: a Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

body of franchise law—in which race has always mattered. Indeed, since the Civil War, the struggle to achieve a healthy race consciousness in our politics has been an ennobling part of our system.

Only a willful disregard of that history would allow a majority opinion that says the equal protection clause of the 14th Amendment passed to extend political rights to blacks—must be read to protect a white majority with no history of discrimination.⁴⁴⁵

This is of course an indictment not just of the *Shaw* claims, but of the Court's entire affirmative action jurisprudence, although it applies with particular force to voting rights because of their centrality to the political process. Stanley Fish calls this fiction "'moral algebra,' a game that is played by fixing on an abstract quality and declaring all practices that display or fail to display that quality equivalent."⁴⁴⁶ The *Shaw* Court plays the game by suggesting that all race consciousness is equally evocative of apartheid and therefore equally suspect, whether the purpose or effect is to fence a minority out or to help bring the previously excluded minority in. In a country where racism has been practiced primarily in one direction with burdens borne primarily by one race, sanctioning all race consciousness equally can only be done without any reference whatsoever to the country's history or to the history of the Fourteenth Amendment or the more recent history of the federal protection for minority voting rights.

Idealism as practiced in the *Shaw* cases—without attention to the past or to the purpose of a constitutional clause—frees the Court to play moral algebra; without historical or precedential constraints any interpretation is permissible. You think the ideal of the Equal Protection Clause is color blindness; I think it is equal results. Who is to say who is right? If the purpose of the provision or the document as a whole does not identify the goal, what does? The Court's refusal to feel bound by traditional constraints is consistent with its commitment to the ideology of Constitution-as-scripture. According to Michael Perry, "the constitutional text conceived as the symbolization of the aspirations of the tradition is significantly less constraining than the text conceived as simply the linguistic embodiment of the various concrete

⁴⁴⁵ Editorial, *A Dinosaur Ruling*, N.Y. TIMES, June 30, 1993, at A14, *quoted in* STANLEY E. FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO ix (1993).

⁴⁴⁶ *Id.*

political-moral judgments constitutionalized by the ratifiers.”⁴⁴⁷ The reason for this is simply that the “grand and cloudy” constitutional commands can mean most anything if taken out of context or, rather, if never put into context. Without reference to the purpose(s) of the clause or to the effect of the challenged action, the Court is free to reach almost any result it wants. The Equal Protection Clause can mean that affirmative action is constitutionally prohibited or that it is constitutionally compelled. The First Amendment can mean that campaign finance reform is constitutionally prohibited or required. We are left with mere idealistic slogans: there should be a marketplace of ideas; there should be no inequality among similarly situated parties. On the other hand, viewing the Constitution as having a pragmatic as well as a scriptural component requires some analysis by the Court of how the challenged act matches the clause’s purpose(s) or what its real world effect(s) will be. We may disagree with the Court’s analysis, but at least we would expect some analysis beyond: this is “unsettling” to a majority of us, therefore it is unconstitutional.⁴⁴⁸

The Canadian cases demonstrate the truth of this proposition. To the Canadian Supreme Court, pragmatism means neither ignoring nor being railroaded by the past, but being guided by it. As the Canadian Court said, “the past plays a critical but non-exclusive role The tree is rooted in past and present institutions, but must be capable of growth to meet the future.”⁴⁴⁹ The common experience and shared purpose of the Charter provides the guidelines for constitutional interpretation and at least limits the possibilities. If this approach were applied to the American experience, a reading of the clause that ensured fair and effective representation of people of color would be consistent with the purposes (broadly conceived) of the clause, whereas a reading that reduced representation of people of color would not be. Because pragmatism requires attention to contextual factors such as the purpose of the clause, the approach to constitutional interpretation most often criticized as being unconstraining turns out to be more constraining than the approach the Court has

⁴⁴⁷ Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551, 566 (1985). Perry is quick to point out that this does not mean that this approach is not at all constraining but only that it is less constraining than some other alternatives.

⁴⁴⁸ Or, as John Hart Ely has put it, “We like Rawls. You like Nozick. We win, 6–3. Statute invalidated.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 58 (1980).

⁴⁴⁹ *Ref. re: EBCA*, 81 D.L.R. at 33.

actually chosen to use which permits ahistoricity and acontextualization. The Court standing at the crossroads of where the law has been and where it is going must be willing to acknowledge the sources of the law.

3. The Instrumentality of Canadian Pragmatism

In Thomas Grey's topology, applying pragmatist tenets to law means thinking about law in its instrumental sense as well. This means selecting a rule that is capable of achieving "socially desired ends."⁴⁵⁰ Here, again, the form of the rule is inconsequential: a bright line can work as well as a collection of independent factors, as the reapportionment and redistricting cases make clear.

To assess the instrumental value of its rule, the Canadian Court evaluated a variety of factors. It heeded the "admonition that courts must be sensitive to practical considerations in interpreting Charter rights."⁴⁵¹ Relying in part on Justice Frankfurter's concern with the "practical living facts," the Court explained that

effective representation and good government in this country compel those charged with setting electoral boundaries sometimes to take into account factors other than voter parity, such as geography and community interests. The problems of representing vast, sparsely populated territories, for example, may dictate somewhat lower voter populations in these districts; to insist on voter parity might deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from their representatives in their "ombudsman" role. This is only one of a number of factors which may necessitate deviation from the "one person—one vote" rule in the interests of effective representation.⁴⁵²

This approach recognizes that a legislature must have room in which to weigh competing values. This is not so much a matter of separation of powers or federalism, as the Americans might conceive it, as of pragmatism: there are simply too many competing factors that interrelate in complicated ways for a court to be able to establish a single

⁴⁵⁰ Grey, *Holmes*, *supra* note 411, at 805. See also Lipkin, *Constitutional Revolutions*, *supra* note 411, at 106 ("Pragmatist virtues are generally oriented toward the future, including a concern with flexibility, coordination, and doing what is best for the community").

⁴⁵¹ *Ref. re: EBCA*, 81 D.L.R. at 38.

