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AUTONOMY VERSUS EQUALITY: VOTING RIGHTS REDISCOVERED

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It was rather odd. On March 4, 2003, Congressman Jesse Jackson, Jr. proposed a constitutional amendment guaranteeing the right to vote to all citizens of the United States.¹ Section 1 of the resolution declared: “All citizens of the United States, who are eighteen years of age or older, shall have the right to vote in any public election held in the jurisdiction in which the citizen resides.”² Was Jackson in a time warp? This is the United States at the beginning of the twenty-first century, not the twentieth. Moreover, this is America, not Iraq or some other non-Western fort where the existence of the right to vote could be openly questioned and indeed disproved.

Perhaps the amendment represented Jackson’s sardonic commemoration of the tenth anniversary of *Shaw v. Reno*,³ a decision that dramatically altered the ability of voters of color to send candidates of color—like Jackson himself—to legislative bodies. The amendment’s breadth also would seem to entail giving citizens of the District of Columbia the right to select members of Congress.⁴ Or explicitly guaranteeing the right to vote to “all citizens” was perhaps intended to override section 2 of the Fourteenth Amendment, which purportedly allows for the disenfranchisement of felons and under which several states, mainly in the South, have deprived a disproportionate number of voters of color of their right to vote.⁵ But surely the proposed amendment’s requirement that “Congress . . . reconsider . . . election performance standards at least once every four years”⁶ referred to the imbroglio of Florida 2000 in which the Supreme Court intervened to decide the outcome of one of the most controversial elections in modern history.⁷

Whatever Jackson’s intentions—and they are undoubtedly layered—the amendment is a reminder of an embarrassing, prickly feature of American democracy: the lack of an express right to vote and the concomitant fragility of any associated rights, such as a right of group political autonomy. As declared by the Supreme Court more than a century ago, “[T]he Constitution of the United States does not confer the right of suffrage upon anyone . . .”⁸ Instead, the right to vote is a negative one, expressed in terms of “thou

1. See H.R.J. Res. 28, 108th Cong. (2003). The bill tracks a proposal advocated in the writings of Professor Jamin Raskin. See, e.g., Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America’s Structural Democracy Deficit*, 3 ELECTION L.J. 559, 573 (2004).

2. *Id.*

3. 509 U.S. 630 (1993).

4. See H.R.J. Res. 28.

5. *Id.*; U.S. CONST. amend. XIV, § 2.

6. H.R.J. Res. 28.

7. See *Bush v. Gore*, 531 U.S. 98 (2000).

8. *Minor v. Happersett*, 88 U.S. 162, 178 (1874).

shall not” and inferred from the Constitution’s political amendments: The Fifteenth Amendment forbids denial of the right to vote on the grounds of race,⁹ the Nineteenth on the grounds of sex,¹⁰ and the Twenty-sixth on the grounds of age for those eighteen years or older.¹¹ The Equal Protection Clause of the Fourteenth Amendment more broadly proscribes adverse governmental action with respect to political rights, requiring that no person be deprived of equal protection of the laws.¹² To these negative rights are added the rights of free speech and association guaranteed by the First Amendment,¹³ the totality of which implies a right to vote.¹⁴

Nowhere has the effect of the piecemeal nature of the right to vote been more significant than in its impact on voters of color. *Shaw v. Reno*’s insistence on the application of the strictest constitutional scrutiny for intentionally-created majority-minority voting districts¹⁵ deprives minority voters of autonomy—a constitutional value implied in many fundamental rights, but neglected in voting¹⁶—while vindicating an interest in color-blindness that has far less a tradition in constitutional jurisprudence.¹⁷ *Bush v. Gore*¹⁸ elevated uniformity of standards above the equality interests implicated by the non-uniform and faulty voting machines assigned to voters in heavily black and Latino precincts,¹⁹ but for a net gain of what constitutionally? *Rice v. Cayetano*²⁰ purported to apply a simple principle of non-discrimination to strike down an electoral scheme that excluded the participation of non-Hawaiians, but the decision’s consequence was to reduce the autonomy of Native Hawaiians in controlling an office devoted exclusively to their special needs.²¹ *Easley v. Cromartie*²² held that the color-blind principle of *Shaw v. Reno* did not apply where a majority-minority district was drawn to advance partisan rather than racial interests,²³ but in so doing it superimposed a political identity on blacks by allowing blacks power only if they could be subsumed under a major-party label, thus depriving them of the autonomy of self-definition. Two trends are apparent from the Supreme

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9. U.S. CONST. amend. XV.
 10. *Id.* amend. XIX.
 11. *Id.* amend. XXVI.
 12. *Id.* amend. XIV.
 13. *Id.* amend. I.
 14. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“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.”).
 15. See 509 U.S. 630, 653 (1993).
 16. See *infra* Part I.
 17. See, e.g., Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 326-27 (1997) (analyzing the legislative history of the Fourteenth Amendment and concluding that “the suggestion that the clause was also intended to render presumptively unconstitutional all race-based state action, whether or not it has such a discriminatory effect, would have absolutely astounded [the amendment’s framers]”).
 18. 531 U.S. 98 (2000).
 19. Editorial, *Race and the Florida Vote*, N.Y. TIMES, Dec. 26, 2000, at A30.
 20. 528 U.S. 495 (2000).
 21. See *id.* at 498-510.
 22. 532 U.S. 234 (2001).
 23. *Id.* at 258.

Court's voting rights jurisprudence from *Shaw* forward. First, the equality principle that undergirds the voting penumbra has not resounded to the benefit of voters of color, but rather to the benefit of white plaintiffs objecting to these voters' pursuit of a measure of political independence. Second, the value of autonomy itself has gone unrecognized by the Court.

When used in the political context, autonomy conjures negative images—separatism, factionalism, and the like. But by democratic tradition and by reference to its usage in the privacy context,²⁴ the term can be understood differently. Autonomy means forms of self-determination that allow a numerically inferior, racially or culturally identifiable group to make certain decisions within the political framework of a society that are not subject to the approbation of the majority of that society's citizens. It is this meaning to which the Court's equality jurisprudence has been resistant. This Article measures—on the Court's own terms—the success of the stated goal that has animated this resistance: reducing the role of race in politics.²⁵ It concludes, in part, that none of the Court's voting rights cases from *Shaw* forward has facilitated this goal and that race is as salient in politics as ever.

After defining the concept of racial minority political autonomy in Part I, this Article next demonstrates that the Supreme Court has traded the political autonomy of voters of color for the elusive goal of reducing the role of race in politics. Part III explains why the Court has not succeeded at reducing the role of race in politics. In short, the Court's antidote to race in politics is ineffective because it misdiagnoses the disease. The Supreme Court and lower courts have systematically over-determined race when minority control is at stake by failing to demarcate the boundaries of racial classifications from political classifications. When race is over-determined, the goal of eliminating it becomes elusive. Conversely, courts have treated race as a proxy for partisanship when doing so has facilitated curtailing minority political autonomy. Similarly, the Supreme Court engages in racially correlative doctrinal shifts in defining the nature of the right to vote and in implementing that right, finding voting to be a fundamental right when the interests of whites are at stake, but insisting on a showing of racially discriminatory intent when the plaintiffs are people of color. The ironic effect of this doctrinal inconsistency is to gratuitously racialize equal protection doctrine and, in the process, politics itself.

Finally, and perhaps most importantly, in Part IV the discussion shifts from constitutional doctrine to politics on the ground. What if the equal protection status quo in voting rights as solidified by the Court over the last dozen years remains? The Court, after all, makes mistakes all the time, and many go unchanged for decades. This Article proposes a political strategy

24. See *infra* Part I.

25. *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (“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.”).

for defying an obstinate judiciary. The problem with the Court's effort to reduce the role of race in politics is not merely that the Court got it wrong, or even that the costs of the Court's mistakes are borne by minorities in the form of less control of electoral outcomes. The problem instead is that the autonomy that the Court extracts from people of color in the name of equal protection can and should be reclaimed by these same voters to the detriment of the Court's color-blind goal. Unlike affirmative action in higher education and employment, the Court cannot enjoin the practice of race-consciousness in politics—regardless of prohibitions on minority districting—because voting and political association are too private and autonomous an act, and race and politics are conjoined. The choice for the Court is between a race-consciousness mediated primarily by competent political institutions such as political parties and state legislatures, and a race-consciousness in the state of nature, unmediated and unleashed by judicial denial of a race-conscious remedy. More than a decade of failure suggests that the Court should embrace the former alternative.

I. DEFINING AUTONOMY

Representative Jackson's apparent concerns are understandable. Indeed, in one manner or another, a generation of voting rights scholars has grappled with the ramifications of an all too inferential basis for the right to vote in the Constitution.²⁶ A great deal of that scholarship has trained on the extent to which the Constitution implies a right of political influence,²⁷ or what this Article refers to as limited group or subgroup autonomy. In the process of its discourse, this scholarship has helped to identify traditions of autonomy in the American political structure. These findings are directly at odds with the Supreme Court's bare five-justice majority in *Shaw v. Reno* and its progeny, which, as argued in Part II, has increased minority voter dependency on white political noblesse oblige in the exercise of the franchise. *Shaw* holds that a majority-minority district whose creation has defied so-called traditional districting principles will be subject to strict scrutiny.²⁸ The objective of the present discussion, however, is not to urge overruling *Shaw*. Rather, in assessing *Shaw*'s success or lack thereof, this Article posits a trade-off, or—worse yet—an unintended consequence, or—worse still—an intended consequence: the curtailment of minority political autonomy. The import of this observation, however, is conditional: only if group political autonomy is a cognizable constitutional tradition can its diminution be of moment. As set forth below, although the debate has the alluring epistemic quality of group-rights-versus-individual-rights discourse (and therefore may never be quailed), it is simply too late in our democratic development to deny the existence of a right of subgroup political autonomy.

26. See, e.g., *infra* notes 29-58 and accompanying text.

27. See *infra* notes 29-32 and accompanying text.

28. *Shaw*, 509 U.S. at 649.

A. *The Lamentation of Scholars*

A continuing lamentation of scholars of voting is the failure of the Court to locate the right to vote within the contours of substantive due process rather than equal protection.²⁹ Professor James Gardner has observed that the Court's reliance on the Equal Protection Clause for its right-to-vote jurisprudence flows from the Court's conclusion that the Constitution does not contain a formal, substantive right to vote.³⁰ Lacking such a right, the Court has consigned the right of political influence through voting to a comparative norm: states need not grant it, but once conferred, all are entitled to exercise it on an equal basis.³¹ But the comparative norm is freighted with circularity: to compare relative degrees of political influence one must determine how much influence is constitutionally required—an inquiry effectively pretermitted by the Court in finding no substantive right to vote.³² If Gardner is correct that the Constitution contains no minimum threshold of political influence, how is it possible to argue for a right of political autonomy? Moreover, how can one coherently accuse the Court of depriving minority voters of an autonomy to which the Constitution does not entitle them in the first instance?

B. *Identifying Traditions*

Gardner argues that the Court, lacking a substantive basis in the Constitution for the degree of political influence to which citizens are entitled, has turned to community understandings and tradition for a baseline.³³ On this criteria, Gardner finds in the Court's voting jurisprudence a choice "to draw a relatively clear and well-defended line at the point of enfranchisement, subject to the one-person, one-vote rule,"³⁴ a choice which he finds "highly plausible."³⁵ Even if we accept Gardner's interpretation of Supreme Court precedent, however, that precedent is inconsistent with any understanding of

29. Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in Bush v. Gore*, 29 FLA. ST. U. L. REV. 587, 596 (2001) ("A number of scholars have suggested that the Court's entire equal protection jurisprudence in the area of voting rights may be little more than a Warren Court recasting of substantive due process concerns in more palatable doctrinal language."); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1064-70 (1979) (discussing the consequences of disentangling due process from equal protection in the political participation context).

Other scholars have found the Fifteenth Amendment to be a more appropriate substantive basis for analyzing claims of racial discrimination in voting. See, e.g., Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 312 (1998).

30. See James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 959 (1997) ("[T]he Constitution does not contain any substantive right to vote.").

31. *Id.* at 962-63.

32. *Id.* at 974.

33. *Id.*

34. *Id.* at 980.

35. *Id.* at 980-81.

the traditions that animate the Reconstruction Amendments³⁶ on which the Court has come to base its voting jurisprudence. Far from being “highly plausible,” a rejection of a right of group autonomy or political influence rewrites tradition and current community understandings of the right to vote.

