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In recent redistricting and juror exclusion cases, the Supreme Court has expressed hostility to the idea that government may consider racial or gender group membership in making decisions that determine the composition of representative institutions. Instead, the Court has insisted that government must think of voters and jurors solely as individual actors, who cannot be recognized as having similar interests, experiences, or perspectives as other persons who share their race or sex. Whatever merit there may be in adopting this exclusively individualistic approach in the area of civil rights and privileges, Professors Amar and Brownstein argue that it is an inadequate basis for understanding the Constitution's equality requirements when political rights are at issue. Instead of focusing exclusively on the individual, our constitutional tradition acknowledges a dual dimension to political rights, consisting of both an individualistic, dignitary component and a group-based, instrumental component. This tradition developed out of the political and legal struggles to extend the franchise to black men and to women through the Fifteenth and Nineteenth Amendments and underlies over 100 years of case law interpreting the nature of political equality for constitutional purposes. Political rights in America have always reflected an uneasy tension between respect for the individual and a concern for the ability of groups to influence government. When the modern Court ignores the group and instrumental dimensions of political rights in our history, it avoids rather than resolves the hard questions and grounds constitutional doctrine in this area on an unstable foundation.

INTRODUCTION

Since its seminal decision in *Shaw v. Reno*[1] in 1993, the United States Supreme Court has repeatedly invalidated majority-minority voting districts legislators created by taking race into account in drawing district boundary lines. In justifying its skepticism of all race-conscious redistricting, the

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1. 509 U.S. 630 (1993).

Court has been explicit in its reasoning. In *Miller v. Johnson*,[2] for example, the Court explained:

> [A state] may not separate its citizens into different voting districts on the basis of race [because] "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." . . . When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls."[3]

Under this reasoning, race-conscious districting is constitutionally problematic even where it does not reduce the representation of any racial group—that is, even where it does not disadvantage members of any race.[4] Rather, as one commentator has observed, the cases

> display considerable hostility toward the very idea of conceptualizing representation in terms of racial groups. . . .
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> . . . [This] color-blindness doctrine "derive[s] from the basic principle that the Fifth and Fourteenth Amendments to the Constitution [as construed by the Court] protect *persons*, not *groups*." . . . [Accordingly,] government must move beyond stereotypes and treat voters as individuals, not as members of racial or ethnic groups.[5]

This key reasoning—that governmental assumptions about racial group attitudes or perspectives are inherently problematic under the Constitution—is not unique to the redistricting cases. Similar language about the requirement of an individualistic as opposed to racial group-based perspective pervades the so-called "juror exclusion" cases handed down over the past decade.[6] These cases, which find race and gender-based peremptory challenges unconstitutional, declare the instrumental irrelevance of race and gender to juror competence and behavior.[7] That the Court has made similar rhetorical moves in the voting and jury settings is not at all surprising. One of us has argued elsewhere that the architects of the Reconstruction Amendments

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2. 515 U.S. 900 (1995).

3. *Id.* at 911 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal quotation marks omitted), and Shaw v. Reno, 509 U.S. 630, 647 (1993), respectively). Nor is this quoted passage a mere rhetorical flourish in an opinion in which the constitutional result is grounded in other reasoning and sources. This quoted passage is virtually the entirety of the Court's *constitutional* justification. Nearly all of the other arguments advanced by the majority to support its approach are explicitly grounded in policy considerations that are never connected to the text, history, structure, or prior interpretations of the Constitution itself.

4. *See* Richard Briffault, *Race and Representation After* Miller v. Johnson, 1995 U. CHI. LEGAL F. 23, 27.

5. *Id.* at 27, 60 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

6. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); Powers v. Ohio, 499 U.S. 400 (1991).

7. *See J.E.B.*, 511 U.S. at 138-41; *Powers*, 499 U.S. at 410.

linked voting and jury service textually, conceptually, and historically and that these two should therefore be seen as part of a package of political rights and should be treated similarly for many constitutional purposes.[8] Indeed, throughout this article, we often use the term "voting" generically to connote voting in elections, jury boxes, and legislative arenas.

What is surprising, and we argue troubling, is that the Court has employed reasoning in voting and jury cases that it originally developed in equal protection cases outside the political rights context—in particular, in cases involving more traditional affirmative action questions. Both on and off the Court, the assumption has been that "[t]he correctness of *Shaw* and *Miller* turns primarily on whether, and to what extent, the government must be 'color-blind' in its actions" generally.[9] Indeed, the above-quoted passage from *Miller*, which frowns on governmental assumptions about racial groups in redistricting, is itself wrenched largely from Justice O'Connor's dissent in the FCC license set-aside case *Metro Broadcasting, Inc. v. FCC*.[10]

Whatever view one takes about the legitimacy of the Court's color-blind instinct in contracting and traditional civil rights cases, the Court's extension of its reasoning to the political rights realm is open to criticism. Dan Lowenstein, for example, has suggested one line of criticism: that the Court's animosity, at least in the redistricting cases, is directed at the wrong target. The federal government, not the state defendants who were before the Court, was the real architect of the race consciousness found troubling by the Court.[11] In this article, we focus less on the target and more on the Court's ammunition—its rationale for finding race consciousness constitutionally problematic in the first place—and argue that the Court is shooting blanks.

We are obviously not alone in criticizing the Court's exclusively individualistic perspective. Other observers, such as Pam Karlan, have argued, as a practical matter, that the Court's individualistic focus is misguided because districting decisions are necessarily group oriented and that race should continue to be taken into account today because of the prevalence of racial bloc voting.[12] What we offer here is not a practical critique, but rather a theoretical, historical, and doctrinal one. According to the Court, political

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8. *See* Vikram David Amar, *Jury Service As Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 206 (1995) (arguing, *inter alia*, that "the voting-jury service linkage was recognized by the Framers in the 1780s, by those responsible for drafting the reconstruction amendments and implementing legislation, and still later by authors of twentieth century amendments that protect various groups against discrimination in voting" (footnotes omitted)).

9. Thomas C. Berg, *Religion, Race, Segregation, and Districting: Comparing* Kiryas Joel *with* Shaw/Miller, 26 CUMB. L. REV. 365, 366 (1996).

10. 497 U.S. 547, 602-04, 618-20 (1990) (O'Connor, J., dissenting).

11. *See generally* Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998).

12. *See generally* Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201 (1996).

equality rights—at least when it comes to race—are to be viewed exclusively as individual interests that require similarly situated, essentially fungible, persons to be treated identically. This approach, we argue, cannot withstand critical analysis.

As a theoretical matter, the Court's approach ignores the essentially hybrid nature of constitutionally protected political rights in America. Such rights necessarily contain a group as well as individual component. This group dimension reflects the instrumental nature of political rights. Political rights are about power. They are about the ability to direct government decisions in particular directions. There is also a dignitary aspect to political rights; they represent status as well as power and, in this sense, clearly implicate individual interests. But political power belongs to groups, not individuals. Groups, not individuals, tell the government how to exercise authority.

This dichotomy between the group and individual components of political rights corresponds to a critical distinction between the harms that ensue from the abridgement of such rights. An individual denied the right to vote or serve on a jury is demeaned and stigmatized. A group denied the right to vote or serve on juries loses its ability to influence political outcomes and thus has its material interests subordinated to those groups that enjoy greater access to political rights.

The key question raised by the Court's recent cases is whether thinking about political rights in group terms can and should be avoided when the group is defined by race (or gender). As we hope to demonstrate, the hybrid nature of political rights cannot be ignored, regardless of the racial or gender characteristics used to identify or define the group whose rights are at stake.

Put simply, as a matter of principle and self-respect, blacks and women as individuals deserved the vote. In addition, as a matter of survival and equality under the law with regard to the material benefits provided and burdens imposed by government, blacks and women collectively needed the power to vote in order to protect and assert their interests.[13]

Critical constitutional developments over the last 200 years confirm the hybrid—group *and* individual—model of political rights that we describe.

13. It is important to recognize that we are not arguing that groups, whether defined by race or other characteristics, have rights in any formal or literal sense. We believe that discussions of "group rights" per se are sometimes unhelpful and may often distract both courts and commentators. Rather, we start from a more basic foundation. Groups exist and are an essential part of political life. Race, gender, religion, ethnic background, and other characteristics are used by political groups in identifying themselves and determining their interests. The constitutional question is how our jurisprudence of political rights should take account of the needs, objectives, and power of these political groups. The thrust of the current Court's response to this question is to insist that it is unconstitutional for government to recognize or take account of race or gender-based political groups in regulating elections and the exercise of political rights. We challenge the historical and conceptual validity of this response.

The Reconstruction Amendments provide much historical information about whether and to what extent government can think in racial group terms. The nuances and history of the Amendments, however, have been completely ignored by the same conservative Court majority that purports to adhere to tradition and originalist constitutional interpretation.[14] When we examine that history carefully, we see first that, by indiscriminately extending generic equal protection ideas into the political rights realm, the Court has ignored the distinction repeatedly drawn by the framers and ratifiers of the Fifteenth and Fourteenth Amendments between political rights, on the one hand, and civil rights, on the other.

Furthermore, when we look more specifically at the Fifteenth Amendment, which spoke exclusively to the political rights omitted from the coverage of the Fourteenth, we see that the Court's approach directly contradicts the reasoning and objectives of the framers and ratifiers of the Fifteenth Amendment in extending the franchise to blacks. *The framers and ratifiers of the Fifteenth Amendment assumed, expected, and indeed counted on the idea that, when it comes to political activity, voters, because of their race, would—to use the Court's words in* Shaw—*"think alike, share the same political interests, and . . . prefer the same candidates at the polls."*[15] One cannot invalidate government race consciousness in the political rights realm on grounds that it reflects unconstitutional assumptions without dealing with the fact that the very constitutional provisions establishing political rights for minorities were premised on those same assumptions.

Whether or not the Fourteenth Amendment's mandate of racial equality in the civil rights realm, as a historical and originalist matter, was dignitary and "individualist at its core"[16]—a question on which we express no strong view—its framers' vision of racial equality in the realm of political rights was assuredly more instrumental and group oriented. This vision was premised not on the irrelevance of race, but on the idea that blacks and whites were in many respects not similarly but rather differently situated. Regardless of whether evidence suggests that the framers of the Fourteenth Amendment thought race irrelevant in the civil rights area—contracting, property ownership, and eligibility for public benefits—race was certainly

14. For examples of historical and/or originalist methodologies by the members of the Court who comprise the *Shaw/Miller* majority, see Printz v. United States, 117 S. Ct. 2365 (1997); City of Boerne v. Flores, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting); United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); New York v. United States, 505 U.S. 144 (1992); Burnham v. Superior Court of Cal., Marin County, 495 U.S. 604 (1990) (plurality opinion); Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

15. Shaw v. Reno, 509 U.S. 630, 647 (1993); *see also* notes 69-105 *infra* and accompanying text.

16. Jeffrey Rosen, Kiryas Joel *and* Shaw v. Reno*: A Text Bound Interpretivist Approach*, 26 CUMB. L. REV. 387, 402-03 (1996).

not viewed as irrelevant in the political rights realm.[17] Race, and thus racial groups, mattered, at least in the minds of the framers.[18]

Group-based assumptions partially underlay not only the Fifteenth Amendment, but also the Nineteenth Amendment, which forbids sex discrimination in the political rights realm. In significant measure, the Nineteenth Amendment's extension of voting rights to women grew out of a belief that men and women *would* act differently in exercising political rights and that, just as whites inadequately represented blacks, men were inadequate surrogates for the political interests and concerns of women. Thus, the Nineteenth Amendment reinforces its historical and textual predecessor, the Fifteenth, in that both Amendments recognize that distinct groups have distinct political perspectives and voices and that these voices are instrumentally essential components of the national political discourse. This group dimension of the Nineteenth Amendment, beyond confirming the hybrid nature of political rights in the constitutional structure, also becomes relevant not in redistricting, but in another important political rights context: jury selection and composition.

In addition to its theoretical and historical shortcomings, the Court's reasoning in recent racial gerrymandering cases is fundamentally inconsistent with a diverse range of prior decisions. The problem is not that the Court's concerns with the individual nature of political rights are completely unfounded, but rather that they describe only half of a story in which the omitted passages are crucial to understanding the plot. Cases that reflect a continuing struggle between the individual and group dimension of political rights become incoherent when the group aspect of such rights is completely ignored or repudiated.

Consider first the many voting and election regulation cases that do not involve racial issues. These decisions are structured around the tension between individual and group rights. The "one person, one vote" cases, for example, reaffirm the central but not exclusively individualistic nature of the right to vote.[19] At the same time, a long line of ballot access cases demonstrate the importance, if not the primacy, of the group component of the franchise.[20] Nor has this tension disappeared in those older voting and election cases in which race *was* in the picture. As the dissenting Justices in *Shaw*

17. *See* notes 69-98 *infra* and accompanying text.

18. One could, as does Justice Stevens, critique the *Miller* majority even from an exclusively individualistic perspective. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 929-33 (1995) (Stevens, J., dissenting). Since whites are allowed to vote in majority-minority districts and their votes are counted, how are their individual interests compromised? They are not. But under this analysis, blacks who are intentionally gerrymandered into underrepresentation would also lack individual claims. Thus, a group perspective is needed to identify and evaluate the harm caused by racial group gerrymandering, regardless of the race of the voters alleging manipulation of their votes.

19. *See* notes 175-176 *infra* and accompanying text.

20. *See* notes 180-198 *infra* and accompanying text.

and *Miller* as well as several commentators have pointed out, the venerable "vote dilution" line of cases is simply impossible to reconcile with the Court's current reasoning.[21] Far from insisting on the constitutional irrelevance of race in political decisionmaking, these cases explicitly recognize that different racial groups may have different political agendas, outlooks, and perspectives. Indeed, the very idea of race-based vote dilution assumes racial group behavior inconsistent with the premises on which the holdings in *Shaw* and *Miller* are based. In yet another line of authority, several decisions prohibit restructuring the political process in any way that unequally burdens the ability of racial minorities to influence government policy in support of their interests.[22] These cases also sharply contradict the current Supreme Court majority's rhetoric and reasoning.[23]

Similar dissonance isolates the Court's most recent cases dealing with race and gender-based peremptory challenges from older jury exclusion decisions.[24] Again, the problem is not that the Court's emphasis on the rights of individuals to serve as jurors lacks any precedent. Instead, it is that recent decisions have all the stability of a person maintaining her balance by standing on one leg. Historically, opinions in equal protection and Sixth Amendment cases labored to reconcile the belief in the individual right to serve on a jury with the recognition that preserving the very function of the jury as an institution required an understanding of the distinct attitudes, experiences, and group-based perspectives that diverse classes were likely to bring to jury deliberations. In contrast, contemporary jury selection jurisprudence ignores the role racial, gender, and class differences play in necessitating close judicial supervision of jury selection procedures, a supervision which is hard to explain, let alone justify, in the color-blind, homogeneous world of fungible individuals described in recent opinions.[25]

This clash between older political rights doctrine and the Court's reasoning in its most recent redistricting and jury selection cases parallels the distinction between the original understanding of political rights that gave

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21. *See Miller*, 515 U.S. at 929-33 (Stevens, J., dissenting); Shaw v. Reno, 509 U.S. 630, 667-74 (1993) (White, J., dissenting).

22. *See* notes 202-223 *infra* and accompanying text.

23. *See id.*

24. *See* notes 224-339 *infra* and accompanying text.

25. For examples of such opinions, see J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994), and Powers v. Ohio, 499 U.S. 400 (1991). A few commentators over the years have indicated, without explanation, that equality doctrines have historically been treated differently in the jury and voting cases than in other settings. *See, e.g.*, Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989). We think much of the explanation lies in the underdiscussed distinction drawn by the Reconstruction Amendments' framers between political and civil rights, a distinction the modern Court has completely ignored. To put the point bluntly, in its zeal to replace a political process model of the equal protection clause with a normative commitment to color-blind governmental decisionmaking across the constitutional board, the Court has apparently lost track of the kinds of interests that are being regulated in the different kinds of cases that it reviews.

rise to the Fifteenth and Nineteenth Amendments, on the one hand, and the Court's current, and highly individualistic, Fourteenth Amendment equal protection jurisprudence, on the other. The Court has thus disregarded history in two respects: first, as to the original understandings of the Fifteenth and Nineteenth Amendments, which had meanings that were distinct from that of the Fourteenth, and second, as to the early and evolving judicial interpretations found in the case law.

These are not really independent mistakes. In a sense, the Court misses the same point twice in two different contexts. Both originalist understanding and early judicial doctrine reflect the same understanding of political rights as hybrid in nature. As noted above, any abridgement of the freedom to exercise political rights caused instrumental as well as dignitary harms.[26] Courts confronting these instrumental consequences—the material harms resulting from the abridgement of political rights—could no more deny the group aspect of rights than could the political actors who fashioned the Fifteenth and Nineteenth Amendments. All-white juries from which blacks had systematically been excluded did more than visit an insult on qualified black citizens; they unjustly eliminated black voices from lawmaking and administration and, in the process, may have convicted innocent individuals. Vote dilution mechanisms did more than send a message that black voters were not worth as much as white voters; they resulted in inferior schools and municipal services relied on by black citizens. Denial of political rights caused tangible harm to real victims. Courts could not redress those grievances without recognizing the group dimension of political rights and the resulting loss of power that resulted from the abridgement of those rights.

In early cases, all but ignored by the modern Court, instrumental consequences drove the Court's analysis. In these cases, courts, like the political actors who framed the Fifteenth and Nineteenth Amendments in response to real world inequities, recognized the group dimension inherent in political rights. By cutting itself off from these roots and the pragmatism that has usually tempered constitutional analysis, the modern Court has constructed its new political rights jurisprudence on needlessly shaky foundations.

Our discussion unfolds as follows: Part I provides a brief analytic overview of the hybrid nature of voting and other political rights in American constitutional thinking. Part II traces the dual components of political rights—individualistic and group oriented—through the history of the two most important political rights amendments to the Constitution: the Fifteenth and the Nineteenth.[27] Both the analytic overview and the (admittedly tedi-

26. *See* note 13 *supra* and accompanying text.

27. In our analysis of the history of the Fifteenth and Nineteenth Amendments, we describe the way in which political rights were understood by the members of Congress who debated and adopted these constitutional provisions, as well as by their political contemporaries. In doing so, we have not identified key actors who played instrumental roles in promoting these amendments,

ous) parsing of framing and ratification histories demonstrate how the current Court's sole focus on the individualistic dimension misses an important strand in constitutional thinking, argument, and reasoning. The missing group dimension is also evident from a careful analysis of a number of voting and election regulation decisions. These cases are explored in Part III. Part IV traces the Court's juror exclusion jurisprudence from the earliest Reconstruction cases to the present. Again, the relevance and propriety of recognizing a racial group dimension to the political rights realm is demonstrated through evolving doctrine. Finally, Part V explores how a richer understanding of the hybrid nature of political rights might inform the Court's consideration of race and gender-conscious measures in the political rights arena.

Our basic suggestion is that an adequate constitutional model must recognize both aspects of the dual nature of political rights. We do not challenge the doctrinal premise that respect for individual political autonomy is an intrinsic part of the protection of political rights provided by the Constitution. Nor do we suggest that the group and instrumental dimension of political rights should dominate our understanding of political equality or even that the group dimension of political rights is easy to understand on its own terms. There is simply no hierarchy of constitutional values that will easily dissolve the tension that sometimes exists between different groups or between individual and group interests. Our primary thesis is that a jurisprudence of political equality that totally ignores the group and instrumental dimensions of political rights when evaluating majoritarian decisions that make use of race or gender distorts both the reality of political life and our constitutional history.

Let us make clear, up front, that we do not necessarily disagree with all the results the Court has reached in its recent districting and jury cases; as should become clear in the last two parts of this article, we agree with some, and we're not sure about others. One reason for our uncertainty is that the Court has not been tackling the tough questions in a way that might help us all think through the right answers. There may be some kinds of government assumptions about race and gender that are constitutionally unacceptable. But the Court's simplistic individualistic focus—its idea that any generalizations that suggest difference rather than similarity are impermissible—obscures many of the tough questions and cuts off the debate precisely where it should begin.

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nor have we focused on their specific interests and perspectives. Instead, we have tried to determine, in a broad and general sense, what political actors thought about extending the franchise to blacks and women. We believe that the picture that emerges from this kind of historical analysis provides a more valuable foundation for constitutional interpretation than a more limited "great man" approach.

I. THE NATURE OF POLITICAL RIGHTS AND POLITICAL EQUALITY

A. *Political Rights*

1. *Political rights as individual and dignitary interests.*

From one perspective, political rights are natural rights belonging to each individual in recognition of his membership in human society. Defined in this way, political rights serve an essential dignitary and legitimating function, confirming the status and worth of the individual.[28] The dignitary and legitimating function of political rights—particularly voting rights—found expression in the commonly invoked principle that voting was an "inalienable" right to which every individual was entitled by virtue of his status as an American citizen. The essential idea behind this ideological axiom was one of popular sovereignty. Government derived its just powers from the consent of the governed. Indeed, government constituted legitimate authority over a person only if that individual had freely consented to being subject to the state's laws.[29]

Voting was the means by which that consent could be expressed or withheld. Access to ballots, juries, and offices was, in this sense, a mark of respect and belonging. An individual entitled to vote shared sovereignty on an equal basis with his fellow citizens.

But a purely individualistic interpretation of the right to vote is strangely divorced from any discussion of the effect of a person's exercise of the franchise. The core of the individualistic perspective is focused on the participatory act itself, regardless of its consequences. If a person votes for a losing candidate, she has not directly consented to the election of the victor. Unlike political speech, which may have considerable influence standing alone, voting—as the singular and secret act of the lone individual—is minimally communicative and has little direct impact on others. In a majoritarian democracy of substantial size, individual ballot votes have very limited meaning or power unless they are aggregated into a group consensus.

2. *Political rights as an instrumental and group interest.*

For these reasons, although the individualistic perspective on voting is valid, it is also incomplete. Voting is much more than an assertion of dignity

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28. The dignitary status that accompanies the franchise was described with pride by one Republican senator during the debates leading to the adoption of the Fifteenth Amendment as follows: "When I was a young man waiting and craving to cast my vote for Henry Clay I never felt that I wore the badge of an American citizen till I arrived at the age of twenty-one years and could deposit the ballot." CONG. GLOBE, 40th Cong., 3d Sess. 1004 (1869) (statement of Sen. Yates (R-IL)); *see also* notes 49-56 *infra* and accompanying text.

29. *See* notes 44-47 *infra* and accompanying text.

or an expression of belief. Voting is about the exercise of power. It operates as the mechanism through which popular sovereignty directs the actions of the government. Accordingly, to the extent that political rights are directed toward the results of political activity, they reflect the collective component inherent in the use of ballots, offices, and juries to channel political power.

Not surprisingly, therefore, alongside the individual dignity and popular sovereignty rationales of voting, a correspondingly powerful and pragmatic understanding of the franchise has evolved in American history. Legitimate government had a distinct purpose: to protect property, to preserve personal liberty, and to promote the public good. Thus, decisions about who should be eligible to vote, hold office, and serve on juries were necessarily to be made in a way that maximized the likelihood that the government elected would competently further these practical goals.[30] Government was like gun powder: It could be harnessed for good or evil. If the wrong people commandeered such a dangerous weapon, lives and fortunes could be lost.

Based on this understanding of political rights, it was argued in earlier times that certain groups—defined by race, gender, age, religion, wealth, and other characteristics—need not and should not vote, regardless of the particular virtues of individual members of the excluded groups.[31] From this perspective, voting was much more of a group privilege than an individual right. Moreover, the appropriate scope of the franchise reflected policy judgments and public expediency, not abstract principles of political philosophy.[32]

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30. In prerevolutionary America, this understanding of the nature of government and the franchise was used to justify the use of property qualifications to limit the right to vote. *See, e.g.*, Christopher Collier, *The American People As Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 19, 22-23 (Donald W. Rogers ed., 1992) [hereinafter VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY]. At the time of the Revolution, popular beliefs as to who had a sufficient "stake in society" to be entitled to vote had broadened considerably. *See id.* at 25-26.

Nevertheless, the conviction that voting eligibility remained an issue of policy and political judgment continued through the ratification of the Constitution and into the debates over the Fifteenth and Nineteenth Amendments. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 210-19 (1833); *see also* notes 32 & 57-79 *infra* and accompanying texts.

31. *See* STORY, *supra* note 30, at 214.

32. In examining the constitutions of the several states prior to the Constitution's ratification, Justice Story observed this directly:

> In the adoption of no state constitution has the assent been asked of any, but the qualified voters; and women, and minors, and other persons, not recognised as voters by existing laws, have been studiously excluded. And yet the Constitution has been deemed entirely obligatory upon them, as well as upon the minority who voted against it. From this it will be seen, how little, even in the most free of republican governments, any abstract right of suffrage, or any original and indefeasible privilege, has been recognised in practice. . . .
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> . . . In no two of the state constitutions will it be found, that the qualifications of the voters are settled upon the same uniform basis. So that we have the most abundant proofs, that

3. *Political rights as hybrid interests.*

Both the dignitary and instrumental perspectives on the nature of political rights have coexisted, albeit somewhat uneasily, throughout our political history. The lack of a more unitary and agreed-upon definition of political rights generated considerable discussion whenever an extension of the franchise was debated.[33] In the two most critical extensions, the Fifteenth Amendment and the Nineteenth Amendment, the political leadership and the general polity ultimately reached a contradictory but compelling conclusion: *Both* positions—the dignitary perspective *and* the instrumental perspective—were correct.

The decision to provide a previously disenfranchised group with the right to vote went to the core of our understanding of the nature of a democratic republic and American citizenship. But extending the franchise could not be adequately justified in abstract, dignitary terms alone. Any attempt to add a new voice to the polity also had to be defended through utilitarian argument explaining how a broader and more varied franchise would serve the public good. The Constitution was amended not solely to allow unrepresented individuals to vote, but also to permit new groups to use ballots, offices, and juries to express their views and redress their grievances. Before existing voters would approve any constitutional amendment, they insisted on knowing what kind of voice was being added to the political chorus.

B. *Political Equality for Constitutional Purposes*

Just as political rights such as voting involve hybrid characteristics relating to both individual and group interests, the nature of political equality for constitutional purposes also proceeds along two parallel tracks. The commitment to equality in voting as an individual right is grounded on the fungibility of individuals and the irrelevance of asserted differences that might distinguish one person from another. In this respect, the meaning of constitutionally mandated equality for political rights is substantially similar to the Fourteenth Amendment equality principles applied to civil rights. A purely individual-rights perspective would suggest, for example, that race is

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> among a free and enlightened people, convened for the purpose of establishing their own forms of government, and the rights of their own voters, the question, as to the due regulation of the qualifications, has been deemed a matter of mere state policy, and varied to meet the wants, to suit the prejudices, and to foster the interests of the majority.

STORY, *supra* note 30, at 214, 216. So powerful were the convictions of the different states regarding the virtues of their own idiosyncratic judgments as to who might exercise the franchise that the Constitutional Convention elected to leave this issue to state control rather than establishing a uniform standard of voting eligibility; the Convention feared that any attempt to interfere with local discretion on this question would have greatly reduced the prospects for ratification of the Constitution. *See id.* at 218-19.

33. *See, e.g.*, notes 57-79 *infra* and accompanying text.

an irrational proxy government should seldom if ever employ to distinguish one person from another. Irrelevant characteristics that arbitrarily distinguish between similarly situated individuals should be ignored; similarly situated persons should not be treated differently.

Thus, an individual denied the franchise altogether due to his race or other allegedly inappropriate ground argues that he is entitled to vote and participate in the political process because he is as competent as any registered voter and bears the same burdens of citizenship as current voters. If access to the franchise is permitted but weighted in favor of one person over another—as occurs when districts are gerrymandered to provide small districts with representation comparable to that of much more populated districts—the individual challenger's argument of essential fungibility remains the same: Because we are all worth the same as citizens, our votes should be of equal weight.

A commitment to political equality that recognizes the group dimension of voting rights and jury service and is concerned with consequences as well as process has an entirely different foundation and focus. The central concern here is not equality of similarly situated persons, but rather an equality of difference: equality among those groups that are differently situated. Under this concept of equality, the primary reason why the exclusion of particular groups from the franchise is unacceptable is that they constitute distinct voices that are not adequately represented under the existing framework. It is precisely because the members of certain groups may exert a force on political decisionmaking that may shift its direction that the battle to extend the franchise is recognized to be one of such fundamental importance not only for those who are currently ineligible to vote, but also for those who are already enfranchised.

From this group interests perspective, voting matters not only in the abstract, but also in terms of its influence on governmental decisionmaking. Inequality in voting is unfair not only because it is an affront to an individual's self-worth and sense of involvement in society,[34] but also because it is dangerously debilitating to the group excluded from political power. As Sam Issacharoff has observed in a related context, "[A]ny sophisticated right to genuinely meaningful electoral participation must be evaluated and measured as a group right, that of groups of voters seeking the outcomes promised to them through the electoral system."[35] Although Professor Issacharoff may be overstating the point by downplaying the very real, and very important,

34. *See* notes 43-48 *infra* and accompanying text.

35. Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883-84 (1995); *cf.* Richard H. Pildes, *Two Conceptions of Rights in Cases Involving Political "Rights,"* 34 HOUS. L. REV. 323, 331-32 (1997) (comparing the "individual rights" rhetoric of redistricting cases with the government's broad justifications for regulating the political culture).

individualist strand in political rights theory, his observation is quite powerful.

In the abstract, the group dimension of political rights and the recognition of an equality of difference are not very difficult to accept. To challenge the Court's current orthodoxy, however, it is necessary to move from the abstract to the specific. In particular, we must consider whether we should apply this hybrid model of political equality to questions of race and gender. Many constitutional rules play out differently, after all, where racial and gender issues are involved.

Far from suggesting a different approach to race and gender equality, however, the relevant constitutional history of race, gender, and political rights not only affirms our analysis, but serves as the basis for it. To a significant extent, the meaning and nature of political rights and equality in the United States were fought out in battles over the rights of blacks and women. Indeed, the strongest evidence supporting our thesis directly involves race and gender: the history of the adoption of the Fifteenth and Nineteenth Amendments.

II. EXTENDING THE FRANCHISE THROUGH CONSTITUTIONAL AMENDMENT

A. *Black Suffrage, Reconstruction, and the Fifteenth Amendment*

The framers of the Reconstruction legislation and constitutional amendments drew a sharp distinction between political rights—which included voting, office-holding, jury service, and militia service—and civil and social rights. The framers of the Fourteenth Amendment did not intend its Equal Protection, Due Process, and Privileges and Immunities Clauses to interfere with state regulation of political rights.[36] The void the Fourteenth Amendment left in the protection of political rights created the impetus and need for the Fifteenth Amendment, which provides that "the right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude."[37] One of us has argued at some length in another piece that the Fifteenth Amendment's "right to vote" includes not just voting in elections, but also voting on juries.[38] That piece offers what we think are compelling textual, structural, and historical reasons for recognizing the linkage between voting and juries when the Reconstruction Amendments are read as a whole.[39] In the present article, we focus on a different aspect of the Fifteenth

36. *See* Amar, *supra* note 8, at 222-27.
37. U.S. CONST. amend. XV, § 1.
38. *See* Amar, *supra* note 8, at 235-41.
39. *See id.*

Amendment: the way it underscores the hybrid nature and group dimension of political rights. To see this, we must ask why those who adopted the Fifteenth Amendment concluded that blacks should be able to vote, hold office, and serve on juries.