⁴⁵² *Id.*

benchmark and expect the legislature to be able to achieve it. This may explain the Court's recognition, especially in the context of voting rights, of "practical considerations" and "the practical living facts."⁴⁵³ The Court's review of legislative action yields not simply a command to try again to reach some abstract ideal, but a recognition of the difficulty of reconciling diverse interests and a grant of the latitude the legislature needs in which to experiment.

Pragmatism's instrumental aspect also helps to explain why the equi-populosity requirement has worked, even though, by its very rigidity, it appears to share some formalist traits. The one person, one vote rule worked not because it was enforced mercilessly (it was not with respect to the states) or even consistently (that did not happen either since state and federal apportionment operate under different standards). It worked because it came with its own instruction manual. The Court did not merely tell the legislatures to achieve some abstract notion of equality, but told them how to achieve it: by apportioning an equal number of people in each district. The Court created a rule that could be easily implemented in the real world of political districting.⁴⁵⁴ The Court's inconsistency in enforcing the rule—rigidly in some instances, flexibly in others—does not detract from its essentially pragmatic quality even as originally articulated: whatever the districts look like, whoever they are intended to benefit, give them the same population. This was a rule that could work: legislators knew how to follow it and they knew when they were violating it. It did not solve all the problems, but it was successful on its own terms.

The color blindness rule, by contrast, is bound to fail because it does not function in the real world. It is neither workable nor effective and it therefore has negligible instrumental value. It is not likely to be workable because it is simply impossible to implement: legislators cannot *not know* the race of voters. As the first *Shaw* Court recognized, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."⁴⁵⁵ How is a legislator to know when permissible race awareness turns into impermissible race consciousness? Moreover, to the extent that racial data is, as an empiri-

⁴⁵³ *Id.* at 33.

⁴⁵⁴ In fact, as noted above, one criticism of the rule is that it is so easy to implement that it constitutes no constraint at all.

⁴⁵⁵ *Shaw I*, 509 U.S. at 646.

cal matter, useful in predicting how people will vote, line drawers will want to use it.⁴⁵⁶ The computer system used by districters in Texas "contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of [election precincts]."⁴⁵⁷ A requirement of legislative color blindness is essentially an order to computer programmers to exclude racial data, or at least to provide it in no more detail than they provide other data. But that is not a particularly meaningful rule. Professor Kousser has commented that "[s]ince they will always have the information and since the knowledge may be crucial to their political careers and policy goals, it would be naïve to assume that redistricters will avoid using it and pointless to spend time and effort proving that they do."⁴⁵⁸ Prohibiting legislators from being race-conscious (or, more precisely, from using race as a predominant consideration) is as futile as asking someone to ignore the elephant in the room: so long as race is relevant and racial data is available, a legislator who is motivated by the desire either to be reelected or to secure fair and effective representation of minorities, or something else, cannot be asked to ignore it, nor should she be expected to.

Nor can race be extricated from other considerations on the basis of which legislators act when they district. As Justice Souter pointed out in his thoughtful dissent in *Bush*, "many of these traditional districting principles cannot be applied without taking race into account and are thus, as a practical matter, inseparable from the supposedly illegitimate racial considerations."⁴⁵⁹ Indeed, the strong correlation between voters of color and democratic voters makes it difficult to determine which trait is a proxy for which.⁴⁶⁰

Nor it is clear that permitting legislators to recognize all communities except those defined by race is even appropriate. Again, Justice Souter has argued that:

⁴⁵⁶ There is no question that race is a useful predictor of electoral outcome, both because of racial bloc voting and because people of color tend to vote overwhelmingly democratic. See *Bush*, 116 S. Ct. at 1956 (97% of Dallas blacks vote Democrat); see also Kousser, *supra* note 352, at 688 n.264 (94% of black registrants in North Carolina were Democrats); Conference, *supra* note 88, at 33 (discussing political utility of racial data).

⁴⁵⁷ *Bush*, 116 S. Ct. at 1953.

⁴⁵⁸ Kousser, *supra* note 352, at 644.

⁴⁵⁹ *Bush*, 116 S. Ct. at 2005 (Souter, J., dissenting) (citations omitted).

⁴⁶⁰ See Kousser, *supra* note 352, at 640 n.61 (citing *Whitcomb*, 403 U.S. 124, for an example of the Court's confusion over whether people were put in districts because of their race or their political affiliation).

racial groups, like all other groups, play a real and legitimate role in political decisionmaking. It involves nothing more than an acknowledgment of the reality that our concepts of common interest, geography, and personal allegiances are in many places simply too bound up with race to deny some room for a theory of representative democracy allowing for the consideration of racially conceived interests. A majority of the Court has never disagreed in principle with this position.⁴⁶¹

The Court has previously endorsed the notion that there may be a set of values that are more likely to be shared by people of the same race, especially given the common culture and common historical experiences.⁴⁶² Indeed, the only explanation for consistent, identifiable racial bloc voting is that race (or things inextricable bound to race) matter to people when they make electoral decisions. The *Shaw* Court has not addressed these issues, saying simply that it is "offensive and demeaning [for the State to assume] that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"⁴⁶³ Again, the criticism is not that the Court did not accept the relevance of racially defined communities of interest but that it did not even try. There is no attempt to distinguish between valid generalizations and archaic and overbroad stereotypes, even though abundant evidence exists, much of which was presented to the lower courts. The Court's refusal to attend to these questions reveals its indifference to whether its new rule works in the real world of electoral politics. The Court insists on its formalistic absolutism without a convincing justification.

Even conceptually, color blindness is not a workable standard in the districting context. Justice Kennedy equates color blindness with neu-

⁴⁶¹ *Bush*, 116 S. Ct. at 2001 (Souter, J., dissenting).

⁴⁶² See Conference, *supra* note 88, at 52 referring to *Hunter v. Erickson*, 393 U.S. 385 (1969) as recognizing that people of color tend to be more interested in certain types of social legislation than whites. See also Karlan, *Still Hazy*, *supra* note 133, at 303 n.21 (noting inconsistency between focus on racial bloc voting in previous cases and *Shaw*'s refusal to recognize distinctive minority interests). For general discussion of how well the North Carolina district functioned by various quantifiable standards, see Conference, *supra* note 88, at 35-40; Parker, *A Critique*, *supra* note 347, at 42.

