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Identifying the Harm in Racial Gerrymandering Claims

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INTRODUCTION

The pace of change in the desegregation of American politics is sometimes overlooked by those immersed in the struggles over issues of minority representation. Gauged from afar, the aptly termed "Quiet Revolution"[1] in legally enforced minority voting rights is properly viewed as a stunning vindication of the transformative power of law. In one recent study of the integration of political office holding, for example, Australian political scientist Anne Phillips speaks admiringly of the post-1965 American experience as a "major success story,"

> where civil rights litigation has interpreted the 1965 Voting Rights Act to imply the right of minority voters to elect 'the candidates of their choice.' When first introduced, the legislation was concerned primarily with guaranteeing black voters their equal right to vote . . . .
>
> The subsequent evolution of the Act extended it to address the right to cast an equally weighted vote, which increasingly meant the creation of black majority districts . . . from which black voters could elect black representatives. . . . Voting rights litigation then came to revolve around the formation of single-member electoral districts, with their boundaries drawn so as

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1. The term comes from a masterful empirical study of the transformation in southern politics brought about by the Voting Rights Act. QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994).

to coincide with black majorities.[2]

As Professor Phillips properly notes, for twenty years the judicially crafted doctrine of "minority vote dilution" has acted as a major force facilitating the growth of minority political power in this country.[3] After barriers to the participation of Black voters in elections were struck down, courts developed the doctrine as a means of eliminating schemes by which states and localities diluted the ability of groups of minorities to elect candidates of their choice.[4] In particular, under the aegis of both the Fourteenth Amendment and the Voting Rights Act, courts mandated the displacement of multimember electoral districts (which overrewarded cohesive White voting blocs) with single-member districts (including majority-Black and Hispanic districts), thereby laying the foundation for our history's largest growth in minority representation.[5] Throughout the 1980s, the voting rights revolution, compounded by the post-1990 reapportionment, quietly transformed not just the racial makeup of governmental bodies, but the distribution of actual political power as well.

In several recent decisions beginning with *Shaw v. Reno*[6] in 1993, however, the Supreme Court has dramatically undermined the most evident and, to date, most successful mechanism for expanding minority representation: the race-based creation of majority-minority electoral districts.[7] Five Justices—Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—have now concluded that redistricting plans should be subject to "strict scrutiny" review in those instances where race has served as the predominant factor in the drawing of district lines.[8]

Almost all students of this "racial gerrymandering" doctrine agree that the constitutional commands of *Shaw* and its progeny leave a great deal unresolved—most notably the relevance of "traditional districting principles" as indicators of improper racial motivation,[9] as well as just how "strict" the Court's scrutiny will be.

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2. ANNE PHILLIPS, THE POLITICS OF PRESENCE 85-86 (1995).

3. *Accord* Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in* QUIET REVOLUTION IN THE SOUTH, *supra* note 1, at 21, 22-29.

4. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

5. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986); White v. Regester, 412 U.S. 755 (1973); Smith v. Paris, 257 F. Supp. 901 (M.D. Ala. 1966).

6. 113 S. Ct. 2816 (1993).

7. *Id.*; *see also* Miller v. Johnson, 115 S. Ct. 2475 (1995); United States v. Hays, 115 S. Ct. 2431 (1995).

8. *Miller*, 115 S. Ct. at 2490.

9. *Compare Shaw*, 113 S. Ct. at 2827 ("[Traditional districting principles] are objective factors that may serve to defeat a claim that a district has been

Clarification of the appropriate legal standard remains in the Court's hands with two cases submitted for review this year,[10] and several other likely candidates to be heard next Term. The focus of this Article, however, is somewhat different from the bulk of the commentary to date, which (including some of our own previous efforts) has sought to dissect the legal standards applicable to federal courts' post-*Shaw* review of minority districts. In this Article, we want instead to give particular attention to the concerns that may have motivated the Court to announce this new doctrine in the first instance. We offer this approach, in a sense, not as an attempt to elucidate *how* the Court intends to police the racial considerations present in redistricting battles, but to concentrate on *why* the delicate issue of racial representation poses such concern for the Court.

We proceed along two lines. First, we review the theories of *harm* set forth in the Justices' various opinions, i.e., the articulated risks to individual rights that may or may not be presented by racial gerrymandering. What we learn from this survey is that *Shaw* and its progeny serve different purposes for different members of the Court. Four members of the *Shaw*, *Miller v. Johnson*,[11] and *United States v. Hays*[12] majorities—Chief Justice Rehnquist, along with Justices Scalia, Kennedy, and Thomas—are far more concerned with "race" than "gerrymandering." In particular, they consider all race-based government classifications to be inherently injurious, and they appear to view the racial gerrymandering cases as a vehicle for moving the Court's interpretation of the Fourteenth Amendment closer to the ideal of "colorblindness."[13]

Diametrically opposed, the dissenters—Justices Stevens and Souter, joined by Justices Breyer and Ginsburg (who now occupy the seats of *Shaw* dissenters White and Blackmun)—argue that the majority has consistently conflated two very different questions: whether government action violates the Fourteenth Amendment, and whether that action harms the plaintiffs sufficiently to establish standing to sue.[14] While these four Justices have concluded that the

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gerrymandered on racial lines . . . . [W]e believe that reapportionment is one area in which appearances do matter.") *with Miller*, 115 S. Ct. at 2486 ("[S]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence . . . .") *and Hays*, 115 S. Ct. at 2431 (omitting all reference to "appearances" and "traditional districting principles").

10. Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995); Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995).

11. 115 S. Ct. 2475 (1995).

12. 115 S. Ct. 2431 (1995).

13. *Miller*, 115 S. Ct. at 2482-83.