We believe it is impossible to read the congressional debates surrounding the enfranchisement of black Americans after the Civil War without appreciating (1) that the drafters of the Reconstruction Amendments viewed political rights as qualitatively different from civil rights, and (2) that voting rights involve both group and individual interests and thereby further instrumental as well as dignitary objectives. Certainly, the current Court's contention that governments may not constitutionally suggest a commonality of interests and perspectives among black voters would have created considerable dissonance in the ranks of the Republican sponsors and supporters of the Reconstruction Amendments. Since the arguments in favor of extending the franchise were often grounded on the perceived need for and anticipated benefits of blacks voting as a coherent force,[40] the framers and ratifiers might well have wondered how and why the objectives they sought to further have been delegitimized by the very constitutional amendments they adopted to serve the collective interests of the black community.[41]

1. *The right to vote—natural, individual, dignitary.*

Congressional supporters of black suffrage certainly insisted that blacks deserved the franchise as individual freemen in a constitutional republic.[42]

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40. The Reconstruction debates concerning black suffrage spanned the several years preceding passage of the Fifteenth Amendment. We consider and draw from political statements made throughout this period, including those made in connection with the Fourteenth Amendment and various proposed bills. Our main point is that the basic understanding of political rights in general—and black suffrage in particular—includes a recognition of the group dimension to political rights, as well as an understanding of common racial perspectives and interests.

41. As Radical Republican leader Charles Sumner advised his Republican colleagues:

> Every question by which the equal rights of all are affected is transcendent. It cannot be magnified. But here are the rights of a whole race, not merely the rights of an individual, not merely the rights of two or three or four, but the rights of a whole race . . . .

CONG. GLOBE, 42d Cong., 2d Sess. 243 (1871) (statement of Sen. Sumner (R-MA)).

42. Senator Welch characterized the primary argument against black suffrage succinctly: "[I]ntelligence and virtue are indispensable to the safe exercise of the right of suffrage; the African race in this country is inferior in respect to intelligence and virtue; and consequently it should be denied the right of suffrage." CONG. GLOBE, 40th Cong., 3d Sess. 982 (1869) (statement of Sen. Welch (R-FL)).

Welch's response to such a position was equally to the point:

> [T]he fallacy of this reasoning ought to be apparent upon its simple statement. The premise with which it starts nobody denies. It is, indeed, an axiom lying at the basis of our republican Government and national prosperity. But intelligence and virtue . . . are not monopolized by nor wholly excluded from any people on the round earth. Intelligence and virtue are individual possessions, inconstant qualities varying *ad infinitum* among the individuals of every people . . . . Those constant qualities which mark the different races are mainly physical, con-

The individual rights argument for black suffrage was a critical weapon in the Republican arsenal.[43] According to this perspective, every citizen had a natural right to vote and express his support for, or opposition to, the government.[44] This was an essential characteristic of the republican form of government guaranteed in the Constitution[45] and the distinguishing charac-

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> sisting of peculiarities of color, feature, figure, and the like; but as these peculiarities are not the qualifications for the voter, nor indicate the presence or absence of such qualifications, they cannot without absurdity be assumed as the ground for withholding or bestowing the right of suffrage. I do not share the prejudice of senators against race; my prejudices are for or against individuals according to their merits or demerits.

Id.

43. The basic dignitary dimension of the individual right to vote is eloquently captured in the words of one Republican senator:

> In the primary and individual capacity must each [citizen] speak, vote, pray, believe, love, hate, live, and die for himself or herself alone. Stamped upon every soul is an individual character and individual responsibilities which can neither be laid aside nor transferred to another. In this respect no one can have a representative character. In this ordeal each one stands for himself, and no one for another. These are the duties of this life which cannot be discharged by proxy. You are your own free agent, but you have no power of substitution, and it cannot be delegated. These are duties pertaining to one's self alone, and it is monstrous to talk of one person voting or representing another in the unorganized and primary state. As well may he live another's life, or die another's death.

CONG. GLOBE, 40th Cong., 3d Sess. 709 (1869) (statement of Sen. Pomeroy (R-KS)); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 1000 (1869) (statement of Sen. Drake (R-MO)) ("The right to vote is an individual right; it does not belong to masses of people, but it belongs to each individual . . . ."); CONG. GLOBE, 39th Cong., 2d Sess. 62 (1866) (statement of Sen. Wade (R-OH)) ("I lay it down that in any free community, if any particular class of that community are excluded from this right [to vote] they cannot maintain their dignity; it is a brand of Cain upon their foreheads that will sink them into contempt, even in their own estimation.").

44. As one representative stated:

> The proposition is clear to my mind that all legitimate and just Governments derive their authority from the consent of the governed, and equally clear that such consent cannot be obtained without an impartial appeal to the ballot. Suffrage is therefore a natural and inherent right which cannot be safely denied to any citizen of sound mind having attained his or her majority, except for rebellion or crime.

CONG. GLOBE, 40th Cong., 3d Sess. app. 94 (1869) (statement of Rep. Corley (R-SC)).

Another representative shared this natural rights perspective:

> This declaration of equality [in the Declaration of Independence], this announcement of the inalienability of the rights indicated, and this assertion that "Governments derive their just power from the consent of the governed," teach, in my estimation, the doctrine that self-government is natural and inherent; that no man confers it upon his fellow; that no constitutional convention speaks it into life; that its title is sustained by the authority of no parchment, and that no human power can *de jure* deprive man of its possession and exercise. It is absurd to speak of self-government as belonging to one who is denied the ballot, for without the ballot no man governs himself . . . .

CONG. GLOBE, 40th Cong., 3d Sess. app. 95 (1869) (statement of Rep. Bowen (R-SC)).

45. One representative expressed this point of view eloquently:

> Tell me not that the governments of those States [that deny black people the right to vote] are republican in form. As well call despotism by the sacred name of liberty, as well assert that vice is virtue. What is a republic? A government by the people; not by a portion of the people, but by all the people. A government, then, in which one fourth of the people are denied any voice or participation lacks every element of a republican government.

CONG. GLOBE, 40th Cong., 3d Sess. app. 200 (1869) (statement of Rep. Loughridge (R-IA)); *see also* CONG. GLOBE, 40th Cong., 3d Sess. app. 94 (1869) (statement of Rep. Corley (R-SC)) ("The

teristic of the democratic principle on which the United States had been founded: that government derived its legitimacy from the consent of the governed.[46]

For example, Senator Ferry, arguing in support of the Fifteenth Amendment, proclaimed in ringing terms:

> In this land Government does not make voters, but voters make the Government. To vote, under every principle upon which our Government is based, is a right of man because of his manhood, and it comes to every citizen because of that truth in our fundamental charter which proclaims that "governments derive all their just powers from the consent of the governed." And herein lies the essential distinction between the European and the American social theories. By the former, all political functions find their source in the governing authority, and descend from it to the subject. By the latter, all political functions originate from the people, in whom alone is inherent sovereignty. The European petitions for franchises; the American asserts rights. This amendment only forbids the denial of these rights.[47]

Constitution guarantees a republican form of government to the States, but while there remains a single friend of the Government and freedom, male or female, disenfranchised in a single one of those States, we are unfaithful to the Constitution and best interests of our common country."); CONG. GLOBE, 40th Cong., 3d Sess. app. 93 (1869) (statement of Rep. Whittemore (R-SC)); CONG. GLOBE, 40th Cong., 3d Sess. 985 (1869) (statement of Sen. Howard (R-MI)); CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner (R-MA)); CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866) (statement of Sen. Morrill (R-ME)).

The argument that any truly republican government must extend the right to vote to all citizens commonly reflects an individualistic conception of the franchise. In the view of many members of Congress, however, republicanism demanded not only the enfranchisement of all individuals, but also the fair representation of all classes in society:

> [I]f [legislators] be taken only from the learned professions or only from the manufacturers, the merchants, or the farmers, or if they be taken exclusively or largely from geographical divisions containing a minority of population, so as to represent land rather than people—it is obvious that the whole people would not be represented, and that the government would be that of a class only, an aristocracy and not a republic.

CONG. GLOBE, 40th Cong., 2d Sess. 1956 (1868) (statement of Rep. Broomall (R-PA)).

Thus, supporters of the Fifteenth Amendment argued that a government that denied suffrage to an entire class or race of people forfeited its claim to republicanism:

> No class, no race is truly free until it is clothed with political power sufficient to make it the peer of its kindred class or race and enable it to resist the contingencies of popular commotion. No nation can be truly republican which denies to any portion of its citizens equal laws and equal rights.

CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (statement of Sen. Ross (R-KS)).

46. As Representative Broomall argued:

> If just government is founded upon the consent of the governed, and if the established mode of consent is through the ballot box, then those who are denied the right of suffrage can in no sense be held as consenting, and the Government which withholds that right is as to those from whom it is withheld no just Government.

CONG. GLOBE, 40th Cong., 3d Sess. app. 102 (1869) (statement of Rep. Broomall (R-PA)).

47. CONG. GLOBE, 40th Cong., 3d Sess. 858 (1869) (statement of Sen. Ferry (D-CT)). The argument that a government that justly derives its powers from the consent of the governed must extend the franchise to black Americans was repeated on numerous occasions before and during the congressional debates over the Fifteenth Amendment. For example, Senator Willey argued:

Moreover, Republicans argued, blacks as individuals had earned the right to vote by their participation in Union armies during the war. No country with integrity could accept a person's service in arms to save the nation and then repudiate that same individual by denying him the right to vote.[48] Even an uneducated but loyal emancipated slave had a more deserv-

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> The fundamental principle of our political institutions is, that all rightful government must rest on the consent of the governed. If the freedmen are to be subject to the laws, are they not, therefore, entitled in justice and equity to some authority in the appointment of those who are to make the laws?

CONG. GLOBE, 39th Cong., 1st Sess. 3436 (1866) (statement of Sen. Willey (R-WV)). Senator Pomeroy also argued:

> The right of self-government springs from the consent of the governed, and there can be no just mind that will consent that a part shall exercise the will of the whole. . . . And if by virtue of citizenship all are not entitled to the ballot as the source of power and rights, then none are.

CONG. GLOBE, 40th Cong., 3d Sess. 710 (1869) (statement of Sen. Pomeroy (R-KS)). Numerous senators argued that political power accrued as of right to each citizen as an individual:

> The theory of our Government is that power, the sovereign power, belongs to the people; not to a portion of the people, not to the learned, not to the ignorant, not to the rich, not to the poor, not to the great, not to the weak, but to all the people. We eschew in our system of government all aristocracies, whether of birth, of wealth, or of learning. Based as are our institutions on the idea that the right of self-government is inherent in manhood, we profess to give each individual an equal share of political power.

CONG. GLOBE, 40th Cong., 3d Sess. 861 (1869) (statement of Sen. Warner (R-AL)); *see also* CONG. GLOBE, 40th Cong., 3d Sess. app. 200 (1869) (statement of Rep. Loughridge (R-IA)) (also insisting that if governments derive their powers from "the consent of the governed," then it "cannot be a just Government or exercise just powers which denies absolutely to one fifth of its citizens any voice or participation in the Government, the laws of which they are required to obey"). For a related argument challenging the taxation of the newly emancipated freemen without representation, see *id.*, and CONG. GLOBE, 39th Cong., 1st Sess. 3436 (1866) (statement of Sen. Willey (R-WV)).

48. The call for the enfranchisement of black citizens repeatedly noted their military service to the Union, in often very personal and poignant terms. Thus, Representative Loughridge insisted that it was intolerable to deny the right to vote to

> citizens who have been patriotic and true to the starry flag at all times, and in the dark hours of the great rebellion one hundred thousand of whom put on the blue uniform of the armies of the Republic, and upon many hard-fought fields battled bravely for a Government from which they had never received aught but injustice and wrongs, and not one of whom was a traitor to the Government.

CONG. GLOBE., 40th Cong., 3d Sess. app. 200 (1869) (statement of Rep. Loughridge (R-IA)).

Senator Ferry described an 1864 battle at the front lines in which a black regiment saw 19 killed and 121 injured:

> The dead lie side by side with their white comrades on the shores of the James; the old pine trees there sing the same requiem over both, and the brave souls of both have gone where all merely external earthly distinctions are forgotten forever. But what shall I say, what shall my colleagues say, of those one hundred and twenty-one wounded? Shattered and maimed they went home to the State that sent them forth and to the people for whom they had shed their blood. Let my colleague go home, if he can, and look those scarred veterans in the face and tell them that it is doing no wrong to deprive them of all share in that Government for which they have made this horrible self-sacrifice.

CONG. GLOBE, 40th Cong., 3d Sess. 858 (1869) (statement of Sen. Ferry (R-CT)); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 984 (1869) (statement of Sen. Ross (R-KS)) ("[T]oo many are prone to forget the lesson learned in the hour of danger, and to conclude that the negro, though good enough to die for liberty, is far too inferior a being to enjoy its full blessings now that it is perma-

ing claim to the right to vote than the traitors and rebels who formed the major part of the white voting constituency in the South.[49] Representative Whittemore expressed this belief as follows:

> Shall we trust the pardoned rebel and not the patriot black man, whose severed limb lies moldering at Fort Pillow, Port Hudson, Olustee, Battery Wagner, or Petersburg mine? . . .
>
> Give to the colored man his vote. . . . On staff and crutch he stands demanding his rights; with scars and empty sleeves he pleads an equal franchise; with uplifted hands, which have borne the musket in the defense of your altars and your homes, of that flag, emblem of freedom, of the future greatness of our Republic, he asks, not social, but political equality.[50]

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nently won."); CONG. GLOBE, 39th Cong., 1st Sess. 3436 (1866) (statement of Sen. Willey (R-WV)) ("[A]ccording to numbers, the colored population have furnished more soldiers to the Army of the Republic than the white residents of the District.").

49. How can it be, Senator Ross wondered, that

> [e]ven the man whose parricidal hand has been raised for the destruction of the Government that has nurtured and protected him may forswear his crime and be received into full fellowship in the political fold, reinvested with all the political privileges and prerogatives which his treason had forfeited; yet the man who bared his breast to the blows of that same traitor for the preservation of a Government whose entire enginery had been used to rivet the chains of servitude upon him is told to stand back, that this is a white man's Government; that he is of too dark a hue to be safely intrusted with the exercise of those rights for which he spilled so much of his blood, as precious to him as ours is to us.

CONG. GLOBE, 40th Cong., 3d Sess. 984 (1869) (statement of Sen. Ross (R-KS)).

Other Republicans echoed this sentiment:

> If the colored men of this nation who periled their lives and poured out their blood freely that the land which gave them birth might remain united and free, a refuge for the oppressed of all nations, are to be longer refused the rights which their heroic efforts have aided in securing to alien outcasts, and even to the sturdy misguided hosts of treason, who fought as desperately against the Government as these dusky sons fought for it, then I assert that this Congress is recreant to justice and humanity, to God and the country, and deserves the just execrations of freemen throughout the world.

CONG. GLOBE, 40th Cong., 3d Sess. app. 95 (1869) (statement of Rep. Corley (R-SC)).

This argument recognized voting as an individual right because of its focus on the returning black veteran who would seek to participate in electing the government he had fought to protect. Thus, it was said of black soldiers that "[i]f you place the musket in his hands, and he perils his life for the nation, it would be very mean afterward to withhold from the same hands the ballot." CONG. GLOBE, 40th Cong., 3d Sess. app. 146 (1869) (statement of Rep. French (R-NC)) (quoting Union General Sherman discussing the wisdom of arming blacks).

However, the same argument also affirmed a more group-oriented, instrumental understanding of the franchise. Black military service justified extending the franchise not only as a direct reward to those who fought for the Union, but as recognition of the collective loyalty of black citizenry during the war and its aftermath. In the words of Representative French:

> History, sir, will compel us to say that it was the black skin that could always be trusted; it was the black man who never betrayed; where ever you found a negro there was a soul loyal to the Union and true to our country's flag. Never in the annals of history was there such an example of universal fidelity and faith.

CONG. GLOBE, 40th Cong., 3d Sess. app. 146 (1869) (statement of Rep. French (R-NC)).

50. CONG. GLOBE, 40th Cong., 3d Sess. app. 93 (1869) (statement of Rep. Whittemore (R-SC)). The connection between prior military service and the right to vote was also invoked in the ratification debates taking place in the state houses; "most Republican legislators simply argued that if the Negro was good enough to fight and die for the Union during the war, he was a good enough

Although some Republicans conceded that many blacks were uneducated and unfamiliar with the exercise of political power,[51] they viewed "the ballot as a great educator"[52] and argued that access to the franchise would provide an incentive for self-improvement and a process for developing political skills.[53] Furthermore, to some advocates of black suffrage, the actual effect of blacks voting was of only secondary importance. Extending the vote to black citizens would provide a powerful symbolic counter to attempts to pin badges of servitude on emancipated freemen, for "[i]n America, the ballot . . . defined a collective national identity."[54] The right to vote established worth as a citizen and demonstrated an entitlement to dignity and self-respect.[55]

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citizen to vote. The importance and influence of this argument cannot be overestimated." WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 81, 85 (1965).

51. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 998 (1869) (statement of Sen. Sawyer (R-SC)) (recognizing "the danger" of permitting black men to vote because a portion of them "are ignorant," but arguing that the ignorance of many white men had not justified denying them the ballot); CONG. GLOBE, 40th Cong., 3d Sess. 709 (1869) (statement of Sen. Pomeroy (R-KS)) (describing newly enfranchised blacks as "unlearned, and for the most part, ignorant men").

Sometimes Republicans used the assumption that the recently emancipated slaves were ignorant in order to argue for enfranchising black people as a class. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 990 (1869) (statement of Sen. Morton (UR-IN)) ("If we admit the inferiority of this race, which I am not now prepared to do, surely it is a reason why we should give to that race the ballot, by which it can protect itself from the powerful and from the majority."); CONG. GLOBE, 40th Cong., 3d Sess. 862 (1869) (statement of Sen. Warner (R-AL)) ("The learned and the rich scarcely need the ballot for their protection. . . . It is the poor, unlearned man, who has nothing but the ballot, to whom it is a priceless heritage, a protection and a shield.").

52. CONG. GLOBE, 40th Cong., 2d Sess. 850 (1868) (statement of Sen. Cragin (AP-NH)).

53. As one senator stated:

> Take the negroes, who it is said are ignorant, the moment you confer the franchise on them it will lead them to struggle to get an understanding of the affairs of Government so as to be able to participate intelligently in them. They will then understand that they are made responsible for the Government under which they live.

CONG. GLOBE, 39th Cong., 2d Sess. 62 (1866) (statement of Sen. Wade (R-OH)); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 1038 (1869) (statement of Sen. Wilson (R-MA)) (opposing educational tests for voting because "I believe in manhood, and I believe the ballot is an educator, and I do not believe in any such petty tests."); *id.* at 709 (statement of Sen. Pomeroy (R-KS)) ("The ballot is its own instructor. It is an educator."); CONG. GLOBE, 39th Cong., 2d Sess. 106 (1866) (statement of Sen. Lane (R-IN)) (suggesting that "the ballot itself is worth all the schools and all the schoolmasters to educate voters to enable them to vote intelligently"); CONG. GLOBE, 39th Cong., 1st Sess. 3436 (1866) (statement of Sen. Willey (R-WV)) (urging Congress to surround the freeman with "the protection and extend to him the privileges of the citizen, and he will be stimulated to industry, and will have some inducement to improve his condition").

54. Eric Foner, *From Slavery to Citizenship: Blacks and the Right to Vote*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY, *supra* note 30, at 55, 62. Foner continues:

> Democrats had fought black suffrage on precisely these grounds. "Without reference to the question of equality," declared Indiana Senator Thomas Hendricks, "I say we are not of the same race; we are so different that we ought not to compose one political community." The enfranchisement of blacks marked a powerful repudiation of such thinking.

Id.

55. The dignitary and individualistic arguments in favor of enfranchising black citizens were also influential in the state-level ratification debates. Even scholars who attribute the ratification of

"[T]he test of suffrage is manhood," one Republican congressman explained, so that the question of eligibility came down to asking of the prospective voter:

> Is he a man? . . . [I]f Governments are instituted among men deriving their just powers from the consent of the governed, will some gentleman, in God's name, tell me why this body of men who are under the Government have not the same right as I have to participate in it? What business have I to elbow another man off, and to say to him that he has no right here? Has God made me better than He has made him? We might as well partition off the atmosphere, collect the rays of the sun, and withhold them from the men we may conceive to be inferior to ourselves.[56]

2. *The right to vote—artificial, instrumental, collective.*

These individual rights and basic fairness arguments were formidable, but by no means conclusive. Unlike other inalienable, God-given rights belonging to the citizens of a free country, voting did not predate government. Instead, voting seemed to be derivative of and created by a man-made political structure.[57] Moreover, the franchise had been substantially limited in many states at the time of the ratification of the Constitution and was still restricted by age and gender when the nation ratified the Fifteenth Amendment.[58] If the Republican Guarantee Clause of the Constitution[59] and the

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the Fifteenth Amendment primarily to political expediency nonetheless concede the importance of arguments based on equality and justice:

> Republicans felt that, like the white man, the black man deserved an equal chance, and this argument for a fair start in the race of life struck a responsive chord among Republican moderates. Anyone who tried to trip the colored man was a coward. Certainly, in 1869 many of these politicians had no doubt who would win the race, but a lot of them were, significantly, conceding equality of opportunity in principle, if not always in practice. Idealism, patriotism, and individualism supported the conclusion that Negro suffrage was just.

GILLETTE, *supra* note 50, at 85.

56. CONG. GLOBE, 39th Cong., 1st Sess. 205 (1866) (statement of Rep. Farnsworth (R-IL)).

57. When debating black suffrage, Democrats challenged the Republicans' claim that the right to vote was a natural, inalienable right on several occasions. For example, one Democrat argued:

> [I]t is nothing but a form of demagoguery to say that every man is entitled by nature to the right to hold office or to vote. Those are artificial rights. They are creatures of an artificial state and law of society. They do not exist as natural rights. . . . [T]he political power of a country ought to be deposited where its exercise would produce the greatest good to all the people.

CONG. GLOBE, 40th Cong., 3d Sess. 1630 (1869) (statement of Sen. Davis (D-KY)). The political tables turned, however, when questions arose as to the power of Congress to deny the right to vote to those persons who had committed treason in the Civil War by giving aid or comfort to the rebels. On that issue, Republicans found it convenient to argue that "suffrage is not a natural right, but a right derived from society, and society has perfect power to impose any conditions that it sees fit upon the exercise of that right." CONG. GLOBE, 39th Cong., 2d Sess. 45 (1866) (statement of Sen. Anthony (R-RI)).

58. Indeed, many Democrats anchored their opposition to black suffrage in the historical record:

democratic axiom about the need for consent of the governed truly required an unrestricted franchise, then the governments of every state as well as the national government lacked legitimacy and were not authentic republics.[60]

> Who shall be voters and who shall not be is a question of expediency rather than of principle, and is to be decided by a due regard to the greatest good of the greatest number. The framers of our Declaration of Independence so considered it; for, while they asserted the natural rights of the man and the principles of good government, they left it to the States which they called into being to regulate suffrage. . . .
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> . . . .
>
> The States thus left free in all our history to regulate suffrage have conferred it according to their sovereign will and pleasure. In some States property qualifications are required, in others only a poll-tax; in some vagabonds and paupers are permitted to vote; in others they are not; in some negroes have the ballot, and in others it is denied to them. And in the same State it has at one period been extended to them; at another taken away.

CONG. GLOBE, 40th Cong., 2d Sess. 2053-54 (1868) (statement of Rep. Woodward (D-PA)).

Republicans as well as Democrats expressed concerns about the extent to which restrictions on the franchise had been accepted as legitimate policy choices by the states. It was one thing to come out in favor of manhood suffrage and quite another to explain exactly what restriction on voting should be permitted under such a regime. *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 43 (1866) (statement of Sen. Willey (R-WV)) (asking whether "manhood" suffrage requires that all citizens must be allowed to vote without regard to their "intelligence," "moral character," age, gender, wealth, or criminal past).

Confronted with the range of groups that might seek the franchise and the clear concerns of many citizens who wanted to maintain at least some barriers to voting, many politicians of the Reconstruction era found it difficult to avoid the argument that voting was more a political privilege than a natural right. Historian Eric Foner has argued that the lack of support for a Radical Republican amendment to make suffrage requirements "uniform throughout the land" in 1869 resulted from the idiosyncratic proclivities of many northern and western states to maintain various economic, gender-based, and racial (anti-Chinese) restrictions on suffrage. *See* Foner, *supra* note 54, at 63. This reluctance to accept language guaranteeing universal suffrage in the Fifteenth Amendment "left open the possibility of poll taxes, literacy tests, and other ostensibly nonracial requirements that could, and would, be used to disenfranchise the vast majority of southern black men." *Id.*

59. U.S. CONST. art. I, § 7, cl. 2.

60. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1004 (1869) (statement of Sen. Yates (R-IL)) (describing the "great debate" that arose in Congress over the question of "whether that was a republican form of government or not in which colored persons were excluded from voting").

Opponents of black suffrage argued forcefully that a republican form of government must be consistent with racial restrictions on the franchise because the slave states were part of the original constitutional compact. Clearly, the southern states had no intention of repudiating slavery as an institution when they adopted the Constitution. Representative Boyer observed:

> Strangely enough, it is insisted that to make a State republican in form its negro population must vote. But of this principle the founders of our Republic must surely have lived and died in blissful ignorance, for they certainly acted and talked as if they imagined they were living in republican communities, even when surrounded by negro slaves.

CONG. GLOBE, 39th Cong., 1st Sess. 177 (1866) (statement of Rep. Boyer (D-PA)). Representative Knott stated the matter more bluntly:

> I would ask if it is to be assumed that the framers of our Constitution were too ignorant and stupid to understand what it required to constitute a republican form of government? They found all the State governments, precisely as a large majority of them are to-day, denying the negro race any participation in the elective franchise; they recognized those governments as being republican in form . . . .

CONG. GLOBE, 40th Cong., 2d Sess. 1962 (1868) (statement of Rep. Knott (D-KY)).

Indeed, if the Republican Guarantee Clause resolved the issue of black suffrage, there would have been no need to adopt the Fifteenth Amendment to prevent states from denying blacks suffrage on the basis of their race.[61] When push came to shove, the problem of determining the nature of political rights—and the proper role of the state in protecting or limiting them—turned out to be a great deal more complicated than the traditional American axioms about the "consent of the governed" and all men being "created equal" implied.[62]

Although not a direct response to the Democrats' challenge, Republicans did argue that, at the time of the Constitution's ratification, only one state excluded freemen from voting on the basis of race. They pointed out that blacks were denied the franchise as a result of their condition of servitude, not on account of color or caste. *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866) (statement of Sen. Morrill (R-ME)). Thus, Republicans could at least maintain that there was no historical obstacle to their contention that race-based restrictions on the franchise were inconsistent with a republican form of government. At least one Republican managed to rationalize this distinction between slaves and freemen in the following way:

> [T]he free blacks in all or nearly all the States had the right of suffrage, and, according to the theory of slavery, it did not militate against the republican form that the slaves had not. Considered as chattels, they could not, of course, be deemed a political element any more than horses or dogs. Considered as persons they were under the legal control of others, and came within the rule applicable to minors. Bad as the system of human slavery was, it might, in theory, co-exist with a republican form of government. None but freemen can constitute the political element of any State. . . . When the free blacks came to be disfranchised, then the want of republican form first began. But this was mainly done after the adoption of the Constitution, at successive periods, by a State at a time; and being inconsiderable in numbers, and without political influence, the victims of the wrong were unable to require and secure the guarantee. The glaring want of the republican form in those States first appeared when four million American citizens, unrepresented in their Government, sprang into existence at the bidding of the conqueror. . . .We must now either adopt universal suffrage or abandon the republican form of government.

CONG. GLOBE, 40th Cong., 2d Sess. 1957 (1868) (statement of Rep. Broomall (R-PA)).

A related argument distinguished female citizens, who could not vote but were in theory adequately represented by their husbands or fathers, from the newly emancipated freemen. Unlike quasi-represented females, black men had to rely on their own voices and ballots because no one else would speak on their behalf. *See* notes 98-99 *infra* and accompanying text.

61. Senators who fervently believed that the Republican Guarantee Clause and the Fourteenth Amendment extended the franchise to black citizens did recognize that passage of the Fifteenth Amendment substantially undermined this argument. Senator Sumner of Massachusetts conceded that the submission of the Fifteenth Amendment to the states for ratification

> admits that, under the National Constitution, as it is, with its recent additions, a Caste and an Oligarchy of the skin may be set up by a State without any check from Congress; that these ignoble forms of inequality are consistent with republican government; and that the right to vote is not an existing privilege and immunity of citizenship.

CONG. GLOBE, 40th Cong., 3d Sess. 904 (1869) (statement of Sen. Sumner (R-MA)).

62. Indeed, many proponents of black suffrage found it important to distinguish the right to share political power equally in a community from any suggestion that blacks and whites were in any true sense the equals of each other. One senator expressed this sentiment:

> The right of suffrage is the vital principle of republican institutions; but its equal enjoyment by the white man and the black man does not and cannot in anywise change the personal identity of either or affect their social relations. Social relations cannot be regulated by the law. . . . Social equality is a matter of taste, of feeling, and of every man's unfettered sense of propriety. The idea that because a negro can vote he is thereby placed on a social equality with the white man is supremely ridiculous. The idle, vicious, dissolute, dishonest white man votes; am I

The arguments in favor of black suffrage thus demanded additional support.[63] When forced to confront the issue in Congress after the Civil War, legislators determined that the right to vote necessarily involved more than the honor of equal manhood, more than the dignity and respect due a citizen, and even more than the power to express one's refusal to consent to a government deemed unjust. The ballot was the "buckler and shield"[64] of the poor, the weak, and the despised. It provided not only respect, but "protection and justice."[65] While it bestowed "dignity" on a voter, it also conferred "power" and made "the Government his agent and protector instead of his master and oppressor."[66]

From this perspective, if suffrage was a right derived from natural law, it evolved from the right of self-defense.[67] Just as humans in the state of nature had the inherent right to defend themselves against marauders, the people in a civil society had the right to exercise the franchise against an oppressive or unresponsive government:

> We meet encroachments on our rights with the swift and telling power which lies in the ballot. We rid ourselves of unjust laws by disposing of unjust lawmakers. We remedy the evils springing from an improper administration of our laws by changing our public officers. We protect our rights by hedging them about with protective laws made, practically, by ourselves. These are all defensive acts, and the weapon by which we achieve them is the ballot.[68]

Arguments extolling the instrumental value of the franchise to the black communities in the South provided a new and powerful foundation for

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> thereby placed under any obligation to acknowledge his social equality, or any other kind of personal equality? Is he, therefore, my equal? I may not and ought not to associate with him at all, nor will the law compel me to do it.