⁴⁶³ *Miller*, 515 U.S. at 912 (quoting *Shaw I*, 509 U.S. at 647, and citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)). But see Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2141 (1989), on how offensive it is to be told what is offensive and demeaning.

trality,⁴⁶⁴ but no legislator in the real world engages in neutral districting. Outside the context of so-called "racial" gerrymandering (where the Court is not blinded by race), it has recognized as much:

The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. *District lines are rarely neutral phenomena.* They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.⁴⁶⁵

Furthermore, labelling the reality as offensive or demeaning does not alter the reality or justify ignoring it. The Court's rejection of generalizations, or essentialism, is particularly inappropriate in the context of redistricting which is nothing but essentialism: districters make assumptions about how people will vote based on certain traits. This is true whether the relevant traits are race, area of residence, religious affiliation, or anything else. See Aleinikoff & Issacharoff, *supra* note 3, at 615-16 (arguing that race-as-a-factor might be less offensive to antiessentialists than the dispositive use of race). In districting, however, race is not dispositive but useful only insofar as it correlates with other factors, such as inclination to vote Democratic, or inclination to vote for similar sets of issues or for similar candidates. See generally Weale, *supra* note 88, at 457 (discussing assumptions about voting patterns based on group traits).

⁴⁶⁴ Compare *Miller*, 515 U.S. at 904 (The "central mandate [of the Equal Protection Clause] is racial neutrality in governmental decisionmaking") with *id.* at 915 ("race-based decisionmaking is inherently suspect"). See also *Abrams*, 117 S. Ct. at 1934 (court may not allow racial considerations to predominate over "traditional and neutral districting principles"). Previous opinions had referred to these only as "traditional districting principles." See, e.g., *Bush*, 116 S. Ct. at 1952; *Miller*, 515 U.S. at 919-20; *Shaw I*, 509 U.S. at 642, 647.

⁴⁶⁵ *Bandemer*, 478 U.S. at 128-29 (plurality opinion) (emphasis added). See also *id.* at 128-29 n.10 quoting:

Robert G. Dixon, Jr., one of the foremost scholars of reapportionment, who observed: [¶] "[Whether] or not nonpopulation factors are expressly taken into account in shaping political districts, they are inevitably ever-present and operative. They influence all election outcomes in all sets of districts. The key concept to grasp is that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place."

Bandemer, 478 U.S. at 128-29 n.10 (quoting Robert G. Dixon, Jr., *Fair Criteria and Procedures for*

No one knows what a non-gerrymandered plan would look like. States do not come with *a priori* electoral maps. No politician has ever tried to draw one. Without a baseline, it is impossible to determine what a non-gerrymandered plan would look like.⁴⁶⁶ The Court's response that traditional districting principles, such as incumbency protection, compactness, and contiguity, are the neutral baseline from which plans should be drawn is unsatisfactory because these baselines are seldom neutral. For instance, the disproportionately large number of white incumbents means that incumbency protection benefits whites over people of color. Current residential dispersal of minorities may mean that compactness also favors republicans and whites.⁴⁶⁷ Thus, traditional districting principles (without corrective attention to race) are not necessarily neutral.

The color blindness rule fails the instrumentality test not only because it is not workable, but also because it is not particularly effective. To judge effectiveness, it is necessary to distinguish between ends and means: a rule is effective only insofar as it achieves an identified purpose. Unlike the equipopulosity rule, which is one effective means to achieve the goal of equality of voting power, color blindness does double duty as a mean and an end. The Court says that the ultimate goal is a political system in which race no longer matters—that is, color blindness—and the best way to achieve the goal is color blindness.⁴⁶⁸ But the evidence suggests that the rule may not be self-fulfilling and may even be counterproductive. It has been shown that, due to residential patterns of racial majorities and minorities, districting done without attention to race (by disinterested political scientists, not leg-

Establishing Legislative Districts, in REPRESENTATION AND REDISTRICTING ISSUES 7–8 (B. Grofman et al. eds., 1982)). Equipopulosity precludes completely neutral districting which would be accomplished by drawing a grid on the state. Since districters have to think about the number of people in each district, they have to consider which people they will include. If they need an extra 30 or 30,000 to meet the equipopulosity requirement, should they go to the north or the west? Once discretion is required, neutrality is impossible.

⁴⁶⁶ See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 41–67 (1993), for discussion of the arbitrariness of baseline selection. In districting of course, there is no such thing as “status quo neutrality.” See also *Abrams*, 117 S. Ct. at 1925 (trying to identify the proper baseline against which to measure the judicial districting plan).

⁴⁶⁷ “Although there has never been a good empirical study on the subject, Republican and Democratic redistricting experts agree that because the most loyal Democrats (blacks, Hispanics, Jews, and lower income voters in general) seem to be more geographically segregated than Republican voters are, compact districts would tend to minimize the number of seats Democrats win.” Kousser, *supra* note 352, at 637 (citing Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1 (1985)).

⁴⁶⁸ *Shaw I*, 509 U.S. at 657.

islators) yields only one-half of the minority-majority districts that race-conscious districting yields;⁴⁶⁹ in other words, with race-blind districting, half as many minorities have the opportunity to elect legislators of their choice as with race-conscious districting. The evidence is uncontroverted that the only times people of color have been elected to Congress in significant numbers have been when the government has made particular efforts to achieve that result such as during Reconstruction and in the 1990s round of redistricting; North Carolina, for instance, did not elect any black person to Congress between 1901 and 1993.⁴⁷⁰ There is also evidence that integrated minority opportunity districts actually dampen persistent racial bloc voting.⁴⁷¹ Thus, districting with attention to race yields more minority-preferred candidates who, as incumbents, break down racial bloc voting so that race is less likely to matter. Race-conscious means, then, are more likely than race-blind means to result in actual race-blindness as an end. Simply put, race-conscious remedies may be needed to cure race-conscious voting.⁴⁷² Or, as Pamela Karlan has written, in a color blind society, no one would notice that the legislature is white.⁴⁷³

⁴⁶⁹ Conference, *supra* note 88, at 78.