14. *Id.* at 2497. Justice Stevens, in dissent, stated:

creation of majority-minority districts violates no constitutional command in the first instance, they also are emphatic in their position that, certainly, the White plaintiffs who have come before the Court to date have suffered no cognizable injury.[15]

Between these two groups, the fifth member of the majority—Justice O'Connor—agrees that racial classifications carry dangers, but differs from the others on both the precise degree of racial motivation that causes harm and just what that harm is.[16] Under O'Connor's interpretation of *Shaw* in her concurrence in *Miller*, concern is warranted only in "extreme instances." This four-one-four split within the Court confirms the widely held view that it is Justice O'Connor's vote that will carry the day. We therefore turn our attention to her concerns in particular, and, in the second step of our analysis, consider whether there might be some factor that causes Justice O'Connor to identify certain redistricting schemes as more "extreme" than others.

Our review is organized from the vantage point of a well-intentioned state actor seeking to achieve some level of accommodation of minority concerns for representation, while at the same time seeking to avoid running afoul of constitutional constraints. The hope is that if, ultimately, this area of law is to find some institutional stasis under the current Court, some sense of the precise constitutional harm may be key. Our conclusions, however, remain tentative and pessimistic. While there are some clear forms of harm that the Court has responded to, such as the Department of Justice's expansive use of its powers under section 5 of the Voting Rights Act to pressure a "maximization" of minority representation, there is deep uncertainty at the core of the Court's ruling in *Shaw* and its progeny. At best, a strategy of avoiding those harms clearly identified thus far in the caselaw can provide only partial cover from challenge for any redistricting plan seeking a balance between minority representation and the avoidance of racial gerrymandering charges.

First, the Court misapplied the term 'gerrymander,' previously used to describe grotesque line drawing by a dominant group to maintain or enhance its political power at a minority's expense, to condemn the efforts of a majority (whites) to share its power with a minority (African Americans). Second, the Court dispensed with its previous insistence in vote dilution cases on a showing of injury to an identifiable group of voters, but it failed to explain adequately what showing a plaintiff must make to establish standing to litigate the newly minted *Shaw* claim. Neither in *Shaw* itself nor in the cases decided today has the Court coherently articulated what injury this cause of action is designed to redress. Because respondents have alleged no legally cognizable injury, they lack standing, and these cases should be dismissed.

15. *Id.* at 2497.

16. *Id.* (O'Connor, J., concurring).

I. THE *SHAW V. RENO* LEGACY: CLASSIFICATORY AND REPRESENTATIVE HARMS

Focusing on the concept of "harm" is particularly appropriate in the racial gerrymandering context because it is on this issue that the battle lines between the Justices have been most heatedly drawn. The bulk of the analysis in Justice O'Connor's opinion for the Court in *Shaw* was devoted to the relatively uncontroversial proposition that it is both possible and appropriate to infer that a district's design was motivated to some extent by race from both its shape and the demographic characteristics of the communities that it includes and excludes.[17] Thus, it is a good guess that a district that consistently "meanders" to include only Black communities while conspicuously dodging adjacent White neighborhoods was designed, at least in part, with race in mind.[18] Without a doubt, the Court had taken that inferential step in several previous decisions, and the dissenters—correctly or not—chose not to challenge its continued use in *Shaw*.[19] In part, the limited focus of the dissenters may be explained by the seemingly uncontroversial ultimate holding of the Court in *Shaw*. For all the rhetorical force of comparisons of racial line drawing to "apartheid," *Shaw* held only that districts drawn based "only" on race were constitutionally actionable.

The dissenters did, however, zero in on the fact that, no matter how racially motivated the design of the challenged districts, it was far from clear that anyone had been injured by them in a cognizable fashion.[20] Justice White, joined by Justices Blackmun and Stevens, attempted to locate *Shaw* squarely within the framework of the Court's prior decisions addressing vote deprivation and vote dilution:

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17. *See Shaw*, 113 S. Ct. at 2825-27 (discussing Wright v. Rockefeller, 376 U.S. 52 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Guinn v. United States, 238 U.S. 347 (1915)).

18. At first blush, this may seem a remarkable understatement. But, in redistricting, like few other areas, appearances can be deceiving, and what would seem obviously to be the principal impetus behind a district's construction may be far from it. *See, e.g.*, Conference Report, *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, 31 (1994).

19. *See Shaw*, 113 S. Ct. at 2841 (White, J., dissenting, joined by Blackmun and Stevens, JJ.).

20. *See id.* at 2834 (White, J., dissenting, joined by Blackmun and Stevens, JJ.) ("The grounds for my disagreement with the majority are simply stated: Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury."); *id.* at 2847 (Souter, J., dissenting) ("[In voting-rights cases], it has seemed more appropriate for the Court to identify impermissible uses [of race] by describing particular effects sufficiently serious to justify recognition under the Fourteenth Amendment.").

> To date, we have held that only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote, for example by means of a poll tax or literacy test. Plainly, this variety is not implicated by appellants' allegations and need not detain us further. The second type of unconstitutional practice is that which "affects the political strength of various groups," in violation of the Equal Protection Clause. As for this latter category, we have insisted that members of the political or racial group demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process.[21]

Justice Souter, in a solo dissent, agreed with this characterization of the Court's precedents,[22] and like Justice White, concluded that, without more, the act of drawing districts along racial lines caused no constitutionally cognizable harm.[23] Instead, "an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively."[24] According to the dissenters, the White plaintiffs in *Shaw* suffered no such harm because, while Blacks may have been advantaged by North Carolina's creation of two majority-Black districts, Whites were not sufficiently *disadvantaged* to make out a constitutional claim, given that they remained the majority in a disproportionate number of the state's congressional districts.[25]

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21. *Id.* at 2834 (citations omitted) (footnote omitted) (quoting City of Mobile v. Bolden, 446 U.S. 55, 83 (1980) (Stevens, J., concurring in the judgment)).

