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Shaw v. Reno: On the Borderline

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ESSAY

SHAW v. RENO: ON THE BORDERLINE*

In 1992, North Carolina submitted–and the Justice Department approved–a new congressional district. District 12 stretches approximately 160 miles along Interstate Highway 85. For much of its length, it is "no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas . . . [dividing towns and counties]. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them."[1] The boundaries of District 12 were drawn so that it would encompass sufficient African-Americans to constitute a majority-minority district. Five white North Carolina voters challenged the validity of District 12 on a variety of constitutional grounds. In *Shaw v. Reno*, the Supreme Court of the United States held that the plaintiffs had asserted a valid constitutional claim that should be heard on the merits.[2]

This essay is about aspiration and reality in civil rights litigation. The opinions in *Shaw v. Reno* provide the context for my comments. They illustrate both the poverty of constitutional analysis bereft of clear aspiration and the danger of constitutional aspiration divorced from reality.

Aspiration and reality work in tandem in civil rights cases: the discrepancy between the two is the measure of a civil rights plaintiff's harm. Because a civil rights plaintiff's reality is not always well understood–or perhaps because her aspirations differ from those historically accorded constitutional significance–a civil rights complaint does not always allege harms that fit neatly within boundaries prescribed by conventional causes of action.

The measure of the general vitality of our civil rights is the Constitution's ability to accommodate new realities and aspirations that together–in their lack of

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1. Shaw v. Reno, 113 S. Ct. 2816, 2820-21 (1993).
2. *Id.* at 2832.

"fit"–constitute a civil rights plaintiff's harms.[3] Without an accommodating Constitution, for example, the right to educational equality recognized in *Brown v. Board of Education*[4] might not exist;[5] neither, perhaps, would an abortion right based on the feminist reality that, in making a decision about abortion, women "define . . . [their] concept of existence, of meaning, of the universe, and of the mystery of human life"[6] an activity essential to one's very "personhood."[7]

Shaw v. Reno only partially honors the unique role played by aspiration and reality within the domain of civil rights disputes. The decision was based on the majority's willingness to recognize unusual harms–harms described as the plaintiffs described them, from the plaintiffs' point of view–despite the fact that the harms did not seem to fit neatly within an analytical framework prescribed by traditional voting rights cases. On the other hand, however, *Shaw* threatens important civil rights victories: a districting which led to the election of the first two African-American representatives from North Carolina since Reconstruction and, if its language and reasoning are read carelessly, federal voting rights legislation. It seems deliberately to ignore the realities and aspirations–and, therefore, the civil rights harms–of African-Americans in the political process.

Shaw has provoked substantial criticism, some well taken[8] and some not.[9] But critics uniformly fail to acknowledge any similarity between the claims of harm made by the *Shaw* plaintiffs and claims typically made by voting rights plaintiffs. They do not see that *Shaw* provides a foundation for expanded constitutional protections for rights of minority political participation.

This essay proceeds on the simple premise that we can learn valuable things about constitutional protection for voting rights by looking at *Shaw* from the perspective of the plaintiffs who brought the lawsuit, by accepting the plaintiffs as legitimate voting rights plaintiffs, and by refusing to dismiss cavalierly the validity of their description of the political realities and constitutional aspirations that

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3. The role of aspiration in constitutional interpretation has been described by others. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991). *See generally* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993). According to Bobbitt, constitutional aspiration is not merely an interpretive fallback to gaps in our understanding of the intent of the Constitution's framers. It is how we manage to effect a "recursion to conscience," to preserve ourselves as a democracy through "'constantly renew[ing] . . . spiritual and moral self-consciousness.'" BOBBITT, *supra*, at 183-84 (quoting Thomas Mann). In civil rights adjudication, aspirations frequently appear more as benchmarks of possible harm rather than as specific doctrinal rules. *See, e.g.*, the way in which the concurrence invoked the principle of no taxation without representation in Missouri v. Jenkins, 495 U.S. 33, 58-81 (1990) (Kennedy, J., concurring).

4. 347 U.S. 483 (1954).

5. *See generally* PETER C. HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA (1990).

6. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992).

7. *Id.*

8. *See infra* notes 73-77 and accompanying text discussing the majority's neglect of the realities of racial politics.

9. For example, the well-known criticism repeated by Jeffrey Rosen, *Gerrymandered*, NEW REPUBLIC, Oct. 25, 1993, at 12 ("[t]he only constitutional value that O'Connor identifies is an aesthetic value") is simply wrong. *See infra* notes 27-32 and accompanying text.

defined their harms.[10] Specifically, we can find in *Shaw* a doctrinal basis for protecting broad rights of minority political participation. And we can see the urgent need for civil rights advocates to rethink and more clearly explain the aspiration to equality on which so many civil rights victories depend.

A. *Constitutional Harms and Voting Rights Plaintiffs*

The *Shaw* plaintiffs' claims were based on several constitutional provisions. They argued that Article I, Section 2, of the Constitution, as well as the Privileges and Immunities Clause of the Fourteenth Amendment, each establish "a right . . . not to have 'the people divided' [for purposes of elections for United States representatives] . . . 'along racial lines.'"[11] They maintained that the North Carolina legislature acted unconstitutionally by its "intentional concentration of majority populations of black voters in districts that are in no way related to considerations of compactness, contiguousness, or jurisdictional communities of interest."[12] They insisted that the injury of which they complained was "suffered alike by 'plaintiffs and all other citizens and registered voters of North Carolina–whether black, white, native American, or others.'"[13] In making their allegations, they did not identify themselves as white.