In her groundbreaking exposition on the Reconstruction Amendments, Professor Peggy Cooper Davis distinguishes hidebound notions of tradition which freeze historic inequities in place from “the traditions that animate the principles expressed in the constitutional text.”³⁷ It is in the latter definition of tradition that at least four Justices of the current Court and scholars of voting have identified a right of limited group autonomy. Justice Ginsburg encapsulated this definition of tradition in her dissent in *Miller v. Johnson*,³⁸ the first sequel to *Shaw*: “To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation’s cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example.”³⁹

Professor Richard Ford makes the crucial observation that the tradition about which Justice Ginsburg writes is not limited to electoral districts but rather extends to the formation of jurisdictional boundaries.⁴⁰ Highlighting the Supreme Court’s inconsistent treatment of state-created majority-minority electoral districts versus state-recognized racially segregated localities (the latter bypassing strict constitutional scrutiny), Ford offers a vision of limited group autonomy in which durable subgroups are afforded recognition by the state, not for purposes of isolationism, but rather to engage in a process that Ford terms “civic pluralism” or “wholesome provincialism.”⁴¹ In civic pluralism the objective of subgroup solidarity is to enlarge the body politic by creating a more variegated political discourse.⁴² According to Ford, unlike segregated localities in which the majority controls the police powers and has no compulsion to enter into a dialogue with subgroups, majority-minority electoral districts encourage republican dialogue because the representatives elected from such districts must function within a broader body in which they are not the majority.⁴³

Although geography has been the foundation of our system of representation, it is merely a proxy—and often a poor one—for political interests.⁴⁴

36. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 214-26 (1997).

37. *Id.* at 216.

38. 515 U.S. 900 (1995).

39. *Id.* at 944-45 (Ginsburg, J., dissenting).

40. See Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 *STAN. L. REV.* 1365, 1382-95 (1997).

41. *Id.* at 1438.

42. *Id.*

43. *Id.* at 1399 (“Majority-minority districts provide an insular group only with the power to send a representative to a broader and more inclusive institution where political power can be exercised only through compromise and persuasion.”).

44. See Henry L. Chambers, Jr., *Enclave Districting*, 8 *WM. & MARY BILL RTS. J.* 135, 137-38 (1999). Professor Chambers argues that, despite the continued use of land as the basic unit of representation, the Supreme Court’s recognition of one-person, one-vote has distilled a modern vision of represen-

The tradition of geographic autonomy in our democracy—most saliently exemplified by federalism itself—is thus fully consistent with subgroup autonomy based on other characteristics. Professor Lani Guinier describes it as follows:

Territorially based electoral districts are compatible with federalism which, as both a political principle and an institutional structure, seeks to balance competing group attachments and to facilitate geographically based political autonomy. If it is consistent with democratic principles to allocate electoral representation to geographically defined groups, it should be consistent with democratic principles to base representation upon other types of groups as well. This is especially true given that geography may not be the most salient characteristic on which to base group representation.⁴⁵

Arguments over the group versus the individual nature of the right to vote tend to arise upon the substitution of some subgroup characteristic for geography.⁴⁶ But the dichotomy is particularly misleading in the voting rights context. For one thing, the invocation of the dichotomy is selective, usually made for purposes of defeating claims of minority political autonomy while ignoring the group-based nature of geographic autonomy.⁴⁷ Moreover, the attempted distinction contrives an irreconcilability where none exists, for whether or not rights of political participation are atomistic, “the conception of voting as a purely individual right could produce a truly

tation based upon the equal right to advance one’s political interests. *Id.* He asserts that states rely too heavily on land as a proxy for political interests and should be afforded the license to group voters based explicitly on their commonality of interests. *See id.* at 138-39. Such “enclave districting” would not eliminate traditional single-member districts but would in some instances render impossible compact, contiguous districts. *Id.* at 140-41, 177.

Professor Chambers offers this justification for what he concedes would be a departure from traditional districting principles:

Enclave districting accepts that while the residence proximity principle may be accurate on a small scale, it becomes less so on a larger scale. Neighborhoods should have common representation for practical reasons and because neighbors often have similar political interests on issues about which Congress legislates. However, when the neighborhood is expanded to the size of a congressional district encompassing more than 500,000 people, there is little reason to provide the entire area with common representation based solely on geographical proximity. As a result, enclave districting is most relevant to large legislative districts, such as congressional districts.

Id. at 177 (footnote omitted).

45. Lani Guinier, Comment, *[E]Racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 127 (1994) (footnotes omitted).

46. *See* Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1219 (2003). Charles notes:

As a consequence of its skeptical reaction to racial identity claims, the Court and opponents of race-conscious districting frequently have concluded that race-conscious districting is inconsistent with the Constitution’s equality norm. This norm, we are told, demands that “[g]overnment . . . treat citizens ‘as individuals, not as simply components of a racial, religious, sexual or national class.’”

Id. (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)) (alteration and ellipsis in original).

47. *See id.* at 1216-27.

egalitarian politics only if one presumed that there were no structural biases in the ways in which individual votes were aggregated.”⁴⁸ Thus, defective or biased aggregation is an alternative conception of minority subgroup autonomy that is consistent with the individual rights depiction of political participation.⁴⁹

The discursion into the group versus the individual nature of the right to vote also ignores a tradition of subgroup political autonomy nearly as old as American democracy itself: the First Amendment’s right of self-definition, which of course includes one’s right to define himself in relation to a group.⁵⁰ The interplay of the First Amendment and minority subgroup autonomy has been the subject of voting rights scholarship critical of the Supreme Court’s attempt to curtail the drawing of majority-minority districts.⁵¹ This author has argued that black voters’ advocacy for districts of their own and their communing of political interests to elect the representative of their choice is constitutionally protected associational conduct and speech.⁵² Surely black voters’ demands, aspirations, and electoral behavior in this regard are comparable to a number of other groups, all of whom have a racial identification if not a racial purpose.⁵³

48. ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 300 (2000).

49. See James Thomas Tucker, *Affirmative Action and [Mis]Representation: Part I—Reclaiming the Civil Rights Vision of the Right to Vote*, 43 HOW. L.J. 343, 381 (2000). Tucker states:

The group right to vote was a natural extension of the individual right to vote because “individual rights and group empowerment were interdependent and reinforcing.” The ability of individual blacks to belong to the community would have little meaning if blacks as a group were prevented from actually having a voice in the political process.

Id. (quoting ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 279 (1998)) (footnote omitted).

50. See Terry Smith, *A Black Party? Timmons, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 56 n.243 (1998) [hereinafter Smith, *Black Party*] (equating the associational rights of political parties with the associational rights of black voters who seek congressional districts in which they are the majority); see also Terry Smith, *Parties and Transformative Politics*, 100 COLUM. L. REV. 845 (2000) [hereinafter Smith, *Transformative Politics*] (arguing that the First Amendment should protect black voters’ attempts to influence the political process by creating black districts just as it protects wealthy white voters’ use of money to influence the political process). Smith explains:

A Court that forbids expenditure restrictions for fear that they will “reduce[] the quantity of expression” and restrict the number and depth of issues discussed, should be equally concerned that states’ inability to create minority-controlled legislative districts will produce the same undesired consequences. Voters of color have divergent political perspectives from whites, and their interests are entitled to the same constitutional protection as the interests of wealthy white campaign contributors. The fact that blacks engage in political expression by seeking to persuade legislatures to create majority-minority districts rather than by contributing money should be constitutionally irrelevant. If anything, the diversity of political speech espoused as a value in the Court’s campaign finance decisions is even more essential in the redistricting context because there the government must inevitably allocate a finite type of speech-electoral representation.

Id. at 859 (alteration in original) (footnotes omitted).

51. See, e.g., James U. Blacksher, *Dred Scott’s Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 HOW. L.J. 633, 687-91 (1996).

52. See Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469, 1494 (2001).

53. See Smith, *Black Party*, *supra* note 50, at 23-24 (using a heuristic to compare black voters’ districting efforts with those of Christian conservatives); *id.* at 34 n.156 (arguing that majority white districts, particularly in the South, are not racially neutral).

Professor Guy-Uriel Charles has elaborated on the interplay of black voters' political aspirations and First Amendment traditions.⁵⁴ Charles demonstrates that the First Amendment's right of association protects not merely expressive private association but an individual's ability to aggregate political power.⁵⁵ Electoral structures that have burdened this right have been successfully challenged in myriad circumstances.⁵⁶ Where voters of color share similar political dispositions and vote alike,⁵⁷ race-blind districting renders it more difficult for them to associate to achieve political ends than whites.⁵⁸

In sum, our democratic traditions of subgroup political autonomy are multifaceted. Federalism, ethnic districting, the incorporation of racially identifiable communities, and the broad associational license for subgroup cohesion practiced under the First Amendment all exemplify this tradition.

C. Tradition Extended

This tradition has been accessed by voters of color at least since 1969, when the Court recognized the concept of minority vote dilution.⁵⁹ Twenty-four years later, *Shaw v. Reno* and its progeny began what historian Alexander Keyssar has called "a disorderly retreat from the effort to prevent the dilution of minority votes and promote the election of minority officials."⁶⁰ Two points warrant elaboration. The first is that twenty-four years *alone* can constitute a tradition. This is certainly a fair inference from the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶¹ In affirming the basic right to an abortion that it had announced nineteen years beforehand, the Court found that the availability of legalized abortion as an option for family planning over the course of nineteen years had created a reliance interest on the part of women and society in general.⁶² To upset that right would hinder women's ability "to participate equally in the economic and social life of the Nation."⁶³ Matters of representation no less affect one's equal existence in American society, so the reliance interest of black, brown, and yellow voters on the pre-*Shaw* understanding of race and districting is not less than that of women on the right to choose.⁶⁴

54. Charles, *supra* note 46, at 1239-62.

55. *See id.* at 1246-59.

56. *Id.*

57. These are social scientific facts, not stereotypical assumptions. *See id.* at 1231-39 (presenting social science inquiries supporting the claim that voting preferences of people of color are nearly identical).

58. *Id.* at 1260.

59. *See Smith, supra* note 29, at 299 (marking the decision in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), as the point at which the Supreme Court recognized the modern paradigm of minority vote dilution); *see also* KEYSSAR, *supra* note 48, at 289, 297.

60. KEYSSAR, *supra* note 48, at 297.

61. 505 U.S. 833 (1992).

62. *Id.* at 857.

63. *Id.* at 856.

64. *See Smith, Transformative Politics, supra* note 50, at 869 n.105 (comparing the Court's treat-

The understanding of the permissible role of race in politics during the twenty-four years intervening between 1969 and *Shaw* was not uniform⁶⁵ (what area of the law is?), but that period more closely fit with the values that animated the constitutional and statutory bases of the exercise of the modern franchise than did *Shaw*. We turn again to Peggy Cooper Davis's work on the Reconstruction Amendments for an analytical framework. Davis reminds us that the Reconstruction Amendments are the product of an "antislavery history and tradition"⁶⁶ that Supreme Court jurisprudence has neglected to evaluate. One witnesses a similar neglect in reference to the constitutional and statutory enactments that form the basis of the modern right to vote. The history surrounding those provisions (the "Movement" history) surely does not support a cabined view of political influence limited to casting an equi-weighted vote.

It would have been counterintuitive for advocates of an expanded franchise to seek a formal right to vote that would leave blacks as dependent on white political noblesse oblige as they had been when they were disenfranchised. Abolitionists such as Frederick Douglass understood and acted on this premise, as did later equality activists whose toils would lead to passage of the Voting Rights Act of 1965.⁶⁷ Over the course of the decades-long struggle for the black franchise, the right to vote assumed a multi-faceted meaning in the view of Movement participants.⁶⁸ Salient among these understandings was that voting meant representation and governmental responsiveness—in short, power.⁶⁹ Movement activists sought not just the formal right to participate but also the fruits of actual representation.⁷⁰ These benefits were not possible without the election of like-minded representatives over whom African-Americans had political control.⁷¹

Those views on the part of Movement participants and African-Americans were understood by white Americans and formed the basis of their resistance: "[W]hites did not fear the solitary black voter, but the specter of a large group of politically cohesive black voters who demanded their legitimate right to equal political participation."⁷² Whether the charge was "Negro domination" during Reconstruction⁷³ or fear of "Negro bloc voting"

ment of abortion rights with its treatment of affirmative action and arguing that "the Court has failed to recognize a comparable reliance interest on the part of racial minorities with respect to affirmative action" (quoting Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1915-16 (1999) (reviewing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998))).

65. See KEYSSAR, *supra* note 48, at 287-94 (discussing major voting rights cases from that period).

66. DAVIS, *supra* note 36, at 214.

67. See Tucker, *supra* note 49, at 389, 395.

68. See *id.* at 354 (identifying three "characteristics of the individual right to vote: voting as freedom; voting as citizenship; and voting as empowerment and transformation").