22. *Id.* at 2847. Justice White and Justice Souter disagreed to some extent on the *reason* that the Court had been more permissive in allowing race-conscious decision making in voting rights cases than other areas. According to Justice White, as a practical matter, legislatures frequently use race as a proxy for other characteristics (*e.g.*, party preference) in drawing racial lines, and therefore "extirpating such considerations from the redistricting process is unrealistic." *Id.* at 2835. Justice Souter added the gloss that the greater latitude allowed to state uses of racial considerations in the political arena inevitably arises from the fact that the Voting Rights Act *requires* that legislatures take race into account to avoid minority vote dilution, a practice that the Court has consistently approved. *Id.* at 2845. Further, purposefully benefiting one race in the redistricting process does not necessarily prejudice members of other races; while awarding a contract preference to a minority firm arguably undermines the ability of White-owned firms to compete for the contract, the act of creating majority-minority districts prevents no individual or group from voting, and generally does not interfere with the voting strength of Whites statewide. *Id.* at 2846-47.

23. *Id.* at 2846.

24. *Id.* at 2836 (White, J., dissenting) (quoting Davis v. Bandemer, 478 U.S. 109, 133 (1986) (plurality opinion)).

25. *Id.* at 2838 (White, J., dissenting).

The *Shaw* majority presented a bifurcated response to this line of argument. First, it posited that *all* racial classifications should be considered constitutionally suspect:

> Classifications of citizens solely on the basis of race "are *by their very nature* odious to a free people whose institutions are founded upon the doctrine of equality." They threaten to *stigmatize* individuals by reason of their membership in a racial group and to incite racial hostility.[26]

Second—and building on this notion of stigma—the majority identified a set of "special harms that are not present in . . . vote dilution cases."[27] These "representational harms" were more akin to the injuries recognized in the dilution context, however, in that they involved dangers related to the political process. The majority was reaching for a notion of a harm to the political process as a whole that transcended the individuals subject to a state classificatory system. While imprecise, these harms clearly involved the act of "gerrymandering," and appeared to be triggered by the shape of the resulting districts. Thus, the majority concluded that

> reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.[28]

Besides this paragraph-long statement, and a later recapsulization of it,[29] however, the *Shaw* majority did not detail a precise

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26. *Id.* at 2824 (emphasis added) (citations omitted) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

27. *Id.* at 2828.

28. *Id.* at 2827 (citations omitted).

29. *See id.* at 2828 ("[Racial gerrymandering] reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their

theory of how these harms might come about. Perhaps more perplexing, given the Court's decision to remand *Shaw* (and in light of the numerous other similar cases predictably working their way up through the trial courts), was the failure to indicate what sort of evidence might sustain a claim of excessive reliance on race in the redistricting process.[30] The question had not been briefed by the parties or amici, and the opinion did not refer to any literature demonstrating that what seemed to be an empirically verifiable phenomenon, in fact, ever took place. Instead, to the dissenters' plaint that the universe of constitutionally cognizable harms in voting-rights cases included only vote deprivation and vote dilution, the majority said, essentially, "not any more."

II. THE POST-*SHAW* INTERLUDE

That the majority's "representational harms" were analytically wanting quickly became apparent in the post-*Shaw* round of litigation and scholarly criticism. On remand in *Shaw* itself,[31] and in various cases before three-judge district court panels throughout the country,[32] judges and litigants alike were befuddled about how to proceed on the question of injury, heretofore thought to be the crux of every plaintiff's burden of establishing standing.[33] In earlier generations of voting-rights litigation concerning both access to the ballot and the dilutive impact of at-large electoral systems, the link between standing and liability had been clear. Standing to sue flowed ineluctably from the fact that Black and Latino plaintiffs had their voting strength as a group diluted.[34]

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constituency as a whole.").

30. For an elucidation of the theory of "excessive reliance" on race as the key to *Shaw*, see T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 608-18 (1993).

31. Shaw v. Hunt, 861 F. Supp. 408, 421-27 (E.D.N.C. 1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995).

32. *See, e.g.*, Miller v. Johnson, 864 F. Supp. 1354, 1370 (S.D. Ga. 1994) ("In both *Shaw* and the instant case, the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these White voters. Under the Supreme Court's most recent pronouncements, this lack of concrete, individual harm would deny them standing to sue."), *aff'd*, 115 S. Ct. 2475 (1995).

33. *See, e.g.*, Shaw v. Hunt, 861 F. Supp. at 424 ("The Supreme Court has emphasized that such a[n] injury must be 'concrete' in both a qualitative and a temporal sense, which means that it must be both 'distinct and palpable' in nature, as opposed to '[a]bstract,' and 'real and immediate' as opposed to 'conjectural' or 'hypothetical.'" (citations omitted)).

34. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980) (upholding at-large elections for failure to prove constitutionally impermissible purpose); Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959) (upholding literacy tests against challenge).