CONG GLOBE, 39th Cong., 1st Sess. 3437 (1866) (statement of Sen. Willey (R-WV)). Senator Stewart conveyed a similar message: "Equality has nothing to do with the right of suffrage. We do not mean that men must be equal physically, . . . intellectually, . . . [or] morally. . . . [We mean that] all men are equally entitled to the pursuit of happiness and to the protection of the law." CONG. GLOBE, 39th Cong., 1st Sess. 3528 (1866) (statement of Sen. Stewart (R-NY)); *see also* W.R. BROCK, AN AMERICAN CRISIS: CONGRESS & RECONSTRUCTION 1865-1867, at 290-93 (1963) (describing the turmoil within the Republican ranks over which categories of rights merited protections and the ultimate abandonment of attempts to guarantee full equality).

63. Between the end of the Civil War and the adoption of the Fifteenth Amendment,

> a remarkable change took place in public opinion [with regard to black suffrage], but in order to foster it the Radicals were forced to rely less and less upon appeals to abstract justice and more and more upon the utility of the negro vote to the party and to the Union.

BROCK, *supra* note 62, at 295.

64. CONG. GLOBE, 40th Cong., 2d Sess. 119 (1867) (statement of Rep. Ashley (R-OH)).

65. *Id.*

66. *Id.*

67. *See* CONG. GLOBE, 39th Cong., 1st Sess. 174 (1866) (statement of Rep. Wilson (R-IA)) ("The office of the right [to vote] under civil government is kindred to that which belongs under natural law to the right of self-defense.").

68. *Id.*

granting freemen the vote.[69] Foremost among these arguments was the claim that black people needed the right to vote in order to be able to protect themselves against the enactment of pernicious laws by white southerners.[70] Republicans anticipated that the black populations in the South would be under siege and believed that political influence and voting power would be their sole means of defense.[71] The only alternative to the franchise was the con-

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69. Brock describes the utilitarian virtues of black suffrage to the Radical Republicans who were stymied in their attempts to extend full equality to the freemen:

> The Radical solution to the dilemma of rights which were natural but which could only be secured by artificial means was negro suffrage. With the vote the negro would be equipped to protect his own rights, and there were Jeffersonian echoes in the idea that the cultivator of the soil would not only defend his personal rights but also act as a repository for political virtue. The voting negro would protect himself against injustice and the Union against its enemies . . . .

BROCK, *supra* note 62, at 293-94.

70. As Representative Julian warned, "Cunning legislative devices are being invented in most of the States to restore slavery in fact. Without the ballot in the hands of the freedmen, local law, reenforced by a public opinion more rampant against them than ever before, will render the civil rights bill a dead letter . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866) (statement of Rep. Julian (R-IN)).

Senator Howe elaborated on this rationale for black suffrage:

> [L]et me state one reason why we seek to give suffrage to the colored race in these communities [in the South] . . . . We seek to give suffrage to them because there is no other way given under heaven or among men whereby the life of that race can be made tolerable or endurable. . . .
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> . . . .
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> . . . What objection is there to our putting the ballot in the hands of the black man? Do you say he is safe without it; that it is needless; that justice will be done to him by the governments of the white men down there? Who dares say that and risk his reputation for veracity upon the statement? Did they ever do justice to them? While they were deprived of the ballot, and while they were subjected to governments representing just such feeling and just such men as the existing civil governments do down there, you know they were made chattels of, slaves of. How do you know they would not do it again but for the prohibition which you have placed in the Constitution of the United States? But because they cannot reduce them to chattelism again do you know that they would do justice to them? Is there no way of oppressing men but by making slaves of them?

CONG. GLOBE, 40th Cong., 2d Sess. 882-83 (1868) (statement of Sen. Howe (R-WI)).

Senator Ross warned of the consequences of failure to grant suffrage to the freemen:

> Slavery is not dead . . . until all its supports are removed. It will never die until the negro is placed in a position of political equality from which he can successfully bid defiance to all future machinations for his enslavement. Until he is clothed with the ballot he is without that power, and is in constant danger from the cupidity of men who have been and expect again to be his masters. Without the ballot he is the slave of public prejudice and public caprice—the foot-ball of public scorn. He is powerless to secure the redress of any grievance which society may put upon him.

CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (statement of Sen. Ross (R-KS)); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869) (statement of Sen. Corbett (R-OR)); CONG. GLOBE, 39th Cong., 1st Sess. 1256 (1866) (statement of Sen. Wilson (R-MA)); CONG. GLOBE, 39th Cong., 1st Sess. 589 (1866) (statement of Rep. Donnelly (R-MN)).

71. Discussion of the problem of protecting the freedom of emancipated slaves began long before the Confederacy was defeated in battle. Many abolitionist leaders recognized early in the war that the status of freemen could only be secure if they were granted the right to vote. Wendell Phillips, for example, compared blacks to the Irish:

tinued military occupation of the South or, at a minimum, continued intrusive civil intervention into the affairs of southern states.[72]

Many congressional Republicans sought to avoid the need for such direct government intervention on behalf of the freedmen. Senator Lane, for example, admonished his colleagues bluntly, asserting that Congress now had only two true choices before it:

> [Y]ou must either give these colored people the right to protect themselves, or you must take upon yourselves for all time to come the duty of their protection, for they cannot be abandoned. . . . If you protect them, you must continue in operation your charitable associations, your Freedmen's Bureau, your civil rights bill, and all that system of legislation, or you may abandon them the very moment you permit them to vote. Then they are self-protecting, self-sustaining. I vote therefore to confer this ballot upon the colored people here because of our duty to protect them, and because it is cheaper and in every sense better to give them self-protection than to extend to them the protection of the Government.[73]

> Do you know a politician who dares to make a speech to-day, without a compliment to green Erin? The moment a man becomes valuable or terrible to the politician, his rights will be respected. Give the negro a vote in his hand, and there is not a politician, from Abraham Lincoln down to the laziest loafer in the lowest ward in this city [New York] who would not do him honor. . . . Give a man his vote, and you give him tools to work and arms to protect himself.

James M. McPherson, *The Ballot and Land for the Freedmen, 1861-1865*, *in* RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS 132, 134-35 (Kenneth M. Stamp & Leon F. Litwack eds., 1969) [hereinafter RECONSTRUCTION] (alteration and omission in original).

There was also no doubt that this analogy was focused on the power of black citizens as a political group, not as autonomous individuals. "Never will this nation be a unit," Phillips argued in condemning racial distinctions, "until every class God has made, from the lakes to the Gulf, has its ballot to protect itself." *Id.* at 138.

72. As Senator John Sherman declared in June 1865, "If we can put negro regiments there [in the South] and give them bayonets, why can't we give them votes? Both are weapons of offense and defense. Votes are cheaper and better." ROBERT D. SAWREY, DUBIOUS VICTORY: THE RECONSTRUCTION DEBATE IN OHIO 16 (1992) (quoting Sen. Sherman (R-OH) from a June 14, 1865, *New York Tribune* article). Sherman later recanted this position and opposed black suffrage. *See id.*

73. CONG. GLOBE, 39th Cong., 2d Sess. 106 (1866) (statement of Sen. Lane (R-IN)); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 1629 (1869) (statement of Sen. Stewart (R-NV)) ("[The ballot is] the only expedient that could be substituted for . . . military power [in the South] . . . . [G]ive to all men, regardless of race or color, the ballot, and they will secure to themselves all other rights."); CONG. GLOBE, 40th Cong., 3d Sess. 912 (1869) (statement of Sen. Willey (R-WV)) ("[S]uffrage is the only sure guarantee which the negro can have, in many sections of the country, in the enjoyment of his civil rights. Without it his freedom will be imperfect, if not in peril of total overthrow.").

The hope that allowing blacks to vote would be an effective substitute for more intrusive federal intervention in southern affairs resonated with northern voters who believed that the freemen deserved some degree of protection, but who were eager to avoid the burden of providing it. Sawrey quotes the June 1865 prediction of Richard Smith, editor of the Radical Republican newspaper *Cincinnati Daily Gazette*, that once enfranchised black voters would join with loyal whites to form a "legal majority in every secession State; then the problem of reconstructing civil governments would be solved, and military supervision and all arbitrary measures might be withdrawn. In this view [black suffrage] appears a short road to the restoration of domestic tranquility and law . . . ." SAWREY, *supra* note 72, at 15 (alteration in original) (quoting Richard Smith from a June 15, 1865, *Cincinnati Daily Gazette* article).

It should be obvious that this instrumental justification for expanding the franchise presumed that black voters would act collectively in exercising political power.[74] The individual black voter acting alone would have minimal impact on political outcomes. Legislators anticipated that the majority of whites, who harbored virulent ill-will toward their former slaves, would engage in racial bloc voting; only the votes of the black masses could offset this white political aggression. Indeed, in many areas, the black vote and voice might be the only opposition to white hegemony.

Furthermore, threats directed at the freemen and their supporters went beyond political domination to include actual physical violence. Representative McKee described the prevalence of such threats as follows:

> [A]ll over the State of Kentucky for the last two years we have had outrage upon outrage, murder upon murder, assassinations by night and by day by the Kuklux Klan . . . . In the dead hour of the night they have gone to men's houses, dragged them from their beds, beaten them and murdered them in the presence of their families, taken them out and hanged them; yet, sir, notwithstanding all this, there is not a single case on the record of that State where one single man engaged in this system of outlawry has been either arrested or punished for the commission of these crimes. . . .
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> . . . .
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> . . . [T]here is no law in my State to protect the two hundred and fifty thousand freemen of color who are there. . . .
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> . . . .
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> . . . You cannot in any manner so forcibly—I might say you cannot in any manner at all—secure to a man the protection of his rights and immunities in

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74. Race was not the only determinant in predicting how groups of voters might exercise the franchise; class and ethnic background were recognized to be powerful forces as well. *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 104 (1866) (statement of Sen. Wilson (R-MA)) ("I believe that . . . [the poor man] will use [the right to vote] in the future as he has in the past generally for the elevation and protection of the poor and lowly and dependent."). Indeed, suffrage supporters often described the utility of access to the ballot for the poor and other ethnic groups in order to highlight what the vote could do for blacks. Senator Stewart explained:

> One thing is certain, that the negro must have the ballot or have no friends; and being poor and friendless, and surrounded as he is by enemies, his fate is extermination. But give him the ballot, and he will have plenty of white friends, for the people of the United States love votes and office more than they hate negroes. I need not allude to the kindly feelings the ballot secures for the poor, for you have plenty of illustrations at every election. There are many classes of poor people in the North who would be little better than slaves but for the power of the ballot . . . .

CONG. GLOBE, 39th Cong., 1st Sess. 2799-800 (1866) (statement of Sen. Stewart (R-NV)).

Stewart and others returned to this theme repeatedly. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3528 (1866) (statement of Sen. Stewart (R-NV)); CONG. GLOBE, 39th Cong., 1st Sess. 2882 (1866) (statement of Rep. Ashley (R-OH)). In fact, many Republicans questioned whether it was sufficient to prohibit the states from denying the franchise solely on the basis of race because such language allowed the disfranchisement of citizens on the grounds of poverty or lack of education. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 862 (1869) (statement of Sen. Warner (R-AL)).

> any other way in a free republic like this than by giving into his hands the ballot.[75]

This argument may have lacked the eloquence of appeals to the natura rights of man and to theories about government deriving legitimacy from th consent of the governed, but its message of pragmatism and expedienc resonated as strongly with the American polity as did the loftier rationale for extending the franchise.[76] Senator Williams even articulated a preferenc for such practical justifications: "I dismiss, . . . in connection with this ques tion, all theories as to the natural rights of persons to vote, and I put my ac tion in favor of this bill upon the plain, practical ground that suffrage to th negro in this country is necessary for his protection."[77]

Black voters were expected not only to use the franchise to act collec tively against discriminatory legislation and the hostile administration of th law, but also to reverse the hierarchy of southern politics. Despite the Unior victory, the plantation aristocracy that had led the South into rebellion re mained a threat to national unity and progress. The dormant seeds of dissen sion and treason threatened to sprout if the class that led the Confederac into war retained economic and political power. Loyal white Unionists in th South, acting alone, lacked the ability to protect themselves. They certainl did not have the power to transform the region. Republicans believed that together, newly freed black men and loyal whites could wrest governmenta authority from rebel leadership.[78] In fact, Reconstruction of the South de pended on their doing so. Senator Morton described the problem Recon struction proponents faced immediately after the war in these terms:

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75. CONG. GLOBE, 40th Cong., 3d Sess. 695-96 (1869) (statement of Rep. McKee (R-KY)).

76. *See* GILLETTE, *supra* note 50, at 85, 87 (describing the importance of expedient appeal focusing on the concrete benefits that would flow from black suffrage).

77. CONG. GLOBE, 39th Cong., 2d Sess. 56 (1866) (statement of Sen. Williams (UR-OR)).

78. *See* SAWREY, *supra* note 72, at 13-17 (quoting Ohio newspaper editorials and speeches o Republican leaders that describe the curbing of southern planters' political power as a rationale fo supporting black suffrage).

For other similar expressions reflecting the need to transform the South politically, see CONG GLOBE, 40th Cong., 2d Sess. 726 (1868) (statement of Sen. Morton (R-IN)) (opposing restriction on blacks' voting eligibility that would "cut off such a large part of the colored vote as to leave th rebel white vote largely in the ascendancy and to put these new State governments there to b formed again into the hands of the rebels"); CONG. GLOBE, 39th Cong., 1st Sess. 3172 (1866) (statement of Rep. Windom (R-MN)) ("[I]f traitors are to vote at all, their votes should be neutral ized by the ballots of loyalists, whether white or black."); CONG. GLOBE, 39th Cong., 1st Sess 3037 (1866) (statement of Sen. Yates (UR-IL) ("[S]uffrage is the only remedy for the evils by which we are surrounded. It is the only thing that can kill secession, . . . which will secure us a loyal representation from the South and a loyal people in the South."); CONG. GLOBE, 39th Cong., 1st Sess. 2800 (1866) (statement of Sen. Stewart (R-NV)) (describing his initial reluctance to sup port black suffrage until his realization "that the fifteen original slave States must shortly be handed over to the enemies of the Government to aid . . . in making loyalty odious and treason honorable, in rewarding traitors and persecuting Union men, unless we extended the ballot to the friends of the Union for our mutual protection").

> Sir, when Congress entered upon this work it had become apparent to all men that loyal republican State governments could not be erected and maintained upon the basis of the white population. We had tried them. Congress had attempted the work of reconstruction through the constitutional amendment by leaving the suffrage with the white men, and by leaving with the white people of the South the question as to when the colored people should exercise the right of suffrage, if ever; but when it was found that those white men were as rebellious as ever, that they hated this Government more bitterly than ever; when it was found that they persecuted the loyal men, both white and black, in their midst; when it was found that northern men who had gone down there were driven out by social tyranny, by a thousand annoyances, by the insecurity of life and property, then it became apparent to all men of intelligence that reconstruction could not take place upon the basis of the white population, and something else must be done.
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> Now, sir, what was there left to do? Either we must hold these people continually by military power, or we must use such machinery upon such a new basis as would enable loyal republican State governments to be raised up; and in the last resort, . . . [w]hatever dangers we apprehend from the introduction of the right of suffrage of seven hundred thousand men, just emerged from slavery, were put aside in the presence of a greater danger. . . .
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> . . . .
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> . . . Congress came to the conclusion that there was no way left but to resort to colored suffrage . . . .[79]

Finally, extending the franchise promised to benefit the Republican Party. New black voters were expected to vote Republican[80] and, in doing

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79. CONG. GLOBE, 40th Cong., 2d Sess. 725 (1868) (statement of Sen. Morton (R-IN)). For examples of similar sentiments expressed in the House, see CONG. GLOBE, 40th Cong., 3d Sess. app. 97 (1869) (statement of Rep. Shellabarger (R-OH)) (characterizing black suffrage as "indispensable to the organization of any reliable State governments in the late rebel states"); CONG. GLOBE, 40th Cong., 2d Sess. 578 (1868) (statement of Rep. Paine (R-WI)) (asserting the necessity of the black vote for securing the loyal majority critical to Reconstruction efforts). *See also* SAWREY, *supra* note 72, at 63 (stating that, in the years immediately following the Civil War, it quickly became clear that there were too few "loyal white Southern voters" to establish governments in the South).

80. In support of this assumption, Republicans pointed to the recent voting behavior of black citizens who already exercised the franchise: "They have the largest number of them given their ballots in the last election for the hero and chieftain, General Grant. With true loyalty in their hearts and Grant ballots in their hands they have exercised a freeman's will and united with yourselves in securing the era of peace." CONG. GLOBE, 40th Cong., 3d Sess. app. 93 (1869) (statement of Rep. Whittemore (R-SC)).

However, such predictions were not unanimous among Republicans; at least some suggested that black people would not necessarily vote Republican, but would support any party that treated them respectfully and addressed their concerns. Thus, Senator Wilson declared:

> If the black man votes for the men who are just and humane, I shall not upbraid him. I do not believe the negro is to be any party's slave if you put the ballot in his hands. . . .
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> . . . .
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> . . . [I]f [the Democrats] treat [black men] better than the Republicans do they will probably get their votes, and I hope they will.

CONG. GLOBE, 39th Cong., 2d Sess. 104-05 (1866) (statement of Sen. Wilson (R-MA)). This position assumed that black voters would respond both positively and in a unified fashion to political

so, would ensure that men who were disloyal to the Union would not lead the postwar governments of the southern states.[81] Black allegiance to Lincoln's party would guarantee loyal governments in the South if the franchise was liberally extended. Republicans considered the alternative, a Democratic South, to be completely unacceptable.[82]

Republican legislators did not hesitate to speak openly of this partisan purpose. Thaddeus Stevens, the radical Republican leader of the House, urged fellow party members to support black suffrage because

> it would insure the ascendancy of the Union [Republican] party . . . . If impartial [Negro] suffrage is excluded in the rebel States then every one of them is sure to send a solid rebel [Democratic] representation to Congress, and cast a solid rebel electoral vote. They with their kindred Copperheads [Democrats] of the North would always elect the President and control Congress.[83]

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candidates offering to "give them their rights, build their school-houses, instruct them, employ them, deal honestly with them." *Id.* at 104. Others were less heartened by this possibility and viewed the malleability of black voters as a threat to Republican interests. *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 100 (1866) (statement of Sen. Foster (R-CT)) (fearing that "former masters" would woo impressionable black voters).

In fact, voting practices immediately following the adoption of the Fourteenth and Fifteenth Amendments appear to have confirmed predictions of Republican loyalty. *See* Foner, *supra* note 54, at 62 (recounting the election of hundreds of blacks to political offices between 1867 and 1877 and the importance of the Republican Party to the black community). Interestingly, white Democrats engineered racial gerrymanders—concentrating black voters in certain districts in order to maintain Democratic control of neighboring ones—that actually strengthened black voters' ability to elect black representatives to Congress. *See* EDWARD L. AYERS, THE PROMISE OF A NEW SOUTH 38 (1992). For a discussion of similar black voting patterns in the North, see GILLETTE, *supra* note 50, at 144, 165 (describing black voters' strong preference for Republican candidates in Cincinnati in 1869 and the national elections of the 1870s and 1880s).

81. *See* notes 78-79 *supra* and accompanying text.

82. *See* C. Vann Woodward, *The Political Legacy of Reconstruction*, *in* RECONSTRUCTION, *supra* note 71, at 516, 521 (describing the reluctance of Republicans "to commit political hara-kiri" by allowing southern whites to fill Congress with Democrats). Republican efforts to enfranchise southern blacks stand in sharp contrast to President Johnson's Reconstruction plan, which would have increased southern representation by counting the freemen as full citizens (rather than three-fifths) for representation purposes while leaving the right to vote exclusively in white hands. *See id.*

83. *Id.* (quoting Thaddeus Stevens) (alterations in original).

Democrats denounced such blatant calls to pad Republican Party voting rolls:

> [The Fifteenth Amendment] is a measure of the party, proposed by the party, passed by Congress as a party measure, submitted to the Legislatures of the States as a party measure, and when the Legislatures of the States come to act upon it party discipline is to be brought to bear upon them to make them adopt it. The result is that if it is adopted as an amendment to the Constitution you have there incorporated upon the Constitution a measure that is not required or asked for by the body of the people. Party asked that it be there, and the party puts it there. They put it there by virtue of party discipline and party machinery.

CONG. GLOBE, 40th Cong., 3d Sess. 1006 (1869) (statement of Sen. Norton (D-MN)); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 645 (1869) (statement of Rep. Eldridge (D-WI)) ("It is at the demand of party and in its interest alone that power is sought to be taken from the intelligent and cultivated white man and given to the ignorant, uneducated, and servile negro.").

Political leaders and party supporters alike also emphasized the importance of the black vote to Republican electoral prospects in the North.[84] Senator Sumner, surely as devoted to black suffrage as a matter of justice and right as any member of the Senate, repeatedly emphasized the value of the black vote to Republican Party ascendancy. In 1869, Sumner exhorted his colleagues as follows:

> I do not depart from the proprieties of this occasion when I show how completely the course I now propose harmonizes with the requirements of the political party to which I belong. Believing most sincerely that the Republican party, in its objects, is identical with country and with mankind . . . I cannot willingly see this agency lose the opportunity of confirming its supremacy. . . .
>
> Pardon me; but if you are not moved by considerations of justice under the Constitution, then I appeal to that humbler motive which is found in the desire for success. Do this and you will assure the triumph of all that you can most desire. Party, country, mankind will be elevated . . . .[85]

Democrats also warned that the Republicans' strategy would prove unsuccessful in many states. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 1299 (1869) (statement of Sen. Saulsbury (D-DE)) (warning that white voters would respond to legislation enfranchising blacks with record voter turnout and thus that "every negro vote that you get only adds two white votes to the Democratic party").

The debate over the ratification of the Fifteenth Amendment reflected the importance of the black vote to Republican electoral prospects:

> The specific intent of the framers and supporters of the Amendment as understood by state legislators and newspapermen was clearly expressed and widely shared. Democrats argued boldly, with the tacit consent of many Republicans, that the primary object of the Fifteenth Amendment was the enfranchisement of the Negro in the North. Republicans needed, and wanted, Negro voters in order to keep the North Republican. Northerners and southerners of both parties recognized that the practical effect of the Amendment was the substantial expansion of the Northern Negro vote. Politicians grasped the political advantage of the vote and calculated carefully its political repercussions.

GILLETTE, *supra* note 50, at 89-90.

84. *See also* GILLETTE, *supra* note 50, at 46-50 (arguing that Republicans primarily extended the vote to blacks in order to maintain Republican dominance in the North). In northern states such as New Jersey, Pennsylvania, Ohio, and Connecticut, where blacks would vote in substantial numbers and possibly hold the balance of power in closely contested elections, the battle over ratification was particularly severe. *See id.* at 113-147.

85. CONG. GLOBE, 40th Cong., 3d Sess. 904 (1869) (statement of Sen. Sumner (R-MA)). On an earlier occasion, Sumner had emphasized the political benefits to the Republican Party in supporting a bill to provide blacks the vote in both northern and southern states in particularly partisan terms:

> I appeal to Senators to look at this measure as a great measure of expediency as well as of justice. How are you going to settle this question in the loyal States? Here are Delaware, Maryland . . . and Kentucky, in each of which this measure is the only salvation of Union citizens. Then there are other States like Pennsylvania, where this measure will give at once—I am speaking now on the question of expediency—twenty thousand votes to the Union cause. There is Indiana, too, where this bill will settle the suffrage question. I will say nothing about Iowa. There is Wisconsin. . . . There is Connecticut. Let us secure three thousand votes in Connecticut for the good cause. You can secure them by act of Congress. A little, short act of Congress can determine the political fortunes of Connecticut for an indefinite period by securing three thousand additional votes to the right side. There is New York, also, where the bill would have the same excellent, beneficent influence.

Republican aspirations regarding the support of black voters, both North and South, rested on a solid political foundation. Democrats' opposition to black suffrage would certainly have cemented the allegiance of the new voters to the party of Lincoln.[86] Moreover, the bitter history and legacy of the war and slavery caused many blacks to openly proclaim their Republican allegiance. "'We would vote the way we shot,' declared one Negro. Another predicted that Negroes would vote Republican 'as naturally as water flows downward.'"[87] In Pennsylvania, the President of the State Equal Rights League, an association of black citizens, "urged that the organization become a political one, aligned with the Republicans, by which the 'power of the colored voters of the state of Pennsylvania can be used as a unit.'"[88]

Historians debate whether Republican supporters of the Fifteenth Amendment were primarily motivated by the partisan goal of preserving the political power of the Republican Party or by a more idealistic commitment to giving black citizens political weapons to protect their communities against hostile white forces.[89] Although the question remains open, resolu-

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CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner (R-MA)).

86. This allegiance proved extremely strong, enabling black voters to resist Democratic overtures:

> Black Southerners inherited a tradition of voting Republican and only Republican; to cast a Republican ballot was to attack the enemy, the Southern White who kept the black men down. . . . Such blacks made it an article of pride and race solidarity that they stick together, that they vote Republican no matter the rewards of voting for a white Democrat.

AYERS, *supra* note 80, at 38.

87. GILLETTE, *supra* note 50, at 132-33.

88. *Id.* at 119.

89. *Compare* LaWanda Cox & John H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, *in* RECONSTRUCTION, *supra* note 71, at 156, 172 (arguing that, "in a period of national crisis when the issue of equality was basic to political contention, it is just possible that party advantage was subordinated to principle"), *with* GILLETTE, *supra* note 50, at 46-49 (analyzing congressional debates and concluding that Republican desires to protect black citizens were secondary to more partisan motivations, in particular the desire to secure the loyalty of northern black voters).

Gillette, one of the more influential historical commentators on Reconstruction politics, concedes that one purpose of the Fifteenth Amendment was directed at the black communities in the southern states. The amendment "was to protect the southern Negro against future disfranchisement, [and] against state constitutional changes that Southern whites might attempt when they regained power." GILLETTE, *supra* note 50, at 49 (quoting congressional debate on this point). Nonetheless, he views this goal as "a secondary objective." *Id.*

Enfranchising the northern black voter was the true focus of the Republican proponents of the Fifteenth Amendment, Gillette argues:

> [I]t was widely recognized in Congress and throughout the country that [the amendment's] primary goal was the enfranchisement of Negroes outside the deep South. To be sure, [the amendment] would permanently guarantee suffrage to the southern Negro by law, but, despite a certain amount of intimidation, he was already exercising the franchise, first under military reconstruction, then under the new southern state constitutions. It was, on the other hand, the unenfranchised northern Negro who would principally benefit by the proposed amendment, and presumably would thereafter loyally support his Republican friends.

tion of this debate bears little on this article's thesis, since both purposes are grounded on a collective understanding of black suffrage. One suspects, in any case, that both arguments influenced Republicans.[90]

Moreover, in addition to these arguments, members of Congress demonstrated their recognition of the collective political unity of black Americans in other ways. For example, both proponents and opponents of black suffrage assumed that black voters would support black candidates for office. Democrats vigorously opposed legislation giving black residents of the Dis-

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Id. at 46. Gillette cites the speeches of numerous Republican legislators in the House and the Senate in support of this thesis. *See id.* at 47-49.

One response to Gillette's argument is that it suggests that Republican leaders viewed the enfranchisement of black citizens as a cost-free addition to their party's voting roles. Gillette explicitly recognizes, however, that there was spirited popular resistance to proposals to expand the franchise:

> Only five New England states, along with Iowa and Minnesota, had given the Negro the ballot voluntarily, and all of those had few Negroes among the population. Other northern states, including those with relatively large Negro populations, had rejected Negro suffrage in postwar referendums. Besides, public opinion strongly opposed Negro rights, and the state legislators who outraged this consensus would commit political suicide.

Id. at 80. It is certainly possible that Republican politicians, driven primarily by party loyalty, shrewdly calculated how many votes the party would lose if it supported black suffrage, offset that against the number of black voters who would be enfranchised by the 15th Amendment, and concluded that there would be a net benefit for Republican candidates. *See* 7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, PART TWO, at 137 (1987) (explaining that, while the Republican Party platform temporized on the issue of black suffrage in light of the defeat of referenda in northern states aimed at removing racial restrictions from the franchise, "party leaders saw the need to tap potential Negro votes in the north"). Still, the clear likelihood that significant votes would be lost as well as gained by promoting the Fifteenth Amendment casts some doubt on the proposition that the presumed increase in Republican voters, standing alone, was enough of an incentive to motivate Congress to adopt the Amendment.

Moreover, efforts to enfranchise black freemen in the North had preceded the Civil War. In those political battles, "[e]ven though they understood that such a position risked losing white votes, Republicans in a number of states fought for black suffrage." Paul Finkelman, *Rehearsal for Reconstruction: Antebellum Origins of the Fourteenth Amendment*, *in* THE FACTS OF RECONSTRUCTION: ESSAYS IN HONOR OF JOHN HOPE FRANKLIN 1, 24 (Eric Anderson & Alfred A. Moss, Jr., eds., 1991). It is unlikely that the willingness to incur political losses out of a commitment to principle before the war was entirely displaced by partisan expediency after the South was defeated.

90. As C. Vann Woodward put it:

> Neither the party purpose, the business purpose [of protecting northern economic interests], nor the two combined constituted a reputable justification with which to persuade the public to support a radical and unpopular program. But there was a purpose that *was* both reputable and persuasive—the philanthropic purpose, the argument that the freedmen needed the ballot to defend and protect their dearly bought freedom, their newly won civil rights, their welfare and livelihood. . . . [I]t is undoubtedly true that some of the Radicals were motivated almost entirely by their idealism and their genuine concern for the rights and welfare of the freedmen. What is doubtful is that these were the effective or primary motives, or that they took priority over the pragmatic and materialistic motives of party advantage and sectional economic interests. It is clear at any rate that, until the latter were aroused and marshalled, the former made little progress.

Woodward, *supra* note 82, at 522.

trict of Columbia the right to vote because they feared that the large numb of black residents would almost certainly elect black municipal leaders. Th potential for black political dominance rendered black suffrage in the Distri even more dangerous and unacceptable to Democrats than extending th franchise in southern or northern states, where the black population w relatively smaller and more dispersed. One Democrat stated this argume bluntly:

> Sir, there are about thirty-five thousand of this class of people [blacks] now in this District I am told. There are about one hundred thousand inhabitants I am informed in the District. Pass this bill, and this "paradise," as the District was said to be when the bill giving freedom to the slaves of this District was passed, will be their paradise indeed, and in less than two years from this time it will be flooded by negroes from all parts of the country, and your mayors and your corporation officers will be composed of negroes. . . .
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> . . . Sir, it may do very well for gentlemen representing States in which there are not enough of the negro race to make mile-posts along the public roads to vote for a measure of this kind, because it is hardly within the range of possibility that any great amount of injury can result to such States; but where the races are so nearly equal [in number], and where it is reasonable to suppose that the "paradise" opened up for negroes will be filled with more negroes than whites, I hold that I should be derelict in duty to my own race, which I believe to be superior in all respects to the negro race, if I were to vote to give them the right of suffrage under any circumstances whatever.[91]

President Johnson expressed the same fear when justifying his decisi to veto legislation enfranchising black residents of the nation's capital: "Tl measures suited to one community might not be well adapted to the conc tion of another . . . ."[92] Thus, suffrage requirements in the District might, necessity, differ greatly from voting eligibility standards in a state such Massachusetts:

> While in Massachusetts, under the census of 1860, the proportion of white to colored males over twenty years of age was one hundred and thirty to one, here [in the District of Columbia] the black race constitutes nearly one third of the entire population, while the same class surrounds the District on all sides, ready to change their residence at a moment's notice, and with all the facility of a nomadic people, in order to enjoy here, after a short residence, a privilege they find nowhere else. It is within their power, in one year, to come into the District in such numbers as to have the supreme control of the white race, and

91. CONG. GLOBE, 39th Cong., 2d Sess. 45-46 (1866) (statement of Sen. Saulsbury (D-DE)).
For similar arguments, see CONG. GLOBE, 40th Cong., 2d Sess. 50 (1867) (statement of S Hendricks (D-IN)) ("It is a very different and more important question in the District of Columl whether the negroes shall have the political power than it is in the State of Ohio, where the wh race, notwithstanding this privilege might be extended to the negroes, would maintain its supre acy."), and CONG. GLOBE, 40th Cong., 2d Sess. 39 (1867) (statement of Sen. Johnson (D-MI (arguing against black suffrage in the District because the large number of black voters would lik result in the election of mostly black officeholders).