69. See *id.* at 393-403.

70. *Id.* at 402.

71. *Id.* at 399-401.

72. *Id.* at 382.

73. See DAVIS, *supra* note 36, at 220-21.

in the 1960s,⁷⁴ the recurring theme of white resistance to the black franchise is the fear of black power. That power could not possibly be realized—and whites understood this—by merely allowing blacks access to the ballot. For one thing, while the passage of the Voting Rights Act of 1965 greatly increased black voter registration in the South,⁷⁵ these increases were outpaced by historic increases in white voter registration throughout the South.⁷⁶ Moreover, if whites were concerned only with blacks having access to the ballot and casting an equi-weighted vote, it would have been largely unnecessary for Southern jurisdictions to undertake the numerous contrivances they did in order to dilute the black vote.⁷⁷ Whites went to such lengths because they understood the meaning of the right to vote in precisely the same terms as blacks: as a source of group political empowerment. Only the Supreme Court's and scholars' revisionist definitions conceive of this right as a narrow formality.

D. Political Autonomy Personalized

We may look to one final source—perhaps an unexpected one—as a basis for subgroup political autonomy: the Supreme Court's privacy jurisprudence. While a private act, voting is not the exercise of intimate bodily agency involved in the right to choose⁷⁸ or consensual adult sex.⁷⁹ And as shown above, voting is far from atomistic—it is a right that requires fair rules of aggregation in order to be meaningful.⁸⁰ Abortion rights and matters of consensual sexual conduct are dissimilar to voting in that regard as well. Despite these distinctions, however, the core values advanced in the Supreme Court's personal autonomy decisions are the same as those envisioned by Movement participants in the quest for the black franchise. Consider the Court's language in defense of a woman's right to choose:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

74. See LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* 76 (2003).

75. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

76. WILLIAM L. VAN DEBURG, *NEW DAY IN BABYLON: THE BLACK POWER MOVEMENT AND AMERICAN CULTURE, 1965-1975*, at 43 (1992).

77. See *id.* at 125 (surveying some of the dilutive practices employed, including gerrymandering).

78. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

79. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

80. See *supra* notes 48-49 and accompanying text.

. . . *The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.*⁸¹

This language is repeated in *Lawrence v. Texas*, a case protecting the right to engage in homosexual sodomy.⁸²

For black slaves, the struggle for bodily autonomy was inseparable from the quest for political rights.⁸³ Abolitionists understood well that without political power, the freed slaves would fall prey to white oppression.⁸⁴ Latter-day equality activists quite literally conceived of political power as a means of protection against the violence attendant to Jim Crow.⁸⁵ And indeed it was the political process—the Republican Party during Reconstruction and the Democratic Party in the twentieth century—no less than the judiciary that secured for the former slaves and their descendants freedom and full citizenship.⁸⁶ Thus, the right of self-actualization that the Court promotes in its privacy decisions is a right racial minorities as a group have garnered through the political process. Their exercise of the right to vote is both an expression and advancement of their self-actualization, rendering the Supreme Court’s elaboration of personal autonomy highly relevant to political autonomy.⁸⁷

Viewed in connection with the overtly political traditions previously identified, the Court’s exposition of personal autonomy helps to moor the right to vote and the right of political influence to substantive due process.⁸⁸

81. *Planned Parenthood*, 505 U.S. at 851-52 (emphasis added).

82. 539 U.S. at 574.

83. See DAVIS, *supra* note 36, at 236-37.

84. See Tucker, *supra* note 49, at 389-91.

85. *Id.* at 391-93.

86. Smith, *Transformative Politics*, *supra* note 50, at 869.

87. The relationship between political and personal autonomy posited here has been amplified elsewhere in more theoretical terms. German philosopher Jurgen Habermas has described political autonomy as “the right to participate in forms of political communication that provide the sole arenas in which citizens can clarify the relevant aspects that define equal status.” Jurgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 784 (1996). Habermas posits an inextricable relationship between the private autonomy that liberal theory champions and public autonomy: in order to be equal in the private realm, citizens must enjoy equal political autonomy to define the legal parameters of private liberty. Jurgen Habermas, *Between Facts and Norms: An Author’s Reflections*, 76 DENV. U. L. REV. 937, 942 (1999). Habermas notes:

Citizens can only arrive at fair regulations for their private status if they make an appropriate use of their political rights in the public domain. . . . In highly differentiated societies with an intransparent diversity of interests, it is an epistemic requirement for the equal distribution of liberties for everybody that those citizens affected and concerned first get themselves the chance to push their cases in the public, and articulate [sic] as justify those aspects which are relevant for equal treatment in typical situations.

Id.

In a similar vein, Professor James Fleming has drawn on the political amendments of the Constitution to find protected realms of personal autonomy. See James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 65-69 (1995) (arguing that First Amendment jurisprudence is a “mirror image” of substantive due process analysis).

88. The reference to substantive due process here is not intended to suggest that this is the only constitutional postulate that would support a right of minority political autonomy. See Smith, *supra* note 29.

History and tradition are lynchpins of heightened protection under substantive due process.⁸⁹ Because the history of the franchise in the United States is one of a struggle to expand the right to vote and to secure representation, a static view of tradition would be decidedly ahistorical. Rather, as it did in finding a right to consensual homosexual sodomy, the Court must examine “emerging awareness” and “emerging recognition,”⁹⁰ concerning the fundamental liberty in question. This dynamic view of history and tradition relative to the right to vote comprehends that right as more than the formal act of casting a ballot.

E. Summary

All but the intellectually recalcitrant must acknowledge some tradition of subgroup political autonomy in American democracy. To be sure, there are and always will be complications arising from these traditions, just as there are complications arising from federalism, which is itself a form of subgroup political autonomy. If the test for the exercise of a constitutional right was simply its ease of administerability, however, then our list of available rights would be short indeed, and the annals of Supreme Court precedent shorter still. Hence, to Justice O’Connor’s regretful musings about creeping proportional representation under the Voting Rights Act,⁹¹ the proper response is: If one does not support proportional representation for voters of color, one supports disproportionate representation for white voters. And to Justice Thomas’s concerns that recognizing minority vote dilution requires the Court to choose from competing conceptions of representative government,⁹² the answer is plain: The Court did precisely that in *Shaw v. Reno*, erring on the side of purported color-blindness. The insistence that government ignore race in a racialized society is hardly neutral or pre-political.

Whether or not it has been formally recognized as a constitutional right, there has been a practice of subgroup autonomy—including minority subgroup autonomy—in American democracy. *Shaw v. Reno* curtailed minority subgroup autonomy, trading it in exchange for an equality-as-neutrality goal that has not and cannot be realized.

II. THE PRICE OF EQUAL PROTECTION: LESS RACE OR LESS AUTONOMY?

Shaw v. Reno has surpassed the decade mark without much fanfare but with considerable doctrinal strain and abundant anecdotal evidence of its failures. *Shaw* held that the creation of a majority-black district that subordinates so-called traditional districting principles to race gives rise to a

89. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

90. *Id.* at 572.

91. *See Thornburg v. Gingles*, 478 U.S. 30, 85 (1986) (O’Connor, J., concurring).

92. *See Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring).

prima facie violation of the Equal Protection Clause of the Fourteenth Amendment.⁹³ *Miller v. Johnson*⁹⁴ subsequently clarified that strict scrutiny would be triggered when race predominated in the creation of a district.⁹⁵ The Supreme Court's decision in *Shaw* was predicated on a lofty goal: "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."⁹⁶ In *Shaw*, the Court chooses sides in the culture war over assimilation versus multiculturalism,⁹⁷ and it invites Americans to measure the success of its choice in favor of assimilation by a seemingly simple barometer: whether it reduced the role of race in politics.⁹⁸ Although the Court did not commit itself to a time horizon for the attainment of its goal, the twelve years that have elapsed since *Shaw* is not an insignificant amount of time in light the Court's announcement in *Grutter v. Bollinger*⁹⁹ that it would expect that affirmative action in higher education would be unnecessary in twenty-five years.¹⁰⁰

Shaw's constitutional policing of majority-minority districts has done nothing to curtail the role of race in politics. More than a decade after the Court's decision, race is as preeminent as before the Court's pronouncement. Meanwhile, however, one by-product of *Shaw* has been the diminishment of minority political autonomy. This consequence has been euphemistically recast by the Court and commentators alike as the development of coalitional or influence districts,¹⁰¹ but in reality it has rendered voters and candidates of color more dependent on the approbation of whites and less able to determine for themselves the politics and the politicians that best represent their interests.

A. *Narrow Measure of Success*

We could measure *Shaw v. Reno*'s success by examining those districts whose minority population was reduced under the decision's dictates and

93. See *Shaw v. Reno*, 509 U.S. 630 (1993). The Court noted:

[W]e conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

Id. at 649.

94. 515 U.S. 900, 917 (1995).

95. *Id.*

96. 509 U.S. at 657.

97. *Cf. id.* at 630.

98. See, e.g., *id.* at 657-68.

99. 539 U.S. 306 (2003).

100. *Id.* at 343.

101. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 466 (2003); Vincent L. Hutchings et al., *Congressional Representation of Black Interests: Recognizing the Importance of Stability*, 66 J. POL. 450, 465 (2004).

asking whether those districts continue to elect minority representatives. We shall call this the “narrow measurement.” Nine majority-black congressional districts were reconstituted pursuant to *Shaw* in Florida, Georgia, Louisiana, Texas, North Carolina and Virginia.¹⁰² In eight of the nine districts, the black population fell below 50%.¹⁰³ In seven of those eight districts, however, the voters returned a black representative to Congress after the redistricting under *Shaw*.¹⁰⁴ In the remaining district in Louisiana, the black incumbent did not seek re-election, and nor was there another black candidate on the ballot.¹⁰⁵ Seven of eight. On the face of it, this is a vindication of *Shaw*. But Bernard Grofman, a political scientist whose work has greatly influenced the case law under the Voting Rights Act of 1965, summarized the studies done of these congressional districts since their redrawing: “[V]oting in these congressional contests was racially polarized and the levels of racial bloc voting *did not decrease over the course of the decade.*”¹⁰⁶ Only about a third of white voters voted for the black candidate, while almost all of the black voters did.¹⁰⁷ If constraining the legislature’s ability to create majority-minority districts contributes to a reduction in the role of race, we would presumably observe progressive increases in the levels of white support for black candidates.

Even assuming that such increases came about, measuring the success of *Shaw* by white voters’ willingness to support a black candidate measures equality at the expense of black autonomy and masks the role of race. Consider the case of Congresswoman Cynthia McKinney of Georgia’s Fourth Congressional District. McKinney’s district was redrawn pursuant to *Miller v. Johnson* from a high of 60% black in 1990,¹⁰⁸ to 33% after the decision,¹⁰⁹ and to 53.1% black following the 2000 decennial census.¹¹⁰ Whites composed 32% of the Fourth District in the 2002 midterm elections¹¹¹ but made up 45% of the registered voters in the district¹¹² and cast 53% of the votes on election day.¹¹³ McKinney is black; so was her opponent in the Democratic primary, Denise Majette.¹¹⁴ Much of the debate during the campaign had a racial undertone, namely McKinney’s criticism of the United States’ Middle East policies and her numerous campaign contributions from

102. Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1397 (2001).

103. *Id.* at 1398.

104. *Id.* at 1399.

105. *Id.*

106. *Id.* at 1400 (emphasis added).

107. *Id.*

108. MICHAEL BARONE & GRANT UJIFUSA, *ALMANAC OF AMERICAN POLITICS 2000*, at 470 (Eleanor Evans ed., 1999).

109. *Id.*

110. *Id.*

111. MICHAEL BARONE & RICHARD E. COHEN, *ALMANAC OF AMERICAN POLITICS 2004*, at 469 (Charles Mahtesian ed., 2003).

112. *Id.*

113. *Id.*

114. *Id.*

Arab-Americans and Muslims.¹¹⁵ Majette unseated McKinney,¹¹⁶ retaining black representation for a marginally black district, but the numbers belie any claim to the success of color-blindness. A post-election review of the vote by the *Atlanta Journal-Constitution* and political scientists confirmed that voting was racially polarized, with McKinney drawing 83% of the African-American vote, while Majette's winning coalition consisted of white voters primarily.¹¹⁷ Thus, measuring the success of *Shaw* by whites' willingness to support a black candidate (1) falsely assumes interchangeability among black candidates,¹¹⁸ (2) essentializes black voters, (3) masks racially polarized voting, and (4) attains equality at the expense of minority voter autonomy.¹¹⁹

B. A Broader Measure of Success

Broadening the measurement of *Shaw*'s success, consider the 2002 mid-term elections in Georgia as whole. The Democratic majority in the state legislature redrew the state's congressional map with two goals in mind: to increase Democratic-leaning districts and to maintain and augment the number of black districts.¹²⁰ In order to meet both these goals, however, it needed to spread black voters across a greater number of districts rather than concentrating them solely in majority-black districts. The legislature concluded that majority-white Democratic districts in Georgia would elect a black candidate.¹²¹ In fact, John Lewis, a longtime black congressman from Atlanta, defended the plan by noting:

[Georgia] is not the same state it was It's not the same state that it was in 1965 or in 1975 or even in 1980 or 1990. We have changed. We've come a great distance. It's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.¹²²

115. *Id.* at 470.