If, however, standing became detached from any electoral injury, it became unclear what harm could be proven at trial by concerned but seemingly unaffected White litigants. Thus, in the North Carolina racial gerrymandering trial, was there to be evidence presented that newly elected representatives Mel Watt and Eva Clayton in fact represented only the interests of their Black North Carolina constituents, leaving Whites politically ghettoized? Could the plaintiffs present testimony that their children had been stigmatized, with playmates from across town taunting them that *they* lived in a *Black* district?[35]

In the end, a general consensus seemed to develop that the "representational harms" were essentially to be assumed as the result of race-based districting.[36] For the plaintiffs, this was a good thing; the harms would have been difficult to prove within the terms assigned by *Shaw*. If the plaintiffs' injuries were based on the claim that legislators would only represent, and voters would only elect, members of their own race, then *Shaw*'s claim that such assumptions were fanciful and perpetuated racial stereotypes would have been disproved. Proof of harm to White plaintiffs would in turn lend support to the state's claim that racial considerations were necessary to accommodate legitimate minority concerns over representational opportunity.[37] Further, a holding that Whites were harmed by submersion in majority-Black districts similarly could serve as justification for the very considerations of race that they were intended to assail. For example, it might be argued that Blacks would be better served by having their influence enhanced in districts where they provided a critical voting bloc, although not a majority. If this argument is correct, and if legislators are acutely sensitive to the shifting racial composition of their districts, then White challengers should not be harmed by inclusion in the majority-minority districts under challenge in the racial gerrymandering cases; these districts are, by and large, the nation's most racially integrated.[38] The expected result under this line of proof would be exactly the opposite of that predicted in *Shaw*—Mel Watt, who represents North Carolina's Twelfth Congressional District,

35. The point of our inquiry is not to endorse a restrictive standing doctrine per se. Rather, it is to signal the departure from developed standing doctrine *and* to show the relation between unclear standing doctrines and unclear notions of proof of harm at trial.

36. *See, e.g.*, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995); Shaw v. Hunt, 861 F. Supp. 408, 426 (E.D.N.C. 1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995).

37. *Miller*, 115 S. Ct. at 2497-98 (Stevens, J., dissenting).

38. *See* Deval L. Patrick, *What's Up Is Down, What's Black Is White*, 44 EMORY L.J. 827, 833 (1995).

with its forty-five percent White constituency, would presumably run an enormous risk if he alienated White voters, while legislators from majority-White districts (which tend to have *very* low proportions of minority populations) would have little incentive to cater to the interests of minority voters. And, as to appearance, the Court completely failed to explain how the Justices' obvious aesthetic discomfort correlated with a rise in racial stigmatization.

The problem lies in the vagaries of translating the generalized concerns evident in *Shaw* into an operational command for trial. In particular, lower courts faced the question whether the post-*Shaw* round of cases could proceed solely on the basis of the general harms that *Shaw* had identified as the result of *all* racial classifications, an approach suggested by several sympathetic readers of *Shaw*.[39] While several pre-*Shaw* decisions had criticized racial classifications as contrary to the spirit of the Fourteenth Amendment,[40] the Court had never previously struck down challenged legislation without identifying some particularized harm to the plaintiffs. For example, in two relatively recent decisions concerning racial preferences in government contracting, the Court had significantly eased the "injury-in-fact" requirement for standing to challenge adverse governmental action, but still took care to explain that White-owned companies had been injured by their inability to compete on equal footing with minority firms.[41]

Under a more relaxed standing requirement, plaintiffs in such cases might be relieved of the requirement of showing that they personally would have received the desired governmental benefit but for the use of a classificatory mechanism. Yet, prior to the racial gerrymandering cases, there was no hint that plaintiffs would not

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39. *See, e.g.*, James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 528 (1995) ("The injury was the commonly held interest in requiring state government to adhere to the racial nondiscrimination precepts purportedly embraced in the principles of Equal Protection."); Timothy G. O'Rourke, Shaw v. Reno*: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 736 (1995) ("In suggesting that the plaintiffs had suffered no injury because their group (White voters) was fairly treated, Justice Souter missed the point. What the plaintiffs were asserting is the right to be treated as individual voters, rather than with reference to their putative membership in a group."); Abigail Thernstrom, *More Notes from a Political Thicket*, 44 EMORY L.J. 911, 940 (1995) ("Racial classifications, in short, deliver the message that skin color matters—profoundly. They suggest that White folks and Black folks just are not the same, that race and ethnicity are the qualities that really matter.").

40. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 410 (1991); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion); Palmore v. Sidoti, 466 U.S. 429, 432 (1984); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

41. Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 667 (1993); *Croson*, 488 U.S. at 493.

have to show that they, at the least, would have been within the zone of consideration absent the challenged governmental policy. Similarly, voting rights decisions prior to *Shaw* had included this element by requiring plaintiffs to prove that they had suffered either the dilution of their voting strength as a group or the outright deprivation of their right to vote.[42]

Lower courts were thus left with no realistic prospect that any justiciable standard could be fashioned that would allow plaintiffs to prove *Shaw*'s underlying conception of representational harms. Moreover, lower courts were left with great uncertainty about whether standing could be based on generalized concerns about racial classifications. At the same time, however, they were equally sure that the Supreme Court would not have gone to the trouble of creating a doctrine with absolutely no practical effect.[43] They therefore went about processing racial gerrymandering cases by essentially ignoring all questions of injury.

That was not possible in every case, however, as a progressively wider array of plaintiffs began challenging a progressively wider array of districts. Cleo Fields' district in Louisiana, for example, was challenged by several voters, none of whom lived in the district itself.[44] This raised the question of whether, even if the plaintiffs were not required to present evidence that they personally had suffered the harms suffered in *Shaw*, there was nonetheless *some* requirement that they be connected to the purposefully created majority-minority district.

In addition, plaintiffs brought challenges to districts that were nowhere nearly as bizarrely shaped as those reviewed in *Shaw* itself. This brought the question of injury to the fore as well, given the fact that *Shaw* seemed to predicate its "representational harms" on the physical appearance of malformed majority-minority districts.[45] If "appearances do matter," what was to be thought of a district that was constructed based on race, but neither mirrored an interstate

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42. *See* Lani Guinier, *No Two Seats: The Elusive Quest For Political Equality*, 77 VA. L. REV. 1413, 1422-23 (1991). *See generally* Aleinikoff & Issacharoff, *supra* note 30 (criticizing the *Shaw* Court for its failure to resolve the issue of whether race may be justifiably relied upon in redistricting).