92. CONG. GLOBE, 39th Cong., 2d Sess. 304 (1867) (statement of President Johnson).

> to govern them by their own officers, and by the exercise of all the municipal authority—among the rest, of the power of taxation over property in which they have no interest.[93]

In a similar vein, Democrats ridiculed the asserted willingness of some northern Republicans to allow blacks to vote in the North. They argued that the political problem with extending the franchise was not the participation of individual black voters, but the aggregate power of blacks voting together:

> In the northern States negro suffrage amounts to nothing, because there are no negroes there to vote; but in the southern States, where the negro voters would amount in numbers to more than the white voters, it then becomes a most material and mischievous matter. . . . To take negro suffrage where there is but one negro in ten thousand white voters is innoxious and can produce no mischief; but when the negroes preponderate, or are about equal, it then becomes the destruction and the ultimate overthrow of government to admit negroes in that proportion to take part in its administration.[94]

Nor were Democrats alone in expressing fear that black suffrage would result in the exercise of black political power. Even some Republican congressmen expressed empathy with southerners confronting large populations of newly enfranchised black voters. To these congressmen, the problem was not that the newly enfranchised voters would not know what was in their own self-interest, as some Democrats suggested, but that they would know what was in their own self-interest all too well. If allowed to vote, blacks would ultimately insist on complete equality with whites. The perceived inevitability of this demand fueled southern resistance to black suffrage.

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93. *Id.*

The Republican response did not challenge the likelihood that blacks would exercise political power in the District if given the vote, but rather defended the legitimacy of such an outcome. Again, their argument was grounded on assumptions about the common interest of blacks and the collective power of the franchise:

> Colored men do the work on the streets; they ought to understand what repairs are needed as well as how to make them. You say they are poor; they ought to know the poor man's wants. You say they are ignorant; then give them a chance to vote against a mayor who loads them with school tax and deprives them of schools. . . .
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> . . . .
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> . . . If the people here were generally consenting to this enlargement of the franchise its necessity would be less apparent. It is because the negro is hated in this city, and justice denied him by prejudiced officials, that his vote is necessary for his own protection.

CONG. GLOBE, 39th Cong., 1st Sess. 179-80 (1866) (statement of Sen. Scofield (R-PA)).

As always, however, the Republican position had an individual, dignitary dimension as well as a more instrumental one:

> The black man has just as much right to his vote as the white man has to his; and it is no more a gift or boon in the one case than in the other; and the white man has no more authority to confer or withhold it than the black man . . . .
>
> It is an individual right, to be regulated and limited for the good of the State; but these limitations should apply to all classes, and be clearly for the public good. It should never be needlessly violated or withheld.

CONG. GLOBE, 39th Cong., 1st Sess. 833 (1866) (statement of Sen. Clark (R-NH)).

94. CONG. GLOBE, 40th Cong., 3d Sess. 998 (1869) (statement of Sen. Davis (D-KY)).

According to Republican Senator Doolittle:

> [T]he mass of the white people of the South object to the colored man taking part in the political affairs of the Government upon a footing of equality with the white men where the negro exists in such numbers that he can, by force of numbers, place himself in such a position as not only to bring on political equality, but to force social equality also. It is social equality which is to be forced on by the political equality in the States where the negroes exist in numbers equal to the white man that makes the white people of the South so persistent and pertinacious in their opposition to this proposed policy. . . .
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> . . . .
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> . . . It will be the destruction of the [black] race to undertake to force this unnatural social equality between races so distinct.
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> . . . .
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> . . . [E]xtend your suffrage among such a number of ignorant, demoralized masses of men, and your whole liberties, Constitution, and Government will go down together.[95]

Other Republicans recognized and, in fact, championed the likeliho that black voters would support black candidates for office. In debates su rounding the adoption of the Fifteenth Amendment, several Republic senators sought explicit language prohibiting racial restrictions on offi holding as well as voting. When the conference committee removed la guage to this effect, supporters of black office holding assured their disco solate colleagues that little damage had been done to black interests, for both a legal and a practical matter, with the franchise guaranteed, black vo ers would be able to elect black representatives.[96]

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95. CONG. GLOBE, 40th Cong., 3d Sess. 1011-12 (1869) (statement of Sen. Doolittle (R-WI

96. As a legal matter, it could be argued that the right to vote subsumes the right to hold fice, in which case the eliminated language would have been redundant. Many members of Congress that proposed the Fifteenth Amendment accepted the argument that the right to vote cluded the right to be voted into office. *See* Amar, *supra* note 8, at 228-41. Indeed, when Geor expelled black legislators from its House of Representatives, Congress punished the state for v lating its promise to Congress to permit blacks to vote. *See id.* at 230-33. Those who ratified Fifteenth Amendment understood that the "right to vote" language represented a shorthand for v ing on ballots, in juries, and in legislatures—that is, a shorthand for a *package* of political rigl *See id.* at 228-35.

Moreover, many Republicans felt assured that, as a practical matter, the newly enfranchis freemen would elect blacks to governmental office through exercise of the franchise, with or wi out explicit constitutional language guaranteeing their right to do so. *See, e.g.*, CONG. GLOBE, 4 Cong., 3d Sess. 1627 (1869) (statement of Sen. Wilson (R-MA)) (noting that many states wo attempt to place racial restrictions on office holding, but expressing confidence that blacks wo eventually overcome such barriers); CONG. GLOBE, 40th Cong., 3d Sess. 1302 (1869) (statement Sen. Howard (R-MI)) (arguing that allowing blacks to vote would render election of black offi holders inevitable). In response to colleagues who suggested that they might vote against the F teenth Amendment because it did not explicitly protect blacks' right to hold elective office, s porters such as Senator Nye eloquently expressed their faith that blacks would use their vot power to secure this right for themselves:

> Arm the negro with the ballot, and I will see to it that he makes laws in the State, if I live in it, that will protect him in his right to hold office. . . .

Democrats also challenged the Republican contention that all citizens have a right to vote by pointing out that women, who were clearly citizens, did not have that prerogative.[97] Thus, the scope of the franchise should be understood to constitute a matter of policy and expediency, not natural right. Republicans responded by arguing that women were already represented in the polity, albeit indirectly, by their husbands, fathers, sons, and brothers who voted to protect their interests. No comparable group of white voters, however, would exercise the franchise to protect the interests of black people. Therefore, blacks must speak with their own voice in order to achieve representation. One senator—who supported woman suffrage, but felt that extending the vote to blacks was more urgent and necessary—argued along these lines:

> . . . [G]ive me the majority of the ballots, and I will fix who shall hold offices in a State. They will fix it; and they are not so black or so stupid that they will not fix it in opposition, if need be, to the Senators who represent them up on this floor. Sir, it is the ballot, it is the count, it is the numerical strength that determines the right of the voter to hold office in his State . . . .

CONG. GLOBE, 40th Cong., 3d Sess. 1306 (1869) (statement of Sen. Nye (R-NV)). For other similar statements, see CONG. GLOBE, 40th Cong., 3d Sess. 1629 (1869) (statement of Sen. Stewart (R-NV)) ("The ballot is the mainspring; the ballot is power; the ballot is the dispenser of office . . . . [I]f I cannot give the poor and the downtrodden the right to hold office, I will give them the power to say who shall hold office and dispense office."); CONG. GLOBE, 40th Cong., 3d Sess. 1300 (1869) (statement of Sen. Frelinghuysen (R-NJ)) ("As to the objection that [the Fifteenth Amendment] does not provide eligibility to office for the colored people I will only say that if you give seven hundred and fifty thousand men the right to the ballot they will look out for their own rights as to office."). But Senator Edmunds warned:

> [I]f you give [the black voter] the right to have a voice in the government, that voice cannot have any live expression unless it enables him to choose from among his fellow-citizens the man who suits him for his representative, instead of confining him, as this amendment does, to a chosen aristocratic class, saying to a citizen of a free republic, "You have rights of manhood, you have rights of equality, but you shall exercise those rights in choosing some one of us to rule over you instead of some one of your fellow-citizens whom you prefer."

CONG. GLOBE, 40th Cong., 3d Sess. 1626 (1869) (statement of Sen. Edmunds (R-VT)); *see also* CONG. GLOBE, 40th Cong., 2d Sess. 1970 (1868) (statement of Rep. Beaman (R-MI)) (expressing skepticism about the possibility of black political dominance in any southern state).

97. As one representative stated:

> If the negro has a natural right to vote because he is a human inhabitant of a community professing to be republican, then women should vote, for the same reason; and the New England States themselves are only *pretended* republics, because their women, who are in a considerable majority, are denied the right of suffrage.

CONG. GLOBE, 39th Cong., 1st Sess. 177 (1866) (statement of Rep. Boyer (D-PA)); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 860 (1869) (statement of Sen. Dixon (R-CT)) (arguing that if voting is a natural right, then a woman "has the same natural right to vote that the African has"); CONG. GLOBE, 40th Cong., 3d Sess. 644 (1869) (statement of Rep. Eldridge (R-WI)) ("[I]f citizenship alone confers the right to vote, and a State is not republican that denies the right to an uneducated, half-civilized colored man, how much more is the State not republican in form that denies the educated, cultivated, and refined women the right?"); CONG. GLOBE, 40th Cong., 2d Sess. 1961 (1868) (statement of Rep. Knott (R-KY)) (contending that if republicanism requires extending the vote to all citizens, "then there is not, and I maintain there never has been, a republican government on the face of the earth; for the women and children, irrespective of age, are as much citizens as the adult males").

> [T]he ladies of the land are not under the ban of a hostile race grinding them to powder. They are in high fellowship with those that do govern, who, to a great extent, act as their agents, their friends, promoting their interests in every vote they give, and therefore communities get along very well without conferring this right upon the female.[98]

Of course, this argument makes no sense if voting is viewed solely as a individual prerogative. Some women will have no living male relative Moreover, if women do not have collective political interests but rather cor prise only an ad hoc accumulation of the interests of individual women, tl representation provided by male relatives would be extraordinarily unequa with some women receiving ten times the representation available to othe Thus, both for women and for blacks, the representational issue presum collective interests.[99]

In an early challenge to the logic of black suffrage, which also focus on Republican inconsistencies, Democrats fiercely condemned the represe tatives of northern states who voted in Congress to extend the franchise blacks in the South even though their own states denied blacks suffrage as

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98. CONG. GLOBE, 39th Cong., 2d Sess. 63 (1866) (statement of Sen. Wade (R-OH)). A su porter of black suffrage who opposed woman suffrage made a similar argument:

> [T]o extend the right of suffrage to the negroes in this country I think is necessary for their protection; but to extend the right of suffrage to women, in my judgment, is not necessary for their protection . . . . Negroes in the United States have been enslaved since the formation of the Government. Degradation and ignorance have been their portion; intelligence has been denied to them; they have been proscribed on account of their color; there is a bitter and cruel prejudice against them everywhere, and a large minority of the people of this country to-day, if they had the power, would deprive them of all political and civil rights and reduce them to a state of abject servitude. Women have not been enslaved. Intelligence has not been denied to them; they have not been degraded; there is no prejudice against them on account of their sex; but, on the contrary, if they deserve to be, they are respected, honored, and loved.

CONG. GLOBE, 39th Cong., 2d Sess. 56 (1866) (statement of Sen. Williams (UR-OR)).

Some Democrats responded to the argument that blacks needed the protection of the ball more than women by challenging its accuracy. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1 (1866) (statement of Rep. Boyer (D-PA)) (doubting "that suffrage is necessary to the black man enable him to protect himself against the oppression of the whites . . . [because in Pennsylvania cannot recall to mind a single instance where justice was denied to a negro because of his co plexion").

99. Proponents of woman suffrage, of course, rejected the proposition that any third pa could adequately represent the interests of an entire class. As Senator Pomeroy proclaimed:

> Do not tell me that the rights of one class of citizens are safe in the hands of another, that the men will take care of the rights of the women. The rights of individuals allied to you may or may not be safe, but of a class they never can be.
>
> The property and character of your own wife and child may be safe in the hands of the husband and father; but would you trust the property and character of all other women and children in his hands? There are instances where one man may safely speak, vote, and act for a whole community; but would you organize and administer a government upon such a theory? Anything short of entire enfranchisement is as destructive of the theory of our Government as it is dangerous and destructive of individual rights.

CONG. GLOBE, 40th Cong., 3d Sess. 710 (1869) (statement of Sen. Pomeroy (R-KS)).

matter of state constitutional and statutory law.[100] Republicans had two responses. First, the North did not need black votes to ensure the existence of loyal governments. In the words of one Republican member of the House:

> It is said that this is a white man's Government, but I insist that it should be a loyal man's Government. This country is the gift of God, and man is God's creature, whether white or black. This is man's country, and the black, equally with the white, may claim it by birthright. He was born here, as were his ancestors before him for many generations, and his voice should be heard in the Government of the country. It is not necessary, however, at this point, to consider the question whether the colored man should be clothed with all the political rights of complete citizenship in the several States. It is illogical to say that he shall not vote in South Carolina because he is denied that privilege in Michigan. Michigan has not been in rebellion, and she needs no reconstruction. The votes of her colored citizens are not necessary to keep her in the Union nor to compel her to sustain the Constitution. The case is far different in South Carolina. The majority of the people of the latter State are loyal, but they are black. The minority are white, but rebels, and they will not organize a loyal government and submit to the Constitution and laws of the land. So in other rebel communities the majority of the whites are unrepentant rebels, but the minority in connection with the blacks are sufficiently numerous to reorganize and maintain the State.[101]

Second, Republicans contended that blacks did not *need* the franchise as much in the North, where former slaveholders were not a threat to black communities.[102] Eventually, of course, Republicans discarded the arguments

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100. The Republican Party Platform of 1868 reinforced the distinction between black suffrage in the North and the South by acknowledging that "[t]he guaranty by Congress of equal suffrage to all loyal men at the South was demanded by every consideration of public safety, of gratitude, and of justice, and must be maintained; while the question of suffrage in all loyal [nonsouthern] States properly belongs to the people of those States." Woodward, *supra* note 82, at 523 (quoting the Republican Party Platform of 1868).

Some Republicans recognized the merit of Democratic claims of hypocrisy. Representative Whittemore stated, "You cannot blame men of the South when they come with their accusations of inconsistency, laying them at your doors, if you still adhere to partial legislation and do not accept for yourselves what you have imposed upon them." CONG. GLOBE, 40th Cong., 3d Sess. app. 93 (1869) (statement of Rep. Whittemore (R-SC)).

101. CONG. GLOBE, 40th Cong., 2d Sess. 1969-70 (1868) (statement of Rep. Beaman (R-MI)).

102. *See, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 50 (1867) (statement of Sen. Morton (R-IN)) (pointing out that many Republicans based their opposition to black suffrage in the North on the assertion that northern blacks had no need for such protection). Some Republicans accepted the legitimacy of the Democrats' argument and directed it at recalcitrant members of their own party who appeared reluctant to support black suffrage in the northern states. *See* CONG. GLOBE, 40th Cong., 3d Sess. 984 (1869) (statement of Sen. Ross (R-KS)) ("Every man who voted for the enactment of negro suffrage in those ten [southern] States and the Territories stultifies himself unless he also votes to enact it in his own State."). Other Republicans based their argument for black suffrage in the North, in part, on the message that this would send to the South. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 561 (1869) (statement of Rep. Boutwell (R-MA)) ("Whenever we do justice to the black man in the North we improve his position, his capability to take care of himself in the South.").

asserting a greater need for black suffrage in the South in favor of a feder constitutional amendment that enfranchised black citizens nationwide.

In subordinating the individual's right to the franchise to the instrument needs of the group and society, these early arguments demonstrate that mar Republicans viewed black suffrage in collective terms. They also sugge that, at least initially, suffrage supporters considered blacks' need for th vote to defend themselves against oppression to be a stronger justification fi extending the franchise than a natural rights argument based on individu autonomy.

In the final analysis, support for the enfranchisement of black Americar and, ultimately, the enactment of the Fifteenth Amendment reflected a var ety of political strategies, policy objectives, and moral principles.[103] Th lack of a single dominant purpose or explanation for this constitution

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103. Indeed, it was not uncommon for the same speaker to invoke a multitude of rationales f enfranchisement that ranged from individual dignity and moral justice to collective se preservation of the freemen and the Republic itself. For example, Charles Sumner argued in : impassioned speech, "Reason, humanity, and justice, all of which are clear for the admission of t freedman, may fail to move you; but you must yield to necessity . . . ." 10 THE WORKS (CHARLES SUMNER 129 (Boston, Lee & Shepard 1876). The necessity that required federal acti had multiple dimensions. First, there was the need of the freemen for protection: "Emancipati itself will fail without Enfranchisement," Sumner proclaimed. *Id.* at 130. "The freedman must l protected. To this you are solemnly pledged by the Proclamation of President Lincoln, which, aft declaring him 'free,' promises to *maintain* this freedom, not for any limited period, but for : time." *Id.* at 133. Second, the safety of the Republic itself was at stake:

> It is idle to expect any true peace while the freedman is robbed of this transcendent right, and left a prey to a vengeance too ready to wreak upon him the disappointment of defeat. The country, sympathetic with him, will be in perpetual unrest. With him it will suffer; with him alone can it cease to suffer. Only through him can you redress the balance of our political system and assure the safety of patriot citizens. Only through him can you save the national debt from the inevitable repudiation awaiting it, when recent Rebels in conjunction with Northern allies once more bear sway. He is our best guaranty. Use him. . . . If he votes now, there will be peace. Without this you must have a standing army, which is a sorry substitute for justice. Before you is the plain alternative of the ballot-box or the cartridge-box: choose ye between them.

Id. at 224-25. Many other congressmen expressed similar statements that reflected multiple poli cal goals and a complex understanding of the value of the vote:

> My purpose is to secure to every citizen born in this country or naturalized in pursuance of its laws the high privilege of the American ballot. I desire this, not only as a means of self-protection to the citizen, but to secure a national recognition in the Constitution of the fundamental principles upon which our Government was organized, which is that "all men are created equal" and "that all Governments derive their just powers from the consent of the governed."

CONG. GLOBE, 40th Cong., 2d Sess. 118 (1867) (statement of Rep. Ashley (R-OH)); *see al* CONG. GLOBE, 40th Cong., 3d Sess. 986 (1869) (statement of Sen. Howard (R-MI)) (arguing th black citizens should be allowed to vote "for their security, for our own security, as an act of justi to them and of security and strength to the Union itself"); CONG. GLOBE, 40th Cong., 3d Sess. 91 (1869) (statement of Sen. Willey (R-WV)) ("[T]he political enfranchisement of the colored race this country is required not only by considerations of policy and expediency, but also by the d mands of justice to the negro, by the principles of human liberty, and by the spirit of Christian civ lization.").

change is hardly surprising. The issue of race has been a central dilemma of American politics for centuries because it is a complex and multifaceted problem that defies simplistic solutions. This was as true in the 1860s as it is today. Superimposing the problem of race on top of the indeterminate nature of the right to vote confounded decisionmakers of the period and continues to challenge today's historians who try to unravel the motivations of those who debated the Fifteenth Amendment.[104]

Conceding complexity, however, does not mean that there is nothing to learn from the debates of this period. Indeed, the necessity of accepting the internal and jarring dissonance of political thought on race and voting during Reconstruction is an important lesson in its own right. An oversimplified understanding of history can only contribute to one-sided and incomplete solutions to the pressing constitutional questions of our day.

In the national debate surrounding the Fifteenth Amendment, the repeated recognition by the Reconstruction Congress of racial voting patterns, the distinct voice of black Americans that deserved to be heard, and the role of blacks voting as a racial bloc does not deny the individual nature of voting rights. Rather, recognition of these group-based rationales should be understood to supplement but not supplant the more individualistic characteristics of voting. Support for the right to vote rested on parallel political themes, neither of which alone provided a clear picture of the political interests at stake. The justifications for permitting black men to vote portrayed voting as an activity of a hybrid nature, with both individual and group dimensions. Voting might thus be analogized to a picture out of gestalt psychology that looks like a rabbit if held one way, but appears to be a duck if the viewer's focus shifts. Viewed from one perspective, voting was individual, dignitary, and a matter of natural right; from the other, it was collective, instrumental, and a matter of political expediency. Despite the apparent lack of logic, both

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104. In his study of the debate over Reconstruction in Ohio, Robert D. Sawrey concisely summarizes prominent historical interpretations of the adoption of the Fifteenth Amendment. Sawrey writes:

> William Gillette has argued that Republicans supported the amendment in the expectation that it would enfranchise enough blacks in the North, including Ohio, to more than compensate for the number of whites who might desert the party. LaWanda Cox and John Cox and Glenn M. Linden have attacked Gillette's conclusions, contending that commitment to justice motivated many Republicans, even though they anticipated losing votes. Michael Les Benedict has suggested that Republicans passed the amendment because they feared that the South was slipping away from the party and believed that the amendment was necessary to secure Reconstruction in the South. Most recently, Eric Foner has stressed the conservatism of the amendment, which had greater popular support because it allowed various states, especially northern states, to continue to disfranchise specific groups of voters as long as race was not the basis of the disqualification.

SAWREY, *supra* note 72, at 144. Sawrey's conclusion, if not more satisfying, is all-encompassing and more accurate. "Surely," he writes, "all these interpretations help explain the behavior of Ohio Republicans." *Id.*

images were equally accurate; neither description alone provided a complete picture of the right to vote.[105]

B. *Nineteenth Amendment—Individualistic or Instrumental?*

The struggle for woman suffrage began before the Civil War and continued until the ratification of the Nineteenth Amendment. At the movement's inception and for some time thereafter, the critical justification for demanding woman suffrage was grounded on natural rights, individual liberty, equal justice, and the essential fungibility of men and women.[106] In the early years,

> suffragists . . . based their demand for political equality with men on the same ground as that on which their men had based their demand for political equality with their English rulers two generations before. If all men were created equal and had the inalienable right to consent to the laws by which they were governed, women were created equal to men and had the same inalienable right to political liberty. In asserting that natural right applied also to women, the suffragists stressed the ways in which men and women were identical. Their common humanity was the core of the suffragist argument.[107]

This natural rights argument was always an important intellectual foundation for extending the franchise to women. But by the end of the nineteenth century, it was sharing prominence with instrumental, policy-driven rationales that emphasized the differences between the sexes.[108] Many suffragists now argued that women should vote because they would constitute a voting bloc with distinct priorities and perspectives. Women's unique voice should be heard in political debate, and through the power of the ballot, their collective opinions would influence governmental decisionmaking for the better.

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105. As one Senator stated:

> The war, succeeding the great intellectual controversy of which it was the consequence, made four and a half million slaves free. Being free they were citizens, and being citizens, all the theories which underlie our political structure demanded for them the same rights and privileges as other citizens, and consequently gave them the ballot. This political privilege was accorded, it may be true, to the former slaves from a sort of necessity, owing to the fact that the other portion of the people of the insurgent States were not in a temper to aid in an equitable readjustment of affairs; but the action was, nevertheless, in accord with the doctrines on which the first movements toward the organization of our Government were predicated, and it had only come after the tardiness of a century.

CONG. GLOBE, 40th Cong., 3d Sess. 980 (1869) (statement of Sen. Abbott (R-NC)).

106. This is not to suggest that there were no references to the instrumental value of the ballot in early discussions of woman suffrage. During the debate over the adoption of the Fifteenth Amendment, some members of Congress urged that the franchise be extended to women as well as blacks for reasons that recognized women as a distinct political class. *See* notes 97-99 *supra* and accompanying text.

107. AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920, at 44 (1965).

108. *See id.* at 44-45 (discussing how "new arguments enumerating the reforms that women voters could effect took their place alongside the natural right principle").

Several explanations have been offered for this shift in direction from an individualistic, inalienable rights approach to arguments emphasizing the instrumental power of women as a group. With the influx of immigration and the increasing heterogeneity of American society during this period, arguments suggesting that all people were created equal and should share political power on that basis were unlikely to persuade the established, Protestant, Anglo-Saxon population to change the status quo.[109]

Also, the American economy had changed fundamentally, altering the needs and interests of women. Women participated in the workplace in unprecedented numbers, creating new political realities:

> Working conditions were . . . dreadful for many women. Garment workers . . . frequently worked 11- and 12-hour days, six or seven days a week, in buildings that were poorly maintained, dimly lit and often in violation of safety codes. They not only were paid meager wages but were also expected to use those funds to purchase their own sewing supplies.
>
> . . . Where the earliest [woman suffrage] leaders had looked for authority to the Declaration of Independence, their successors looked to any number of investigatory reports about the wages and hours of working women. Women's lives had changed, these new leaders argued, and women needed the ballot in order to deal with the consequences.[110]

An instrumental vision of the women's franchise also resonated with the spirit of the times. A progressive era was dawning, and reform was in the air. Woman suffrage was worth fighting for because it was a tool society could use to help solve the serious social problems confronting the country.[111]

Moreover, the collective nature of women's political power fit comfortably within the limited ideals progressive political figures espoused.

> For [progressive] reformers, competition and relative inequality were permanent features of the social order, but expanding abundance, comprehensive education, and efficient government would allow opportunities for all citizens. Through such a compromise, social stability could be guaranteed. For the long run, reformers looked to the model of the corporation to balance differing social interests: farmers, workers, businessmen, and consumers would each form a "bloc" to secure their share of the commonwealth.

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109. *See id.* at 44, 53 (describing how the democracy-based natural right argument lost force as social changes brought about a general decline of faith in democracy).

110. ELIZABETH FROST & KATHRYN CULLEN-DUPONT, WOMEN'S SUFFRAGE IN AMERICA: AN EYEWITNESS HISTORY 287 (1992); *see also* THE CONCISE HISTORY OF WOMAN SUFFRAGE 353 (Buhle & Buhle eds., 1978) (explaining that, for suffrage leaders, political "[e]quality was not only desirable but necessary for the self-protection of new groups of working women").

111. *See* KRADITOR, *supra* note 107, at 56-74 (discussing the links between Progressive Era ideology and the woman suffrage movement).

> . . . Suffragists followed the mainstream and demanded the political inclusion of women into American society as one great estate among the plural powers.[112]

Finally, reformers needed to supplement natural rights arguments because these arguments, by themselves, had not been sufficient to achieve political victory. Suffragists, like the Republicans of the 1860s before them, needed to be both principled and pragmatic, regardless of whether they believed women would constitute a distinct political force. As one astute historian has put it, "Some suffragists used the expediency argument because social reform was their principal goal and suffrage the means. Other suffragists used the same expediency argument because the link of woman suffrage to reform seemed to be the best way to secure support for their principal goal: the vote."[113]

Ultimately, justifications for granting women the right to vote were molded out of the same political amalgam that had defined the debate over expanding the franchise for the previous 150 years: the mixture of an abstract theory of natural, individual, and dignitary rights to which all citizens were equally entitled with the pragmatic reality that the franchise would widen only if reformers could justify adding a new collective voice as an instrumentally beneficial supplement to the existing order.

1. *The distinct voice of women.*

Proponents of woman suffrage argued that women, as a group, differed from men in perspective and experience. They suggested that women would bring heightened moral and humanitarian sensibilities to the political arena, fight to protect women's interests in the workplace, promote the welfare of children, and help to achieve a proper legal status for women in the family. Suffragist leaders expressed these positions repeatedly in their speeches and writings, and their supporters in Congress echoed them during the debates leading to the adoption of the Nineteenth Amendment. As noted earlier, however, these claims supplemented—but did not replace—the natural rights arguments that had been the primary focus of suffrage supporters of a previous generation.[114]

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112. THE CONCISE HISTORY OF WOMAN SUFFRAGE, *supra* note 110, at 36-37.

113. KRADITOR, *supra* note 107, at 45-46.

114. Senator Works of California combined both arguments in a typical manner when he read into the Congressional Record an address to the Senate Committee on Woman Suffrage from a committee of Southern California women. Under the subheading "What Women Want," the address stated:

> Suffrage is the right of every citizen in a democracy, and it belongs to women by every right of reason, logic, and justice. Women, as human beings and as citizens, should have the right to every possible means of education, every developing experience, every avenue of self-expression, and the opportunity of service.

2. *The generic gender difference.*

Both opponents and proponents of the woman suffrage movement recognized that if men and women were entirely fungible, it would be difficult to argue either that women or society would gain anything of substance by the participation of women in politics or that women were inadequately represented by their husbands, fathers, brothers, and sons. Indeed, opponents of the movement often asserted fungibility of the genders. Senator Brandagee, for example, opined:

> I do not think [woman suffrage] will make much difference politically. I suppose the women will probably divide as their husbands and fathers and brothers do, and they will divide upon the issues that are presented to them probably about as the men do.
>
> . . . I do not look for additional uplifting and purity and the hastening of the millennium by their participation in politics.[115]

Some opponents of woman suffrage accepted the argument that men and women would vote differently, but argued that this difference foreshadowed disaster for America if the country expanded the franchise. For example, Representative Clark argued that woman suffrage "will unquestionably materially aid the growth of socialism in this country. It will not only add to the growth of socialism, but will likewise contribute to the upbuilding of feminism and Bolshevism in America."[116] Even worse, from Clark's perspective, the Nineteenth Amendment would enfranchise black women as well as white women.[117]

Suffragists themselves attacked the fungibility notion directly. "[A] man is by nature too different from a woman to be able to represent her," Alice Stone Blackwell explained in a pamphlet published by the National American Woman Suffrage Association. "The two creatures are unlike. Whatever

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51 CONG. REC. 4134 (1914) (statement of Sen. Works (R-CA)). Five sentences after this appeal to individual rights and justice, the report went on to explain:

> In the evolution of government, the State has been gradually taking unto itself the duties that the Creator Himself has labeled as feminine—the care and education of the child and the preservation of the purity and health of the home. Therefore it is that the woman of to-day is demanding a voice and a place in the political household . . . .

Id.

115. 58 CONG. REC. 621 (1919) (statement of Sen. Brandagee (R-CT)).

116. 58 CONG. REC. 91 (1919) (statement of Rep. Clark (D-FL)).

117. *See id.* at 90. Clark expressed his concern that,

> [w]hile the great masses of the negroes in the South are contented with existing conditions, some of the alleged leaders of the race are agitators and disturbers and are constantly seeking to embroil their people in trouble with the white people by making demands for social recognition which will never be accorded them; and the real leaders in these matters are the negro women, who are much more insistent and vicious along these lines than are the men of their race.