116. *Id.*

117. Ben Smith & David A. Milliron, *Vote Analysis: GOP Not Key in McKinney Loss*, ATLANTA J.-CONST., Oct. 15, 2002, at A1.

118. While the differences between McKinney and Majette were cast as largely stylistic by some, this was clearly not the view of the candidates themselves. In painting Majette as a "Republican Party plant," for instance, McKinney noted that Majette had voted for conservative Republican commentator Alan Keyes in the 2000 Republican presidential primaries. *Id.*

119. McKinney regained her seat in the 2004 elections, while Majette sought a vacant United States Senate seat. Majette was decisively defeated by a conservative white Republican; exit polls showed that she took a mere 21% of the white vote. CNN.com, U.S. Senate Georgia Exit Poll, <http://www.cnn.com/election/pages/results/states/GA/S/01/epolls.0.html> (last visited Nov. 19, 2005).

120. Michael Finn, *Remap Discussions Focus on Black Voters*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Sept. 8, 2001, at B2.

121. *Id.*

122. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1538 (2002) (quoting Melanie Eversley, *Redistricting Map for Georgia Goes to Court in D.C.*, ATLANTA J.-CONST., Feb. 4, 2002, at C1) (alterations and ellipsis in

What happened in Georgia on election night 2002? One of the black candidates in a coalitional district that was 42% black (Georgia's 12th District) was defeated by a white Republican;¹²³ the other, in a district that was 40% black, prevailed.¹²⁴ But what was happening in the rest of Georgia? Georgia voters unseated a Democratic incumbent in favor of a Republican, Sonny Perdue,¹²⁵ who ran on the issue of restoring the Confederate flag emblem prominently to the state flag.¹²⁶ Indeed, by the 2004 election, political parties in Georgia had become more racially stratified than before *Shaw*.¹²⁷ Blacks made up only 24% of Democratic primary voters in 1990 but made up more than 50% in 2004.¹²⁸ This was not coalition-building; it was white flight. As one political scientist put it, "As conservative whites have left the Democratic Party, what you have remaining is African-Americans and liberal whites, with some moderates."¹²⁹

As for John Lewis's encomiums about the rest of the South,¹³⁰ Barbara Blackmon, a black candidate for lieutenant governor of Mississippi in 2003, would probably strongly disagree. After receiving only 8% of the white vote¹³¹ against her scandal-tainted general election opponent, and going down in resounding defeat, Blackmon commented, "[I]f my pigmentation were different, I would be the lieutenant governor of this state."¹³² Lest Blackmon's complaint be written off as hyperbole or sour grapes, the fate of another black on the ballot for state treasurer corroborates her impression. The candidate, Gary Anderson, a veteran of state finances, received only 22% of the white vote,¹³³ losing to a white twenty-nine year-old bank portfolio manager.¹³⁴ The backdrop of these defeats was a gubernatorial contest in which Republican Haley Barbour campaigned on retaining the Confederate flag and actively linked his white opponent to Blackmon,¹³⁵ even though candidates for governor and lieutenant governor do not run on tickets in Mississippi.¹³⁶

original).

123. See BARONE & COHEN, *supra* note 111, at 438. The district, "heavily Democratic" and "strongly African-American," converted to the Democratic column in the 2004 elections, being narrowly carried by a black lawyer, 52% to 48%. Ernie Suggs, *Election 2004: Democrats Add House Seat; GOP Loses Heavily Black 12th District*, ATLANTA J.-CONST., Nov. 4, 2004, at C2.

124. BARONE & COHEN, *supra* note 111, at 490.

125. *Id.*

126. *Id.*

127. See Jim Tharpe, *Democratic Vote May Be Mostly Black*, ATLANTA J.-CONST., June 25, 2004, at A1.

128. *Id.*

129. Jim Tharpe & Anna Varela, *Senate Race: A Groundbreaker, No Matter What*, ATLANTA J.-CONST., Oct. 31, 2004, at D3 (quoting Alan Abramowitz, a political scientist at Emory University).

130. See Pildes, *supra* note 122.

131. *MS: Barbour Names Transition Team*, BULL.'S FRONTRUNNER, Nov. 12, 2003.

132. Opinion, *Candidate Exaggerates Race Issue*, HATTIESBURG AM. (Miss.), Nov. 9, 2003, at C10.

133. See *MS: Barbour Names Transition Team*, *supra* note 131.

134. Patrice Sawyer & Julie Goodman, *Election 2003*, CLARION-LEDGER (Jackson, Miss.), Nov. 9, 2003, at 1A.

135. See Press Release, Haley Barbour for Governor, Haley Barbour Sets the Record Straight on Musgrove's Campaign of Lies (Oct. 15, 2003), available at <http://www.haleybarbour.com/Lies.htm>.

136. MISS. CONST. art. 5, § 138.

One might be inclined to dismiss these examples as idiosyncrasies of particular states or a particular election. To help dispel any such notion, let us examine the national presidential vote from 2004. Political analysts and commentators like to speak of the American electorate in terms of red or blue states.¹³⁷ A more apt description, however, would be white-red versus black-and-brown-blue states. The available polling data suggest that if the 2004 presidential election had been held only among white voters, George Bush would have carried most blue or Democratic states.¹³⁸ Of the states for which data is available—40 of 51 jurisdictions—only in the District of Columbia and Washington state did the Democratic presidential candidate garner a majority of the white vote.¹³⁹ Black and brown voters are thus the reason for blue states. Nearly a decade after *Shaw*, the racial divide in voting remains the very predicate of two-party competition within our democracy.

It will simply not do to characterize the divide as a partisan one rather than a racial one. If, when voters of color support a white Democrat, it is partisan, then their efforts to secure safe districts for black Democrats cannot be any less partisan. Yet *Shaw* and its progeny treat such actions as racial. It is to this seeming judicial sleight of hand that we now turn.

III. EQUAL PROTECTION'S ROAD TO LESS AUTONOMY: TWO DOCTRINES, MULTIPLE INCONSISTENCIES

How exactly does curtailing the drawing of majority-minority districts reduce the role that race played or seems to have played in Mississippi, Georgia or Texas (i.e., Ron Kirk),¹⁴⁰ or Philadelphia (i.e., John Street versus Sam Katz),¹⁴¹ Los Angeles,¹⁴² New York (i.e., Carl McCall),¹⁴³ or Florida (i.e., Gore took 93% of the black vote, Bush 7%)?¹⁴⁴ It does not, and it cannot. *Shaw*'s simultaneous failure to reduce the role of race and its inglorious success in reducing minority political autonomy have a common root: the

137. See Phil Patton, *One Fates, Two Fates, Red States, Blue States*, VOICE: AIGA J. OF DESIGN (2004), <http://designforum.aiga.org> (search for "one fate"; then follow resulting hyperlink) (discussing the evolution of the use of the colors red and blue to represent Republican and Democrat, respectively, on election-results maps).

138. See Gregg Sangillo, *The GOP and Blacks: An Inch at a Time*, NAT'L J., Jan. 1-8, 2005, at 57. Sangillo breaks down the percentages of the white and black votes that George Bush received in most states, save those where the black population is too small to collect a reliable sample. Thus, the following states are omitted from the survey: Arizona, Iowa, New Hampshire, Maine, Wyoming, Idaho, Oregon, Hawaii, Nebraska, Kansas, and Massachusetts.

139. *Id.*

140. R.G. Ratcliffe, *It's a Grand Old Sweep; Analysis; Anglos Don't Buy a Democrat Dream*, HOUS. CHRON., Nov. 6, 2002, at A1.

141. David B. Caruso, *Philadelphia Chooses Mayor in Campaign Divided by Race*, ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 4, 2003.

142. Daniel B. Wood, *L.A.'s Blacks, Latinos See Answers in Alliance*, CHRISTIAN SCI. MONITOR, Aug. 11, 2005, at 2; Brian MacQuarrie, *Black-Latino Alliance Buys L.A. Mayor Candidate*, BOSTON GLOBE, May 4, 2004, A1.

143. Deepti Hajela, *Analysts: Minorities Moving Away from Lockstep Party Affiliations*, ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 9, 2002.

144. Thomas B. Edsall, *Bush Lost 9 to 1 Among Blacks: Poll Findings and Fla. Fight Present Challenge to GOP Nominee*, WASH. POST, Dec. 12, 2000, A01.

Court's conflation of race and politics. *Shaw* and its progeny, it turns out, instrumentally define minorities as a racial group or classifies them as a non-racial entity depending on which category deprives them of political power. One cannot discern a clear principle from these cases, but we do witness a clear pattern of disparate impact. The Court's eliding definition of race has doomed its purported goal of reducing the role of race in politics, for the Court cannot eliminate what it cannot define. Compounding the judicial wrong-headedness in bifurcating race and politics is an equally pernicious inconsistency in assigning the right to vote to different branches of the Equal Protection Clause. The confluence of these two doctrinal failures effectively—and selectively—racializes equal protection doctrine and advances no salutary goal.

A. *The Race/Politics Symbiosis*

Long before *Shaw v. Reno* dubiously touted the judiciary's ability to distinguish race from politics, the Court demonstrated its limitations in this endeavor. In one of its earliest racial vote dilution cases, the Court refused to invalidate an Indiana multi-member districting scheme that black voters claimed debased their voting strength in violation of the Fourteenth Amendment.¹⁴⁵ The Court treated blacks as a political rather than a racial group:

The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.

...

. . . [A]re poor Negroes of the ghetto any more underrepresented than poor ghetto whites who also voted Democratic and lost, or any more discriminated against than other interest groups or voters in Marion County with allegiance to the Democratic Party, or, conversely, any less represented than Republican areas or voters in years of Republican defeat? We think not.¹⁴⁶

However, in fashioning a wholly new constitutional claim in a context where black and Latino voters were *defending* the creation of majority-minority districts, the Court throughout the 1990s had no trouble finding that these groups were racial rather than political groups.¹⁴⁷ As a racial cate-

145. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

146. *Id.* at 153-54.

147. *See* *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

gorization, their districts were subject to strict scrutiny and invalidated.¹⁴⁸ How do courts distinguish a racial from a political group? The above-referenced cases and those discussed below reveal a disturbingly incoherent and suspect pattern. On the one hand, the Supreme Court rather consistently over-determines race when minority control is at stake. On the other hand, it and lower courts downplay the role of race when white voters or institutions controlled by these voters—namely, major political parties—stand to gain from such diminution. Underlying this inconsistent treatment of racial and political labels is a tendency on the part of the Court to stereotype voters of color by identifying them solely by their race rather than ascribing to them the same ideological attributes as other participants in the political process.¹⁴⁹

1. *Easley v. Cromartie: Race Without Ideology*

The last iteration of *Shaw* was *Easley v. Cromartie*.¹⁵⁰ Even some who had been critical of the Supreme Court's reverse-racial gerrymandering jurisprudence hailed this case as a victory for voting rights advocates.¹⁵¹ In *Easley*, which involved one of the same congressional districts contested in *Shaw*, the Court upheld a revised district whose voting age population was 47% black.¹⁵² It did so despite the relatively strange shape of the district and despite the existence of some evidence that the state actively considered race in the construction of the district.¹⁵³ A probing of the Court's reasoning reveals that the decision is less salutary than it appears.

In overturning a three-judge district court panel's ruling that race predominated in the creation of the district and therefore rendered it unconstitutional, Justice Breyer, writing for a five-justice majority, held that it was permissible for a state to consider race if race correlated with partisanship, as it did in North Carolina.¹⁵⁴ Justice Breyer wrote:

A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-

148. See *Abrams v. Johnson*, 521 U.S. 74 (1997); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Vera*, 517 U.S. 952.

149. The term stereotype, as used throughout this section to describe the Court's treatment of voters of color, largely refers to the historical meaning of the term: an "inaccurate or overbroad generalization[]," though to some degree the usage also encompasses the other understanding of the term as "'cognitive categories' employed in processing information." R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 830 (2004).

150. 532 U.S. 234 (2001).