43. This would remove the post-*Shaw* cases from the fate of Davis v. Bandemer, 478 U.S. 109 (1986), at the hands of the lower courts. When *Bandemer* announced that claims of partisan gerrymandering would be constitutionally cognizable, the resulting evidentiary standard proved so elusive as to leave no meaningful trail in the lower courts. *See* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1670-85 (1993).

44. *See* Hays v. Louisiana, 862 F. Supp. 119 (W.D. La. 1994), *vacated sub nom.* United States v. Hays, 115 S. Ct. 2431 (1995).

45. *See Shaw*, 113 S. Ct. at 2827.

highway (as does North Carolina's Twelfth[46]), nor resembled a "bug splattered on a windshield" (as North Carolina's First was complained to do[47]), and was instead essentially cartographically dull? Should representational harms be presumed to be the result of that district as well?[48]

III. POST-SHAW THEORIES OF HARM

A. Miller's Theory: Stereotyping

The importance of shape was directly presented by a challenge to Georgia's Eleventh District in *Miller v. Johnson*,[49] a case heard by the Supreme Court in its October 1994 Term. While the Eleventh District had several malformed appendages, the bulk of its land mass was a geographically unremarkable central core, and according to several objective measures, the district was as regularly shaped as most of the state's majority-White districts.[50] The defenders of the Eleventh District therefore argued that, no matter how important race had been to its construction, the district was not so bizarrely shaped as to trigger *Shaw*'s concern for appearances.[51] Rather than attempting to wage a battle of aesthetic tastes, the same five Justices that had constituted the *Shaw* majority held that, properly understood, *Shaw* was not actually about "a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence)."[52] Instead, appearance was simply one of an unspecified number of potential tools to unearth "circumstantial evidence" of racial motivation.[53]

Having thereby discounted any notion that *Shaw* was a case uniquely about districting or district shape, Justice Kennedy's opinion for the majority only glancingly mentioned the issue of

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46. *Id.* at 2820-21.

47. *Id.* at 2820 (quoting WALL ST. J., Feb. 4, 1992, at A14).

48. *See* Blumstein, *supra* note 39, at 531 (describing *Shaw* plaintiffs' claim as that of "an individuated right not to be placed in a district whose boundary is race-determined even if the race of which plaintiffs were a member was not disadvantaged as a group").

49. 115 S. Ct. 2475 (1995).

50. *See id.* at 2489 ("[B]y comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face . . . ."); *see also id.* at 2502-03 & nn.3-4 (Ginsburg, J., dissenting).

51. *See id.* at 2485.

52. *Id.* at 2486.

53. *Id.* at 2486-87.

"representational harms."[54] Instead, according to *Miller*, the racial gerrymandering doctrine is simply an extension of the Court's earlier decisions concerning the general practice of race-based government decision making, as evidenced by *Shaw*'s discussion of the general harms of racial classifications.[55] But, while *Shaw* had discussed the inherently "odious" nature of such classifications and the resulting risk of stigmatization, Justice Kennedy described as the premise of the Fourteenth Amendment that the government should not *stereotype* individuals on the basis of their race:

> [T]he essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: "At the heart of the Constitution's guarantee of equal protection lies the simple command that *the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.*"[56]

Specifically, the act of drawing district lines on the basis of race with certain electoral outcomes in mind is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens, the precise use of race as a proxy the Constitution prohibits."[57]

If this proposition from *Miller* were to stand as an unadulterated definition of the law of equal protection, the effect would be of tremendous sweep. As the passages quoted from Professor Phillips at the start of this Article indicate, even a distant observer could not help but be struck by the tremendous transformative energy in American politics unleashed by the use of race-conscious remedial tools under the aegis of the Voting Rights Act. Prior to *Miller*, the Court had not upheld a frontal assault upon such race-conscious measures, but had under the pen of Justice O'Connor expressed grave concern that claims of remediation could

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54. *See id.* at 2486; *see also id.* at 2497 (Stevens, J., dissenting) (discussing how the *Shaw* Court explained the concept of representational harm).

55. *Id.* at 2486-87.

56. *Id.* at 2485-86 (emphasis added) (citations and internal quotation marks omitted) (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995)).

57. *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting), *quoted in Miller*, 115 S. Ct. at 2487.

yield to a renewed racial factionalism. This was clearest in *City of Richmond v. J.A. Croson Co.*,[58] where O'Connor identified the remedial claims underlying a generous municipal minority set-aside program as an invitation to a racial spoils system in the distribution of city contracts.[59] The key was not simply that racial classifications had been utilized, but rather that the wielders of power were no longer a White community seeking to burden itself. Instead, the Richmond minority set-aside was established by a new generation of Black elected officials, the very minority political powers that had been brought to office through the voting rights revolution. Under this circumstance, race was suspect not because of a per se desire to close the door to all further remedial efforts along America's persistent racial divide, but rather because claims of historical injustice could be thought to serve as a screen for interest group demands of the present.[60] To the extent that *Shaw* emanated from O'Connor's concerns articulated in *Croson*, there remained a difference between race-conscious measures inspired by a continuing legacy of exclusion and the use of race as the coin of the realm in demanding interest group benefits.[61]

In light of the persistent four-one-four divide on the Court in its equal protection jurisprudence, what is to be made of Justice O'Connor's vote in *Miller*? Although O'Connor joined the opinion of the Court and thereby lent the indispensable fifth vote for Justice Kennedy, she also added a concurrence that is widely viewed as an important limit on *Miller*'s scope. While Justice Kennedy's opinion focused on the "demeaning" assumptions on which the entire concept of race-conscious districting is based,[62] O'Connor strongly suggested that gerrymanders come in various gradations, only the "extreme instances" of which contravene the Fourteenth Amend-

58. 488 U.S. 469 (1989).