Id.

his good will, he cannot fully put himself in a woman's place, and look at things exactly from her point of view."[118]

Using language that foreshadows the Supreme Court's Sixth Amendment cases prohibiting the exclusion of women from jury service, Blackwell used the metaphor of the church choir to demonstrate how men and women's political voices would form a new harmony that was richer than the sound men could produce singing alone. "[T]he great advantage" of letting women sing in the choir, Blackwell noted, was not simply that women "doubled the volume of sound," but that "they add the soprano and alto to the tenor and bass."[119]

3. *Women as moralists and humanitarians.*

Perhaps the most common quality attributed to the political vision of women was a sensitivity to moral and humanitarian concerns that men by nature overlooked and neglected. Again, Alice Stone Blackwell stated the point explicitly:

> Men are superior to women along certain lines, and women superior to men along certain others. The points of weakness in American politics at present are precisely the points where women are strong. . . . The business interests, which appeal more especially to men, are well and shrewdly looked after; the moral and humanitarian interests, which appeal more especially to women, are apt to be neglected.[120]

Carrie Chapman Catt also identified the distinctive moral influence of women as a basis for extending the franchise. Did you know, she asked rhetorically,

> that women will add a distinct moral element to the present vote? . . . Is it not true that in every immoral institution, and in every factor which tends to handicap the moral progress of society, women are in the minority? Is it not true that

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118. ALICE STONE BLACKWELL, OBJECTIONS ANSWERED 2 (1911), *reprinted in* WOMAN SUFFRAGE: ARGUMENTS AND RESULTS, 1910-1911 (Kraus Reprint Co. 1971) [hereinafter WOMAN SUFFRAGE] (This book is an unpaginated collection of various pamphlets. When a cited pamphlet itself is paginated, page numbers are provided. No page numbers appear for pamphlets that are themselves unpaginated.).

119. *Id.* at 28; *see also* DOROTHY DIX, ON WOMAN'S BALLOT (1910), *reprinted in* WOMAN SUFFRAGE, *supra* note 118 ("Women should vote because they are unlike men, because they have different aspirations, different needs, a different point of view, a different way of reaching conclusions. Feminine talents, which are invaluable everywhere else in life, should be equally useful in politics."); Mary Fainsod Katzenstein, *Constitutional Politics and the Feminist Movement*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY, *supra* note 30, at 83, 87 (citing Yale historian Nancy Cott for the position that, after the adoption of the Nineteenth Amendment, "women moved beyond the view that prevailed before suffrage—the view that women were different and that it was this difference that made their vote important").

120. BLACKWELL, *supra* note 118, at 28-29.

> in the churches, and in all altruistic and moral movements whose chief motive is the uplifting of humanity, women are in the majority?[121]

The last decades of the nineteenth century had established a foundation for this emerging political persona. Women had spearheaded specific movements for "temperance, social purity, and the suppression of vice."[122] Now they saw themselves in broader terms "as a moral balance of power" that would use the vote to create a better world.[123] Indeed, far from demanding the right to vote as a matter of self-interest, some women argued for the expansion of the franchise so that they could fulfill their moral obligation to improve society.[124] Many suffragists pointed with pride to other countries and those states in which women already voted to prove that, as an empirical matter, women have a humanitarian impact on the democratic process.[125]

Congressional proponents of woman suffrage repeated the claim of moral superiority again and again on the floor of the House and the Senate.[126]

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121. CARRIE CHAPMAN CATT, DO YOU KNOW? 4 (1910), *reprinted in* WOMAN SUFFRAGE, *supra* note 118.

122. THE CONCISE HISTORY OF WOMAN SUFFRAGE, *supra* note 110, at 26.

123. CHRISTINE A. LUNARDINI, FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910-1928, at 2 (1986).

124. *See* DOROTHY SCHNEIDER & CARL J. SCHNEIDER, AMERICAN WOMEN IN THE PROGRESSIVE ERA, 1900-1920, at 168 (1993) ("All along men had assigned charitable tasks to women. Now women were beginning to feel that to accomplish these tasks they needed political power, embodied in the vote. Suffragists, abandoning their former emphasis on the rights issue, were saying that women had an actual duty to vote.").

125. In Australia, it was argued, women's influence had been "especially felt" in political struggles "against privilege, against monopolies of all kinds, against the rising of the cost of living, in favor of individual liberty, in favor of temperance, moral and physical cleanliness, and all that goes to build up a great national character." WOMEN'S VOTE IN AUSTRALIA (1910), *reprinted in* WOMAN SUFFRAGE, *supra* note 118; *see also* FRANCES MAULE BJÖRKMAN, WHERE WOMEN VOTE 21 (1911), *reprinted in* WOMAN SUFFRAGE, *supra* note 118. In Wyoming, women not only supported progressive candidates and opposed any politician tainted by immorality, bribery or whiskey, they were also credited with the adoption of stringent laws against gambling. TESTIMONY FROM WYOMING (1910) (letter from W.S. Collins, president of the Big Horn County irrigation company), *reprinted in* WOMAN SUFFRAGE, *supra* note 118. In Colorado, woman suffrage gave "dynamic force to a fresh and vital interest in the state," focusing on social interests "affecting education, public cleanliness, public morality, civic beauty, charities and correction, public health, public libraries—and such subjects as more intimately affect home life, and conduce to the prosperity of the family." MORE TESTIMONY FROM COLORADO (1910) (citing letter from Prof. Harry E. Kelly, a Denver lawyer), *reprinted in* WOMAN SUFFRAGE, *supra* note 118; *see also Woman Suffrage: Hearings Before the House Comm. on the Judiciary*, 62d Cong. 14-58 (1912) [hereinafter *1912 Woman Suffrage Hearings*] (address of Rep. Edward T. Taylor (D-CO)) (detailing Colorado's experience with suffrage and attributing many progressive effects to the votes of women); GEORGE CREEL & JUDGE BEN B. LINDSEY, MEASURING UP EQUAL SUFFRAGE, *reprinted in* WOMAN SUFFRAGE, *supra* note 118.

126. On some occasions, supporters inserted the comments of suffragists directly into the Congressional Record or Hearing Reports. *See, e.g.*, *Woman Suffrage: Hearings on Woman Suffrage Before the House Comm. on the Judiciary*, 65th Cong. 11 (1917) [hereinafter *1917 Woman Suffrage Hearings*] (Carrie Chapman Catt, *Objections to the Federal Amendment*, *in* WOMAN SUFFRAGE BY FEDERAL CONSTITUTIONAL AMENDMENT, inserted by Sen. John Shafroth (D-CO) (arguing that "[w]oman suffrage would increase the moral vote" because most criminals, drunkards,

In 1914, Senator Bristow left no doubt as to the respective moral capabilities of the genders:

> On moral questions, and government relates to moral questions as well as economic problems, women are far the superior of men. Their sense of natural justice is more acute and they instinctively resent moral wrong. As a whole, they are on the right side of every moral controversy in every community far more frequently than are the men. Indeed, the progress of the human race is due in a great measure to their superior moral sensibilities.[127]

Senator Shafroth presented an even more succinct view: "I will tell you where a woman's vote is different than a man's, and that is when the moral issues are involved."[128]

To some members of Congress, one cause of this moral distinction was plain. Representative Rankin, the first woman in Congress, asked rhetorically:

> Might it not be that the men who have spent their lives thinking in terms of commercial profit find it hard to adjust themselves to thinking in terms of human needs? Might it not be that a great force that has always been thinking in terms of human needs, and that always will think in terms of human needs, has not been mobilized?[129]

Indeed, congressmen from states that permitted women to vote quickly attributed recent political reforms in their jurisdictions to the extension of the franchise to women. One senator reasoned that his state "secured more progressive and more humane legislation than she had been able to secure in 25 years"[130] through women's votes and influence. Nor was there much doubt among politicians about the character of the forces that opposed woman suffrage. Representative Keating from Colorado described his own state's experience this way:

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and petty misdemeanants are men while, "in churches, schools, and all organizations working for the uplift of humanity, women are a majority")).

127. 51 CONG. REC. 3599 (1914) (statement of Sen. Bristow (R-KS)). Rep. Langley argued similarly that

> the history of civilization shows that wherever the influence of true womanhood has touched the affairs of the world it has exalted them; that wherever that influence has been exerted, whether in spiritual or material affairs, it has lifted mankind to a higher plane of usefulness and honor. The world would be a barren waste without woman's ennobling influence and the wheels of progress will move faster, as they have already done, as the sphere of her activity is widened. Give all of them the ballot and we will have better laws, better government, better men, and a brighter and a better world.

56 CONG. REC. 781 (1918) (statement of Rep. Langley (R-KY)).

128. *1917 Woman Suffrage Hearings*, *supra* note 126, at 6; *see also* 56 CONG. REC. 799 (1918) (statement of Rep. Fess (R-OH)) (explaining that a woman "will exert an abiding and a salutary influence upon the political life of a people . . . [because] her nature readily responds to the humanitarian calls of the times . . . [and] her abilities peculiarly qualify her to exert an ever-widening influence against prevalent evils and on behalf of the good of humanity").

129. 56 CONG. REC. 771 (1918) (statement of Rep. Rankin (R-MT)).

130. *1917 Woman Suffrage Hearings*, *supra* note 126, at 13 (statement of Sen. Kendrick (D-WY)).

> Of course, the people of the suffrage States are not unanimous in their support of woman suffrage. There is opposition. Ask the saloon keeper who put him out of business and he will answer, with a curse, "The women."
>
> Ask the gambler who stopped the roulette wheel and closed the faro bank and he will tell you, "The women."
>
> Ask the political boss why his power is disappearing and he will tell you, "Those confounded women insist on scratching their ballots."[131]

In addition to arguing that women voting would hasten substantive moral reforms, suffrage proponents also argued that women would cleanse the process of politics itself. Congressmen asserted that "[the] superior moral and mental qualities of woman . . . [would] purify the ballot"[132] "as completely as running clear water into a muddy stream."[133] Senator Jones proudly proclaimed that "women have elevated and purified politics wherever they have taken part in it."[134]

Even the President, during a congressional address in support of the Nineteenth Amendment, conceded the need for the counsel of women to solve the country's problems after the end of World War I. Women had not only been essential to the war effort, but should also play a vital role in postwar political decisionmaking. "We shall need their moral sense," the President explained, "to preserve what is right and fine and worthy in our system of life as well as to discover just what it is that ought to be purified and reformed."[135]

4. *Women as homemakers.*

Although many arguments supporting woman suffrage advocated an expanded political role for women, the suffragists did not challenge traditional gender-based divisions of labor or spheres of authority. Instead, they argued that women must be allowed to vote because, in a modern industrial society, women could not fulfill their "traditional . . . responsibility for the moral,

131. 56 CONG. REC. 803 (1918) (statement of Rep. Keating (D-CO)). The special role of women in supporting temperance, fighting prostitution, and working to raise the age of consent were frequently mentioned. *See, e.g.*, *1917 Woman Suffrage Hearings*, *supra* note 126, at 15 (statement of Sen. William Thompson (D-KS)) (claiming that "the women in my state helped with even limited suffrage . . . to make Kansas the leading prohibition State of the Union"); 56 CONG. REC. 793 (1918) (statement of Rep. Mays (D-UT)) (noting that the most important reason some men opposed woman suffrage was "that women, if voting, would be dangerously unfriendly to the liquor traffic"); 51 CONG. REC. 4194-95 (1914) (statement of Sen. Clapp (R-MN)) (asserting that "no red-light law ever passed Congress until the women in several States of the Union participated in the election of those who represent those States in the American Congress" and that "in those States where woman has received the right to vote . . . the age of consent has constantly been raised").

132. 56 CONG. REC. 10,770 (1918) (statement of Sen. Vardaman (D-MS)).

133. 56 CONG. REC. 8345 (1918) (statement of Sen. Thompson (D-KS)).

134. 56 CONG. REC. 10,925 (1918) (statement of Sen. Jones (R-WA)).

135. 56 CONG. REC. 10,929 (1918) (statement of Pres. Wilson).

spiritual, and physical well-being of [their] families" by acting within the confines of the home alone.[136] "Municipal sanitation, food inspection, the regulation of working conditions, the control of drunkenness and all manner of vice—all were relevant to [women's] duties, and all were manageable only through political action."[137] Women could not achieve necessary reforms in these areas without the ballot.

Jane Addams made this homemaker argument the centerpiece of a popular booklet explaining "Why Women Should Vote." She maintained that

> as society grows more complicated it is necessary that woman shall extend her sense of responsibility to many things outside of her own home if she would continue to preserve the home in its entirety. One could illustrate in many ways. A woman's simplest duty, one would say, is to keep her house clean and wholesome and to feed her children properly. Yet if she lives in a tenement house, as so many of my neighbors do, she cannot fulfill these simple obligations by her own efforts because she is utterly dependent upon the city administration for the conditions which render decent living possible. Her basement will not be dry, her stairways will not be fireproof, her house will not be provided with sufficient windows to give light and air, nor will it be equipped with sanitary plumbing, unless the Public Works Department sends inspectors . . . . [I]f the street is not cleaned by the city authorities no amount of private sweeping will keep the tenement free from grime; if the garbage is not properly collected and destroyed a tenement-house mother may see her children sicken and die of diseases from which she alone is powerless to shield them . . . . In short, if woman would keep on with her old business of caring for her house and rearing her children she will have to have some conscience in regard to public affairs lying quite outside of her immediate household.[138]

The homemaker argument sharply distinguished men and women's interests and was particularly effective in garnering support for woman suffrage.[139] No one seemed to challenge women's propensity to be uniquely concerned about home and family or men's proclivity to "lose sight of these important considerations in the scramble of partisan warfare for office."[140]

Senator Ashurst starkly described women's need for political power due to her role as homemaker:

> Under the present conditions she must trust to the integrity and capability of the inspectors and supervisors, whom she had no voice in selecting, to pass upon

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136. ROBERT DARCY, SUSAN WELCH & JANET CLARK, WOMEN, ELECTIONS, & REPRESENTATION 12 (2d ed. 1994).

137. *Id.*

138. JANE ADDAMS, WHY WOMEN SHOULD VOTE 1-3 (1911), *reprinted in* WOMAN SUFFRAGE, *supra* note 118. Frances Maule Björkman also elaborated on the housekeeping argument in another long, polemical pamphlet. *See* FRANCES MAULE BJÖRKMAN, WHY WOMEN WANT TO VOTE 1-5 (1911), *reprinted in* WOMAN SUFFRAGE, *supra* note 118.

139. Darcy, Welch, and Clark credit the housekeeping rationale as one of the two arguments "that won the day" for woman suffrage. *See* DARCY ET AL., *supra* note 136, at 12.

140. BLACKWELL, *supra* note 118, at 13 (quoting Denver lawyer Henry E. Kelly).

> the quality of the milk for her household, and the only practical way in which to enable her to see to it that she receives pure fabrics, clean and wholesome food supplies, and other things which mean the physical, and even the moral, health of her children is to invest her with the right to a voice in selecting these various governing agents which are to manufacture, prepare, and inspect these necessities.
>
> . . . .
>
> We hear the opponents of equal suffrage say that "It is woman's place to direct her house and her children." Sir, that is indeed a choice assortment of words, but how about the brutality of a system which denies to woman the right and opportunity to have sensible and wholesome laws and regulations to assist her in procuring pure foods, pure fabrics, and sanitary houses?[141]

Indeed, to the proponents of woman suffrage, the ballot was more than a tool to facilitate women's service as homemakers: It was a weapon women needed in order to protect their homes from very real dangers. Thus, women had come to realize that their

> assailants are no longer in the open, but . . . hide in the results and products of social injustice and industrial greed. . . . [T]hey exist because of laws and the absence of laws. [Women have] found from bitter experience that sickness and death are concealed in impure food which is bought for pure, and in insanitary tenement houses of our great cities in which so many are compelled to live.[142]

Moreover, women especially needed the power to protect themselves when the men of the nation were away during times of war. Some advocates argued, "[W]hen men went to war they used formerly to give [their wives] a pistol and say, 'Protect yourselves.' But you can protect a woman infinitely more effectively when you go to war by giving her the ballot and by letting [women] work together . . . ."[143]

Opponents of woman suffrage who claimed they wanted to deny women the vote in order to protect them from the taint of politics simply misunderstood the true threat to women's well-being in modern society. Far from defending her interests, the antisuffragists were "depriving her of her most effective means of protection [by] refus[ing] to grant her the ballot."[144] Instead, the proper course was to mobilize a woman's inherent homemaking capabilities to effectively direct the power of the state on her behalf. "If, because of changed economic and industrial conditions, we can not keep women in the home, then let us . . . help her to raise all the standards of business and of industry to the standards of the home."[145] Out of necessity, the State was becoming more "feminine" in its functions and, as such, needed

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141. 51 CONG. REC. 2026-27 (1914) (statement of Sen. Ashurst (D-AZ)).

142. 56 CONG. REC. 805 (1918) (statement of Rep. Dill (D-WA)).

143. *1917 Woman Suffrage Hearings*, *supra* note 126, at 51 (testimony of Madeline Z. Doty, *New York Tribune* correspondent).

144. 56 CONG. REC. 10,947 (1918) (statement of Sen. Kendrick (D-WY)).

145. *Id.*

the guiding hand of women to supervise its actions.[146] "The problems of bad housing, unwholesome food, conservation of life and health, commercialized vice, evil working conditions, all need the remedial hand of the home maker."[147]

5. *Women as the guardians of children.*

If women had a recognized sphere of influence in the home, society even more obviously acknowledged women to be the primary caretakers and custodians of children. Men provided for their children as family breadwinners, but only women had true expertise on matters relating to childcare. At best, male legislators could be sorry substitutes for the mothers of the country on issues involving young people.[148] Thus, suffragists insisted that "the protection of the weak and the young" would be secured more easily if women were allowed to vote.[149]

To the suffragists, it was not that men did not care about the welfare of children. Rather, what was lacking was personal knowledge, political will, and political power. Florence Kelley admonished:

> We are not gaining upon child labor, or upon child illiteracy. These grave evils are gaining upon us. There are more illiterates, more child laborers, a smaller per cent of the population upon the rolls of the schools.
>
> Why are these things true? . . . [B]ecause the mothers, the teachers, the women fitted by nature and by training to guard the welfare of the children are prevented by law from electing the officers who enforce the laws.[150]

Men simply could not be trusted to handle these issues adequately, for obvious reasons:

> [W]omen realize, as men never can realize . . . what it means to have the compulsory-education laws and child-labor laws abrogated, because it is the business of the women to be constantly with the children. . . .

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146. *See* 51 CONG. REC. 4134 (1914) (Address in Favor of an Amendment to the Constitution of the United States Extending the Right of Suffrage to Women, inserted by Sen. Works (R-CA)).

147. 56 CONG. REC. 769 (1918) (statement of Rep. Kelly (R-PA)).

148. *See* DARCY ET AL., *supra* note 136, at 16 ("Jane Addams, suffragist leader and social reformer, . . . pointed out that male legislators made themselves 'a little absurd' with uninformed discussions in the German *Reichstag* of infant mortality and naive debates in the English Parliament on infant clothing.").

149. BLACKWELL, *supra* note 118, at 9; *see also* ALICE STONE BLACKWELL, DO TEACHERS NEED THE BALLOT? (1910), *reprinted in* WOMAN SUFFRAGE, *supra* note 118 (arguing that one reason why public schools are overcrowded and underfunded is that "the mothers and the teachers have no votes"); *id.* (quoting Gen. Irving Hale of Denver: "The extension of suffrage to women has made it easier to secure liberal appropriations for education.").

150. FLORENCE KELLEY, PERSUASION OR RESPONSIBILITY (1910), *reprinted in* WOMAN SUFFRAGE, *supra* note 118. Other suffragists emphasized women's need for political power to promote child labor legislation and establish juvenile courts. *See, e.g.*, BJÖRKMAN, *supra* note 138, at 8-9 (arguing that women needed the vote to effectively advocate for child labor laws and the expansion of the juvenile justice system).

> . . . [F]rom a practical standpoint we women know more about the necessities of the children, . . . and we know what they need in the way of protective legislation better than the men can ever know . . . .
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> . . . .
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> . . . It is not because men do not care for their children [that they do not enact appropriate child protection legislation], but it is because they do not pay enough attention to them and their needs. That is the work of women. We could not run your business, and we feel that you can not run our business as well as we can—that is, the business of caring for the children.[151]

Members of the House and Senate supported the contention that women needed the ballot to protect children, pointing to women's disproportionate support of child labor laws,[152] their special concern for issues concerning education and literacy,[153] and their efforts and accomplishments in reforming institutions and programs addressing the needs of children.[154] As Senator Phelan observed:

> Women are so closely interested in all governmental activities—in juvenile courts, the rights of minor children, schools, nurseries, things which come within what some gentlemen would fain call her proper sphere . . . . Yet we find men voting about minor children, juvenile courts, infant hospitals, and matters of local concern of which they only have knowledge so far as it is imparted to them by their wives, and the wives and mothers are excluded from the ballot.[155]

6. *Women as workers.*

Most arguments in favor of woman suffrage described the distinct voice of women as essentially a voice of altruism, but it was equally clear to the suffragists that women must have access to the ballot in order to protect their own interests as members of a disadvantaged class. In particular, voting rep-

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151. *1917 Woman Suffrage Hearings*, *supra* note 126, at 177-78 (1917) (testimony of Mrs. Donald R. Hooker); *see also* BJÖRKMAN, *supra* note 138, at 4-7 (listing the numerous ways in which women could only fulfill their traditional responsibilities for the care of their children through the exercise of political power); FLORENCE KELLEY, WOMAN SUFFRAGE: ITS RELATION TO WORKING WOMEN AND CHILDREN (1910), *reprinted in* WOMAN SUFFRAGE, *supra* note 118 (arguing that women are uniquely positioned to lobby for the welfare of the poor, the young, and the uneducated).

152. *See, e.g.*, 56 CONG. REC. 10,948 (1918) (statement of Sen. Pittman (D-NV)) (asserting that if women voted, states would prohibit the employment of children); 51 CONG. REC. 2026 (1914) (statement of Sen. Shafroth (D-CO)) (proclaiming that women's political influence in Colorado explains why that state has "the very best" child labor laws).

153. *See, e.g.*, 51 CONG. REC. 3598 (1914) (statement of Sen. Bristow (R-KS)) ("Who could have a greater interest in the schools of the country than have our women?").

154. *See, e.g.*, 51 CONG. REC. 4194 (1914) (statement of Sen. Shafroth (D-CO)) (listing laws relating to the establishment of juvenile courts, the treatment of juvenile delinquents, the establishment of an industrial school for girls and compulsory education, the creation of a traveling library commission, and the provision of medical examinations to school children—laws "that have been added to the statutes of the State of Colorado largely through the influence of women").

155. 56 CONG. REC. 10,945 (1918) (statement of Sen. Phelan, (D-CA)).

resented a critical tool for working women, enabling them to obtain safe working conditions and fair compensation. Suffragists proclaimed repeatedly that gender inequality in wages was prevalent and could only be cured politically:

> Experience proves that women as well as men need the ballot to protect them in their special interests and in their power to gain a livelihood. In Philadelphia no woman teacher receives the same salary as men teachers for the same work . . . . What is true of Philadelphia is true in the main, of the public schools in 42 of the United States; but it is not true in the four states where women vote.[156]

The principle presented was a simple one: "When women organize and vote they will get EQUAL PAY for EQUAL WORK."[157]

The necessity of women voting as a way to improve deplorable working conditions also served as a constant theme. Economic changes required corresponding political changes.[158] Arguments about working conditions asserted an immediate need for action lacking in the other justifications for extending the franchise to women. Writing in response to the Triangle Shirtwaist Company fire, Mary Ware Dennett insisted that "the time has come when women should have the one efficient tool with which to make for themselves decent and safe working conditions."[159]

As with other instrumentalist arguments, reformers described, at length, the legislative achievements of countries and states in which women had the vote in order to demonstrate empirically how women could improve working conditions if they were given the ballot. One suffragist noted that, in New Zealand,

> [s]ince women got the vote legislative measures [were] enacted making women eligible to practice at the bar; giving equal educational opportunities and honors to both sexes in common schools, high schools and universities; . . . providing equal pay for equal work; [and] insuring healthy conditions and a minimum wage for working women.[160]

In Australia, the women's vote "helped secure measures providing for equal pay for equal work; . . . establishment of [an] eight-hour day for women; state boards for the fixing of a minimum wage scale, and hours and condi-

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156. BLACKWELL, *supra* note 149 (quoting President Thomas of Bryn Mawr College); *see also id.* (arguing that, in New York, women teachers "have been using their 'indirect influence' to the utmost to secure equal pay for equal work, but without avail," whereas, "[i]n Wyoming where women vote, the law provides that women teachers shall receive the same pay as men, when the work done is the same").

157. MRS. MARY KENNEY O'SULLIVAN, WOMEN AND THE VOTE (1910), *reprinted in* WOMAN SUFFRAGE, *supra* note 118.

158. *See* BJÖRKMAN, *supra* note 138, at 10 (describing how women entering the industrial workforce in record numbers lacked any political voice in regulating working conditions).

159. FROST & CULLEN-DUPONT, *supra* note 110, at 303-04 (quoting Dennett's statement in the *Woman's Journal*).

160. BJÖRKMAN, *supra* note 125, at 17-18.

tions for working women."[161] In Wyoming, the state legislature passed a law providing that men and women teachers should receive equal pay for equal work.[162] Colorado passed a law prohibiting women from working more than eight hours a day at any job requiring her to be on her feet.[163] And Utah adopted a maximum hour law for women and a statute providing school teachers with equal pay for equal work.[164]

Despite the relatively limited achievements of the suffrage states in improving working conditions and equity at the workplace for women, congressional supporters of the Nineteenth Amendment stressed this issue during floor debates and hearings. In an amusing exchange between Representative Clark and suffragist leader Carrie Chapman Catt at hearings before the House Committee on Woman Suffrage early in 1918, Clark asked, "What do women need to be protected against?" When Catt answered "Men" to general laughter, Clark responded, "That is all. I do not care to ask anything further if that is your answer." Catt replied more seriously, "Women are now in large numbers employed as wage earners and they are almost nowhere protected on equal terms with men, and the strongest, real reason for immediate action lies in behalf of the women who are in the industrial life of our country."[165]

Members of Congress seemed to have little difficulty accepting the argument that working women must be given the tools to protect themselves against oppression. Representative Hersey, for example, recited the following news article from the *New York Tribune*:

> WOMEN WHO NEED THE VOTE PLEAD FOR EQUAL SUFFRAGE—LAUNDRY, KITCHEN, AND SWEATSHOP WORKERS, POORLY CLAD, FACE 10,000 MEN IN UNION SQUARE AND SHOW WHY THEY SHOULD HAVE FRANCHISE.
>
> Up from the laundries and the kitchens, from the sweatshops and the factories, the working women came yesterday to plead with the men of New York for the vote. Much has been said of the need of the ballot to remedy conditions for the working women, but usually the working woman has had to keep on working and let some one else do the talking for her. Yesterday she came herself.
>
> Pale, undersized, meanly clad, the women who need the vote climbed a rickety ladder leading to a platform . . . and faced a crowd of 10,000 men. Then

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161. *Id.* at 21.

162. *See id.* at 25.

163. *See* FRUITS OF EQUAL SUFFRAGE, I (1910), *reprinted in* WOMAN SUFFRAGE, *supra* note 118.

164. *See* BJÖRKMAN, *supra* note 125, at 32.

165. *Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200 Before the House Comm. on Woman Suffrage*, 65th Cong. 51 (1918).

> in a series of "living pictures" they told the story of woman's place in the industrial world.[166]

To Senator Ashurst, "the necessity of the ballot in order that . . . women may have a voice in the shaping of proper laws for their protection" was obvious considering that women were working in factories "under the eye, perhaps, of an employer whose sole desire [was] to wring from her labor the largest amount of profit she is capable of producing for him."[167]

Other members of Congress argued that if women were forced to struggle for their existence in the same industrial environment as men, then they had a similar need for political power to protect their interests. Representative Little explained that, although it could not be helped that "modern society . . . forced women out of the homes and into an absolutely essential struggle for existence," it was possible to "give [women] the same power and the same opportunity that you give to men when you compel them to battle for existence on the same plane with men."[168]

Still other congressmen suggested that women would protect their own interests by voting to support progressive legislation that improved conditions for all workers, regardless of their sex. For example, Senator Phelan argued that opponents of woman suffrage know that

> [i]n their sweatshops, in their factories, there is a great aggregation of women, and they fear that if they are invested with the suffrage there may be . . . such an outburst of democratic manifestation at the polls that the old order will change . . . that the sweatshop shall be made wholesome; that the homes shall be made livable; that the tenements shall be made sanitary; that the working conditions of the people in the factories shall be made better.[169]

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166. 56 CONG. REC. 777 (1918) (statement of Rep. Hersey (R-ME)).

167. 51 CONG. REC. 2026 (1914) (statement of Sen. Ashurst (D-AZ)). As always, woman suffrage proponents pointed to the achievements of the suffrage states to establish the actual utility of women voting. *See, e.g.*, 56 CONG. REC. 10,946 (1918) (statement of Sen. Phelan (D-CA)). Senator Phelan noted that

> [t]he extending of the eight-hour law in California for women was a great reform, because the covetous manufacturers worked them 9 and 10 hours without hindrance from the male legislators until the women invested with the ballot simply made the request and the men acquiesced. It was not the compulsion of justice. It is the power of the ballot.

Id.

168. 56 CONG. REC. 796 (1918) (statement of Rep. Little (R-KS)); *see also* 58 CONG. REC. 80 (1919) (statement of Rep. Little (R-KS)) (noting that American civilization "gives woman the glorious privilege that man has to battle for a livelihood if she will do so for smaller wages, but denies her the use of the ballot in her struggle").

169. 56 CONG. REC. 10,945 (1918) (statement of Sen. Phelan (D-CA)); *see also* 51 CONG. REC. 2025 (1914) (statement of Sen. Ashurst (D-AZ)) (enumerating the many labor-related reforms enfranchised women would help create).