151. See Charles, *supra* note 46, at 1274-80. *But see* MCDONALD, *supra* note 74, at 233.

152. 532 U.S. at 257.

153. *Id.*

154. *Id.* at 258.

American precincts, but the reasons would be political rather than racial.¹⁵⁵

In other words, oddly shaped districts that are consciously black will likely violate the Constitution, but districts created in the service of the two-party system that are coincidentally black are permissible.

Throughout his opinion, Justice Breyer (perhaps sincerely, or perhaps merely as a concession to *Shaw*) draws a distinction between racial motives and political motives, a conceptual distinction that not even the dissent disputes.¹⁵⁶ At no point, however, does Breyer define the difference between these two types of motives. And for good reason: to do so would implode *Shaw*. As it did in *Shaw*, the Court in *Easley* treated race as a crude phenotype, a question of melanin rather than ideology based on shared circumstances.

But if the Court's implicit assumption about racial identity is true, how does one explain black-on-black political contests, such as the McKinney/Majette congressional race, where both the candidates were black, but black voters had a decided preference for one candidate and white voters the other? And how does one explain the black electorate's consistent rejection of black conservatives even when the alternative is a white candidate? Examples of this phenomenon would include a Michigan gubernatorial race in the 1980s (Blanchard versus Lucas) that pitted a white liberal against a black conservative Republican, with the white liberal winning the black vote overwhelmingly;¹⁵⁷ Republican conservative Alan Keyes's failure to attract any significant black support in the 2000 presidential election;¹⁵⁸ and, more recently, the 2003 Louisiana gubernatorial contest, in which a conservative dark-skin South Asian, Bobby Jindal, attracted only 9% of the black vote against a white opponent, Kathleen Blanco.¹⁵⁹ Indeed, one is hard-pressed to think of a single example where black voters have preferred the black candidate in a bi-racial contest in which that candidate has been politically conservative. For that matter, there are examples of blacks supporting white candidates even when their opponent is a black liberal. (Baltimore, a predominately black city, has a white mayor.)¹⁶⁰ If race were the non-ideological, biological state that the Supreme Court portrays it as in the wrongful districting cases, these examples would be non-existent. Treating race in the electoral context as a biological fact rather than a political reality

155. *Id.* at 245.

156. *Id.* at 243-58.

157. Joseph Sefwach, *Crime Tops Michigan Debate: Lucas Attacks Blanchard Over Emergency in Detroit*, CHI. TRIB., Oct. 21, 1986, at 14.

158. Adam Nagourney, *Keyes Finally Gets Attention, but Not Support*, N.Y. TIMES, Feb. 1, 2000, at A19.

159. Lee Hockstader, *Louisiana's Break From the Past*, WASH. POST, Nov. 16, 2003, at A8.

160. Les Kinsolving, *A "Fair" Process Results in All Whites!*, WORLDNETDAILY.COM, May 1, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=38293.

is simply another form of the stereotyping that *Shaw* itself supposedly condemns.

There is considerable evidence from political science of a strong relationship between the race of the legislator and legislative behavior. In other words, what the Court has elsewhere dismissed as mere “descriptive” representation¹⁶¹ often translates into substantive representation. Political Scientists Kathleen Bratton and Kerry Haynie have examined six state legislatures in geographically diverse states to determine the role that race exerts on the introduction of “black interest legislation.”¹⁶² Controlling for other variables that might explain the sponsorship of such legislation,¹⁶³ they concluded that “[r]ace exerts a powerful influence on the introduction of black interest bills; black legislators introduce more black interest bills than do other legislators.”¹⁶⁴ Bratton and Haynie also found a positive relationship between a district’s black population and the propensity of the representative to sponsor black interest legislation.¹⁶⁵ Using Bratton and Haynie’s data, what the Court in *Easley* envisions as a duel between race and partisanship could just as easily—and more honestly—be recast as a case about the state’s right to draw districts that reflect constituents’ distinctive ideological views.

Political scientist Kenny J. Whitby has examined the bill sponsorship of members of the Congressional Black Caucus and has found a significantly positive relationship between electoral marginality and sponsorship of black interest legislation: black congressmen who hailed from safe districts were more likely to introduce racial-oriented legislation.¹⁶⁶ Unlike Bratton and Haynie, Whitby does not examine the race of the representative as an explanation for bill sponsorship, but his findings nevertheless support the conclusion that substantive representational outcomes ensue from the creation of

161. *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003).

162. Kathleen A. Bratton & Kerry L. Haynie, *Agenda Setting and Legislative Success in State Legislatures: The Effects of Gender and Race*, 61 J. POL. 658, 664 (1999). The authors define black interest bills as “legislation . . . that may decrease racial discrimination or alleviate the effects of such discrimination, and those that are intended to improve the socioeconomic status of African-Americans.” *Id.*

163. Among other things, the authors controlled for the bill-sponsor’s committee membership, the sponsor’s overall sponsorship activity, whether the sponsor is a member of the majority party, the seniority of the sponsor, and whether the sponsor holds a leadership position. *Id.* at 666-67.

164. *Id.* at 667. Moreover, black legislators’ molding of the legislative agenda was not limited to race issues. Because Bratton and Haynie also examined whether black and female legislators—two different “minority groups” within a legislature—would advance each other’s interests, they were able to observe an additional dimension of black legislators’ contribution to the process of legislative agenda-setting: blacks introduce more women’s interest bill than do whites. *Id.* at 670. The authors define women’s interest bills as “those bills that may decrease gender discrimination or alleviate the effects of such discrimination, and those that are intended to improve the socioeconomic status of women.” *Id.* at 664. The authors’ finding of the broader policy ramifications of the participation of blacks in the legislative process is a particularly important contradistinction to the Supreme Court’s efforts to cast blacks in the political process as a racial group rather than a political group.

165. *Id.* at 672. The authors note, however, that “no additional significant effect is brought about once the percentage black in the district reaches 50%.” *Id.*

166. Kenny J. Whitby, *Bill Sponsorship and Intra-racial Voting Among African American Representatives*, 30 AM. POL. RES. 93, 105 (2002).

majority-minority districts.¹⁶⁷ Whitby qualifies his findings in two important respects. First, although bill sponsorship is an important measure of substantive representation because it is the mechanism through which constituents' policy interests are addressed, most Caucus members spend a substantial portion of their time on non-race-related matters.¹⁶⁸ Second, the bill sponsorship stage is but one stage of the legislative process.¹⁶⁹

In his book *The Color of Representation*, Whitby focuses on congressional voting behavior, as opposed to bill sponsorship, and demonstrates that the voting of black congressmen at the amendment and final passage stages is on the whole more responsive to black interests than even the most liberal of white representatives.¹⁷⁰ Whitby concludes that "[t]here is more to the election of African-Americans than symbolism or the color of skin. The color of Congress has implications for the quality of substantive representation for African-Americans."¹⁷¹ Again, where the *Easley* Court posits a choice between race and politics,¹⁷² social science deconstructs race and redirects the inquiry to its core: the distinctive policy positions for which black voters seek representation and the extent to which the choice of a same-race candidate maximizes representation of such issues.¹⁷³

It would be as wrong to typecast black voters' policy positions as nothing more than race in ideology's clothing as it would be to brand political conservatism in the same manner. The racial divide in American politics grows or contracts depending on whether the issue is explicitly racial or more broadly pertains to social welfare policy.¹⁷⁴ Race, or in-group identification with one's race and resentment of the other,¹⁷⁵ is but one explanatory variable, and its causative role diminishes the further the focus shifts from explicitly racial matters to broader policy concerns.¹⁷⁶ To be sure, where "political principle" explains black/white differences on policy positions, race nevertheless lurks: "[R]acial group interest is insinuated into both the political principles that blacks and whites endorse and the group attach-

167. *Id.* at 96.

168. *Id.* at 104.

169. *Id.* at 105.

170. KENNY J. WHITBY, *THE COLOR OF REPRESENTATION* 111 (1997). Referring to non-Southern Democrats, who next to black lawmakers are the most progressive House members as measured by the Leadership Conference on Civil Rights (LCCR) index, and black lawmakers, Whitby concludes:

While both are in the high final passage/high amendment category, on balance there is a good deal of space between the two groups on some important issues. The variation in the support level of white nonsouthern Democratic support gives more credence to the hypothesis that race matters in the decision calculus of the representative.

Id.

171. *Id.* at 112.

172. 532 U.S. 234 (2001).

173. See WHITBY, *supra* note 170, at 110-12.

174. Donald R. Kinder & Nicholas Winter, *Exploring the Racial Divide: Blacks, Whites, and Opinion on National Policy*, 45 AM. J. POL. SCI. 439, 449-50 (2001).

175. *Id.* at 447 (defining the above as "social identity" and using this term interchangeably with black's resentment of whites and vice versa).

176. *Id.* at 450 (discounting social identity as the source of racial differences in social welfare policy and concluding that "differences between whites and blacks on social welfare programs are due, in small part, to social class and to audience, and in large part, to principle").

ments and resentments that they feel. Principles are often used in politics to defend and advance interests; group sentiments are a product, in part, of conflict over resources.”¹⁷⁷ But if this is true for black and white voters alike, then it must hold true for the districts created on both their behalf: white districts are not less racial—and hence no more political—than black ones. To frame the issue as the Court does in *Easley*—as a choice between a racial versus a partisan gerrymander¹⁷⁸—grossly oversimplifies the question and, much worse, perpetuates the insupportable notion that majority-white districts are racially neutral.

None of these findings are noted or engaged by the Court in *Easley* because to do so would obscure the simplistic line between race and politics on which the decision rests. If symbolic representation in the form of electing a black representative translates into superior representation of a group’s common interests, race has a functional, ideological character that is not susceptible to the race-for-race’s-sake premise of *Easley*. Under *Easley*, blacks can be good Democrats, but they may not be black Democrats. Ideological differences between Democrats and Republicans are cognizable in the redistricting process, as are differences between liberals and conservatives, but ideological differences between blacks and whites cannot be the basis for drawing a district because blacks do not have an ideology—they only have their color.

This is hardly a caricature of the Court’s reasoning, for although the majority and the dissent disagree over the ultimate finding of racial intent,¹⁷⁹ they both embrace the hollow distinction between race and politics. Justice Thomas penned the dissent. In discussing an email from the state in which a state employee asserted that he had “moved Greensboro Black community into the 12th [District],” Thomas discovers a silver bullet necessitating a finding of unconstitutionality.¹⁸⁰ Thomas writes, “The Court tries to belittle the import of this evidence by noting that the e-mail does not discuss *why* blacks were being targeted. However, the District Court was assigned the task of determining *whether*, not *why*, race predominated.”¹⁸¹ Under Thomas’s reasoning race functions as an albatross around the necks of black voters. They cannot transcend their color as whites have done under the guise of political conservatism. They are simply black. Three contradistinctions are worth noting, the last of which is appropriately individuated to Thomas.

First, the dissent appears to rest its designation of blacks as a racial group upon the very sort of correlations between race and other variables that the Court has rejected in other contexts.¹⁸² The fact that the blacks in

177. *Id.* at 450.

178. *Easley v. Cromartie*, 532 U.S. 234, 241 (2001).

179. *Id.* at 234.

180. *Id.* at 266 (Thomas, J., dissenting) (brackets in original).

181. *Id.* at 266 (Thomas, J., dissenting) (citation omitted).

182. *Id.* at 259-67.

Georgia were put to death more often for killing whites than whites were for killing other whites merely showed “a discrepancy that appears to correlate with race,” but not race itself.¹⁸³ And “[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be,”¹⁸⁴ such a correlation itself does not prove race.¹⁸⁵ To be sure, factual context matters, but in order to distill race from mere correlations with race, as the Court has purported to do in order to defeat the claims of defendants of color, one must do exactly what the dissent in *Easley* declined to do: examine the reasons *why* the legislature acted as it did.¹⁸⁶

Second, while the dissenters appear eager to find race rather than partisanship at work in North Carolina, they, like the majority, offer no way of distinguishing racial from political alliances.¹⁸⁷ Their task would be daunting, for as Justice Stevens observed two decades before *Easley*:

[It cannot] be said that racial alliances are so unrelated to political action that any electoral decision that is influenced by racial consciousness—as opposed to other forms of political consciousness—is inherently irrational. For it is the very political power of a racial or ethnic group that creates a danger that an entrenched majority will take action contrary to the group’s political interests.¹⁸⁸

Finally, Justice Thomas labors under a personal if not ethical dilemma in insisting that black voters cannot be deemed a partisan or ideological group for redistricting purposes. Consider Thomas’s speech before the National Bar Association decrying critics who have severely chastised him for breaking ideological ranks with traditional civil rights views:

I, for one, have been singled out for particularly bilious and venomous assaults. These criticisms, as near as I can tell, and I admit that it is rare that I take notice of this calumny, have little to do with any particular opinion, though each opinion does provide one more occasion to criticize. Rather, the principal problem seems to be a deeper antecedent offense: *I have no right to think the way I do because I’m black.*¹⁸⁹

183. See *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).

184. See *Hernandez v. New York*, 500 U.S. 352, 375 (1991).

185. *Id.*

186. Apparently, even if Justice Thomas and the other dissenters had asked why, they would have relied on the finding that “[i]t is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters.” *Easley*, 532 U.S. at 266-67. To reach their desired outcome, the dissenters were prepared to recast as a mere stereotype the social scientific fact that blacks in North Carolina, voting Democratic at a rate of 95% to 97%, were reliably Democratic. *Id.* at 245.