59. *Id.* at 506 ("If a 30% set-aside was 'narrowly tailored' to compensate Black contractors for past discrimination, one may legitimately ask why they are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.").

60. *See* Daniel A. Farber, *Richmond and Republicanism*, 41 FLA. L. REV. 623, 623-24 (1989) (interpreting O'Connor as emphasizing the importance of keeping open the prospect of political deliberation as opposed to strategic politics).

61. *Croson*, 488 U.S. at 495-96 ("In this case, blacks constitute approximately 50 percent of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.").

62. *Miller*, 115 S. Ct. at 2487.

ment.[63] Thus, she wrote, "[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices."[64] Under this view, the uncertainty of the harm inherited from the *Shaw* analysis persists and is fundamentally unaltered by *Miller*. Moreover, on its own terms, this standard leaves unanswered what it is that strict scrutiny is supposed to scrutinize. A standard of review cannot exist independent of a substantive conception of rights and wrongs that are to be examined, no matter how exacting that examination.

B. Hays' Theory: The Denial of Equal Treatment

While Justice O'Connor's *Miller* concurrence did not expressly touch on the plaintiffs' injury, she did address the issue in her opinion for the Court regarding the challenge to Cleo Fields' Louisiana district in *United States v. Hays*,[65] a decision handed down on the same day as *Miller*. The Court unanimously agreed that the plaintiffs lacked standing to sue, but split five-to-four (dividing as it had in *Shaw* and *Miller*) on the rationale.[66] Invoking at some length the Court's prior decisions on Article III standing, the majority concluded that the plaintiffs had not been harmed in a constitutionally cognizable fashion because they did not live within the district that the State had designed to be majority-Black.[67]

The Court's decision to resuscitate standing doctrines in *Hays* took all observers—and the parties to the case—by surprise.[68] Under *Northeastern Florida Contractors v. Jacksonville*,[69] written only two Terms prior, it certainly appeared that the Court would allow suit against state reliance on racial classifications even without direct proof of harm.[70] There seemed little to distinguish a contractor complaining that race had altered the distribution of bidding opportunities (even if he individually lost no contract opportunities) and a citizen of Louisiana claiming that race had altered the distribution of political opportunities (even if she were not a

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63. *Id.* at 2497 (O'Connor, J., concurring).

64. *Id.*

65. 115 S. Ct. 2431 (1995).

66. *Id.* at 2432.

67. *Id.* at 2436.

68. Brief for Appellant, Louisiana v. Hays, 115 S. Ct. 1311 (1995) (showing that although the issue was raised, appellants devoted only three pages to the issue in their brief).

69. 508 U.S. 656 (1993).

70. For a discussion of pre-*Hays* standing issues, see Brian R. Markley, Comment, *Constitutional Provisions in Conflict: Article III Standing and Equal Protections after* Shaw v. Reno, 43 KAN. L. REV. 449 (1995).

resident of the state-created majority-Black district). More immediately, the sudden interest in standing brought *Hays* into direct conflict with *Shaw*, in which the Court entertained a challenge to a district in which no plaintiff resided.[71]

Equally significant, there was little prospect of the Court escaping from a controversial case by invoking standing as a gatekeeper to the court system. The standing requirement in *Hays* does not serve as a meaningful threshold to litigation. Plaintiffs in politically charged cases such as redistricting battles are readily recruitable from the ranks of the interested political parties. On remand in *Hays* itself, the district court permitted a simple substitution of parties to allow the action to go forward.[72] Moreover, the court then reinstituted its prior opinion, putting the substantive issue back before the Supreme Court.[73]

This peculiar set of events refocuses the issue on just what conception of harm the Court was trying to identify in *Hays*. In describing the relevant harms of racial gerrymandering, Justice O'Connor offered a theory that, like Justice Kennedy's opinion in *Miller*, turned on the dangers of racial classifications generally. She did not, however, employ *Miller*'s conception that race-based decision making is unconstitutional because it serves as a form of pernicious stereotyping. Invoking the rule against "generalized grievances," Justice O'Connor instead held:

> Where a plaintiff resides in a racially gerrymandered district, . . . *the plaintiff has been denied equal treatment* because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action. Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference.[74]

While this explanation appears narrowly consistent with *Shaw*'s representational harms, in practice it artfully moves them to the

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71. *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 278.

72. *See* Ed Anderson, *Activist Pair Labeled Racist; Minority-Based Districts Fought*, NEW ORLEANS TIMES-PICAYUNE, Aug. 21, 1995, at A1.

73. *See* Ed Anderson, *Cleo Fields' District Rejected; Court Overturns Race-Based Boundary*, NEW ORLEANS TIMES-PICAYUNE, Jan. 6, 1996, at A2.

74. *Hays*, 115 S. Ct. at 2436 (emphasis added) (citations omitted).

side. According to *Hays*, in almost all instances, only individuals who live within a district have standing to challenge it as a racial gerrymander. While those district residents *may* suffer representational harms, they *necessarily* suffer a denial of equal treatment.[75] Given the majority's conclusion that "[o]nly those citizens able to allege injury 'as a direct result of having personally been denied equal treatment' may bring such a challenge,"[76] a reviewing court need never attempt to muddle through the question of just how representational harms occur.

Nonetheless, this peculiar standing doctrine does not elucidate a coherent view of harm. For example, imagine two White neighbors wishing to form a political coalition at the local level to advocate for greater farm subsidies. A line is drawn between their landholdings, separating them into two distinct legislative districts, one with a Black majority and the other with a White majority. Assume as well that the line is drawn for predominantly racial reasons. Is it possible to believe that one but not the other has had his representational opportunities conditioned on the basis of race? Furthermore, is it possible that the primary identity of each as a farmer in need of subsidies has not been dealt an equal blow regarding his chances of forming a political coalition on the basis of that primary identity?