7. *Women's role in the family.*

Although it received far less attention than working conditions, suffragists identified yet another area of self-interest for which women needed the ballot: their status in the family. By voting, women would be able to amend laws that discriminated against them with regard to family matters. Thus, Carrie Chapman Catt argued

> that the laws of many states discriminate unjustly against women; that, for instance, in only sixteen [states] is a mother equal guardian with the father over her own children; that for fifty-five years the women of Massachusetts worked for an equal guardianship law and then succeeded in getting it only when a dreadful tragedy had shocked the public into a realization of the injustice of the old law, whereas in Colorado women had themselves made equal guardians with the fathers over their children in the very next year following their enfranchisement . . . .[170]

Members of Congress also took note of the arguments for equal rights within the family. Senator Shafroth wryly noted, "It may be said that the husband will give the wife all the rights she should have, but he did not do so when by legislation he vested in himself the title to all her property on marriage and arrogated to himself the sole guardianship of all the children."[171] Senators also cited the accomplishments of suffrage states in enacting legislation that protected the interests of women in the family by making community property laws more equal,[172] establishing parents as joint heirs of deceased children, and preventing husbands from mortgaging household goods without the consent of their wives.[173]

8. *The influence of the ballot.*

All of the arguments regarding the gender-based interests of women shared a common theme: The voice of women would not be heard without the power of the ballot to back it up. The group-based rhetoric of the suffragists and their supporters shared center stage with the individualist arguments for woman suffrage and, on some occasions, stole the spotlight. Suffragists argued that the franchise must be extended to women for the same instrumental reasons why it had to be extended to black Americans fifty years earlier: because voting gave a class the power to force decisionmakers to take its views and needs into account. Since "the ballot [was] the only weapon known to free government in time of peace, the only way woman

170. CATT, *supra* note 121, at 10. The comparison between Massachusetts and Colorado with regard to equal guardianship was repeated on several occasions in suffragist materials. *See, e.g.*, *1912 Woman Suffrage Hearings*, *supra* note 125, at 14-58 (statement of Rep. Taylor (D-CO)); BJÖRKMAN, *supra* note 138, at 10-11; BLACKWELL, *supra* note 118, at 4-5.

171. 56 CONG. REC. 10,898 (1918) (statement of Sen. Shafroth (D-CO)).

172. 56 CONG. REC. 10,945 (statement of Sen. Phelan (D-CA)).

173. *See* 51 CONG. REC. 4194 (1914) (statement of Sen. Shafroth (D-CO)).

can be sure of her rights in the benefits, moral and material, that flow from free government, is to be equipped with that instrument, that weapon of free government."[174]

III. JUDICIAL REVIEW OF VOTING AND ELECTORAL REGULATIONS: DOCTRINAL DEVELOPMENTS REFLECTING THE GROUP DIMENSION OF POLITICAL RIGHTS

A. *Reapportionment*

Judicial decisions commonly recognize or emphasize either the individual or group aspect of political rights. Less frequently, a court directly addresses both dimensions of voting rights in a single case. Rarer still are opinions that coherently explain how the individual and group nature of political rights fit together in deciding constitutional questions. The uncertainty reflected in the case law does not undermine our contention that political rights have a hybrid composition. In fact, the hybrid nature of political rights causes much of the ambiguity in the case law. The hybrid nature of political rights presents complex constitutional issues for courts that cannot be resolved by reference to any simple hierarchy of values.

Even cases ostensibly resting on the individual dimension of political rights cannot avoid the importance of group issues or the tension between these conflicting aspects of political rights. The seminal reapportionment cases of *Baker v. Carr*[175] and *Reynolds v. Sims*,[176] for example, illustrate the essential duality of voting rights. On the one hand, *Carr* and *Sims*—with their ringing endorsement of the "one person, one vote" principle and concern for the unequal weight assigned to the votes of single voters—seem to endorse a uniquely individualistic understanding of the right to vote.

As Richard Briffault and others have suggested, however, the Court also recognizes a significant group dimension to the right to vote in these cases.[177] As *Sims* illustrates, gerrymandering the demographic size of voting districts is unconstitutional because it provides unequal representation to large political groups, as well as to individual voters—so much so that the very essence of majority rule is jeopardized as a minority of voters threatens to take control of political decisionmaking in a state.[178] This concern about proportion-

174. 51 CONG. REC. 4194 (1914) (statement of Sen. Clapp (R-MN)).

175. 369 U.S. 186 (1962) (holding that equal protection challenges to legislative apportionment are justiciable).

176. 377 U.S. 533 (1964) (invalidating Alabama apportionment scheme under the Equal Protection Clause and the principle of "one person, one vote").

177. *See, e.g.*, Briffault, *supra* note 4, at 27-30, 60-63.

178. *See Sims*, 377 U.S. at 565.

ality in representation necessarily radiates from the group nature of the right to vote.

The reapportionment cases obscure the relative weight of the individual and group aspects of voting rights because both aspects point in the same direction from the plaintiffs' perspective: toward equalizing the population of electoral districts. As individuals *and* members of a potentially subordinated majority, the voters in gerrymandered districts are disadvantaged by the state's refusal to engage in numerically equitable reapportionment. Thus, in at least one sense, individual and group objectives of voting rights are on the same side in these cases.

The reapportionment cases also ambiguously present a clash between group and individual interests. Localities benefited by gerrymandering attempted to justify their favored treatment through something like a group rights analysis. They defended their preferred position by analogizing state legislatures to the United States Senate, where smaller states enjoy disproportionate political representation and power. The Court flatly rejected this argument in *Sims* on the grounds that allocating power among the political subdivisions of a state cannot reasonably be analogized to a constitutional compromise among sovereigns.[179]

In so doing, the Court ignored much of the persuasive force of Alabama's argument. States in preconstitutional America were not only sovereign entities; they were also political groups with common political, social, and economic interests, groups which feared their collective interests would be overwhelmed by the political power of more heavily populated states. The compromise of the Senate reflected a balance between individual and group interests. The less populated areas receiving disproportionate representation in state legislatures felt themselves to be in need of some similar political accommodation. In refusing to accept a parallel argument for numerically unequal reapportionment within a state, cases like *Sims* may be read to support the primacy of the individual dimension of voting rights over the group component.

However, as noted, there are both individual and group equality arguments in support of numerically balanced voting districts. Thus, in *Sims* and similar reapportionment cases, group and individual interests can be weighed on one side of the equality equation while group interests alone can be counted on the other side. From this perspective, it is hardly surprising that the side advancing both individual and group interests would carry the day. But this conclusion says little about the relative value of the group and individual dimensions of the right to vote in a more evenly divided context. Perhaps the most one may conclude from *Sims* and its progeny is that the vindi-

179. *See id.* at 547, 575.

cation of group concerns can never justify the complete sacrifice of individual rights.

B. *Ballot Access Cases*

The Court's ballot access cases of the past two decades present a more focused illustration of the tension between the individual/dignitary component of political rights and its group/instrumental counterpart.

In reviewing restrictions on candidacy and voting, the Court has repeatedly pointed to the "sharp contrast" and "conflict" between the two functional goals of the electoral system.[180] On the one hand, the individual voter, particularly one dissatisfied with the nominees of the major parties, wants a broad field of candidates. Each voter "hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues."[181] To the extent that the voter cannot do so, his vote is intrinsically less meaningful to him, and his role in the electoral process is correspondingly diminished.

On the other hand, a lengthy and fragmented ballot "undermine[s the function of the electoral] process [in] giving expression to the will of the majority."[182] "[T]he possibility of unrestrained factionalism at the general election"[183] defeats the important objective of reserving general elections "for major [political] struggles."[184] From this perspective, "ballots [should be] of reasonable size [and] limited to serious candidates with some prospects of public support."[185]

The Court has made the contours of these competing objectives fairly clear. As an individual and dignitary matter, both the isolated voter and the candidate who lacks public support have an important interest in being taken seriously by the political system. At a minimum, the denial of access to the ballot implicitly tells these voters and candidates that their views and concerns are not worthy of respect. From a group and instrumental perspective, limiting ballot access to those candidates with a fair prospect of winning election recognizes that political contests are about allocating power between groups, not individuals. In this view, politics deals with shared interests and collective goals, and majorities determine the direction of representation.

Confronted with these alternative demands, the Court determined that the group dimension of political rights trumps the individual aspect of voting

180. *See, e.g.*, Lubin v. Panish, 415 U.S. 709, 712-15 (1974).
181. *Id.* at 716.
182. *Id.* at 714.
183. Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986).
184. *Id.* (quoting Storer v. Brown, 415 U.S. 714, 735 (1974)).
185. *Lubin*, 415 U.S. at 715.

insofar as running for office is concerned. The individual's interest in having his name placed on the ballot without significant public support is often portrayed as the product of "intra party feuds,"[186] as a kind of "sore-loser" candidacy,[187] or as a decision "prompted by short-range political goals."[188] Accordingly, restrictions that exclusively burden individual interests, such as a refusal to count write-in votes[189] or a prohibition against independent candidates affiliating with a political party during the year prior to a primary election,[190] are upheld against constitutional challenge.

Not all ballot access restrictions withstand judicial review, however. Significantly, those that are struck down are restrictions that impair the group dimension of political rights. In *Anderson v. Celebrezze*,[191] for example, the Court struck down Ohio's early filing deadline for independent candidates.[192] In doing so, the Court emphasized the burden that this regulation placed on political groups and the importance of such an impact on the law's validity:

> As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. "Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'"[193]

The Court has similarly grounded its willingness to strike down substantial filing fees on the effect of such restrictions on groups, not individuals. Large filing fees are unconstitutional in part because the ability to pay exorbitant fees bears little relation to the state's legitimate interest in limiting the ballot to serious candidates.[194] As the Court observed in *Bullock v. Carter*,[195] "Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support."[196]

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186. *Storer*, 415 U.S. at 735.
187. Burdick v. Takushi, 504 U.S. 428, 439 (1992).
188. *Storer*, 415 U.S. at 735.
189. *See Burdick*, 504 U.S. at 428.
190. *See Storer*, 415 U.S. at 724.
191. 460 U.S. 780 (1983).
192. *See id.* at 780.
193. *Id.* at 792-93 (quoting Clements v. Fashing, 457 U.S. 957, 964 (1982) (plurality opinion) (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974)) (alteration in original)).
194. *See, e.g.*, Bullock v. Carter, 405 U.S. 134, 145-46 (1972) (pointing out that Texas' filing fee requirement was "ill-fitted" to the goal of weeding out spurious candidates).
195. 405 U.S. 134 (1972).
196. *Id.* at 143.

More importantly, these restrictive requirements particularly disadvantage groups defined by economic class. In striking down the Texas filing fee system, the Court explained:

> Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. . . . This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee. But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.[197]

Despite its commitment to the individual nature of political rights in the racial redistricting cases, the Court has not forgotten the group dimension of political participation in more recent ballot access cases. Just this Term, the Court reaffirmed that the Constitution guarantees the "right of citizens to create and develop new political parties . . . [which] advance[] the constitutional interest of like-minded voters to gather in pursuit of common political ends."[198] The Supreme Court has dismissed the group dimension of political rights only, it appears, where race is involved.

C. *The Relevance of Racial Groups*

1. *Vote dilution.*

Although the sharply individualistic orientation of the Court's current redistricting cases rests uneasily alongside older reapportionment cases and decisions reviewing ballot access restrictions, one might try to reconcile these lines of authority by examining the special role of race in our constitutional culture. No such interpretation is possible, however, when the reasoning of *Shaw* and *Miller* is juxtaposed against the vote dilution cases. These cases, featured prominently in the dissenting opinions in *Shaw* and *Miller*, explicitly deal with *racial* group cohesion. We give them only brief consideration here, despite the support they provide for our position, because they have been the subject of substantial scholarly analysis elsewhere.

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197. *Id.* at 144. Ballot access requirements that disfavored economic classes have not withstood constitutional review. *See Lubin*, 415 U.S. at 722 (Douglas, J., concurring) ("California does not satisfy the Equal Protection Clause when it allows the poor to vote but effectively prevents them from voting for one of their own economic class. . . . [T]he State must show a compelling interest before it can keep political minorities off the ballot.").

198. Timmons v. Twin Cities, 117 S. Ct. 1364, 1369 (1997) (quoting Norman v. Reed, 502 U.S. 279, 288 (1992)).

In a nutshell, the reasoning of *Shaw* and *Miller* renders the earlier vote dilution cases incoherent because the vote dilution and color-blind doctrines rest on fundamentally opposed premises. The color-blind doctrine of *Shaw* and *Miller* "insists that race has no place in politics; the vote-dilution doctrine assumes that, in practice, race is politically significant [for constitutional purposes]."[199] If there is no group dimension to voting rights, no racial group can have its political power diluted because racial groups have no cognizable identity. As Richard Briffault has succinctly put things:

> Vote dilution is necessarily about groups. In vote-dilution cases there is no claim that an individual has been denied the right to cast a ballot, to have it counted, or to have that ballot given the same nominal weight as all other ballots cast. Individuals are affected by vote dilution only insofar as they are members of politically cohesive groups.
>
> . . . .
>
> There could be no such thing as the dilution of the votes of racial or ethnic minorities unless those minorities constituted politically distinctive groups.[200]

Of course, even after *Shaw* and *Miller*, it is possible that the deliberate creation of a large voting district for the purpose of minimizing the exercise of black political power would still be struck down as unconstitutional. The Court could not, however, rest that judgment on the impact of the redistricting on the political influence of black voters; the Court would have to base its decision on illicit purpose alone and the invidious but erroneous belief by the district's creators that the racial composition of the district mattered with regard to election results.[201]

2. *The political restructure cases.*

The *Miller/Shaw* reasoning also clearly conflicts with the so-called "political restructure" cases.[202] In these cases, the Court invalidated changes in the structure of a state or city's political processes that isolated policy decisions intrinsically important to racial minorities, thereby making it difficult for these groups to further their interests in conventional legislative politics.[203]

The two most important cases in this area deserve particular attention. In *Hunter v. Erickson*,[204] the Court first gave "clear[] expression" to the principle that equal protection requirements may be violated by "subtl[e] dis-

199. Briffault, *supra* note 4, at 59.

200. *Id.* at 60-61.

201. *But see* Palmer v. Thompson, 403 U.S. 217, 217-19 (1971) (rejecting inquiry into impermissible motive if state action is equal in its effect on racial groups).

202. *See* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1440-41 (9th Cir. 1997) (detailing the logic of the political structure analysis and its applications).

203. *See id.* (describing the legal reasoning behind political restructure cases).

204. 393 U.S. 385 (1969).

tort[ions in] governmental processes [that operate to] . . . place special burdens on the ability of minority groups to achieve beneficial legislation."[205] In *Hunter*, the citizens of Akron, responding to a fair housing ordinance enacted by the city council, amended the city charter to prevent implementation of any fair housing ordinance without the express approval of a majority of Akron voters.[206] The amended charter defined the ordinances subject to the newly created popular approval requirement as those laws regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry."[207] The charter amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required approval of the electors before any future [housing discrimination] ordinance could take effect."[208]

By an eight-to-one vote, the Court struck down the charter amendment as violative of equal protection. The Court declined to rest its decision on a finding of invidious intent; instead, the Court subjected the charter amendment to strict scrutiny because it effectively drew a "racial classification [that] treat[ed] racial housing matters differently [and less favorably]" than other matters.[209] The Court emphasized that the charter amendment, although neutral on its face in that it drew no distinctions between racial and religious groups, would nonetheless uniquely disadvantage the primary beneficiaries of antidiscrimination laws—i.e., minorities—by forcing them to run a legislative gauntlet of popular approval that other laws, and thus other interest groups, are spared.[210]

In *Washington v. Seattle School District No. 1*,[211] the Court applied and extended *Hunter*. To cure widespread de facto racial segregation in Seattle-area schools, Seattle School District No. 1 adopted a voluntary integration plan that used extensive pupil reassignment and race-based busing to eliminate one-race schools.[212] In response, the voters of Washington enacted Initiative 350. On its face, the initiative provided broadly that "no school board . . . shall directly or indirectly require any student to attend a school other than [the geographically closest school]."[213] The initiative, however, then set out so many exceptions that the effect on local school boards was to prohibit reassignment or busing for the purpose of racial integration, but to permit

205. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982) (describing the origins of the *Hunter* doctrine).

206. *See Hunter*, 393 U.S. at 386-88.

207. *Id.* at 387.

208. *Id.* at 389-90.

209. *Id.* at 389.

210. *See id.* at 390-91.

211. 458 U.S. 457 (1982).

212. *See id.* at 457.

213. WASH. REV. CODE § 28A.26.010 (1981) (repealed 1991).

reassignment and busing for all other educationally valid reasons. As the Supreme Court asserted:

> [T]he initiative was directed solely at desegregative busing in general, and at the Seattle plan in particular. Thus, "[e]xcept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students."[214]

By a five-to-four vote, the Court struck down the plebiscite. As in *Hunter*, the Court declined to rest its holding on a finding of invidious intent. Instead, the Court invalidated Initiative 350 because it specially removed racial busing—a program of particular importance to racial minorities—from the control of local decisionmaking bodies and shifted it to the statewide level, where minorities were less likely to enjoy democratic success.[215] This selective and unfavorable treatment of public programs beneficial to minorities denied these minorities the equal protection right to "full participation in the political life of the community."[216]

Throughout these restructure cases,[217] the Court has applied, with varying degrees of clarity, a two-pronged test. First, a challenger must show that the law in question is "racial" or "race based" in "character," in that it singles out for special treatment issues particularly associated with minority interests. Second, the challenger must show that the law imposes an unfair political process burden with regard to these "minority issues" by lodging them at a high level of decisionmaking, thus entrenching their unfavorable resolution. Strict scrutiny is triggered only if the challenger satisfies both parts of the test.[218] A law that imposes special political process burdens on groups that are not defined by race does not trigger special constitutional scrutiny under this test.[219] Similarly, the Court might find a law that deals explicitly

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214. *Seattle Sch. Dist. No. 1*, 458 U.S. at 463 (quoting Washington v. Seattle School Dist. No. 1, 473 F. Supp. 996, 1008 (W.D. Wash. 1979)).

215. *See id.* at 474 ("As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.").

216. *Id.* at 467.

217. *See also* Lee v. Nyquist, 318 F. Supp. 710, 716 (1970) (declaring New York's prohibition against the race-based organization of school districts unconstitutional).

218. *See* Crawford v. Board of Educ., 458 U.S. 527, 537 n.14 (1982) (explaining that the charter amendment's presumptive invalidity in *Hunter* followed from "'the reality . . . that the law's impact falls on the minority' . . . *and* the distortion of the political process worked by the" . . . amendment" (emphasis added) (citation omitted)); *Seattle School Dist. No. 1*, 458 U.S. at 470 (finding that the constitutional flaw in Initiative 350 is that it "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique [political] burdens on racial minorities"); Hunter v. Erickson, 393 U.S. 385, 389-90 (1969) ("Here, . . . there was an explicitly racial classification [that] treat[s] racial housing matters differently . . . [and subjects them to a unique procedural] gantlet [sic].").

219. *See* James v. Valtierra, 402 U.S. 137, 140-41 (1971) (suggesting that the *Hunter* line of cases is limited to race-sensitive issues). *But see* Evans v. Romer, 854 P.2d 1270, 1276 (Colo. 1993) (Evans I) (extending the *Hunter* line of cases to protect gays and lesbians).

with "racial" issues but does not entrench any burdens on the political process to be constitutional.

The central idea behind this line of cases is relatively straightforward: Just as laws cannot single out minorities for substantively inferior treatment—say, a sales tax that uniquely burdens a particular racial group—neither can laws single out minority groups and relegate them to inferior treatment in the political process—by imposing a race-based poll tax, for example. Consider the following (extreme) hypothetical: a state constitutional provision that requires a 90% legislative supermajority vote for any law that benefits persons of color. This provision is obviously problematic because its text explicitly defines the provision's scope in terms of minority interests and because the high supermajority requirement obviously imposes a substantial burden.

The political restructure line of cases is controversial in large part because, unlike the hypothetical posed above, the cases did not concern laws *whose very scope was explicitly defined in terms of minority interests*. The laws in question did not expressly single out, or even refer to, minorities, but instead singled out *issues* the Court has *deemed* to be of particular and sufficient interest to racial minorities. The determination of minority interests is the threshold inquiry of the first prong of the two-pronged test. Indeed, the Court in *Seattle* deemed racial busing a public policy program favored by racial minorities and important to their interests, even though a sizable number of blacks, as the Court conceded, were opposed to race-conscious busing measures.[220] This "deeming" or "characterization" was central to the Court's analysis in striking down both the Akron charter amendment and Initiative 350.[221]

And yet, "deeming" an issue racial in character—the doctrinal foundation of the restructure cases—itself would be constitutionally illicit under the reasoning of *Shaw* and *Miller* and the formalistic model of equality that they reflect. If government cannot assume that people of the same race or gender share common interests and perspectives, then it is difficult to understand why the courts, as a branch of government, can do so. But the Supreme Court has found certain public policy questions—i.e., those relating to antidiscrimination, busing, or affirmative action—to be ones "minorities may consider . . . to be 'legislation that is in their interest.'"[222] In other words, these political restructure cases are based entirely on the permissibility of—indeed, the need for—the government's assumption of race-based political

220. *See Seattle Sch. Dist. No. 1*, 458 U.S. at 472 ("It is undoubtedly true . . . that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents . . . .")

221. *See id.* ("[D]esegregation of the public schools, like the Akron open housing ordinance, . . . inures primarily to the benefit of the minority . . . .").

222. *Id.* at 474 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J. concurring)).

cohesion. The Supreme Court, in these political restructure cases, "assum[ed] that voters . . . because of their race . . . share the same political interests . . . at the polls."[223] Yet the political restructure cases are not even *cited*, let alone reconciled, in *Miller* and *Shaw*.

The political restructure cases are inconsistent with the Court's current equal protection, voting rights jurisprudence in another fundamental sense. Not only do *Shaw* and *Miller* cast doubt on the propriety of identifying a policy issue as "racial in nature," they also undermine the conclusion that restructuring the political process will have a constitutionally cognizable impact on the political process rights of racial minorities.

Shifting a public policy decision about racial discrimination in housing or education from the legislature to a plebiscite, or from local to state control, burdens racial minorities only if one assumes that race plays some role in shaping voter attitudes on these matters. If blacks and whites are equally likely to support antidiscrimination laws and race-based busing, and if government cannot acknowledge a correlation between race and political viewpoint on these issues, then relocating these decisions would not have much of a real or predictable impact on continued governmental support for such policies. The suggestion that shifting decisions about race-based busing from the local to state level impairs the ability of black voters to influence this policy judgment depends largely on the fact that blacks comprise a smaller percentage of the state electorate than certain local electorates. Thus, the constitutional injury in *Seattle* itself depends on a premise that *Shaw* and *Miller* categorically reject: that black voters would share a common political perspective that would distinguish them from other voting blocs.

IV. JURY EXCLUSION CASES

In a long series of cases beginning with *Strauder v. West Virginia*[224] in 1879 and culminating with *J.E.B v. Alabama ex rel. T.B.*[225] in 1994, the Court has evaluated the constitutionality of state action that excludes racial and gender groups from jury pools and petit juries. Like *Shaw* and *Miller*, the most recent jury cases ostensibly rely on the Equal Protection Clause. As we shall see, although the recent cases correctly invalidate exclusionary actions, their underlying premises remain open to serious question. Indeed, the Court's assumptions in such cases are vulnerable to essentially the same criticism we direct at its recent redistricting decisions.

223. Miller v. Johnson, 515 U.S. 900, 912 (1995) (citation omitted).
224. 100 U.S. 303 (1879).
225. 511 U.S. 127 (1994).

A. *The Questionable Focus on Fungibility and Multiple Injuries*

The current Court suggests two premises to justify its holdings in the jury exclusion cases. First, it relies heavily on the idea that it is unconstitutional for the state to assume or suggest that people of the same race or gender share similar perceptions, attitudes, or perspectives. Thus, in *J.E.B.*, the Court indignantly rejects Alabama's argument in support of gender-based peremptory challenges that men and women may differ in their sympathies for and their receptivity to the male defendant's arguments in a paternity action. Such a generalization not only falls far short of the substantially important interest required to justify gender classifications, Justice Blackmun, writing for the Court, insists, but it is also an outmoded, empirically unsupported, and constitutionally impermissible stereotype worthy of no respect.[226] For the purposes of jury service, men and women are fully fungible. Accordingly, it violates the Constitution to treat them differently.

The Court's second premise is that race or gender consciousness in jury selection creates a multiplicity of serious injuries. Exclusionary jury selection procedures injure the entire community, since they undermine public confidence in the administration of justice and "invite[] cynicism" as to the impartiality of the system.[227] Excluded jurors are injured by the stigma that results when they are denied the opportunity to play an important civic role.[228] And the litigants themselves are injured because of the attenuated risk that "the prejudice that motivated the discriminatory selection will infect the entire proceeding."[229]

When it moves from the general to the specific, however, the Court experiences considerable difficulty in explaining the harm to the defendant caused by exclusionary jury selection procedures. Race-based exclusion deprives criminal defendants who are the same race as the excluded jurors of the protection guaranteed by the Fourteenth Amendment "against race or color prejudice."[230] But the source of the prejudice and the manner in which it is manifested are not clearly identified. The Court discusses "a defendant's interest in 'neutral jury selection procedures'"[231] and affirms that a jury is supposed to be comprised of the peers of the accused.[232] It maintains that

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226. *See id.* at 137-40. Justice Blackmun's opinion concludes that most studies find minimal or no differences in perspective between male and female jurors. *See id.* at 138 n.9. He further argues that, even if there was some truth to such stereotypes, this would not justify discrimination based on gender. *See id.* at 139 n.11.

227. Powers v. Ohio, 499 U.S. 400, 412 (1991).

228. *See J.E.B.*, 511 U.S. at 140-42.

229. *Id.* at 140.

230. Batson v. Kentucky, 476 U.S. 79, 87 (1986) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1879)).

231. *Powers*, 499 U.S. at 411 (quoting Allen v. Hardy, 478 U.S. 255, 259 (1986)).

232. *See Batson*, 476 U.S. at 86 (citing *Strauder*, 100 U.S. at 308).

discrimination in the jury selection process "'casts doubt on the integrity of the judicial process' and places the fairness of a criminal proceeding in doubt."[233] However, the Court states that the harm to the defendant does *not* come about because the excluded jurors "may have been predisposed to favor the defendant."[234] The exact nature of the harm to the defendant thus remains an unexplained mystery.

Much of this reasoning is subject to criticism. Justice Blackmun emphatically condemns Alabama's suggestion that gender may, as an empirical matter, correlate with juror attitudes as an overbroad and unconstitutional stereotype.[235] But Justice Blackmun's majority opinion produces more than a little dissonance when read in conjunction with Justice O'Connor's concurrence. Justice O'Connor argues, with much force, that in the real world race and gender do matter, that numerous studies make clear that, at least in rape cases, female jurors vote differently than male jurors, and that "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case."[236]

In recent majority opinions, both Justices Blackmun and Kennedy allege that race or gender-based peremptory challenges stigmatize jurors by perpetuating harmful stereotypes.[237] However, this assertion appears implausible, given the nature of the voir dire process. If race or gender-based peremptory challenges were the only kind of peremptories based on broad generalizations, displaced jurors might reasonably feel their race or gender was given undue weight. But in a system in which jurors are excused because of generalizations regarding their religion, class, age, vocation, education, wealth, and a host of other factors, the claim of stigma loses much of its force. The range of potential inferences that could be drawn about why someone was struck from a jury is simply too wide to raise equality concerns. A jury selection methodology that manages to stereotype everyone in the world—members of all races and both sexes—may have a lot of things wrong with it, but it is hard to argue that it causes serious stigmatic injuries.[238]

Yet in a remarkable statement in the recent jury exclusion case *Powers v. Ohio*,[239] the Court per Justice Kennedy asserted that "the assumption that no

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233. *Powers*, 499 U.S. at 411 (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)) (citation omitted).

234. *Id.* Rather, the Court finds an injury in the perception and real possibility of unfairness in the process. *See id.*

235. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 137-40 (1994).

236. *Id.* at 149 (O'Connor, J., concurring).

237. *See, e.g., id.* at 140, 142 & n.14; *Powers*, 499 U.S. at 408-10.

238. Of course, if peremptories are used systematically to disproportionately remove members of minority races or religions, a sense of group stigma could arise.

239. 499 U.S. 400 (1991).

stigma or dishonor attaches [to race-based peremptory challenges] contravenes accepted equal protection principles."[240] Under this color-blind equal protection analysis, the Court seems to presume that stigma occurs in such circumstances, without regard to whether excluded jurors actually experience injuries.

B. *The Critical Weakness: Ignoring Historically Recognized Harm*

These criticisms, however justified they may be on their own, are only incidental to more important problems with the Court's analysis. The most critical weakness of the Court's current approach to exclusionary jury selection procedures is that it ignores—indeed, that it denies the possibility of—the historically recognized concrete harm that renders the race-based exclusion of jurors constitutionally problematic. This harm is the potential that the race-based exclusion of jurors may eliminate the important and distinct political voices of racial groups.

This justification for prohibiting race-based exclusionary practices dates back to the nineteenth century. In 1879, the Court in *Strauder* understood all too well why a statute that excluded blacks was harmful to blacks. Whites and blacks were not fungible jurors. Many whites harbored extreme prejudice against black people.[241] Indeed, it was the intensity of that prejudice that had required the adoption of the Fourteenth Amendment itself.[242]

The Court in *Strauder* patiently explained that "prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."[243] The framers of the Fourteenth Amendment had been particularly concerned that such prejudice would victimize and deny equal protection to black citizens.[244] It was precisely because of this "apprehended existence of prejudice" that excluding black people from juries so clearly discriminated against black interests.[245] To be sure, the Court in *Strauder* recognized that the total exclusion of blacks from jury service was inherently discriminatory and visited dignitary harms ("a brand . . . of their inferiority") upon black people as a group.[246] But the stigma experienced by the black population as a whole as

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240. *Id.* at 410.

241. *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1879) ("[I]t require[s] little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would . . . be looked upon with . . . positive dislike . . . .")

242. *See id.* at 309.

243. *Id.*

244. *See id.*

245. *Id.*

246. *Id.* at 308.

a result of their exclusion was not—to the Court at least—the primary inequity and harm created by racist jury selection procedures. The injury recognized by the Court, evident to all, was the risk that a black defendant would be unfairly deprived of his life or liberty by a jury inflamed by racial prejudice, a jury in which the black voices had been instrumentally removed from participation in the administration of law.[247]

If the current Court's analysis in cases like *Powers* and *J.E.B.* is accepted at face value, however, such concerns would be misguided and constitutionally untenable, since the conservative majority believes that the race of jurors makes no difference. All-white juries are functionally indistinguishable from all-black ones, and it is constitutionally impermissible to suggest that their results would differ. The inclusion of blacks on juries has only indirect, attenuated consequences for jury deliberations and decisions. The current Court's reasoning seems to suggest that the historical fear of verdicts based on racial prejudice and animosity represents, in constitutional terms, a paranoid fantasy devoid of substance.

Indeed, in at least one sense, the Court's rationale for invalidating race and gender-based peremptory challenges in *J.E.B.* and *Powers* on equal protection grounds seems more closely aligned with Justice Field's dissent in *Strauder*[248] than with the majority's position in that seminal case. Justice Field dissented in *Strauder* on the grounds stated in his dissent in a companion case, *Ex Parte Virginia*.[249] In *Ex Parte Virginia*, the majority argued that

> the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color. We held that immunity from any such discrimination is one of the equal rights of all persons, and that any withholding it by a State is a denial of the equal protection of the laws, within the meaning of the amendment. We held that such an equal right to an impartial jury trial, and such an immunity from unfriendly discrimination, are placed by the amendment under the protection of the general government and guaranteed by it.[250]

To Justice Field, the majority's argument was entirely in error. He could not see how the exclusion of black jurors from trials unconstitutionally undermined anyone's civil rights.[251] Justice Field conceded that the rights of

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247. *See id.* at 309-10.

248. *See id.* at 312 (Field, J., dissenting).