⁴⁷⁰ See Higginbotham et al., *supra* note 338, at 1648–49 (Appendix A) (showing that the only 2 periods during which more than 5 blacks served in either house of Congress were during Reconstruction (1871–1875) and after 1965, and that during most of the years in between Congress included one (1929–1945) or no black members (1901–1929)); see also *Abrams*, 117 S. Ct. at 1945 (Breyer, J., dissenting) (noting that “no African American had represented Georgia in Congress since Reconstruction, when Congressman Jefferson Franklin Long briefly represented the State.”) (citation omitted).

⁴⁷¹ Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 Miss. L.J. 271, 288 (1995); see also Bernard Grofman & Lisa Handley, *1990's Issues in Voting Rights*, 65 Miss. L.J. 205, 259 (1995) (showing that the white support for black Congressman Mike Espy grew with each election); see also Parker, *A Critique*, *supra* note 347, at 19–20 (“creation of majority-minority districts and the subsequent election of minority candidates reduces white fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society, and promotes a political system in which race does not matter as much as it did before.”). Indeed, Ruth Shaw, the white named plaintiff in the original case, voted for the black candidate for Congress in the 1992 election. Conference, *supra* note 88, at 51. This helps to explain the reelection of black members of Congress who were first elected from minority opportunity districts that were invalidated in the Shaw cases. See *Abrams*, 117 S. Ct. at 1936 (noting the reelection of Cynthia McKinney with 23% of the white vote); see also Neil A. Lewis, *Ruling Ended Use of Race to Redraw Districts*, N.Y. TIMES, Feb. 27, 1997, at B2 (“five black members of Congress whose districts were redrawn to eliminate black voting majorities were re-elected easily”). This may say more about the value of incumbency than the overnight disappearance of racial bloc voting since non-incumbent blacks did not enjoy the same electoral success.

⁴⁷² Grofman & Handley, *supra* note 471, at 269. (“In a world of race-conscious voting, race-conscious remedies are needed”).

⁴⁷³ Conference, *supra* note 88, at 75. There is a countervailing argument that it is better for

IV. A PRAGMATIC APPROACH TO REDISTRICTING

A. *Pragmatism's Normative Appeal*

A jurisprudential choice can be selected on the basis of any number of criteria. At a minimum, a theory must achieve its own stated objectives. Pragmatism surely withstands scrutiny under this standard. As the Canadian *EBCA* case illustrates, a court can write an opinion that is true to pragmatist values in that it considers a range of competing interests, is constrained by the society's values, traditions, and needs, and substantively is both contextually and instrumentally coherent. But a choice may be even more attractive if it also achieves what the competing theories set out to do. This section explores pragmatism's appeal by measuring it against one approach that shares many of pragmatism's values (Dworkin's integrity theory), and one that shares few (Scalia's formalism). I conclude that, in the context of redistricting cases, pragmatism achieves not just its own stated objectives but also those of alternative jurisprudential attitudes at least as well as those alternatives do and better than idealism or textualism do.

Ronald Dworkin argues that an interpretive theory must pass the two-dimensional test of fit and justification in order to be legitimate.⁴⁷⁴ Dworkin explains the "fit" dimension by equating the process of adju-

blacks to be a meaningful constituency (if not a majority) in several districts to influence several representatives than to be packed into one or two districts where they can count on one or two representatives' responsiveness but have no clout whatsoever with the majority of representatives. See, e.g., Parker, *A Critique*, *supra* note 347, at 55 (discussing the debatable value of "existing racially mixed districts which repeatedly elected liberal white Democrats who supported the minority legislative agenda"; Parker concludes that the challenged districts did not result in the defeat of such liberal Democrats). For instance, one of the reasons for Judge Bork's failure to win confirmation from the United States Senate was that even though most Southern Senators were white and most of their constituents were white, many had sufficient numbers of blacks in their states to whom they felt responsible. See generally MICHAEL PERTSCHUK & WENDY SCHAEZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* (1989). The existence of a potential alternative to minority-majority districts shows not that the Court was correct in invalidating them but that complex political issues deserve legislative deliberation rather than judicial fiat.

⁴⁷⁴ There is much debate as to whether Dworkin is or is not a pragmatist. See, e.g., Smith, *supra* note 412, at 410 (referring to Dworkin as an unconfessed pragmatist). This article uses Dworkin's theory as a benchmark because, to the extent that he is not a pragmatist, his theory offers an important contrast to pragmatism insofar as he rejects pragmatism; to the extent that he is a pragmatist, and his integrity theory is a pragmatist theory, his approach to law's justifications elaborates on the pragmatic stance that this article endorses.

Since no recent voting rights case adopts Dworkin's theory, this article does not argue that law's integrity would not work for such cases; it is used rather to show how pragmatism achieves integrity's objectives.

dication with a chain novel. He explains that a judge "cannot adopt any interpretation, however complex, if he believes that no single author who sets out to write a novel with the various readings of character, plot, theme, and point that interpretation describes could have written substantially the text he has been given."⁴⁷⁵ The Canadian Court has shown that the pragmatist attitude is capable of fitting the constitutional text in that it requires that judicial decisions be consistent with "the values and principles essential to a free and democratic society [such as] respect for [inherent human dignity,] commitment to social justice and equality, accommodation of a wide variety of beliefs, . . . and faith in the social and political institutions"⁴⁷⁶ By requiring a court to consider the contextuality of decisions—where the law has been, what the purpose(s) of the constitutional command is or are, what its values are—a pragmatist court ensures that its interpretation of a constitutional provision fits the overall story being told by the constitutional text. The Australian version of textualism, as practiced in cases like *McKinlay* and *McGinty*, probably also meets the standard for fit. By relying on the plainest possible meaning of the text, the Court is limiting the possible interpretations to those that are consistent with the constitutional language. Idealism, however, does not require any particular fit but relies instead on the judge's normative value system defined by bright lines.⁴⁷⁷ Whereas an integrity judge choosing color blindness would need to show its consistency with what some "author" in the "chain" would have written, the idealist judge is not so burdened.

The second dimension of the Dworkinian legitimacy test is justification, which refines the "fit" requirement when that requirement produces more than one possible result. Justification requires the decision-maker to "judge which of all these eligible readings makes the work in progress best, all things considered."⁴⁷⁸ This dimension comprises two

⁴⁷⁵ RONALD DWORKIN, *LAW'S EMPIRE* 230 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*].