The only meaningful distinction between the two farmers is that one is likely to be represented by a Black-elected official and the other by a White-elected official. Surely, the Supreme Court does not intend to turn the notion of standing into an inquiry whether a particular citizen is represented by an elected official of the other race, or more broadly, by an elected official whom he opposes. Such a conception of harm would explode the entire *Shaw* line of cases since it would label the failure to be race sensitive in drawing district lines a potential harm to Black voters who might find themselves without a Black representative. If anything is to be made of the *Shaw/Miller* conception of harm, it must be that there is something deeply disquieting about governmental assumptions about the necessary race of a political representative for any particular group or set of individuals in this society. It would therefore be preposterous for the Court in *Hays* to use as the trigger for constitutional standing the fact that one but not the other White farmer in our hypothetical illustration would likely be represented by a Black representative. It is not clear, however, what alternative the *Hays* standing doctrine offers.

The Court's fundamental confusion in this regard is evident

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75. *Id.* at 2436.

76. *Id.* at 2437 (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)).

from *Gomillion v. Lightfoot*,[77] in which the State of Alabama redrew the boundaries of Tuskegee in a way that was most notable for excluding ninety-six percent of its Black residents, but almost no Whites. The Supreme Court held that those statistics and the "uncouth" "twenty-eight sided" form of the resulting city boundaries were sound evidence of racial motivation,[78] and the case stands as the first example of the justiciability of racial gerrymandering claims—later resurrected by *Shaw*. As the modern Court has noted, the racial gerrymandering cases resemble *Gomillion* in that the government drew boundary lines in order to include only a certain racial proportion. But in *Hays*, Justice O'Connor concluded that only the citizens within a district were presumptively injured, not those that were excluded,[79] which is to say that the Whites in Tuskegee could sue but not the excluded Blacks. That reasoning simply fails to recognize that, in districting, a decision to include one kind of person is fundamentally also a decision to exclude other kinds of people.

IV. A COMPARATIVE LOOK: NONINSTRUMENTAL AND INSTRUMENTAL HARMS

In trying to piece together the Supreme Court's view of harm in the racial redistricting cases, we must conclude that, in only two years, the same five Justices of the Supreme Court have articulated a half-dozen different theories of the harms of racial gerrymandering.[80] The Court began in *Shaw* with a vision of "representational harms": the stigma generated by including widely dispersed communities in a district based on only their residents' race, and the risk that elected representatives will respond only to the interests of a single racial group. For whatever reason, however, the representational harms were short lived, and the Court is now proceeding down two different tracks, neither of which accords any special consideration to the fact that these cases arise in the voting rights context.

From the Rehnquist, Scalia, Kennedy, and Thomas camp we are

77. 364 U.S. 339 (1960).

78. *Id.* at 340.

79. *See Hays*, 115 S. Ct. at 2435.

80. The focus of this Article is primarily on the nature of the harm identified by the majority opinions in *Shaw*, *Miller*, and *Hays*. The dissenting group, now made up of Justices Stevens, Souter, Ginsburg, and Breyer continues to subscribe to a group-based notion that harm occurs in the presence of a dilution of aggregate representational opportunities. Their concern resides much more in insuring a robust pluralism in representative bodies than in the processes by which those bodies were selected. For a more comprehensive analysis of their views, see Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45.

offered what can be classified as the "noninstrumental harms" of racial classifications. The name reflects the fact that, while these may involve some effect upon racially classified individuals, that is not their defining characteristic. According to *Shaw*, "racial classifications are by their very nature odious to a free people."[81] Justice Kennedy's opinion for the Court in *Miller* added that such classifications are inherently suspect because they are based on stereotypes of individuals according to their race, a characteristic deemed irrelevant by the Fourteenth Amendment.[82]

This theory of harm is significant precisely because of how far removed it is from the Court's prior insistence that plaintiffs have standing only if they prove that the complained-of government action has had some operative effect upon them. In fact, the essence of noninstrumental harms is not even the substance of the racial classification itself. Instead, the harm stems from the government's reduction of plaintiffs from individuals to categories in enacting the classification—the racial presumptions upon which the classifications are ultimately based.[83] The demeaning assumption that members of a certain race share the same beliefs, values, and preferences is apparently not just the source, but the substance, of constitutional harm.

That is not to say that a cognizable injury arises absent *any* government conduct—from, say, mere legislative deliberations. However, removing the instrumental impact on individuals from the calculus greatly lowers the threshold of racial motivation that gives rise to standing. Carried to its logical conclusion, this theory would suggest that, even when race is far from a statute's animating concern, if the legislature acted in part based on what the Court views as racial stereotypes, it injures the individuals upon whom the statute operates.

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81. *Shaw*, 113 S. Ct. at 2824 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

82. This theme is most forcefully articulated in Holder v. Hall, 114 S. Ct. 2581, 2599 (1994) (Thomas, J., concurring) ("The basic premises underlying our system of safe minority districts and those behind the racial register are the same: that members of the racial group must think alike and that their interests are so distinct that the group must be provided a separate body of representatives . . . . Such a system . . . is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant." (citation omitted) (quoting Wright v. Rockefeller, 376 U.S. 52, 64 (1964))).

83. *See, e.g.*, Katherine I. Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 596 (1995) ("As for the existence of an injury sufficient to support standing, classification and assignment of citizens according to their race *is* the injury. The assignment of citizens to segregated voting districts is no more constitutional than the assignment of students to segregated schools or the assignment of the public to segregated drinking fountains.").