249. 100 U.S. 339 (1979). In *Ex Parte Virginia*, the Court denied a petition for a writ of habeas corpus sought by a county judge who had been charged with excluding citizens from jury service because of their race in violation of federal law. *See id.* at 340, 349. The judge claimed that the statute prohibiting race-based jury exclusions exceeded the powers of Congress. In response, the Court, citing *Strauder*, defended this exercise of federal power as appropriate enforcement of the equal protection mandate of the Fourteenth Amendment. *See id.* at 344-48.

250. *Id.* at 345.

251. *See id.* at 367-68 (Field, J., dissenting).

individual black citizens to serve as jurors were arguably abridged by a law denying all the members of their racial group the opportunity of jury service. But the right to serve on a jury was a *political right, not a civil right*, and only the latter was protected against infringement by the Fourteenth Amendment.[252] Thus, Justice Field explained:

> Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The Thirteenth and Fourteenth Amendments were designed to secure the civil rights of all persons, of every race, color, and condition; but they left to the States to determine to whom the possession of political powers should be [e]ntrusted.[253]

To Justice Field's mind, the Fourteenth Amendment did not touch on political rights and thus did not speak to the rights of excluded jurors denied political participation.[254]

Nor were a black *defendant's* civil rights infringed by racially exclusionary jury selection practices. It cannot be, Justice Field argued, that when a person of particular characteristics is charged with a crime, the presence of persons with similar characteristics on the jury "is essential to secure to him the equal protection of the laws."[255] As a formal matter, such a principle would exceed all reasonable boundaries. State laws routinely excluded women, children, the aged, and aliens from jury duty. Yet surely, no one would "contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests."[256] Furthermore, even the more narrow claim that the race-based exclusion of jurors alone represented an Equal Protection Clause violation failed as a logical proposition. Thus, Justice Field argued:

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252. *See id.*

253. *Id.* at 368.

254. Indeed, one of us has previously argued that the Fifteenth Amendment—which does speak to political rights, including jury service—would have been a much better ground upon which the Court could have rested its holdings in *Strauder* and *Ex Parte Virginia*, as well as more recent cases. *See* Amar, *supra* note 8, at 238-41. By focusing on the political nature of jury service and the political rights of the group being excluded from political participation, the Court could have avoided complicated problems that arise (and are discussed, in part, below) when the Court's holdings rest, as does *Strauder*'s, on the rights of the litigants alone. Recognition that juries serve the polity and not just the parties would have strengthened *Strauder*'s reasoning, but it need not challenge *Strauder*'s result.

255. *Ex Parte Virginia*, 100 U.S. at 368 (Field, J., dissenting).

256. *Id.* at 367.

> The position that in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race was set off against the prejudices of the other.[257]

Although they reach markedly different conclusions, Justice Field's argument has much in common with the majority's position in the recent race and gender peremptory challenges cases. Justice Field, like the current Court, suggests that race does not correlate with the attitudes or behavior of jurors. Unlike the modern Court majority, however, Justice Field directly confronts rather than avoids the implications of this reasoning. If race has no bearing on how jurors think and act, and if courts should construe the race of jurors as having no deliberative significance, Justice Field asks, then how can a defendant claim he has been unjustly tried by a jury from which the members of his race have been excluded?[258] Justice Field, at least, is willing to go where his logic takes him.

In short, the current Court's analysis of race and gender-based peremptory challenges seems to affirm the holding in *Strauder* while at the same time adopting the reasoning of the dissenting opinion by Justice Field. That it does so is not entirely surprising, since the Court's understanding of equality in the area of political rights, particularly with regard to jury service, has been ambivalent and uncertain since the time that *Strauder* was decided. If, as the *Strauder* opinion clearly implies, race does matter in jury deliberations, then why is Justice Field in error when he suggests that this proposition dictates that the participation of racial minorities on juries must not only be permitted but indeed required as the only way to ensure a black defendant a fair trial?[259] Yet in another companion case to *Strauder*, *Virginia v.*

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257. *Id.* at 368-69.

258. Jeffrey Abramson suggests that Justice Field's argument in his dissent in *Ex Parte Virginia* is a proper basis for rejecting the claim that the inclusion of blacks on a jury trying a black defendant is constitutionally required. In doing so, Abramson implies that Justice Field's reasoning is consistent with the Court's attempt in *Strauder* to serve "the traditional ideal of impartial justice across racial lines" in striking down West Virginia's exclusionary statute while maintaining "the ideal of color-blind justice." JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 107 (1994).

Justice Field, of course, asserted the contrary position. He dissented in *Strauder* for the same reasons why he dissented in *Ex Parte Virginia*. *See* Strauder v. West Virginia, 100 U.S. 304, 312 (1879) (Field, J., dissenting). He believed that, under a color-blind model, the defendant in *Strauder* could not have been prejudiced by the exclusion of blacks from the jury that convicted him.

259. *See Ex Parte Virginia*, 100 U.S. at 368-69 (Field, J. dissenting).

Rives,[260] the Court stated explicitly that black participation in a jury trying a black defendant is not constitutionally required.[261]

This doctrinal puzzle, which has never been adequately resolved, is at least in part a product of the Court's failure to fully recognize the political nature of juries and the hybrid nature of political rights. If the Court had employed the Fifteenth instead of the Fourteenth Amendment to analyze peremptory challenges, then constitutional doctrine could appropriately focus more on the distinctive voice of the excluded groups and the instrumental consequences of the denial of their rights and less on the civil rights and equality interests of each individual litigant. Alas, the Court has yet to see the light.

C. *The Mandate of Political Equality*

The inconsistent explanations and justifications of the jury exclusion decisions, highlighted both by Justice Field's dissents and by recent equal protection decisions, have obvious parallels to recent cases in the voting rights area. Jury service, like voting and other political rights, serves multiple functions. And like racial discrimination that limits access to the franchise or dilutes the power of the ballot, the exclusion of racial groups from juries results in both dignitary and instrumental harms. In this instance, we can see once again how the injuries caused by deprivation of certain rights illuminate the hybrid nature and importance of those rights. More importantly, the lessons learned from these insights will provide a basis for resolving the constitutional dilemma the Court confronts in both the jury and districting cases.

From the perspective of various individual participants, as distinguished from the perspective of the excluded groups themselves, there are several

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260. 100 U.S. 313 (1879).

261. *See id.* at 323. The *Rives* court did not explain its conclusion. It merely stated emphatically, "A mixed jury in a particular case is not essential to the equal protection of the laws . . . ." *Id.* The following year, in *Neal v. Delaware*, 103 U.S. 370 (1880), the Court reversed the conviction of a black man convicted of rape with the explanation that the exclusion of black citizens from the grand and petit juries undermined "the fairness and integrity of the whole proceeding against the prisoner." *Id.* at 396. Chief Justice Waite, in dissent, questioned how such a conclusion could be consistent with *Rives*, where the Court had said, "[T]he mere fact that no person of color had been allowed to serve on juries where colored men were interested, was not enough to show that they had been discriminated against because of their race." *Id.* at 398 (Waite, J., dissenting).

Of course, the Court in *Rives* had distinguished between juries that lacked black jurors as a result of neutral juror selection policies and those that lacked black jurors because of deliberate discrimination. *Rives*, 100 U.S. at 322. But as Chief Justice Waite's *Neal* dissent pointed out, the reason why blacks were excluded from a jury was in fact irrelevant to the defendant's charge that he was being tried unfairly without the equal protection of the laws. *See Neal*, 103 U.S. at 398 (Waite, J., dissenting). To Justices Waite and Field, unless one assumed that whites were prejudiced against blacks, the exclusion of blacks from a jury would make no difference; and if whites were prejudiced against blacks as a general matter, then the trial of a black defendant by white men was manifestly unfair regardless of the way the jury was selected. *See id.* at 408-09 (Field, J., dissenting).

harms caused by the exclusion of members of a particular race (or people of a particular sex) from juries. First, exclusion is a basic affront to the dignity of the individual barred from service because of her race or gender. Exclusion from jury service on the basis of race subordinates a person's individual identity to his racial one. Exclusion assumes that the juror's race dominates all of that person's other qualities and experiences. The excluded juror is treated as a *black* person, not a black *person*. This, we think, is the stigmatic harm the Court intuitively recognizes in cases like *Batson v. Kentucky*[262] and *Powers*,[263] but that it does not adequately describe or place in political context.

The Court's predisposition to see racial matters in all-or-nothing terms is one reason why the Court has so much trouble satisfactorily explaining this harm. Justice Kennedy's concurring opinion in *J.E.B.*, for example, appears to suggest that a person's race either has no bearing on who she is or is the controlling characteristic of her identity.[264] There is no room in this model for a person whose race is simply a part of who she is and whose racial experiences are simply a part of her background and perspective. Because we believe that this kind of person—for whom race is a part of her identity, but not necessarily the dominant part—describes much of the population, the Court's categorical rejection of the relevance of race rings analytically hollow.

Although Justice Kennedy's analysis, which assumes that race can affect perspective only in an invidious way the state cannot countenance, might have been appropriate in the racially polarized world of Justice Field in the 1870s, it simply does not describe the present. Today a black defendant may be wary of an all-white jury not simply out of fear of overt racism, but because a white juror might interpret evidence or understand the context of events differently than a juror of a different race.[265] Race might serve as a

262. 476 U.S. 79, 87 (1986) ("[B]y denying a person participation in jury service on account of his race, the State unconscionably discriminated against the excluded juror.").

263. *See* Powers v. Ohio, 499 U.S. 400, 410 (1991) ("[T]he assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence.").

264. Justice Kennedy seems to see race and gender solely in terms of bias and never in terms of the perspectives of people differently situated because of their background or experience. Thus, Kennedy writes in his *J.E.B.* concurrence:

> We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own. . . .
>
> In this regard, it is important to recognize that a juror sits not as a representative of a racial or sexual group but as an individual citizen. . . . The jury pool must be representative of the community, but that is a structural mechanism for preventing bias, not enfranchising it.

J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 153 (1994) (Kennedy, J., concurring).

265. *See* Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 121-22 (1994) (describing the "general" or "interpretive" bias on the part of jurors based on different life experiences that expresses itself in different race-based perspectives);

vantage point that gives different jurors different perspectives, although each person is viewing the world as honestly and forthrightly as he can. To require a member of a racial minority to somehow give up that perspective in order to faithfully discharge her duties as a juror, as Justice Kennedy seems to suggest in *J.E.B.*,[266] challenges that person's integrity in a fundamental way. Thus, when political rights are at issue, the Court must recognize that race need not always be ignored. A person's understanding of who he is and what has been important in his life deserves respect from the state even if it is based in part on his race.[267]

There is a second harm that, although it derives from the group nature of the right to serve on a jury, may be seen from the individualistic perspective as well. Excluding members of a particular race from a jury may have instrumental consequences for an individual criminal defendant. Here, again, the Court must recognize that race matters. Because race plays a role in the way individuals in this country experience the world, preventing persons of one race from serving as jurors effectively silences what may be a distinct voice or perspective in jury deliberations. In so doing, it skews these deliberations in such a way that the result may be contrary to a defendant's interests. While this difference in perspective may not always exist or be relevant in every case, excluding the members of a group because of their race poses a constant danger that their voice will not be heard in one of the key institutions of our society in which an individual's life or liberty may be at risk.

Mark Cammack, *In Search of the Post-positivist Jury*, 70 IND. L.J. 405, 409 (1995) ("[R]ecent research on juror decision-making confirms that the identity of the decision-maker is inseparable from, and an ingredient in, the decision."); George P. Fletcher, *Political Correctness in Jury Selection*, 29 SUFFOLK U. L. REV. 1, 13-14 (1995) (recognizing that racial differences affect jury behavior and thinking on a wide range of issues).

266. *See* note 264 *supra.*

267. Abramson seems to agree that there is more to fair representation on jury panels than the objective of "canceling out the competing biases built into identity in America." ABRAMSON, *supra* note 258, at 123. "Absent [from such an approach] was any sense that members of different groups brought much of value to the conversation." *Id.* He recognizes that diverse jurors make a special contribution to jury deliberations by bringing "a new point of view," *id.* at 120, and "more knowledge," *id.* at 124, to the enterprise.

Abramson fears, however, that viewing jury service in political or representational terms goes too far. He argues that doing so risks transforming the goal of trials from the pursuit of impartial justice to a kind of compromise among competing interest groups. What passes for justice under this approach would be "reached by miring the jury in representing those subtle, imponderable but inescapable biases and preferences we all imbibe along with our group identities." *Id.* at 125.

Although we agree that jury deliberations should not involve interest balancing among group constituencies, we think that recognizing the political dimension to jury service involves perspective representation more than interest group representation. What people see may in some cases depend on where they stand, and the only way to obtain a complete picture is to discuss events among viewers who are differently situated. A verdict reached from the deliberations of such a jury should not be a deal, but it will be the result of a dialogue that would not exist among homogenous participants.

Once it is recognized that a juror's race may have a significant role in defining her political identity and may, consequently and legitimately, influence her judgment as a juror, the constitutional difficulty in understanding the harm caused by exclusionary jury selection procedures wanes. The exclusion of black citizens from the jury's deliberations risks undermining the democratic legitimacy and fairness of the defendant's trial. This is why a litigant, in addition to the polity, may be harmed by such exclusionary policies and why the litigant's protests cannot be answered by assurances of juror fungibility.

As we explained in our discussion of voting rights and the above analysis, the dignitary and instrumental consequences of the abridgement of political rights are intimately connected to the hybrid—individual and group—nature of these interests. Thus, to achieve political equality and avoid each type of harm, the Court must recognize both the individual and group dimensions of the right to serve on a jury. As a facet of political choice and personal perspective, race and group membership matter and may be appropriately acknowledged. Neither race nor group membership, however, can be recognized in a way that deprives another person of her right to exercise her individual political rights. The group dimension of political rights cannot trump the individual nature of political rights.

D. *The Scope and Nature of the Political Equality Mandate*

The far-reaching implications of these principles require careful discussion and analysis. For although the above discussion refutes Justice Field's argument about the irrelevance of race, it does not respond to his additional arguments about the scope of the equality mandate. If race matters, Justice Field argued, then other characteristics must matter as well. The distinct voices of young people, senior citizens, women, and other groups have been kept off of juries. Why doesn't the exclusion of *these* voices also jeopardize the democratic legitimacy and fairness of any trial in which a person with characteristics similar to the defendant is prevented from serving? Nor has our discussion thus far confronted head-on Justice Field's second argument: that if race matters, then all juries must include members of the defendant's race.[268]

Justice Field is correct, of course, that individual characteristics other than race relate in important ways to a juror's attitude and perspective.

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268. *Cf.* Virginia v. Rives, 100 U.S. 313, 334 (1879) (Field, J., dissenting) (refuting the theory that "the presence of persons of the colored race on the jury is essential to secure them the 'equal protection of the laws'"); *see also* Ex Parte Virginia, 100 U.S. 339, 368-69 (1879) (Field, J., dissenting) (arguing that proponents of such a theory must also logically conclude that equal protection requires a judge of the same race as the defendant and the exclusion of all whites from such a jury); note 257 *supra* and accompanying text.

However, at the time of Justice Field's dissents, the Court recognized race, unlike these other qualities, as a politically salient characteristic that could not serve as the basis for the denial of political rights.[269] Thus, the deliberate exclusion of other groups did not—at least as a constitutional matter in 1879—undermine the representative nature of the jury by excluding voices and groups the Court had already recognized must be included.

We do not suggest, of course, that the restricted nature of constitutional political pluralism in the late 1800s adequately identified all those groups and characteristics in the polity that deserve constitutional recognition. Justice Field was, in some sense, ahead of his time in pointing out the anomaly that resulted when the Court protected black defendants from trial by all-white juries, but did not protect women defendants from all-male juries.[270]

Justice Field's concerns about mandatory inclusion of racially diverse groups has also proven prescient and even more difficult to resolve.[271] The

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269. *See* Amar, *supra* note 8, at 227 ("[A]ll provisions in the Constitution or laws of any state whereby any distinction is made in *political* or civil right or privileges on account of race . . . or color shall be inoperative and void." (quoting CONG. GLOBE, 40th Cong., 3d Sess. 1032 (1869) (statement of Sen. Fessenden (R-ME))) (emphasis added) (omission in original)).

270. *See Rives*, 100 U.S. at 335 (Field, J., dissenting) ("Women are not allowed to sit on juries; are they thereby denied the equal protection of the laws?").

271. Because the absence of discriminatory selection procedures will not always guarantee the presence of a black perspective or voice on every jury trying a black defendant, the causal link between discrimination in the jury selection process and the purported unfairness of the defendant's trial that would justify overturning his conviction may be difficult to establish. How can a black defendant demonstrate that the particular black citizens who would have been seated on his jury would have voiced a different perspective than the white jurors who heard his case? More importantly, how can the defendant even establish that there would have been any black jurors at all on the panel at his trial? Even if the state had not deliberately prevented blacks from serving, racial demographics will result in many jury panels that are all white even when a neutral and impartial selection process is employed.

The first question is easier to answer than the second by analogizing to the voting rights context. If black voters were systematically prevented from exercising the franchise in an election, the result of that election should be invalidated. Arguments that black voters do not necessarily share similar political interests or that they probably would have voted for the winning candidate in about the same percentage as white voters would be largely irrelevant to such a conclusion. The Fifteenth Amendment enfranchised black voters in part because they might constitute a distinct voice that deserved representation in the polity. That collective opportunity cannot be foreclosed on the theory that it would never be exercised. A similar analysis applies to black citizens who are prevented from serving on juries.

The possibility that no black jurors may be seated under neutral jury selection procedures may be ignored for a different reason, one which relates to the unique nature of the jury as a political institution. Due to its limited size, no petit jury can function as a truly representative decisionmaking body. Our society is simply too pluralistic to guarantee actual representation of all groups and perspectives that should be included in a jury's deliberations. However, jury unanimity serves as a partial counterweight to that structural limitation: The fact that one dissenter can prevent a verdict magnifies the power of minority voices on juries. But the unanimity requirement cannot add volume to a voice that is not represented in the first place. Thus, the risk that this single voice will be excluded from jury deliberations because the members of a particular race are prevented from serving on a jury is sufficiently powerful to warrant judicial intervention. The impossibility of

best response, as we have suggested, is to focus less on individual litigants and jurors and more on the polity served by the political jury institution. Once we focus on the abridgement of the group dimension of the hybrid right as the foundation for individual harm to litigants, we see that each group's political participation can be assured by the use of random criteria to select all juries, even if such randomness reduces (or enlarges) their participation in any individual case.

This point can be elusive, but it is critical to understanding the error in Justice Field's analysis. Recognizing that members of a racial group may share a perspective or comprise a distinct voice in jury deliberations explains why deliberate exclusionary selection practices may have problematic instrumental consequences for the individual litigants whose interests are adjudicated by these tribunals. But at base, the equality mandate should guarantee a political voice commensurate with a group's numbers. The fact that this group guarantee is intended to safeguard the interest of individuals does not mean that each individual has a right to have his group's voice actually represented in every tribunal that reaches decisions affecting his interests. Racial minorities may have limited political power because of their status as minorities. Nothing in the Constitution changes that political reality or its consequences.

This analysis is as valid for juries as it is for election districts. In each case, as long as the government does not deprive individuals of their right to participate on an equal basis with others and the power of a group is not unfairly diminished because of its racial composition, then the Constitution is not violated. Thus, although one might argue that the Constitution permits the creation of majority-minority voting districts to ensure the adequate representation of the voices of black citizens in the legislature, no one would claim that each individual black voter has the right to be located in a majority-black election district. Although there may be instrumental consequences for those who live in a district in which they are a distinct minority, there is no constitutional violation when an individual finds himself in a district in which he is politically isolated, as long as election boundaries do not deny representation to black citizens as a class.

When applied to juries, this analysis is necessarily exaggerated because of the limited size of each jury and the number of juries regularly empaneled. If the jury pool reflects the racial demographics of a community and no invidious manipulation changes the composition of any particular jury, then a random selection of jurors for a particular panel that results in a racially homogenous jury does not undermine the political equality of black jurors or defendants. It may, of course, result in an individual being tried by a jury

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predicting which defendants would have been tried by juries including members of a particular race should not preclude a remedy for deliberate, racially exclusive jury selection procedures.

possessing a limited perspective. But the inclusion of the members of a minority group on one panel necessarily diminishes the likelihood that the group will be represented on some other panel, and there is no clearly appropriate way to allocate political power when it is a scarce resource. Although various ways to assert the political perspective of racial minority groups on juries may or may not be constitutional—an issue which is beyond the scope of this article—we do not believe that interpreting the Constitution to bar exclusionary practices should be understood to *require* any specific inclusionary device or result. Minority voices should not be quashed, but no one has a right to amplification.

E. *Examining the Court's Review of Jury Selection Procedures over Time*

A careful examination of the judicial decisions on exclusionary jury selection procedures over time demonstrates that the Court's inability to develop a coherent doctrinal picture has an obvious cause: The Court has failed to reconcile the tension between the individual and group dimensions of political rights. For this reason, Supreme Court and lower court cases concerning juries often do not directly confront the central dispute about the relevance or irrelevance of race. As is true of voting rights cases, until courts acknowledge the hybrid nature of political rights, the role of race in political rights equality will remain clouded.

1. *The Court's focus on the individual juror.*

We have already seen in *Strauder* and its accompanying cases that the Court has forcefully denounced racially exclusionary jury selection procedures because of their impact on the right of the accused to a fair trial. The Court has reaffirmed this conclusion on countless occasions.

Yet the Court has also reiterated its contention, first stated in *Rives*[272] and then in *Neal v. Delaware*,[273] that a black defendant has no constitutional right to have members of his race on the jury that hears his case. In so doing, however, the Court has often become entangled in conflicting understandings of how jury service implicates the individual and group nature of political rights.

Thus, in *Akins v. Texas*,[274] the Court rejected the petitioner's contention that the grand jury that indicted him had been deliberately limited to only one black member. Accordingly, it rejected his constitutional claim. In explaining why petitioner's "showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible indi-

272. *Rives*, 100 U.S. at 322-23.
273. 103 U.S. 370, 394 (1880).
274. 325 U.S. 398 (1945).

viduals"[275] did not establish a constitutional violation, Justice Reed pointed to three considerations. First, disproportionate representation was not sufficient to demonstrate purposeful discrimination by the jury commissioners.[276] Second, from a practical perspective, the Court could not order proportional representation, since "[t]he number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection."[277] Third, the Court suggested that disproportionate effects alone did not deny an accused equal protection of the laws.[278] The majority stated, "Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists, have been based on the theory that their continual exclusion indicated discrimination and not on the theory that *racial groups must be recognized*."[279] The Court then went on to acknowledge, however, the overriding principle that "[a]ny such discrimination which affects an accused will make his conviction unlawful."[280] The Court left unanswered the question of how racial discrimination in grand jury selection could "affect" the accused unless, as we have suggested, racial groups are recognized to exist and influence jury deliberations.[281]

In *Cassell v. Texas*,[282] the Court distinguished *Akins*, holding that deliberately restricting the number of black persons to one on each grand jury violated the Fourteenth Amendment.[283] Again, the Court insisted that the Constitution did not require proportional representation of racial minorities on a grand jury in order to provide black defendants with fair and equal treatment.[284] Furthermore, the Court added, deliberate attempts to achieve

275. *Id.* at 403.

276. *See id.*

277. *Id.*

278. *See id.*

279. *Id.*

280. *Id.* at 404.

281. Justice Murphy's dissent demonstrated similar dissonance. Believing that the state deliberately limited the participation of blacks to a single individual on each grand jury panel, Justice Murphy argued that color and racial background were "irrelevant factors in setting qualifications for jury service." *Id.* at 409 (Murphy, J., dissenting). Race could not be considered if a jury "is to be fairly chosen from a cross section of the community." *Id.* Justice Murphy also insisted, however, that juries must be selected without regard to race or color because any other principle "would make juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Id.* at 408. Thus, Justice Murphy's earlier claim that race was irrelevant could not mean that race had no bearing on a juror's judgement. Rather, taking race into account was dangerous precisely because race affected juror attitudes. Moreover, to the extent that Justice Murphy suggested that any use of race as a criterion would be unconstitutional, including the deliberate consideration of race in order to integrate otherwise homogeneous juries, he does not explain why doing so would undercut the goal of fairly assembling a jury from a "cross section" of the community.

282. 339 U.S. 282 (1950).

283. *See id.* at 287.

284. *See id.* at 286.

racial proportionality were not only unnecessary, but unconstitutional: "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race."[285]

Once again, the Court resisted proportional representation partly for pragmatic reasons. Obviously, as the Court explained, "the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation."[286] But the Court also understood proportional representation to violate important principles of racial neutrality. "Jurymen should be selected as individuals," the Court explained, "on the basis of individual qualifications, and not as members of a race."[287]

Despite the Court's commitment to treating jurors as individuals, Justice Jackson's dissent could not escape the relevance of group membership and race:

> It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influences we cannot weigh. A single juror's dissent is generally enough to prevent conviction. A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance, of impartiality, especially when the accused is a Negro and the alleged victim is not.[288]

The Court's focus on individuals in *Akins* and *Casell* may have reflected an uncertainty as to how notions of group equality would operate in the jury context rather than a reasoned denial of any group dimension to the right to serve on juries. Certainly, on the surface, the easiest response to a claim that the Constitution requires proportional racial representation on juries is to deny the group nature of the right to jury service. As we suggested earlier, however, recognizing a group dimension to political equality would not require proportional racial representation on *every* jury. Given the range of

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285. *Id.* at 287.

286. *Id.* at 286-87.

287. *Id.* at 286.

288. *Id.* at 301-02 (Jackson, J., dissenting). Furthermore, as another Justice argued, some consideration of race might be necessary in order to assemble a constitutional jury. Justice Clark in his concurrence accepted the jury commissioners' explanation that the paucity of black jurors asked to serve resulted from the commissioners' personal ignorance of qualified blacks who were available for jury service in the area, not from discriminatory motives. Yet he argued that the Commissioners were constitutionally obligated to remedy that situation: "Their responsibility was to learn whether there were persons among the Negroes they did not know who were qualified and available for service." *Id.* at 298 (Clark, J., concurring). The racial composition of juries could not be left to the happenstance of the personal knowledge of the commissioners.

possible ways in which representation and the exercise of political power may be structured and the number of racial and ethnic groups within any local polity, it is unlikely that the Constitution could require any such jury selection mechanism or any specific racial composition of juries.

2. *The Court's recognition of group influence.*

Yet another line of jury selection cases strongly *supports* the conviction that group consciousness in general, and race consciousness in particular, influence juries. In the first of these cases, *Rawlins v. Georgia*,[289] individuals convicted of murder challenged the exclusion of various occupational groups—such as lawyers, ministers, and doctors—from the jury hearing their trial. Justice Holmes summarily rejected petitioners' claims while sharply distinguishing policies of racial exclusion from other limits on juror selection: "The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice."[290] Justice Holmes' argument clearly implies that the race of a juror influences her deliberations in a way her occupation and other characteristics do not.

The *Rawlins* decision did not stand unchallenged over time. Over forty years later, in *Fay v. New York*,[291] defendants convicted by special jury panels argued that the state's jury selection procedures had violated their equal protection and due process rights.[292] The defendants asserted three distinct claims: "(1) That laborers, operatives, craftsmen, foremen and service employees were systematically, intentionally and deliberately excluded from the panel. (2) That women were in the same way excluded. (3) That the special panel is so composed as to be more prone to convict than the general panel."[293]

In response to these claims, the Court conceded that some exclusionary practices might cause sufficient harm to the defendant's opportunity to establish his innocence so as to violate either the Due Process or Equal Protection Clause.[294] However, the Court did not find that occupation or economic class shaped jurors' perspectives:

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289. 201 U.S. 638 (1906).

290. *Id.* at 640.

291. 332 U.S. 261 (1947).

292. It is important to remember that, at this time, the Sixth Amendment had not yet been incorporated into the Due Process Clause of the Fourteenth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968). Until 1968, general due process and equal protection claims were the only available constitutional arguments for reviewing state jury selection procedures.

293. *Fay*, 332 U.S. at 272-73.

294. *See id.* at 283-84.

> No significant difference in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it. It would require large assumptions to say that one's present economic status, in a society as fluid as ours, determines his outlook in the trial of cases in general or of this one in particular.[295]

The Court's reasoning demonstrated once again its implicit recognition that the exclusion of a distinct group from jury service can only prejudice a defendant if members of the excluded group share a common perspective. It also revealed a growing but not yet fully established sensitivity to the representative and political nature of the role of the jury as an institution.

However, the Court did not explicitly explore the relationship between race and perspective in *Fay* as a basis for analogizing other selection procedures to the case law prohibiting racial exclusionary practices. As the Court explained, Congress had determined that the exclusion of racial minorities from juries was inherently problematic and had enacted a statutory prohibition to remedy the situation: "[B]ecause of the long history of unhappy relations between the two races, Congress has put these cases in a class by themselves."[296]

The Court demonstrated some sympathy for the right of women to serve on juries and some recognition of the influence of women jurors, but it emphasized the long-traditional acceptance of gender discrimination in refusing to force states to include women.[297] In light of American custom and history, the Court suggested that "[i]t would . . . take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence."[298]

Justice Murphy, joined by three other dissenters, expressed his disagreement with the *Fay* majority's refusal to find a constitutional violation. According to the dissent, the use of a "blue ribbon" panel—a special panel selected for this case based on a purported "intelligence" questionnaire—undermines the nature of the jury as a representative political institution.[299] To serve its purpose, a jury must operate as "a democratic institution, representative of all qualified classes of people."[300] Any deviation from that principle was unacceptable. Although the impact of a defective, unrepresentative selection process might be difficult to measure in any tangible way, the "sub-

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295. *Id.* at 291-92. The Court continued, "Nor is there any such persuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations, as would be the case with regard to purposeful discriminations because of race or color." *Id.* at 292.

296. *Id.* at 282. Thus, no showing of prejudice was necessary when jury selection was tainted by racial discrimination. *See id.* at 292.

297. *See id.* at 289-90.

298. *Id.*

299. *See id.* at 298 (Murphy, J., dissenting).

300. *Id.* at 300.

tlety" of the resulting prejudice did not make it any less a constitutional violation.[301]

While the Court in the late 1940s remained reluctant to impose jury selection requirements on the states except in the most egregious situations, it exhibited a greater willingness to supervise the selection of federal juries. The Court continued to focus on the question of whether excluded groups shared a sufficiently distinct perspective to undermine the fairness of a trial. The opinions in these cases reveal a continuing disagreement over whether the Court should mandate procedures to eliminate the risk of prejudice or whether it should only intervene in cases in which prejudice could actually be demonstrated.[302] The Court also fragmented on whether the incidental weakening of a jury's representative nature caused by ostensibly benign selection procedures warranted judicial intervention.[303]

Thiel v. Southern Pacific Co.,[304] a case challenging the exclusion of workers paid a daily wage, demonstrated the Court's evolving understanding of the importance of widespread representation on juries. Although some of the Court's language emphasized the individual nature of jury qualifications, this description was far more pragmatic than conceptual. In holding that the selection process must treat jurors as individuals rather than as members of a group,[305] the Court explained that this was necessary in order to avoid "open[ing] the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."[306] Since courts could not enforce a rule requiring every jury to include "representatives of all the economic, social, religious, racial, political and geographical groups of the community,"[307] the courts could best ensure an impartial jury drawn from a cross-section of society by carefully monitoring any procedure that suggested the "systematic and intentional exclusion" of any group.[308] Thus, the Court implicitly acknowledged that, because of the role of group membership in shaping jurors' attitudes, selection procedures focusing on group status were dangerous. Because of this danger, as a prophylactic measure, courts must require that jurors be considered as individuals in order to discourage "any latent tendencies to establish the jury as the instrument of the economically and socially privileged"[309] or any other group. The Court made it clear in

301. *See id.* Justice Murphy's dissent in *Moore v. New York*, 333 U.S. 565 (1948), following *Fay*, reiterated this point: "Jury panels are supposed to be representative of all qualified classes." *Id.* at 570 (Murphy, J., dissenting). Juries should not lose their "democratic flavor." *Id.*

302. *See* notes 310-314 *infra* and accompanying text.