187. See 532 U.S. at 259-67 (Thomas, J., dissenting).

188. *Rogers v. Lodge*, 458 U.S. 613, 651 (1982) (Stevens, J., dissenting).

189. Justice Clarence Thomas, Speech at the National Bar Association Annual Meeting: I Am a Man, a Black Man, an American ¶ 28 (July 29, 1998) (emphasis added), available at [HeinOnline -- 57 Ala. L. Rev. 286 2005-2006](http://www.dougllassar-</p>
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Justice Thomas is a jurist who has refused to be defined by his race to any extent but is willing to define black voters solely in terms of their race. This is intellectually dishonest.¹⁹⁰

There is little wonder, then, why the twelve years since *Shaw* have not seen a reduction in the role of race in politics. The Court sees race often but has no coherent way of distinguishing it from politics itself.

2. *Bush v. Vera: Language As Race*

*Bush v. Vera*¹⁹¹ further illustrates the Court's zeal for classifying minority groups as racial at precisely the time such a classification disadvantages them. In *Vera*, the Court struck down a 61% majority Latino district as an unconstitutional racial gerrymander.¹⁹² The case is even more remarkable than those involving black districts because the Court assumes without analysis that Latinos constitute a racial group,¹⁹³ though in previous cases, this very question was dispositive.¹⁹⁴

Nowhere in *Vera* does the Court cite to its prior decision in *Hernandez v. New York*.¹⁹⁵ In *Hernandez*, the Court rejected a claim that a prosecutor's use of peremptory challenges targeting potential Latino jurors violated the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁶ The Court drew a distinction between categories drawn on the basis of bilingualism—which are not subject to strict scrutiny—versus categories drawn on the basis of race, which are.¹⁹⁷ Writing for the majority, Justice Kennedy acknowledged that language could be a proxy for race in some circumstances.¹⁹⁸ But he also acknowledged that “the breadth with which the concept of race should be defined for equal protection purposes” was not a facile inquiry.¹⁹⁹ Yet in *Vera*, the Court—and especially Justice Kennedy in his concurrence²⁰⁰—treated the categorization of Latinos as a racial group as so intuitive that it warranted no analysis.²⁰¹

Even as the State of Texas in *Vera* attempted to justify the creation of the majority Latino congressional district under the Voting Rights Act of 1965, the Court ignored legislative history that Congress itself did not view

http://www.douglassarchives.org/thom_b30.htm.

190. For a more sympathetic analysis of Justice Thomas's judicial inconsistencies, see Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 *How. L.J.* 323, 330-31 (2004) (arguing that Thomas, like W.E.B Du Bois before him, has struggled to balance his black nationalism with his concern for individualism).

191. 517 U.S. 952 (1996).

192. *Id.* at 974.

193. *Id.* at 975.

194. *See Hernandez v. New York*, 500 U.S. 352 (1991).

195. *Id.*

196. *Id.* at 360.

197. *Id.*

198. *Id.* at 371.

199. *Id.*

200. *Bush v. Vera*, 517 U.S. 952, 996 (1996) (Kennedy, J., concurring).

201. *See id.*

Latinos as a racial group when it conferred the Act's protections on them in 1975.²⁰² Language minorities were included under the Voting Rights Act because "Congress [found] that voting discrimination against citizens of language minorities is pervasive and national in scope."²⁰³ Although during the legislative debates comparisons were made to the disenfranchisement of blacks in the South,²⁰⁴ it was clear that Congress found both overlap and distinction between racial and language minorities.²⁰⁵

We can only speculate as to why the Supreme Court treated Latinos as a language group when it disserved their interests (*Hernandez*) and treated them as a racial group when not doing so would have advanced their interests (*Vera*), but the disparate impact of this inconsistency is clear.

3. *Rice v. Cayetano and the Aborigines of Hawaii*

*Rice v. Cayetano*²⁰⁶ further illustrates the propensity of the Court to overdetermine race where the effect of doing so eviscerates minority autonomy. It also highlights the porousness of the Court's race/politics distinction.

In fulfillment of a condition to its admission to statehood, the State of Hawaii, through its constitution, created the Office of Hawaiian Affairs. The agency's mission was "[t]he betterment of conditions of native Hawaiians . . . [and] Hawaiians."²⁰⁷ The agency was administered by nine trustees selected in a statewide election, where voting was limited by the state constitution to "Hawaiians."²⁰⁸ The State of Hawaii defined Hawaiians as "those persons who are descendants of people inhabiting the Hawaiian Islands in 1778,"²⁰⁹ 1778 marking the year that England's Captain Cook made landfall in Hawaii.²¹⁰ This electoral scheme was attacked by a white voter as violating the Fifteenth Amendment to the United States Constitution, which prohibits denial of the right to vote on account of race.²¹¹

202. Nor is it apparent from the Court's opinions that the State of Texas directed the Court's attention to this history.

203. 42 U.S.C. § 1973b(f)(1) (2000).

204. S. REP. NO. 95-295, at 791 (1975).

205. As one of the co-sponsors of the 1975 bill, Representative Badillo, noted:

[The 1975 amendments] merely try to establish the principle that the language minorities are entitled to the same protection that presently exists in the Voting Rights Act for other groups. The reason that we specifically refer to the protections of the 14th amendment was [sic] because of the fact that the Spanish-speaking groups may be of one racial group or another. They might be white; they might be black; they might be Indian; or they might be a mixture of two or three different groups. In order to insure that all of them would be covered, whatever their background be, we provided that the protections of the act shall include not only the protections guaranteed by the 15th amendment, but the protections guaranteed by the 14th amendment as well.

121 CONG. REC. 13 (1975), reprinted in 1975 U.S.C.C.A.N. 16271.

206. 528 U.S. 495 (2000).

207. *Id.* at 501 (quoting HAW. REV. STAT. § 10-3 (1993)) (alterations and ellipsis in original).

208. *Id.*

209. *Id.* at 499.

210. *Id.*

211. *Id.*

The Court recited in detail the atrocities visited upon aboriginal Hawaiians by westerners seeking to control their lands and to deprive them of self-governance.²¹² However, it rejected the State of Hawaii's attempt to analogize Native Hawaiians to Native Americans, a group for whom the Court has recognized Congress may accord preferential treatment without such actions being deemed a racial classification.²¹³ The Court could find no justification for a voting scheme that allowed Native Hawaiians autonomy to determine who should govern an agency devoted to addressing their unique socioeconomic conditions born of a neo-colonialist history.²¹⁴ Justice Stevens, on the other hand, marshaled powerful evidence of the congruity between Native Hawaiians and Native Americans, citing the fact that more than 150 federal laws include Native Hawaiians as part of the class of Native Americans to whom those statutes apply.²¹⁵

Cayetano undoubtedly can be criticized on a number of counts. In the context of the Court's race/politics conundrum, however, it is the comparison of *Cayetano* to other decisions in which race and politics have clashed that demonstrates the absurdity of *Cayetano*'s outcome. *Easley* holds that black Democrats are a political group, even if blacks participating in the political process as such would be a racial group.²¹⁶ Undoubtedly, however, blacks have fewer characteristics in common with quasi-sovereign Native Americans than do Native Hawaiians. Yet, *Cayetano* labels the latter group racial.²¹⁷ No coherent rationale explains these outcomes, but a pattern begins to emerge: if a racial label is more likely to deprive a minority group of political autonomy, then the Court is more inclined to apply it, overdetermining race when politics is at least as plausible an explanation. The Court, however, repairs to the political label when doing so disadvantages voters of color and privileges whites.

4. *Disaggregating Under the Guise of Partisanship*

If a state may avoid a racial label by aggregating minority voters in order to create a safe Democratic district, it may also disaggregate and spread them for partisan gain—again ignoring racial effect under the guise of politics. That is what happened in three distinct contexts in the illustrative cases discussed below.

212. *Id.* at 500-04.

213. *Id.* at 518-22.

214. *Id.*

215. *Id.* at 533-34 (Stevens, J., dissenting). Since the decision in *Cayetano*, legislation has been proposed and debated in both Houses of Congress giving Native Hawaiians the same legal status as Native Americans. *See, e.g.*, 149 CONG. REC. H8500-01 (Sept. 24, 2003) (statement of Rep. Lewis).

216. *Easley v. Cromartie*, 532 U.S. 234, 257 (2001).

217. *Cayetano*, 528 U.S. at 517.

a. *Session v. Perry: A New Look at and for Texas Voters of Color*

The black and Latino voters in *Bush v. Vera* who were dubbed racial groups for the purposes of dismantling their majority-minority congressional districts²¹⁸ recently became political groups for the same reason that black voters in North Carolina were deemed such: to facilitate a partisan gerrymander.²¹⁹ This time, however, voters of color were used on behalf of a Republican gerrymander.²²⁰ Black voters were extracted from an Anglo Democratic North Texas district and placed into a Republican one so that an additional Republican congressional district could be created in that area.²²¹ Latinos in Southwest Texas incurred a similar fate as they saw a Latino majority citizen voting age district dismantled to increase Republican fortunes in the district.²²² Race abounded in this historic gerrymander, but with judicial effervescence, racial minorities became victims of politics, not racial discrimination. “The result,” explained the three-judge panel with one judge dissenting, “disadvantaged Democrats. And a high percentage of Blacks and Latinos are Democrats.”²²³

On this notion, of course, the dissenters in *Easley* could not reasonably complain about the use of race in North Carolina to benefit the Democrats. As Justice Breyer argued, correlations between race and partisanship may dictate the racial composition in a given district, and the reason would be political rather than racial.²²⁴ But the fate of minorities in Texas’s midterm congressional redistricting underscores the fact that a reliance on partisan correlations does not uniformly benefit voters of color. Moreover, a comparison of *Bush v. Vera* with *Session* reveals the judicial sleight of hand at work in sorting racial and political groups. In *Vera*, when voters of color sought to control their own districts, they were a racial group.²²⁵ If, however, they could be yanked from one district to the next in order to create more districts for Republicans, a disproportionate number of whom were

218. 517 U.S. 952, 974 (1996).

219. See *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated*, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (holding that gerrymandering claims are nonjusticiable), *cert. granted*, *Jackson v. Perry*, 126 S. Ct. 829 (Dec. 12, 2005) (No. 05-439).

220. *Id.* at 471.

221. *Id.* at 470-71.

222. *Id.* at 489-91.

223. *Id.* at 471 (footnote omitted). Contrary to the district court’s findings, an internal memo unanimously endorsed by lawyers and analysts within the voting rights section of the United States Department of Justice concluded that Texas’s redistricting violated the Voting Rights Act. See Dan Eggen, *Justice Saw Texas Districting as Illegal*, WASH. POST, Dec. 2, 2005, at A01. The memo, which had been suppressed for two years and not made available to the district court, concluded that “[t]he State of Texas has not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect.” *Id.*

224. *Easley v. Cromartie*, 532 U.S. 234, 244-46 (2001).

225. *Bush v. Vera*, 517 U.S. 952, 974 (1996).

white, then they were a political group with a cognizable ideological underpinning.²²⁶

b. Page v. Bartels: Any Black Will Do?

*Page v. Bartels*²²⁷ involved New Jersey's reapportionment of its state legislative districts. In *Page*, Black and Hispanic voters in Essex County along with (ironically) Republican members of the New Jersey legislature challenged a reapportionment plan that reduced the black voting age population in one Assembly District (District 27) from 52.8% to 27.5%.²²⁸ The state argued, in essence, that given the absence of white bloc voting in the relevant geographic area, new District 27's combined minority voting strength (42%) would allow it to elect a minority representative, while the District to which the surplus blacks were allocated (District 34) would stand a chance of electing an additional black or minority representative.²²⁹ Both these representatives would be Democrats.²³⁰

The evidence was convincing that white Democrats tended to support black candidates.²³¹ However, as with *Easley*, the result in *Page* is more salutary than the decision's reasoning. Minority voters in *Page*, as in *Easley*, were conceived in almost exclusively racial rather than ideological terms. Ironically, the court straight-jacketed minority voters as racial groups for the purpose of dismissing claims of racial harm.