⁴⁷⁶ *Ref. re: EBCA*, 81 D.L.R. at 33 (internal quotations omitted). Indeed, the living tree metaphor is the arboreal analog to the literary chain novel. In both cases, the image is of building upon some developing body in an organic way.

⁴⁷⁷ Obviously, no judge who is a part of his or her political culture or interpretive community decides a case in a "fit" vacuum and in this sense the normative values of an idealist judge are likely to "fit" the constitutional interpretive tradition of which he or she is a part. However, idealism does not make fit an independent requirement; in fact, the abstract element of idealism seems to reject the value of fit.

⁴⁷⁸ DWORKIN, *LAW'S EMPIRE*, *supra* note 475, at 231; see also *Boerne*, 117 S. Ct. at 2168 ("There is language in our opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights

subparts, one that focuses on the word “best” and the other on the proviso “all things considered.” Textualism fails the justification prong on both counts: textualist judges are not concerned with creating the best text but with interpreting the text provided, and, in general, are not interested in considering “all things” except at the margins where the meaning of the text is not so plain. By contrast, idealism (in its normative aspect), like pragmatism, is concerned with putting the text in the best light. But idealism does not consider “all things” in order to determine what is best: the idealist judge decides what is best by reference to some abstract rule untethered to facts (e.g., that we can only achieve color blindness by being color blind). Pragmatism, by contrast, is virtually defined by its willingness to consider “all things” (as evidenced by the *EBCA* Court’s attention to such diverse factors as the practical living facts and the importance of the social mosaic). Thus, under integrity’s standards of fit and justification, pragmatism appears to be normatively superior to both idealism and textualism.

At the other end of the spectrum from integrity is formalism. The argument that pragmatism is normatively more attractive than formalism is a little more complex than the previous argument that pragmatism is at least as attractive as integrity theory. Yet pragmatism turns out not only to achieve formalism’s goals but to do so even better than formalism itself.

In *A Matter of Interpretation*, Justice Scalia contrasts pragmatism (or living constitutionalism) with formalism. Not surprisingly, Scalia’s preference is for formalism. His argument against pragmatism is two-fold: that it is excessively evolutionary and that it does not contain self-constraining standards.⁴⁷⁹ The argument against Scalia’s position is not that he is wrong—the conclusions he draws could in some instances turn out to be right—but that in the context of voting rights, he is not necessarily right. Decisions of the Canadian courts show that there is a viable way out of the difficulties Scalia identifies.

First, Scalia argues that the pragmatist approach is contrary to the anti-evolutionary nature of constitutions. “It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”⁴⁸⁰ A

contained in Section 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.”).

⁴⁷⁹ Again, I consider these arguments not in the abstract, as Scalia does, but in the limited context of the districting claims that are the subject of this article.

⁴⁸⁰ SCALIA, *supra* note 320, at 40. Scalia’s version of living constitutionalism is something of an

subpart of this argument is that even if evolution were acceptable, *this* evolution is objectionable because it runs in the wrong direction. Evolutionism would be persuasive, Scalia explains, "if most of the 'growing' . . . were the *elimination* of restrictions on democratic government. But just the opposite is true."⁴⁸¹ In particular, he argues that "in the past thirty-five years, the 'evolving' Constitution has imposed a vast array of new constraints—new inflexibilities—upon administrative, judicial, and legislative action."⁴⁸²

The main complaint here is that pragmatism permits too much change, contrary to constitutionalism's anti-evolutionary nature. Here again, Canadian pragmatism seems more consistent with the goal of moderation than idealism. In *Shaw*, the Court announced a brand new rule that was "analytically distinct" from either the voting rights cases or the discrimination cases the Court had decided before. If the Constitution now permits claims by majority-race voters who can show no tangible or even stigmatic harm, surely it is constraining democratic government in new and unforeseen ways. By contrast, the Canadian and Australian Courts refused to recognize a new cause of action that was not clearly warranted by some established legal tradition. These Courts acknowledged that a Constitution cannot solve every societal problem, but it is not entirely impotent either. Thus, they held that while the challenged districting plans seemed justifiable, at some point plans might deviate so excessively from the value of relative equality that they would have to be invalidated. In the meantime, however, the government should be permitted the latitude to solve problems as it thinks best.

In one sense the *Shaw* Court's decision was anti-evolutionary. Even if the Court's constitutional interpretation was radical, the social and political ramifications of its ruling were arguably regressive, since striking down these electoral plans could have resulted in the first reduction in black Congressional membership ever.

On the other hand, the complaint may be that pragmatism does not permit sufficient change—that it needlessly constrains the political branches. While this may be true in some instances, pragmatism has

oxymoron: he criticizes "devotees of The Living Constitution" for seeking not "to facilitate social change but to prevent it," but says the theory's most glaring defect is "its incompatibility with the whole anti-evolutionary purpose of a constitution." *Id.* at 42, 44. It is not anti-evolutionary, but it prevents change.

⁴⁸¹ *Id.* at 41.

⁴⁸² *Id.*

no monopoly here. In the voting rights cases, the pragmatic Canadian courts (as well as the textualist Australian Court) were more deferential to state governments than the American Supreme Court; both the Canadian and the Australian courts explicitly recognized interests of separation of powers, federalism, and judicial restraint, none of which was acknowledged in the *Shaw* cases.