Justice O'Connor, by contrast, appears to be trying to identify a set of instrumental harms—those that have as their foundation the *effect* of racial classifications on individuals.[84] It is possible to find, even in O'Connor's initial focus on representational harms in *Shaw*, an attempt to fit the concept of harm into an instrumental mold. *Shaw* was concerned with stigmatic effects on individuals and the disruption of representative government although this conception appears to have evaporated by the time of *Hays*. By a further stretch, and we concede that it is indeed a stretch, the same could be said of the theory of "equal treatment" that O'Connor proffered in *Hays*.[85] Unlike Justice Kennedy's interpretation of injury under the Fourteenth Amendment as government stereotyping, a fully developed "equal treatment" philosophy would seem to require consideration of the statute's operation upon individuals, i.e., how it *treats* them.

For our purposes, the crucial difference between the two approaches is that while Kennedy's theory would apparently find a constitutional violation in even those instances in which race has a fairly minimal input into government decision making, Justice O'Connor's theory could conceivably account for gradations. To date, O'Connor's approach appears not to be a regime of strict liability for race-conscious government action; the legislature's mindset is not the focus. Instead, a determination must be made whether the challenged statute *in operation* is one that presumptively denies individuals equal treatment on the basis of race. As a logical construct, therefore, there must necessarily be a set of cases in which, though race was a factor that the government considered, it does not so taint the statute as a whole as to separate individuals on the basis of their race. Just as important, Justice O'Connor apparently views the class of redistricting plans that do cause injury as relatively small, given her emphasis in *Miller* that she views only the "extreme" instances of gerrymandering as constitutionally suspect.[86] And, while Justice Kennedy may too recognize that gerrymanders come in different degrees, only O'Connor's theory of harm appears able (or, more likely, intended) to take them into account.

However, it is not possible from *Shaw*, *Miller*, and *Hays* to

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84. A simple gauge of the importance of the distinct views that Justice O'Connor has staked out in these cases is that in the Court's five most recent cases involving race and voting, she has either written the opinion for the Court or written a concurrence to stake out her separate position. *See* Johnson v. Miller, 115 S. Ct. 2475, 2497 (1995) (concurring opinion); United States v. Hays, 115 S. Ct. 2431, 2433 (1995) (opinion for the Court); Johnson v. De Grandy, 114 S. Ct. 2647, 2664 (1994) (concurring opinion); Holder v. Hall, 114 S. Ct. 2581, 2588 (1994) (concurring opinion); Shaw v. Reno, 113 S. Ct. 2816, 2819 (1993) (opinion for the Court).

85. *Hays*, 115 S. Ct. at 2435.

86. *Miller*, 115 S. Ct. at 2497.

divine a particular type or degree of racial motivation that triggers Justice O'Connor's ire—there simply is at this point no open and safe path for state and local legislatures to travel in their effort to comply with both the Fourteenth Amendment and the Voting Rights Act. We do discern from those opinions, however, one flash point that has received such venomous attention that it almost certainly is one of O'Connor's central concerns. All three decisions contain repeated references to the "maximization" policy of the Justice Department in recent administrations, through which the Department would refuse to preclear under section 5 of the Voting Rights Act proposed voting systems that did not include the maximum possible number of majority-minority districts.[87] *Hays* in particular includes an extraordinary and extraneous effort by Justice O'Connor to bring attention to this issue, in which the Court describes the Department's attempt to require the maximization of Louisiana's *school* districts, and hypothesizes that "[p]erhaps in part because of its recent experience with [those school] districts, the Louisiana Legislature set out to create a districting plan containing two majority-minority districts."[88] This emphasis on outside (and in O'Connor's view illegitimate[89]) pressure from the federal government buttresses the Court's suggestions that while courts should defer to the redistricting decisions of state legislatures, particularly those that conform to "traditional districting principles," such policies must be the actual results of the customary political give-and-take within the states.

CONCLUSION

It is unlikely that our analysis will provide much solace to the well-intentioned state actor. On the issue of harm, as in the holdings in general, the Court remains deeply divided over the means and ends of racial remediation. No matter what the vantage point, there is no escaping the pivotal role played by Justice O'Connor in defining the uncertain constitutional parameters of race conscious-

87. *See Miller*, 115 S. Ct. at 2483-84, 2488-89; *Hays*, 115 S. Ct. at 2433-34; *Shaw*, 113 S. Ct. at 2820.

88. *Hays*, 115 S. Ct. at 2434.

89. Johnson v. De Grandy, 114 S. Ct. 2647, 2664 (1994) (O'Connor, J., concurring) (stating that "[t]he Court makes clear that § 2 does not require maximization of minority voting strength, yet remains faithful to § 2's command that minority voters be given equal opportunity to participate in the political process and to elect representatives of their choice"); *see also id.* at 2666 (Kennedy, J., concurring) (emphasizing that the constitutionality of the Voting Rights Act remained an open question and stating that "[a]s a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions").

ness in state decision making. To the extent that Justice O'Connor has focused on the issue of harm, her concern appears to emanate from excessively manifest racial considerations in the political give-and-take surrounding redistricting. She appears both to express a systemic concern about the corruption to the political process as a whole (*Shaw, Miller*) and to want to confine that harm to specific individuals who have been adversely affected as a consequence (*Hays*). The most evident problem is that there are, as yet, no theories espoused and no facts identified for providing the link between systemic harms and individual consequences. Until the Court in general, and Justice O'Connor in particular, can identify why the in-districted plaintiffs required by *Hays* suffer from the particularized form of harm identified in *Shaw* and *Miller*, this area will remain a treacherous quagmire for state actors charged with redistricting, no matter how well intentioned. At the end of the day, admonitions from the Supreme Court not to rely excessively on race provide extraordinarily little guidance for the affected parties. "All things in moderation" may make for a wise and sensible personal ethos; it leaves much to be desired as a statement of jurisprudence.