In finding that District 27's combined 42% minority voting age population was sufficient to elect a minority candidate,²³² the district court did not ask whether there might be a substantive difference between a minority candidate from such a marginally "minority" district and a minority candidate who hails from the former District 27, which contained a minority voting age population of 68.6%.²³³ Likewise, although the district court seemed reasonably certain District 34 (the District to which the surplus black voters were allocated) could elect a minority representative with a bare majority of 51.8%,²³⁴ it did not ask the substantive representation question: what kind of minority representative would such a slender majority yield?

Political scientist Kenny Whitby has found a statistically significant relationship between Congressional Black Caucus members' sponsorship of black-interest legislation and electoral marginality. He writes, "Unlike Black representatives from closely contested elections, Black lawmakers from uncompetitive districts apparently do not fear electoral retribution

226. *Sessions*, 298 F. Supp. 470-71; *see also id.* at 1004 (Stevens, J., dissenting).

227. 144 F. Supp. 2d 346 (D.N.J. 2001).

228. *Id.* at 353.

229. *Id.*

230. *Id.* at 359.

231. *Id.* at 361.

232. *Id.* at 353.

233. *Id.*

234. *Id.* at 362.

from their constituents for introducing racial bills.”²³⁵ Thus, we may reasonably posit that the marginality of a black representative’s district affects the vigor of his representation of minority interests. The court in *Page* simply fails to reckon with these issues in the course of permitting black voters to be exploited for partisan gain.

c. Georgia v. Ashcroft: *Partisanship’s Extended Invitation to Whiteness*

This scholarship, though highly relevant, was likewise not engaged by the Supreme Court in *Georgia v. Ashcroft*.²³⁶ If *Shaw* and its progeny engendered suspicion among voting rights scholars that the Court was erecting an unwarranted barrier to the election of minorities,²³⁷ *Ashcroft* officially rewarded states with the power to “whiten” the districts of even those black lawmakers who managed to be elected from a marginally minority or majority white district.²³⁸ *Ashcroft* involved the State of Georgia’s appeal from the United States Department of Justice’s refusal to pre-clear a redistricting of its state senate.²³⁹ The Department of Justice had interposed an objection to Georgia’s redistricting plan because in three senate districts the black voting age populations were reduced from comfortable majorities to slightly above 50%.²⁴⁰ Deeming these decreases a retrogression in violation of section 5 of the Voting Rights Act, the Department of Justice refused to allow Georgia, a “covered jurisdiction,” to implement its new plan.²⁴¹ Georgia thus sought preclearance through a three-judge federal district court in the District of Columbia.²⁴²

Departing from its past definition of impermissible retrogression,²⁴³ the Supreme Court found that Georgia had not run afoul of its obligations under the Voting Rights Act.²⁴⁴ According to the Court, Georgia was free to measure retrogression not solely in terms of blacks’ ability to elect the rep-

235. Whitby, *supra* note 166, at 102.

236. 539 U.S. 461 (2003).

237. See, e.g., Jamin B. Raskin, *The Supreme Court’s Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship that Defends It*, 14 J.L. & POL. 591, 619 (1998) (“[T]he whole point of the *Shaw* line of authority is to dismantle majority-minority districts that seem to venture too far from the geographical core the Court appears to accept in resigned concession to the existence of ghettos—that is, *real* apartheid.”).

238. *Ashcroft*, 539 U.S. at 486.

239. *Id.* at 465.

240. *Id.* at 472-73. In District 2, the decrease was from 60.58% to 50.31%; in District 12 the decrease was from 55.43% to 50.66%; in District 26, the black voting-age population dropped from 62.45% to 50.8%. *Id.*

241. *Id.* at 470.

242. *Id.*

243. See *Beer v. United States*, 425 U.S. 130, 141 (1976) (“[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”).

244. *Ashcroft*, 539 U.S. at 489-90 (“Section 5 gives States the flexibility to implement the type of plan that Georgia has submitted for preclearance—a plan that increases the number of districts with a majority-black voting age population, even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their choice.”).

representative of their choice by virtue of their being a majority in a district, but by whether the new plan created influence or coalitional districts.²⁴⁵ In influence districts, blacks do not play a decisive role in electing the eventual winner, but that candidate is nevertheless responsive to their concerns once elected.²⁴⁶ In coalitional districts, blacks are able to elect the candidate of their choice despite being a voting-age minority because they are able to join with white cross-over voters.²⁴⁷ Georgia was also free to consider whether the new plan allowed for minority empowerment in the legislative process, such as by re-electing black incumbents who could become committee chairmen in the legislature.²⁴⁸ Finally, the extent to which incumbent black legislators supported Georgia's plan was a relevant consideration in determining whether it had a retrogressive effect.²⁴⁹

The majority supported its new-found flexibility toward retrogression analysis in part by citing studies which it characterized as suggesting "the most effective way to maximize minority voting strength may be to create more influence or coalitional districts."²⁵⁰ This characterization is both puzzling and suspicious. One of the studies cited by the Court noted that between 1972 and 1994, blacks prevailed in only 72 of 5,079 elections held in white majority districts.²⁵¹ Far from providing support for the idea of coalitional districts, this number just as convincingly argues for the necessity of majority-minority districts with realistic electoral margins.

The majority's equation of so-called influence districts with responsiveness to minority concerns was similarly overstated. Recently, an important study on the effect of black constituency size on congressmen's support for black-interest legislation concluded, "Clearly, support for black interests is somewhat unreliable among southern Democrats, even when a significant fraction of their constituents are black."²⁵² Why is this so? In southern states such as Georgia, these black "influence" voters are paired with racially conservative white voters.²⁵³ Consequently, the white representative from an influence district in the South "cannot easily cast a cost-free vote" on black interest legislation.²⁵⁴ The influence districts that the Court attempts to promote in *Ashcroft* are not demonstrably more effective at maximizing minority voting strength than majority-minority districts.²⁵⁵

245. *Id.* at 488-89.

246. *Id.* at 481-83.

247. *Id.*

248. *Id.* at 483-84.

249. *Id.* at 484.

250. *Id.* at 482.

251. David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?"*, 93 AM. POL. SCI. REV. 183, 184 (1999).

252. Vincent L. Hutchings et. al, *Congressional Representation of Black Interests: Recognizing the Importance of Stability*, 66 J. POL. 450, 465 (2004).

253. *Id.* at 461-62.

254. *Id.* at 454.

255. *See id.* at 466 (concluding that the study results "suggest that, as with majority-minority districts, the influence-district strategy is also far from perfect").

The Court only obliquely addressed the issue of whether influence or coalitional districts might impair the quality of black representation while maintaining or even augmenting the number of black representatives. The candidates in such districts, according to the majority, “may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground.”²⁵⁶ The ease with which the majority made this argument suggests its superficiality. Most African-Americans have been and continue to be represented by whites in most elective offices. They “pull, haul, and trade,” with a frequency to which whites are wholly unaccustomed.²⁵⁷ Moreover, while the Court posited that coalitional districts might be an appropriate recourse where cross-over voting occurred, Georgia offered no evidence of cross-over voting in the altered districts at issue.²⁵⁸

An explanation for the *Ashcroft* Court’s lapses in analysis is likely found in its reliance on the support that the senate redistricting plan garnered among incumbent black legislators.²⁵⁹ When many of these same legislators urged the creation of additional majority-minority congressional districts in Georgia, their activity was used against them in finding that the added districts were unconstitutional racial gerrymanders.²⁶⁰ Their assent to decreasing the black voting age population in three senate districts, however, created neither a Voting Rights Act nor a constitutional problem. The Court found the support of these legislators probative that the decreases would not have a retrogressive effect on minorities’ exercise of the franchise: “The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how ‘voters will probably act’ and whether the proposed change will decrease minority voters’ effective exercise of the electoral franchise.”²⁶¹

The Court’s change of position with respect to the weight to be accorded the desires of minority legislators in Georgia cannot be explained by claiming that race predominated in the first instance but not the latter. As Justice Kennedy stated in his concurrence in *Ashcroft*: “As is evident from the Court’s accurate description of the facts in this case, race was a predominant factor in drawing the lines of Georgia’s State Senate redistricting map.”²⁶² Race in *Ashcroft* was converted into politics because minority political autonomy was being diminished rather than augmented.

256. 539 U.S. at 481 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

257. *See id.*

258. *Id.* at 501-02 (Souter, J., dissenting).

259. *See, e.g., id.* at 469-70, 484, 489.

260. *See Miller v. Johnson*, 515 U.S. 900, 907 (1995) (finding that the disputed redistricting plan “was the so-called ‘max-black’ plan drafted by the American Civil Liberties Union (ACLU) for the General Assembly’s black caucus”) (citation omitted). That plan was struck down as an unconstitutional racial gerrymander in *Abrams v. Johnson*, 521 U.S. 74 (1997).

261. 539 U.S. at 484.

262. *Id.* at 491 (Kennedy, J., concurring). Although he makes this observation, Justice Kennedy does not provide us with a way of distinguishing race from politics.

5. *Summary: On Competence*

Many courts' failure to delineate politics from race has characteristics of both intentional disparate treatment of minorities as well as simple judicial incompetence. On the latter cause, a plurality of the Supreme Court has recently acknowledged an institutional inability to create manageable standards for policing partisan gerrymanders.²⁶³ In rejecting proposed constitutional tests for illegal partisan gerrymanders, the Court plurality made clear that its judicial incompetence did not extend to racial gerrymanders: "[A] person's politics is rarely as readily discernible—and *never* as permanently discernible—as a person's race," Justice Scalia confidently declared.²⁶⁴ The foregoing analysis in this section, however, suggests courts often cannot distinguish race from politics, and when they do, voters of color are usually assigned to whichever category is most disadvantageous in a given case.

Despite Justice Scalia's conviction that compartmentalization of politics and race is possible, the Supreme Court's own reckoning with the concept of race as such suggests otherwise. In *Saint Francis College v. Al-Khazari*,²⁶⁵ the Court recognized the social fluidity of the concept of race in holding that a plaintiff of Arab ancestry could sue under a federal civil rights statute for "racial discrimination."²⁶⁶ Although the Court in *Al-Khazari* was tasked with divining congressional intent, the Court's observations regarding the concept of race are no less applicable to the race/politics symbiosis than they were to the statutory interpretation question presented:

There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial

263. *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion).

264. *Id.* at 287.

265. 481 U.S. 604, 613 (1987).

266. *Id.*

classifications are for the most part sociopolitical, rather than biological, in nature.²⁶⁷

B. *Voting: A Fundamental Right for Whites Only?*

Courts have failed to reduce the role of race in politics in part by failing to coherently demarcate the boundaries between race and politics. But in a manner that is as inexplicable as it is disturbing, the Supreme Court has created two distinctive protections of the right to vote, each of which turns not on high constitutional principle but rather on the plaintiff's race. At a minimum, the effect of this inconsistency is to inject race gratuitously into equal protection analysis. Its most pernicious role, however, is to permit the goal of reducing race in politics—or color-blindness—to act as a stalking horse for curtailing minority political autonomy.

In *City of Mobile v. Bolden*,²⁶⁸ black voters sought to strike down an at-large system of electing city commissioners as violative of the Fourteenth and Fifteenth Amendments. The Court denied their claim.²⁶⁹ A Court plurality insisted that the plaintiffs make a showing of discriminatory intent, a showing made all the more difficult by the Court's unwillingness to give due weight to Alabama's lurid history of discrimination in voting.²⁷⁰ In dissent, Justice Marshall ascribed to the plurality a myopia that is equally characteristic of the Court's behavior in sorting race from politics: "Perhaps because the plaintiffs in the present cases are Negro, the plurality assumes that their vote-dilution claims are premised on the suspect-classification branch of our equal protection cases, and that . . . they are required to prove discriminatory intent."²⁷¹

Justice Marshall argued, however, that vote-dilution claims implicate the fundamental right to vote and thus should be analyzed under the fundamental rights branch of the Equal Protection Clause rather than its anti-discrimination prong.²⁷² Marshall discerned from the Court's vote-dilution decisions "a substantive constitutional right to participate on an equal basis in the electoral process that cannot be denied or diminished for any reason, racial or otherwise, lacking quite substantial justification."²⁷³

267. *Id.* at 610 n.4.

268. 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (codified as amended at 43 U.S.C. § 1973 (2000)).

269. *See Bolden*, 446 U.S. at 80.