Scalia's concern with unnecessarily fettering the political branches seems to rest on preference for rule-making by legislative deliberation rather than judicial fiat. Governments, he argues, must have sufficient flexibility to govern effectively. This goal must recognize, however, that a democratic government's muscle-flexing is legitimate only to the extent that it is supported by a legitimate electoral process. Otherwise it is not so democratic. Scalia seems to acknowledge that some limitations on government are either acceptable or unavoidable;⁴⁸³ indeed, the purpose of having a constitution is to restrain some government action. The limitations that would seem most justifiable, therefore, are those that promote governmental legitimacy by ensuring fair electoral processes.⁴⁸⁴ In other words, if what we care about is good government, the *Reynolds* rule, which concededly constrained deliberative decision-making, might nonetheless be justified because it enhanced effective representation.⁴⁸⁵ Not justified, however, are constraints on government that do not ensure better or more efficient or more legitimate government. The requirement of color blindness is of this type. Color blindness could not cure any political injury because the plaintiffs did not allege any.⁴⁸⁶ It cured only the harm of color consciousness, an

⁴⁸³ "All government represents a balance between individual freedom and social order." *Id.*

⁴⁸⁴ This is, of course, not an original thought. See e.g. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); ELY, *supra* note 448; Carl A. Auerbach, *The Reapportionment Cases, One Person, One Vote—One Vote, One Value*, SUP. CT. REV. 1, 2 (1964) (arguing that it is "paradoxical for the advocates of judicial self-limitation to criticize the Court for helping to make majority rule effective, because the case for self-restraint rests on the assumption that the Court is reviewing the legislative acts of representatives who are put in office by a majority of the people. Since malapportionment destroys this assumption, judicial intervention to remove this obstacle to majority rule may be less intolerable than the self-perpetuation of minority rule."). Although we may disagree about what additional rights are necessary preconditions to effective political processes (such as, for instance, food, shelter, education) most everyone would probably agree that voting rights are indispensable.

⁴⁸⁵ Scalia uses the *Reynolds* rule as an example of a presumably unjustified evolutionary constraint. See SCALIA, *supra* note 320, at 37. This can be understood as consistent with his argument in the sense that although *Reynolds* did achieve this goal, it was not necessary to achieving it; as the dissenters argued in that series of cases, other legitimate conceptions of democracy permit malapportionment.

⁴⁸⁶ "Only when such placement affects election results and political power statewide has an

injury of questionable pedigree, doubtful palpability, and undefinable scope.⁴⁸⁷ Given Scalia's ambivalence about individual rights generally,⁴⁸⁸ it is not clear how the creation of a new individual right—the right to color blind districting—is justified given that it constrains government without any obvious gain.⁴⁸⁹

The principle that judicial intervention is especially warranted where the legitimacy of the political process is at stake helps to explain the correctness of the *Reynolds* Court's activism, the correctness of the *EBCA* and *McGinty* Courts' restraint, and the incorrectness of the *Shaw* Court's activism. As discussed earlier, the *Baker-Reynolds* Court had no reason to believe that the extreme malapportionment it confronted was self-correcting, and every reason to be skeptical of the representativeness of the state legislatures and of their ability to respond to a majority of their constituents. Today, in the United States, as well as in Canada and Australia, the situation is quite different. The Canadian and Australian Courts were justified in deferring to the political process where the malapportionment was neither egregious nor intracta-

actual disadvantage occurred." *Bandemer*, 478 U.S. at 141 (plurality). "[A] threshold showing of discriminatory vote dilution is required for a prima facie case of an equal protection violation." *Id.* at 143.

Nor does *Hays* clarify the nature of the alleged harm. The Court's reasoning is circular and uninformative: the Court held that "where a plaintiff resides in a racially gerrymandered district . . . [she or he] has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Hays*, 515 U.S. at 744–45. The injury is defined not by the harm felt by the plaintiff but solely by the actions of the government. That action (reliance on racial criteria) is called a denial of equal treatment but neither the plaintiffs nor the Court translates the action into an articulable harm to plaintiffs.

⁴⁸⁷ As described by one of the foremost academic advocates of the *Shaw* cases, "[t]he injury was the commonly held interest in requiring state government to adhere to racial nondiscrimination precepts purportedly embraced in the principles of Equal Protection." Blumstein, *supra* note 97, at 528. This description, however, does not square with the Court's holding in *Hays* that only some voters in each gerrymandered state have standing to raise a *Shaw* claim. *See Hays*, 515 U.S. at 742–44. If it is so commonly held, why not let everyone who is subject to the state's race consciousness sue? It is this failure to describe the *Shaw* injury coherently that led Justice Souter to describe the *Shaw* cause of action as flawed at "the conceptual bone." *Bush*, 116 S. Ct. at 1998 (Souter, J., dissenting).

⁴⁸⁸ "[A]nother argument of the proponents of an evolving Constitution [is] that evolution will always be in the direction of greater personal liberty. (They consider that a great advantage, for reasons that I do not entirely understand . . .)." SCALIA, *supra* note 320, at 42.

⁴⁸⁹ The gains are presumably the good feeling we all get when we believe that we have rid ourselves of racial strife and that we are all one race. But the Court has not described what it hopes to gain in sufficient detail nor has it explained why this generalized and amorphous claim is sufficient to confer standing despite otherwise stringent limitations on standing. *See generally* Allen v. Wright, 468 U.S. 737 (1984) (requiring a personalized, concrete injury that is fairly traceable to the alleged conduct and likely to be redressed by the relief prayed for).

ble. In Australia, the gaps left open by the democratic system were not significant. Five of six states had achieved virtual voter parity without any constitutional heavy-handedness, and the sixth—the subject of both *McKinlay* and *McGinty*—was well on its way, having deviated only for specific reasons of extraordinary demographic diversity. In Canada, too, the deviations were carefully reviewed by the Court but ultimately found to be justified by legitimate considerations.

Like the situation in Australia and Canada, the political landscape confronting the *Shaw* Court did not demand judicial intervention. Indeed, after 1990, one could argue that state legislatures were finally beginning to respond to claims of underrepresentation by racial minorities and to ameliorate the electoral process. As Justice Souter has explained, “[t]he Congress that assembled in 1981 had only 17 black representatives out of 435 and no black senator” meaning that “blacks, ‘who constitute 11.1% of the nation’s voting age population, made up only 4.9% of the members of Congress.’”⁴⁹⁰ But after 1990, black representation in Congress increased significantly. Justice Souter continued: “[R]emedies for vote dilution (and hedges against its reappearance) in the form of majority-minority districts account for the fact that the 104th Congress showed an increase of 39 black members over the 1981 total.”⁴⁹¹ America in the 1990s, unlike America in the 1960s, was acting to redress the imbalance. Judicial involvement is needed to correct legislative intransigence, not to impede legislative responsiveness.