303. *See* note 311 *infra* and accompanying text.

304. 328 U.S. 217 (1946).

305. *See id.* at 220.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 224.

Thiel that, in exercising its power to supervise the administration of justice in the federal courts and requiring a new trial, it need not determine whether the exclusion of workers paid daily wages actually prejudiced the petitioner.[310] Rather, the representative nature of the jury system must be preserved against even innocent and incremental impairment.[311]

The Supreme Court was more explicit in describing the importance of including distinct voices on juries in *Ballard v. United States*.[312] In defending its decision to prohibit the systematic exclusion of women from jury panels, the Court quoted *Thiel* for the proposition that "[j]ury competence is an individual rather than a group or class matter."[313] It then went on, however, to address the critical question of prejudicial impact and found that gender did affect jurors' perspectives:

> It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. . . . The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.[314]

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310. *See id.* at 225.

311. Justice Frankfurter dissented. He agreed that "the broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." *Id.* at 227 (Frankfurter, J., dissenting). Here, however, the exclusion of daily wage earners was not an act of systematic discrimination against working men, but rather an expression of concerned anticipation that people depending on a daily wage for their livelihood would seek to be excused from jury service because of financial hardship. *See id.* at 229-30. Not only was there no intent to manipulate jury deliberations through this exclusion, but the selection policy had no prejudicial effect:

> It certainly is too large an assumption on which to base judicial action that those workers who are paid by the day have a different outlook psychologically and economically than those who earn weekly wages. . . . And American society is happily not so fragmentized that those who get paid by the day adopt a different social outlook, have a different sense of justice, and a different conception of a juror's responsibility than their fellow workers paid by the week.

Id. at 230.

312. 329 U.S. 187 (1946).

313. *Id.* at 193 (quoting *Thiel*, 328 U.S. at 220).

314. *Id.* at 193-94 (footnotes omitted).

3. *Group representation, color-blindness, and the Sixth Amendment.*

By far the strongest validation of the representative role of juries and the influence of class characteristics such as race and gender in jury deliberations is found in yet another line of jury cases: those construing the Sixth Amendment. Years before Justice Murphy's dissenting argument in *Fay*, the Court described the jury's function using overt political analogies. "Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government," the Court explained in *Glasser v. United States*.[315] "For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.'"[316]

The *Glasser* Court recognized that jury commissioners must exercise some discretion in choosing qualified individuals for jury service.[317] However, the Court warned that

> they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.[318]

These Sixth Amendment cases conceive of the jury as a representative group and resonate with the historical recognition that jury service, like voting, is a political right. Indeed, after selectively incorporating the Sixth Amendment right to a jury trial into the Fourteenth Amendment,[319] the Court repeatedly emphasized the jury's role as a political buffer between the state and the individual. Thus, in *Williams v. Florida*,[320] the Court explained that "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[321] In *Taylor v. Louisiana*,[322] the Court suggested that the jury could not adequately serve this critical purpose "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[323] The Court also quoted, with approval, a passage from a House report that ex-

315. 315 U.S. 60, 85 (1942).
316. *Id.* at 85 (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).
317. *See id.* at 86.
318. *Id.*
319. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
320. 399 U.S. 78 (1970).
321. *Id.* at 100.
322. 419 U.S. 522 (1975).
323. *Id.* at 530.

plained the statutorily mandated, fair cross-section of the community requirement for federal juries:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.[324]

Although the Court appropriately emphasized group representation in these Sixth Amendment cases, it nonetheless failed to articulate any foundation for its conclusions about the constitutionality of particular exclusions. For example, the Court in *Taylor* correctly determined that the systematic exclusion of women from juries violated the Sixth Amendment, but its reasoning seemed based on nothing more than judicial intuition. The Court rejected the view "that an all-male panel drawn from various groups in the community would be as truly representative as if women were included."[325] Instead, it recognized that "a distinct quality [would be] lost if either sex [were] excluded" from jury service.[326] But the majority offered no answer to Justice Rehnquist's dissenting retort that similarly distinct qualities would be lost if any class, such as members of a particular vocation, were excused from jury duty.[327] Invalidating exclusion by race or gender while allowing exclusion based on other characteristics seemed highly subjective. The Sixth Amendment, at least standing alone, lacked a theory of representation on which to ground the Court's decisions.

Equal protection jurisprudence seemed to provide a more convincing basis for distinguishing race and gender from other types of characteristics. By this time, the Court had recognized race and gender as uniquely suspect (or quasi-suspect) classifications, and as a result, discrimination on either ground would receive some form of rigorous scrutiny. This equal protection analysis, however, would flounder on different doctrinal shoals.

As equal protection doctrine evolved from a political process model to one emphasizing color and gender-blind principles, the Court's attention shifted from concerns about majority prejudices to a more universal notion that race and gender represented illegitimate classifications in every form. Blacks and whites, as well as men and women, were similarly situated for all important governmental purposes, and it violated the Constitution to treat them differently. This reorientation of equal protection jurisprudence allowed the Court to strike down jury selection procedures that discriminated against blacks and women as a violation of the rights of excluded jurors. Indeed, in 1969, almost 100 years after *Strauder*, the Supreme Court decided,

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324. *Id.* at 529 n.7 (quoting H.R. REP. NO. 90-1076, at 8 (1968)).

325. *Id.* at 531.

326. *Id.* at 532 (quoting Ballard v. United States, 329 U.S. 187, 194 (1946)).

327. *See id.* at 542 (Rehnquist, J., dissenting).

for the first time, in *Carter v. Jury Commission of Greene County*[328] that prospective black jurors could directly challenge racially discriminatory selection policies and seek affirmative relief.[329] A color-blind equal protection theory insisting on equal treatment of essentially fungible blacks and whites easily justified this attack on discriminatory jury selection procedures.

It was far less clear, however, how the Court's new color-blind principles could be invoked by defendants to support their claims of constitutional denial of their rights when jurors had been excluded because of race. In *Carter*, all nine Justices supported the right of *excluded jurors* to challenge the racially discriminatory procedures that barred them from jury service.[330] Two years later, however, when a white *defendant* challenged the exclusion of blacks from both the grand jury and his trial jury in *Peters v. Kiff*,[331] a badly splintered Court struggled to resolve the petitioner's equal protection and due process claims. Three Justices argued that the possible bias resulting from the state's exclusionary policies violated the defendant's due process rights.[332] Three Justices concurred in the judgment, but grounded their decision on an extension of a federal statute prohibiting racial discrimination in jury selection procedures.[333] Three Justices dissented on the grounds that the Court could not infer prejudice from the exclusion of black jurors in a criminal proceeding against a white defendant.[334]

Significantly, neither the plurality nor the concurrence suggested that the defendant was entitled to relief on equal protection grounds. It was difficult enough to contend that a black defendant was denied equal protection of the laws when blacks were systematically excluded from the jury. Extending the color-blind approach to find racial bias against white defendants would seem completely beyond the pale. After all, if the legislature and executive branch were prohibited from recognizing any perspective or attitude common to a race, surely the judiciary would be equally constrained.

Indeed, under these color-blind principles, the dissenting justices in *Kiff* may have had an even stronger argument than they realized. The exclusion of any class of jurors, such as lawyers or senior citizens, might or might not raise serious concerns about resulting bias in the jury selected. The Constitution is silent about these classifications, and therefore no presumption ap-

328. 396 U.S. 320 (1970).

329. *See id.* at 329-30 (1970).

330. *See id.*

331. 407 U.S. 493 (1972).

332. *See id.* at 501-05 (plurality opinion). The defendant had been indicted and convicted before incorporation of the Sixth Amendment into the Fourteenth Amendment. *See id.* at 494 n.1. Accordingly, petitioner was forced to argue the anomalous position that the state did not have to indict him or try him before a jury at all, but that if it did, it could not proceed against him before a jury from which blacks had been systematically excluded. *See id.* at 496.

333. *See id.* at 505-07 (White, J., concurring).

334. *See id.* at 509-11 (Burger, J., dissenting).

plies with regard to the fungibility of the young and the old or doctors and construction workers. However, race and gender, under current equal protection doctrine, are different and must be treated differently. The Court has presumed the fungibility of persons and juries with these characteristics. This presumption flies in the face of any suggestion that the exclusion of jurors of a certain race would result in a biased jury.

The dissenting justices in *Kiff*, of course, did not disagree with the long line of authority allowing a black defendant to challenge his conviction by a jury from which blacks had been deliberately excluded.[335] The ghost of Justice Field, however, continued to haunt the Court's equal protection analysis and could not be easily exorcised. If the Constitution prohibits government from basing decisions on the likelihood that people of the same race have common attitudes, experiences, beliefs, and perspectives, then how can a court rule that defendants are presumptively harmed when persons of a particular race or gender are excluded from the jury that evaluates their guilt? The Court failed to adequately resolve this doctrinal puzzle in its early jury exclusion cases, and the current equal protection line of reasoning demonstrates that it has still not escaped from this quandary.

Justice Rehnquist comes perilously close to recognizing the incoherence of the Court's equal protection analysis in his dissent in *Duren v. Missouri*,[336] a Sixth Amendment case about the underrepresentation of women on juries resulting from gender-based exemption policies. Justice Rehnquist complained "[t]hat the majority is in truth concerned with the equal protection rights of women to participate in the judicial process rather than with the Sixth Amendment right of a criminal defendant to be tried by an 'impartial jury.'"[337] After briefly summarizing the Court's equal protection cases beginning with *Strauder*, Justice Rehnquist argued:

> [A]s the majority recognizes . . . women as a class are every bit as qualified as men to serve as jurors. If, then, men and women are essentially fungible for purposes of jury duty, the question arises how underrepresentation of either sex on the jury or the venire infringes on a defendant's right to have his fate decided by an impartial tribunal.[338]

Justice Rehnquist concluded his discussion of this inconsistency by noting, in a bewildered tone, that "[t]he reversal of concededly fair convictions returned by concededly impartial juries is, to say the least, an irrational means of vindicating the equal protection rights of those unconstitutionally excluded from jury service."[339]

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335. *See id.* at 508-09.
336. 439 U.S. 357 (1979).
337. *Id.* at 371 n.* (Rehnquist, J., dissenting).
338. *Id.* at 372 n.*.
339. *Id.* at 373 n.*.

F. *A More Sophisticated Model of Equality: Recognizing the Group Voice*

The Court can resolve the conceptual difficulties it confronts in all of the exclusionary jury selection cases if it recognizes that jury service is a political right and that the presumption underlying equal representation for political purposes is one of difference, not similarity. We care about the exclusion of racial or gender groups from jury service because we presume that the voices of these groups are *not* adequately represented by persons of a different race or sex. Again, the election analogy makes the point clear. If the law prevented blacks from voting in an election, no one would doubt that the losing candidate suffered an injury that justified rejecting the election results. The winning candidate could not respectably argue that blacks and whites were fungible or that there was no reason to think that the participation of black voters would have altered the election results. The Constitution requires that courts *presume* that the voice of black voters *matters*.

A political rights model of equality that recognizes the distinct voice of racial and gender groups serves two important functions. First, it substantially strengthens the Court's holdings in cases stretching from *Strauder* to *J.E.B.* This is no minor virtue. The permanence of constitutional law depends on the persuasiveness of the Court's reasoning, and the incoherence of the current rationale employed in jury exclusion cases leaves these cases unnecessarily vulnerable to future retrenchment. Second, the exclusively individualistic, noninstrumental equal protection approach currently employed by the Court in jury cases unreasonably restricts legislative attempts to promote equality of political rights. Conceiving of the jury as a political institution poses a difficult question: What constitutes equality in jury access? The rigid color-blind mandate of the current civil rights model makes it more difficult to answer this question by prohibiting all experimentation that takes race or gender into account. As a policy matter, there may be strong arguments—some of which we discuss below—for rejecting such experiments. But the Court's equal protection analysis prevents these questions from even being considered.

V. THE IMPLICATIONS OF A MORE SOPHISTICATED MODEL

So much for history and case law. The current Court's political rights jurisprudence is neither historically defensible nor doctrinally coherent. But perhaps only the reasoning and not the results of cases such as *Shaw* and *Miller* have been wrong. For even if the Court recognizes that political and civil rights are constitutionally distinct, the meaning of equality they embrace need not be so different in practice. To phrase the point as a question, why should the Constitution treat civil and political equality differently? After all, to say that political rights have a dual dimension—one half of which the

Court has ignored—is not to deny that civil rights may also have a dual dimension and that group interests may also promote constitutional equality in the civil rights realm. Yet the Court has often subordinated such group interests in rejecting race or gender-conscious measures.

A. *Reasons for Subordinating Group Interests in the Civil Rights Context*

We suggest that the Court has subordinated group interests for four related reasons. First, the goal of achieving racial equality can be effectively accomplished by focusing on the individual dimension of rights. The very idea of equality can coherently be defined in the civil rights area in terms of an absence of difference.[340] Under this understanding, we attain equality under the law by insisting that arbitrary and irrelevant differences must be ignored. If decisionmakers do not take race into account, there can be nothing unequal about the results. Moreover, mandating that decisions be made without regard to race is an enforceable and administrable goal. Government decisions improperly classifying on the basis of race can be identified and remedied. Administrative and judicial supervision of the processes and results of state action may miss occasional violations, but there is nothing intrinsically problematic about screening out race-based decisions regarding public employment, contracting, and other matters.

Second, in the civil rights context, equality among groups inevitably requires the sacrifice of important interests and rights of individuals who are not members of the group whose interests are being promoted. Put another way, in the civil rights arena, there is almost always a clash between group and individual equality. Individual equality requires the allocation and distribution of benefits and burdens without regard to race. In order to increase racial minorities' access to jobs and other benefits, individual members of the majority must lose tangible and valued interests solely because of their race. Thus, group equality may exact a heavy cost from *individual* majority group members.

Consider two civil rights examples, both predicated, to some extent, on racial group attitudes and perspectives. In *Regents of the University of California v. Bakke*,[341] the Medical School of the University of California at Davis asserted, in support of its affirmative action program in admissions, that all medical school students received educational benefits from a racially diverse student body.[342] There is an inherent group dimension to this argument. Black students add something to the educational experience of attending medical school because they bring distinct attitudes, experiences, and

340. This is not the only way to understand equality in the civil rights realm, but in this article, we take as a given the Court's understanding of civil rights and benefits.

341. 438 U.S. 265 (1978).

342. *See id.* at 306.

perspectives to the classroom. Recognizing the existence and value of racial group identity in this context, however, inevitably imposes costs on nongroup members. From Alan Bakke's point of view, the issue was not whether racial groups share common attitudes, but whether these shared attitudes could justify the denial of his application to medical school. It is this kind of direct and tangible loss to the nongroup member that makes affirmative action in this civil circumstance so problematic.

Palmore v. Sidoti[343] provides an even more dramatic example of this distinction between civil and political rights. In *Sidoti*, the Court was asked to recognize a specific attitude of both black and white racial groups: the animosity of both groups toward interracial couples. The trial judge had originally awarded custody of a divorced couple's white daughter to her white mother.[344] After the mother remarried a black man, the court transferred custody to the white father, reasoning that removing the child from an interracial environment that might generate social hostility against her would be in the child's best interest.[345] In reversing the trial court's decision, the Supreme Court did not challenge the accuracy of the lower court's observations about racial attitudes. Instead, the Court considered whether significant legal consequences for individuals could be grounded on such a foundation. For the Supreme Court, the question was

> whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[346]

The burden the lower courts imposed on the mother as an individual in *Sidoti* was direct and substantial. These courts erred not in recognizing the role of race in community attitudes on this issue, but by unconstitutionally subordinating the individual right of the mother to white and black groups' conception of racial solidarity and cohesion.

Third, there is a danger that any recognition of racial groups by the state legitimizes thinking in racial terms. Our nation aspires to make race irrelevant in public and private decisionmaking, and government action that acknowledges racial differences communicates a contrary message. Legal acknowledgment of racial differences appears to accept the inevitability, if not the reasonableness, of racial consciousness and helps to freeze society in a racially polarized mold.

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343. 466 U.S. 429 (1984).
344. *See id.* at 430.
345. *See id.* at 430-31.
346. *Id.* at 433.

Finally, the fourth reason suggests that permitting the government to attempt to promote equality among racial groups creates an unacceptable risk that the state will manipulate racial ratios for inappropriate purposes. The Court cannot easily distinguish between benign attempts to use race-based measures to further racial justice and impermissible attempts to aggrandize one's share of racial spoils. This concern—that attempts to achieve fairness among groups creates opportunities for exploitation and abuse—extends beyond race to other prohibited classifications. Regulating on the basis of viewpoint, for example, is typically prohibited by the First Amendment even when the state is attempting to equalize expressive opportunities.[347] Surely, this constitutional restriction responds, in part, to the legitimate fear that rules ostensibly imposed in the name of fairness and equality can easily disguise efforts to advance the interests of those groups government favors in the marketplace of ideas.[348]

B. *Applicability of Civil Rights Reasoning to the Political Rights Context*

Don't these reasons for subordinating group interests in the civil rights context also apply to attempts to achieve equality among racial groups with regard to political rights? We offer a few potential responses.

Unlike the civil rights context, equality of political rights requires some recognition of racial group interests. Ignoring racial differences does not define or guarantee political equality. There is no way to inquire whether black citizens are adequately represented in the political system without taking race into account. There is no way to talk about the equal exercise of political power among blacks and whites without taking race into account.

Put simply, there is no constitutionally appropriate choice between political candidates as there is between applicants for a government job. If a highly qualified black person and an unqualified white person both apply for the same government position, the constitutionally correct choice requires hiring the black applicant. No similar comparison is possible when political candidates compete for office. It is not clearly unconstitutional for voters to take race into account when they manifest their political preferences. Equality in political rights refers to the ability to exercise power; it does not pertain to the way power is exercised.

Nor can we reasonably distinguish between opportunity and outcome with regard to political rights as we can with regard to civil rights. In the civil rights context, we can to a great extent diminish the significance of race

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347. *See generally* Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

348. *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 289-98 (1991).

in shaping outcomes by eliminating the role race plays in defining or limiting opportunity. We can prevent government officials—who hire public employees, admit students to public colleges, and award public contracts—from invidiously considering race by imposing sanctions on the decisionmaker who allows racial issues to taint his judgment. In so doing, we need not take race into consideration to ensure that black persons receive the share of jobs, contracts, and acceptance letters that their qualifications justify. Leaving aside for the moment the question of remedying past wrongs, a fair selection process necessarily comports with constitutional equality in the civil rights context.

In the political rights realm, by contrast, there are immense practical and theoretical problems with removing all racial considerations at the opportunity stage, even assuming, for example, that the Constitution mandates racial neutrality in voting. The people themselves, in their sovereign capacity, choose representatives to form and operate the government. While the government manages the election process, voters of the polity are the ultimate decisionmakers in the selection of legislators. The majority's refusal to elect members of a particular racial group to office denies that group a political opportunity it values: the opportunity to achieve what group members believe would constitute effective political representation. There is no difference-denying mechanism available to deal with this kind of race consciousness in the voting booth, however. Courts cannot insist on race-neutral political judgments from the electorate; courts cannot police the election process to impose sanctions on those voters who take race into account. Consequently, taking account of race in anticipating outcomes is inherently more justified when equality in the allocation of political power is at issue.[349]

The burden on individuals resulting from attempts to achieve group equality in the civil rights area can be similarly distinguished. In the political rights context, promoting minority group equality and political power does not require the sacrifice of the individual rights of majority group members. Unlike affirmative action programs in government contracting, school admissions, employment, and other settings, individuals per se are not harmed by legislative efforts to avoid minority vote dilution. As another commentator has observed:

> The shift from at-large elections to single member districts, or the reapportionment of a single-member district system does not disenfranchise any voter and, as long as one person, one vote is respected, it does not deny any individual voter a fair opportunity to influence the outcome of an election. . . . [A] voter who is intentionally shifted from a district in which she is clearly a part of the political majority to a district in which she is in the minority may have reduced

349. Policing the outcomes of the jury system may theoretically be more possible because we can overturn decisions based on insufficient evidence (except for acquittals). Within the confines of *permissible* jury discretion, however, no supervision of results is possible.

> political influence, but that is due to the salience of groups to politics within the districts, not to any reduction in the weight of her individual vote.[350]

The dissents in *Shaw* and *Miller* illustrate this point by demonstrating that no white person was deprived of his vote, which was valued equally with everyone else's, when redistricting created majority-minority electoral districts.[351]

We recognize that the individual injuries at stake may involve dignitary as well as tangible harms. If recognition of group political interests impairs the dignity of or otherwise stigmatizes individuals, we would agree that courts must take such consequences into account in evaluating the constitutionality of state action. We have already argued, however, that the alleged stigmatic effect of race-based peremptory challenges on excluded jurors is of limited significance in a system in which juror challenges are typically grounded on a variety of hunches and stereotypes. We think the same analysis applies with regard to any alleged stigma resulting from the creation of majority-minority districts.

The dignitary offense created by generalizations of this kind presumably arises out of the individual complaint that membership in any particular racial group does not determine one's personal beliefs.[352] This observation is obviously correct. All the members of any racial group are unlikely to agree on any specific issue. But no one, including the proponents of majority-minority districts, suggests otherwise.

In fact, the drawing of district lines using any criteria will inevitably be based on imprecise generalizations. Not everyone who lives in an urban area has the same views as other city dwellers. The same may be said of virtually any group characteristic—gender, class, vocation, age, political party affiliation, location of residence, or religion. Disagreements within groups are common. Recognition of some shared perspectives does not deny individual differences.

The Court has also expressed concern that taking race into account will encourage the practice of thinking along racial lines.[353] It is difficult to argue that these concerns are less worrisome in the context of political rights. Some costs here may not be easily escaped. Nonetheless, as this part of the article has suggested, there are relevant, significant differences between civil and political rights. The problem of racial, ethnic, and gender identity for both individuals and groups and the role of government in fostering or dis-

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350. Briffault, *supra* note 4, at 60-61.

351. *See* Miller v. Johnson, 515 U.S. 900, 929-31 (1995) (Stevens, J., dissenting); *id.* at 947-48 (Ginsburg, J., dissenting); Shaw v. Reno, 509 U.S. 630, 659-67 (1993) (White, J., dissenting); *id.* at 681-82 (Souter, J., dissenting).

352. *See, e.g.*, Shaw, 509 U.S. at 647-48 (arguing that the notion that members of the same racial group share the same political views is a constitutionally impermissible assumption).

353. *See, e.g.*, *id.* at 643, 647-48, 650.

couraging this way of thinking, however, are simply too complicated to address thoroughly in this article. While we doubt that the Court's voting rights and jury selection jurisprudence can stand on this foundation alone, at least as a constitutional matter, we willingly concede that there are important issues here that are worthy of serious consideration and discussion—at some other time and place.[354]

As for the risk that groups may use the government's attempts to achieve group equality in order to aggrandize power, the concern is certainly a legitimate one. It cannot be avoided, however, by prohibiting the state from taking those factors that distinguish political groups into account. In the area of political rights, the state already considers characteristics that are generally inappropriate bases for government decisions concerning individual interests. Political viewpoint is the most obvious example. The state has no business distinguishing between Democratic or Republican Party members even for the purpose of equalizing expressive opportunities. But in drawing voting district boundary lines, because of the group dimension of political rights, the state obviously takes party affiliation into account.[355] The risks of this practice resemble the risks inherent in recognizing racial groups. In both cases, the courts must confront these risks directly by evaluating the fairness

354. When the state takes race into account in promoting equality in the civil rights arena, it lends an air of legitimacy to racial group identification. Determining which individuals will be the beneficiaries of affirmative action programs, for example, arguably affirms that group membership matters in some objective sense. Wrongs done to the group in the past justify remedial action directed at individual group members today. Although remedial action would not be necessary unless a group had been victimized in the past, the relationship between the individual and the group of which he is a member, from the perspective either of the person benefitted by the affirmative action program or of the person burdened by it, has no independent significance. Group affiliation matters because the state chooses to recognize it as legitimate. By adopting a group perspective on matters conventionally determined on an individual basis, the state assigns meaning to racial identity that would not otherwise exist.

In taking race into account when political rights are at issue, racial group identity derives more from what group members believe than from who they are. Race matters because political groups believe that it matters. In taking race into account in redistricting, the state does not affirm that race matters, but that voters believe that it matters. The difference is an important one because the state is largely disassociated from the substance of what political groups believe and the characteristics upon which they ground their identity, even when it takes such beliefs and preferences into account.

In a state in which one political party overtly endorses racist beliefs or sectarian religious beliefs, for example, the state would still have to respect the political rights of the group. In drawing up district boundary lines, political power might be equalized to allow that party a fair opportunity to elect representatives espousing its position. No one would suggest, however, that in drawing district lines to reflect these political demographics the state has necessarily endorsed a racist party's philosophy.

Similarly, where a pattern of racial bloc voting exists, the state does not affirm the values inherent in that perspective when it attempts to fairly equalize political power through the drawing of district lines. The state simply implements the private configuration of power through the political process. Responsibility for the political salience of particular group characteristics belongs to the people, the ultimate sovereign.

355. *See* Davis v. Bandemer, 478 U.S. 109, 128-29 (1986).

of the state's decision. Courts will not mitigate these risks by pretending that fair redistricting may never consider the ideology of voters in drawing district lines.

C. *Constraints on the Recognition of Group Interests*

These arguments do not suggest that the Court cannot create limits on taking race into account in the political rights realm. To begin with, in promoting minority group equality, a state cannot ignore the individual interests of members of the majority. As we have said throughout, recognition of the hybrid nature of political rights means that the state cannot ignore *either* component. Under this approach, for example, although drawing district lines to maximize majority-minority districts may be an acceptable way to increase black representation in the legislature, a state could not weigh the votes of blacks more than whites to accomplish the same result. That would violate both the one person, one vote doctrine and the individual political rights of white voters. Similarly, even if jurymandering to increase minority participation on petit juries were permissible, accomplishing the same result by excluding whites from the jury pool would violate the rights of individuals in the majority group to have a chance to serve.

Other constraints arise from concerns about the fairness of the treatment of groups other than the legislatively preferred one, as well as from an uncertainty about defining the interests of a preferred minority group. It would obviously violate the rights of the majority to create a greater percentage of majority-minority districts than the percentage of minority voters in the state. It might also violate the rights of other minorities if only some minorities benefit from race-conscious districting programs.[356] Moreover, is it entirely clear that majority-minority districts help minorities? Might majority-minority districting hurt minority groups in important ways, such that some race-conscious districting is problematic even from the perspective of the group that ostensibly benefits from race-conscious line drawing? Have changing times affected our answer to this question? And is it legitimate for the Court to rely on changed circumstances in deciding what is constitutionally permissible? Are these legislative decisions, and if so, are they more appropriate for Congress or the states?

These are certainly tough questions that must be addressed in various electoral contexts. Some of them are even tougher in the jury context, for several reasons. First, the Court may have more reason to worry about government stereotyping in the context of some jury selection decisions. It is one thing, in the districting realm, to acknowledge that racial minorities might have distinct perspectives and preferences. It is quite another for gov-

356. For a discussion of this vexing problem, see generally Issacharoff, *supra* note 35.

ernment to speculate, as it does in excusing jurors through peremptory challenges, about exactly what those preferences are. For example, in *J.E.B.*, the government's use of peremptory challenges reinforced troubling stereotypes about women's roles in society.[357] We would feel very differently about a jurymandering scheme in which there were always at least four women on any petit jury than one in which there were always at least four women on any family law case, but no others. True, the framers of the Fifteenth and Nineteenth Amendments had specific as well as general expectations about group attitudes, but the content of specific generalizations has become more troublesome over the years. Resolving issues such as these requires careful constitutional consideration.

A second problem with considering racial group interests in the jury context arises from the unanimity requirement, which makes it more complicated to think about group equality. In other words, the fact that minorities sitting on juries where unanimity is required already have a form of veto reduces and perhaps renders insufficient the justification for any additional mechanisms to further equality of representation, such as jurymander quotas. If we move away from unanimity, then jurymandering seems more justifiable.[358]

But the Court never reaches this level of analysis; instead, it reflexively rejects all race or gender generalizations. In the end, the Court will never face any of these difficult questions if it pretermits consideration of such issues with the simplistic invocation of the individualistic equality mandated by indiscriminate application of the Court's color-blind vision.

CONCLUSION

Political rights are different from civil rights. Much of the constitutional history of the United States relating to political interests, such as voting, recognizes this difference. Yet the current Supreme Court majority, more overtly committed to originalism than its predecessors of the last fifty years, completely ignores this traditional distinction.

Unlike civil rights, political rights have a hybrid nature. They reflect both an individual and group dimension. The complex composition of political rights fundamentally changes the meaning of equality for constitutional purposes. The color-blind model of equality—the equality mandate that presumes fungibility and insists on common treatment for the similarly situated—cannot provide an adequate or coherent framework for evaluating the constitutionality of regulatory distinctions involving political rights. The

357. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140, 142 & n.14 (1994).

358. Alternatively, perhaps the adoption of mechanisms to ensure the representative composition of juries supports moving away from unanimity to be respectful of majority groups' interests.

Supreme Court must also consider a separate, group-oriented equality of difference.

Constitutional history confirms the dual meanings of political equality and rights in two important ways. First, a hybrid model of equality reflects the way the people who struggled to extend political rights to unrepresented groups, such as blacks or women, understood the political reality they lived in and the goals they sought to achieve. Second, this hybrid model helps to explain and resolve the underlying tensions that pervade over 100 years of constitutional case law, a century of decisions in which courts floundered in their attempts to remedy injuries caused by political rights violations while remaining doctrinally and conceptually tied to a jurisprudence of individual rights.

For the current Court, however, rights are exclusively individual interests and constitutional equality only prohibits the government from distinguishing between individuals on the basis of irrelevant differences. This limited doctrinal framework is rooted in only part of our political and legal history. As this article makes clear, there is another tradition, one focused on the needs and power of groups, that exists in conjunction with an individualistic conception of rights.

An understanding of political rights that is broad enough to encompass both the individual and group nature of political equality stands in sharp contrast to the Court's limited and one-sided perspective. Constitutional doctrine that recognizes the hybrid nature of political rights more authentically reflects the political reality of the present as well as the past. Groups, and the importance of group identity to the exercise of political rights, are a part of the American story. Just as there is something missing when the distinct voices of racial and gender groups are not included in our legislatures and juries, our constitutional discourse is incomplete and distorted when group interests are ignored.