270. The Court defended its reasoning as follows:

[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

Id. at 74.

271. *Id.* at 113 (Marshall, J., dissenting).

272. *Id.* at 120.

273. *Id.* Marshall recognized, however, that the Fourteenth Amendment does not grant an absolute right to vote. *Id.* at 116 n.12.

Marshall's arguments were met with apoplexy by the plurality, which referred to his theory as "extreme" and accused Marshall of divining a substantive constitutional right from the Equal Protection Clause.²⁷⁴ This, however, is precisely what the majority did on behalf of primarily white plaintiffs—and certainly in the service of primarily white voters—in *Bush v. Gore*.²⁷⁵

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. . . . When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is *fundamental*; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.²⁷⁶

The fundamental nature of the right to vote, like a group's categorization as political or racial, appears to turn on the plaintiffs' race and whether minority autonomy is at stake.

Bush v. Gore cited *Reynolds v. Sims*²⁷⁷ for the classic proposition that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."²⁷⁸ Yet *Reynolds* itself stands as evidence of the Court's racially selective recognition and implementation of the right to vote. The white suburbanites who were the plaintiffs in *Reynolds* were afforded the luxury of not having to prove invidious intent, unlike racial or qualitative vote dilution claimants.²⁷⁹ *Bush v. Gore* is thus a new millennium incarnation of what has long been a double-standard under the Equal Protection Clause's voting precedents.

IV. PRACTICAL AUTONOMY: THREE STEPS BEYOND DOCTRINE

Where shall voters of color go to rediscover the voting rights of which courts have misguidedly deprived them? Not back to the courts. In overturning *Bowers v. Hardwick*,²⁸⁰ a case that licensed states to criminalize consen-

274. *Id.* at 75-76 (majority opinion).

275. 531 U.S. 98 (2000).

276. *Id.* at 104 (emphasis added).

277. 377 U.S. 533 (1964).

278. *Bush*, 531 U.S. at 105 (quoting *Reynolds*, 377 U.S. at 555).

279. Barbara Y. Phillips, *Reconsidering Reynolds v. Sims: The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 HOW. L.J. 561, 578 (1995) (describing the legal standard in malapportionment vote dilution cases as a "relatively simple inquiry into whether the challenged plan resulted from a good faith effort to create equi-populous districts and whether any significant variance from population equality was justified by legitimate state interests").

280. 478 U.S. 186 (1986).

sual homosexual sodomy, Justice Kennedy, writing for the majority in *Lawrence v. Texas*,²⁸¹ noted that *Bowers* had sustained substantial doctrinal erosion, and that under such circumstances, academic criticism of the decision took on added significance.²⁸² Parts II and III of this Article have set forth the real-world failures, internal inconsistencies, and doctrinal unworkability of *Shaw v. Reno*²⁸³ and its progeny. Moreover, that decision has been pilloried in academic commentary.²⁸⁴ One suspects, however, that the Court will remain particularly obstinate in this area, for its wrong and wrongful districting decisions are but a continuation of a broader equal protection doctrine that is no less indictable.²⁸⁵

Barring the overturning of *Shaw*, what recourse do voters of color have? Under court-imposed race-blindness, people of color can retain their autonomy in the political process only by forcing whites to internalize the costs of their racial discrimination in voting. Voters of color must assert a distinctive political identity and insist on recognition of that identity on pain of electoral retribution. If this seems precisely the opposite of *Shaw*'s goal of reducing the role of race in politics, that is precisely the point. Unlike affirmative action in higher education and employment, the Court cannot enjoin race-consciousness in politics, both because voting is too private and autonomous an act and because race and politics are symbiotic. An inclusive political process, on the other hand, is capable of altering many of the material circumstances that give rise to race-consciousness in the first place. Where the judiciary impedes this result rather than facilitating it, voters of color must default to the only process left: politics. Three graduated strategies suggest themselves: (1) issue submersion, (2) a functional strike group, and (3) a formal third party. Each is discussed below independently and in relation to the others.

A. Issue Submersion

If a correlation between race and partisanship can justify the racial composition of a district,²⁸⁶ then a correlation between race and policy positions should similarly justify a district's racial composition. This suggests that voters of color must begin to identify themselves with a set of concrete

281. 539 U.S. 558 (2003).

282. *Id.* at 576.

283. 509 U.S. 630 (1993).

284. See, e.g., Edwin Howard Green, *When Looks Can Kill: Shaw v. Reno Aftermath*, 20 T. MARSHALL L. REV. 183, 199-204 (1994); Michael J. Moffatt, *The Death of the Voting Rights Act or an Exercise in Geometry?—Shaw v. Reno Provides More Questions Than Answers*, 22 PEPP. L. REV. 727, 775-82 (1995); James B. Zouras, Note, *Shaw v. Reno: A Color-Blind Court in a Race-Conscious Society*, 44 DEPAUL L. REV. 917, 959-97 (1995).

285. See generally Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 637-81 (2003) (arguing that the U.S. Supreme Court protects influential and favored groups while mandating that oppressed groups use the political process to gain relief from past oppression).

286. *Easley v. Cromartie*, 532 U.S. 234, 245 (2001).

policy positions rather than with a particular political party.²⁸⁷ This proposal, however, should not be confused with the now fashionable rhetoric about blacks needing to divide their influence between the major parties. “Is it a good thing for the African American community to be represented mainly by one political party?,” President George W. Bush asked as he campaigned before the National Urban League during the 2004 election.²⁸⁸ The answer is a conditional yes, where the Republican Party seeks black votes without accommodating black interests, and where Democrats are marginally better. Such has been the case in American politics since at least the 1964 presidential election.²⁸⁹ As the President was forced to concede during his campaign appearance, “The Republican party has got a lot of work to do.”²⁹⁰

But *Easley* underscores the problem with the close identification of blacks and Democrats. Courts have begun to view black interests only through the lens of partisan interests. This myopia necessitates differentiation if voters of color are to exercise autonomy within the electoral process. Ironically, *Shaw* and its progeny—powerless as they are to eliminate race-consciousness from politics—now demand a more accentuated race-consciousness to elide the Court’s constraints.

How shall this heightened race-consciousness come about? In the tradition of *Brown v. Board of Education of Topeka*,²⁹¹ it shall come through the use of social science. Voters of color must seek not just documentation of the fact that they vote differently from whites, but more importantly that they vote for and based on different interests. Differences between blacks and whites on policy matters that directly implicate race are “huge.”²⁹² When asked in a 1992 study if there should be federal spending on pro-

287. Professor Henry Chambers has delineated two methods by which voters may identify themselves according to a set of interests. The traditional method, communities of interest, permits voters to assert their commonality for purposes of recognition in the districting process. See Chambers, *supra* note 44, at 179. On the other hand, under enclave districting—of which Chambers is a proponent—a legislature employs “demographic criteria” to identify “neighborhoods” of interest that typically will be smaller than communities of interests. *Id.* at 179-80. The process of issue submersion is more akin to enclave districting in that the interests associated with voters of color would not be interests identified merely for purposes of creating a district. See *id.* at 180. Those interests instead would reflect the same political principles that motivate a myriad of other interest groups in the political process, from evangelicals to the gun lobby. See *id.*

288. President George W. Bush, Remarks to the 2004 National Urban League Conference (July 23, 2004), available at <http://www.whitehouse.gov/news/releases/2004/07/20040723-8.html>.

289. See, e.g., Edward G. Carmines & Robert Huckfeldt, *Party Politics in the Wake of the Voting Rights Act*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 117, 121-24 (Bernard Grofman & Chandler Davidson eds., 1992) (documenting roll call votes for Senate and House members from 1945 to 1980 and demonstrating the decreasing racial liberalism of the Republican Party and the inverse for Democrats); WHITBY, *supra* note 170, at 110, 102, 81-112 (examining the roll call votes of three Congresses—101th to 103rd—and finding “the two parties are clearly polarized on issues of primary interest to African-Americans,” and “Republicans are to the Right of Democrats on black policy preferences”); Hutchings et al., *supra* note 252, at 466 (“[S]outhern Republicans did not become more responsive to black interests under any circumstances even though some of their districts contain a substantial number of African Americans.”).

290. Bush, *supra* note 288.

291. 349 U.S. 294 (1954).

292. Kinder & Winter, *supra* note 174, at 440.

grams to assist blacks, 69.3% of blacks responded affirmatively while only 18% of whites did²⁹³—a 51.3% gap. An equally resounding differential exists in black/white public opinion on college affirmative action.²⁹⁴ In short, there are differences in policy positions between blacks and whites that cannot be explained on grounds of partisanship alone and that independently form a legitimate basis for apportioning political power.

B. A Functional Strike Group

The skeptic will observe that it is one thing to document policy differences, quite another to convince a legislature to recognize them as a basis for power-sharing, and still a greater feat to convince the courts not to tag these interests as impermissibly racial. As to the last, we have seen that there is no stopping a determined Supreme Court. It would be odd, however, to deem a district drawn to encompass fervent supporters of affirmative action as racial but to fail to similarly describe a district filled with racial conservatives. Indeed, what if one of the policies that voters of color support disproportionately is a constitutional amendment legalizing all remedial race-conscious government action? Would a district drawn to favor a proponent of such an amendment be a racial or political one?

Shaw v. Reno and its progeny portray state legislatures creating black districts in the 1990s with abandon.²⁹⁵ In her important historical account of the redistricting process and voting rights litigation, however, J. Morgan Kousser documents a process that exploited black voters for the benefit of white incumbents and was otherwise hostile or indifferent to blacks' interests.²⁹⁶ For this reason, voters of color cannot trust state legislatures any more than they can the courts. Yet they can engage politicians in a way that sends an unmistakable message to the courts. This engagement ultimately might take the form of an independent third party, but an intermediate step is to be ventured beforehand: a political strike group.

The strike group model would not involve the creation of a third party but instead would work like so: Candidate A is a Latina running in a district that was previously majority-minority but whose minority population was reduced to minority status pursuant to *Shaw*. Candidate A loses the election to a white opponent where racial bloc voting was substantial. Latinos statewide have been informed of the loss. As political retribution, they organize against a white candidate for state insurance commissioner who is supported by a majority of white voters but not a sufficient number of them to ensure his election without winning minority votes. The Latinos here function as a strike group to raise the electorate's race-consciousness and to warn white

293. *Id.* at 441 tbl.1.

294. *Id.*

295. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900, 944-45 (1995) (Ginsburg, J., dissenting).

296. *See* J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 366-455 (1999).

voters—and indirectly the Supreme Court—that failure to support their candidates comes at a price. The office selected is deliberately a “down-ballot”²⁹⁷ one; undertaking this course of action where electoral stakes are high or policy outcomes potentially detrimental would be a last resort. This scenario is bluntly and perhaps distastefully race-conscious; it is race-consciousness unmediated by traditional institutional actors, namely the courts and the state legislatures.

For white voters, the price is a political loss. For the Court, the cost is a repudiation of its doctrine in a manner that citizens are ordinarily unable to effectuate. Absent a material alteration in the life circumstances of people of color that give rise to race-consciousness, the Court’s only means of curtailing race-consciousness of the sort illustrated above is to rediscover voting rights in minority autonomy. This relocation of voting rights jurisprudence would involve a shift from the use of the Equal Protection Clause to substantive bases for evaluating voting claims (i.e., substantive due process and the Fifteenth Amendment) and the concomitant grant to state legislatures of the power to mediate race-consciousness rather than attempt to suppress it.

C. *The Third Party*

The logical extension of the strike group model would be the creation of a formal third party under applicable state laws. The party would negotiate with allies—Democrats—for recognition in the districting process, affording minorities under the guise of a partisan gerrymander what *Shaw* denies them when these same types of districts are created within the two-party context. This recourse is suboptimal to the extent that it would require the third party to field candidates against sympathetic allies to maintain its third-party status.²⁹⁸ But redistricting usually happens only once every ten years, thus enabling the party to assume non-major-party status at strategic times. Moreover, as Southern jurisdictions become increasingly inhospitable to black voters at every electoral level, the risks posed in running a state-wide candidate in order to retain major-party status become commensurately less.

V. CONCLUSION

In time, perhaps the Supreme Court will re-examine *Shaw* and its progeny and return to a more practical approach to redistricting and voting rights. In the interim, however, voters of color must rediscover for themselves a right of political autonomy that is as much a part of American democracy as is the supposed right to vote. In the process, their experiential-

297. See *Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992) (“[T]he tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level.”).

298. See Smith, *Black Party*, *supra* note 50, at 71-72.

tion may well lead the Court to rediscover voting rights outside of the Equal Protection Clause where these rights have incurred inexplicable detriment.