The *Shaw* cases did exactly what Justice Scalia says the Court should not do: they needlessly fettered the state governments by imposing color-blindness upon them. The fettering was needless by Scalia’s own terms: he wants to ensure that governments have flexibility and are able to function effectively. Indeed, in the context of districting, this is the result the Constitution envisions as well.⁴⁹² The Court’s zeal to manage these legislative efforts imposes more new constraints on democratic government than a pragmatic court could do in these

⁴⁹⁰ *Bush*, 116 S. Ct. at 2000 (Souter, J., dissenting) (citing Statistical Abstract of the United States, 1982–83, p. 490 (103d ed. 1982) (Table 802); BLACK AMERICANS: A STATISTICAL SOURCEBOOK 142 (L. Hornor ed., 1995) (Table 4.02) and quoting Frank P. Parker, *The Damaging Consequences of the Rehnquist Court’s Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U.L. REV. 763, 770–71 (1996) [hereinafter Parker, *Damaging Consequences*]).

⁴⁹¹ Minorities in Congress, 52 Cong. Q., Supplement to No. 44, p. 10 (Nov. 12, 1994); see also Parker, *Damaging Consequences*, *supra* note 490, at 771 (noting “a fifty percent increase in the number of black members of Congress”); see also Karlan, *Still Hazy*, *supra* note 133, at 305.

⁴⁹² U.S. CONST. art. I, §§ 2, 4.

circumstances. Whereas idealism impels a Court toward activism, pragmatism counsels restraint.

Scalia's second criticism of pragmatism is its standardlessness. [T]here is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy. The originalist at least knows what he is looking for: the original meaning of the text.⁴⁹³

While pragmatism may be susceptible to standardlessness, the Canadian Supreme Court has shown that constitutional interpretation may be constrained in principled ways while still staying true to pragmatist values.⁴⁹⁴ Although it explicitly adopted living constitutionalism, the Canadian Court was guided by relatively non-subjective values such as history—the nation's traditions and shared experiences—and by the Charter's purpose. These two constraints are no less legitimate than the original meaning of the text and may be substantially more effective as constraints and more workable as guides. For instance, it simply cannot be said that the Canadian decision was less constrained than the American and Australian cases. While the Australian decision was bounded, perhaps excessively, by the constitutional text, and the American decision was bounded only by abstract idealism, which in itself is not defined by any objective or shared value, the Canadian decision was bounded by the jurisprudential conviction that the Charter is a living tree, by the nation's history of evolving democracy, and by the Court's respect for provincial autonomy and for separation of powers between the judicial and the political branches. The most pragmatic decision turns out to be the most judicially restrained.⁴⁹⁵

By formalist standards, then, an interpretive theory must remain faithful to the anti-evolutionary nature of the Constitution and it must

⁴⁹³ SCALIA, *supra* note 320, at 45.

⁴⁹⁴ "Pragmatism takes stability, reliance and the internalization of constitutional values seriously." Lipkin, *Constitutional Revolutions*, *supra* note 411, at 138.

⁴⁹⁵ See *id.* at 135 ("It is simply false to insist that pragmatist judges must be oblivious to precedent, legal history, our political traditions, or even to the reflective convictions of our citizens. Pragmatism, like conventionalism and [Ronald Dworkin's] integrity, is concerned about fit and justification.").

constrain judicial decisionmaking. The decisions of the Canadian and Australian Courts show that pragmatism and textualism achieve these goals at least as well as idealism. Indeed, the Canadian *EBCA* case shows that pragmatism may be even more successful than formalism at its own game.

B. *Redistricting Pragmatism*

This section will briefly sketch what a pragmatic American court might do if faced with a *Shaw*-style wrongful districting claim.

First, the court's guiding principle would be to recognize that it is a player in the process of democratic governance and that its decisions should therefore be designed to contribute constructively to the overall goal of effective representation. A court, therefore, has a significant role to play where legislative action is diminishing the possibility of effective representation, but a more marginal role where there is no apparent injury to electoral rights.

Pragmatism counsels restraint on historical grounds as well. According to the *Shaw* Court, the long history of state deprivation of minority voting rights justifies continued judicial oversight.⁴⁹⁶ But the Court misapplies this history to the present situation. Unlike the white supremacist legislation of the pre-Civil Rights era, the challenged districts drawn after the 1990 Census were the product of negotiation and compromise that included representatives of minority interests (not the least of which was the federal government in its capacity as enforcer of the Voting Rights Act). The result of this process was to enhance minority representation in Congress. Reasonable people could argue about whether minority-majority districts are the best way to enhance minorities' power in Congress, but that is a political, not a judicial, question.⁴⁹⁷ The pragmatic court would recognize that enhancing minority representation means correcting, not reinforcing, the historic racial imbalance in legislative halls, and would defer to legislative judgments as to the best way to achieve that end, absent a clear indication of injury to some group of voters.

Pragmatism would also require the court to be more realistic in its appraisal of electoral processes. As discussed above, voting is both an

⁴⁹⁶ See, e.g., *Shaw*, 509 U.S. at 639–41; *Hays*, 515 U.S. at 740 n.*.

⁴⁹⁷ See Karlan, *Still Hazy*, *supra* note 133, at 310 (arguing that the Court should dismiss wrongful districting claims as nonjusticiable political questions since “complainants have suffered no particularized injury, but simply object to the prevailing democratic theory”).

individual and an associational endeavor. It is among our most private acts,⁴⁹⁸ and yet its meaning is only realized when individuals' votes are combined with others'. Both the Canadian and the Australian Courts recognized that groups, as well as individuals, ought to have some electoral rights. The American Court, by contrast, has recognized only individualized interests, since the marginalization of the "effective representation" interest identified in *Reynolds*. Indeed, Justice Souter, in particular, has taken the Court to task for failing, in the *Shaw* cases, to recognize what he has called the "basically associational character of voting rights in a representative democracy."⁴⁹⁹ Many scholars have elaborated on this aspect of voting, particularly in the wake of the *Shaw* cases.⁵⁰⁰ As Lani Guinier has said, districting is inevitably about gerrymandering and gerrymandering is inevitably about groups.⁵⁰¹ A pragmatic court would therefore presumptively accept the associations that a legislature acting in good faith chose to recognize especially where, as with the case of racial ties, there is good reason to believe that the associational trait may have political significance.

In following these principles, the hypothetical pragmatic court, faced with wrongful districting claims, would recognize a cause of action to the extent that plaintiffs could allege and prove some kind of tangible injury, but would refuse to intervene where legislative action results in obvious tangible gains and no tangible costs. This court would have learned from such cases as *Gray*, *Wesberry*, and *Reynolds* and would have emerged a smarter and more sophisticated court. It would temper the activism, individualism, and absolutism of the earlier cases by acting only with theory that is grounded in the realities of the political world. By adhering to pragmatist tenets, it would be more restrained and moderate than its predecessor of two generations ago or than its idealist counterpart today.

⁴⁹⁸ See e.g. *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding Tennessee statute that prohibits solicitation of votes and campaign displays within 100 feet of polling place).

⁴⁹⁹ *Bush*, 116 S. Ct. at 2000 (Souter, J., dissenting). See also *id.* at 1999 ("voting is more than an atomistic exercise").

⁵⁰⁰ See, e.g., McDonald, *supra* note 471, at 271; Martin Shapiro, *Gerrymandering, Unfairness & The Supreme Court*, 33 UCLA L. Rev. 227 (1985); Karlan & Levinson, *supra* note 97; Aleinikoff & Issacharoff, *supra* note 3; Guinier, *supra* note 86; Issacharoff, *supra* note 7; Karlan, *All Over the Map*, *supra* note 89. This has also been recognized intermittently by the Supreme Court, most explicitly in *Bandemer*, 478 U.S. 109.

⁵⁰¹ Guinier, *supra* note 86, at 1591, 1615 (discussing the "group nature of representation itself, especially in a system of geographic districting" and drawing the conclusion that all districting is gerrymandering).

V. CONCLUSION: A PROGNOSIS

It is unlikely that the U.S. Supreme Court will jettison its idealist districting jurisprudence and adopt the Canadian approach. In the past five years, the Court has reaffirmed its commitment to color blind districting in an unbroken line of cases. In each of these cases, the majority is slim, but it is as committed to its view as the persistent dissenters are to theirs. The only disputes among the majority justices are at the margins.⁵⁰²

Some seeds of a more measured approach, however, have been planted by the justices themselves, in a series of dissents by a determined group of four justices.⁵⁰³ Although there is substantial and legitimate dispute about the propriety and utility of dissents, it does seem clear that dissenting opinions may in some cases serve useful functions.⁵⁰⁴ In time, they may even persuade a majority of the Court.⁵⁰⁵

If ever a dissenting view were worthy of swaying the Court, this collection of dissents deserves the honor. These dissents are long and thoughtful and remarkably insistent.⁵⁰⁶ They tend to attack the majority opinion on three levels by arguing against the majority's characterization of the facts,⁵⁰⁷ charging the majority with misconstruing the

⁵⁰² See, e.g., *Bush*, 116 S. Ct. at 1968 (Separate Opinion of O'Connor, J.) (arguing that compliance with Section 2 of the Voting Rights Act is a compelling government interest whereas the plurality (*written by O'Connor*) only left that possibility open).

⁵⁰³ See *Shaw I*, 509 U.S. 630 (Justices White, Blackmun, Stevens, Souter filing dissenting opinions); *Miller*, 515 U.S. 900 (Justices Stevens and Ginsburg filing dissenting opinions in which Justices Breyer and Souter joined); *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894 (Justices Stevens and Souter filing dissenting opinions in which Justices Ginsburg and Breyer joined); *Bush*, 517 U.S. 952, 116 S. Ct. 194 (Justices Stevens and Souter filing dissenting opinions in which Justices Ginsburg and Breyer joined); *Abrams*, 117 S. Ct. at 1943 (Justice Breyer filing a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined). The exception is *Hays*, 515 U.S. 737, 115 S. Ct. 2431 where a majority held that the particular plaintiffs did not have standing. Justices Breyer and Stevens (with Justices Ginsburg and Souter) disagreed to the extent that the majority suggested that other plaintiffs would have standing.

⁵⁰⁴ See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986). See generally Laura K. Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988). See also Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996).

⁵⁰⁵ Compare, e.g., *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time command the support of a majority of this Court") with *New York v. United States*, 505 U.S. 144 (1992).

⁵⁰⁶ But see Ray, *supra* note 504, at 313-14, on the propriety of repeated dissents after the majority has decisively ruled.

⁵⁰⁷ See, e.g., *Abrams*, 117 S. Ct. at 1943 (Breyer, J., dissenting) (arguing that the Court's mischaracterization of the intent of the Georgia legislature is both a legal and a factual error); *Bush*, 116 S. Ct. at 1980-89 (Stevens, J., dissenting) (challenging the Court's "reading of the

law,⁵⁰⁸ and criticizing the majority's theory as hollow and incoherent.⁵⁰⁹ And the mere fact that four justices reject the idealism of the majority may in itself be a good sign for pragmatists. The principal contribution of the dissenters, however, is to cast doubt on the inevitability of the majority position. By their thoroughness, they reveal that on each level the majority has made a particular decision—to view the facts in a particular way, to characterize the mission of the Equal Protection Clause in a particular way, to understand the judicial branch's relationship to the electoral process in a particular way—that one could reasonably challenge. These specific decisions are incidents of the more idealist jurisprudential attitude towards voting rights and equality rights that the Court has adopted. It is this fundamental choice that the dissenters challenge, and to which the Canadian cases present an appealing alternative.

record" with respect to whether the Texas legislature subordinated race-neutral districting principles to race).

⁵⁰⁸ See, e.g., *Bush*, 116 S. Ct. at 2001 (Souter, J., dissenting) (challenging the Court's interpretation of Equal Protection law in that "*Shaw I* . . . broke abruptly with these standards, including the very understanding of equal protection as a practical guarantee against harm to some class singled out for disparate treatment").

⁵⁰⁹ See, e.g., *id.* at 1998, 2007 (Souter, J., dissenting) (attributing the Court's failure to define the harm in *Shaw* claims to "reasons that go to the conceptual bone" and describing the claims as "incoherent" and "inscrutable").