The district court faithfully recorded the plaintiffs' allegations of harm but it seemed unable to truly hear them. It was "puzzled" that the allegations did not tie the plaintiffs, their harms, or their rights to membership in a particular racial group.[14] Unable to cope with allegations of unconventional harms, it chose to transform the allegations by taking judicial notice of the race of the plaintiffs.[15] Having effected this transformation, the court was able to analyze the complaint as if it presented a traditional vote dilution claim. Not surprisingly, the complaint did not contain allegations that would satisfy traditional vote dilution standards. Thus, the court concluded, the complaint should be dismissed.

The *Shaw* plaintiffs suffered a fate that minority voting rights plaintiffs would surely recognize. For example, when minority plaintiffs first alleged group harms that were effectively invisible to courts blinkered by conventional voting rights doctrine, their claims were rejected.[16] They knew, however, that the success of their struggle to secure more meaningful protection for minority voting rights

10. The perspective and claims are those embodied in the official record. I do not pretend to know what political or other motives may have driven the plaintiffs to file suit. For purposes of exploring the ideas offered in this article, they are irrelevant.

11. Shaw v. Barr, 808 F. Supp. 461, 469 (E.D.N.C. 1992) (three-judge court) (quoting from the Complaint).

12. *Id.* at 465 (citing to the Prayer for Relief).

13. *Id.* at 470 (quoting from the Complaint).

14. *Id.*

15. *Id.*

16. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971) (the back-and-forth analysis reflects the Court's incomplete understanding of group-based voting rights claims).

depended on their ability to secure judicial recognition of new constitutional harms. In particular, they fought to secure recognition that the right to vote may be unconstitutionally infringed by procedures or structures that affect the political power of minorities as a group–even when those procedures or structures in no way interfere with the ability of any individual to register as a voter or to cast a ballot.

Minority plaintiffs ultimately secured this recognition in decisions like *White v. Regester* [17] and *Rogers v. Lodge*.[18] In *White* and *Rogers*, African-Americans were given a vote but could only cast it in multimember district elections that minimized the collective influence of African-Americans.[19] By recognizing group-based constitutional claims, the Supreme Court refused to ignore a simple reality of political life: individual minority voting rights are not meaningful if the collective political power of the minority group is obstructed.[20] It also endorsed expansive constitutional aspirations for the right to vote. Although the Court did not clearly link its aspiration to an explicit textual source, the right "preservative of all [other] rights"[21] was given strong protection.

Over time, however, the Court's group-oriented voting rights decisions came to stand for a limiting rather than an expansive view of voting rights harms.[22] Districting was assumed to threaten one and only one kind of voting rights harm--harm to the power of groups to elect representatives stemming from persistent patterns of racial bloc voting. This assumption, at the heart of "vote dilution" claims, has been reinforced by amendments to and interpretations of Sections 2 and 5 of the Voting Rights Act.[23] The *Shaw* plaintiffs ran head-on into this assumption in the district court, which was so wedded to the assumption that it felt compelled to transform the plaintiffs' allegations. In the Supreme Court, however, the majority took the plaintiffs' allegations of harm at face value, as alleged, and rejected the validity of the assumption.

Justice O'Connor, writing for the majority, maintained that *Shaw* was about the "complex and sensitive" issue of "the meaning of the constitutional 'right' to

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17. 412 U.S. 755 (1973).

18. 458 U.S. 613 (1982).

19. *See supra* notes 17-18.

20. Justice Souter's dissent in *Shaw*, 113 S. Ct. at 2845-49, contains a good description of the Court's extension of voting rights protections to groups.

21. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). *See generally* Emily Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 TENN. L. REV. 549 (1985) (discussing the consequences of the Court's failure to tie the right to an explicit textual source).

22. *Cf.* Lani Guinier, *Voting Rights and Democratic Theory: Where Do We Go From Here?*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 283 (Bernard Grofman & Chandler Davidson eds., 1993) (Challenges to multimember districts are merely "remedial" and are unable to fulfill the "broad-based participatory and transformative politics implicit in the original vision of the civil rights movement.").

23. 42 U.S.C. § 1973 (1988). See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992) (describing the evolution of vote dilution analysis).

vote,"[24] even though the plaintiffs asserted neither group-based harms nor individual vote deprivation. She accepted the plaintiffs' decision not to complain that North Carolina's "reapportionment plan unconstitutionally 'diluted' white voting strength"[25] but rather to argue that they had a "constitutional right to participate in a 'color-blind' electoral process."[26]

Using the claimed right as an aspirational point of reference, O'Connor maintained that the harms flowing from racial gerrymanders are "special harms ... not present in our vote-dilution cases."[27] District 12 was said to threaten harm to a goal of achieving a multiracial society that is not divided or balkanized,[28] harm to a system of representative government in which interests of the whole constituency rather than a particular racial group are taken into account,[29] harm to a goal of minimizing racial bloc voting,[30] and harm to the obligation of elected representatives to be accountable to more than a particular racial constituency.[31]

For the most part, these harms would be felt by any citizen whose constitutional aspirations include a government in which elected representatives owe a constitutionally-rooted obligation to work for the entire community but whose representative in fact has only the constitutionally-irrelevant criterion of race to identify the community to which he (the representative) will hold himself accountable. The harms would be felt by persons whose aspirations for citizenship include membership in a political "community"–neither a majoritarian nor a minority special-interest group–but who in fact live in a district that by virtue of its structure will preclude any realistic possibility of achieving community.[32]

The dissenters in *Shaw* had different views of the plaintiffs' allegations of harm. As did the district court, Justice White believed the *Shaw* facts "mirror[ed] those presented in [vote dilution cases]."[33] He did not understand or share a con-

24. 113 S. Ct. at 2819.
25. *Id.* at 2821, 2824.
26. *Id.* at 2824.
27. *Id.* at 2828.
28. *Id.* at 2827, 2832.
29. *Id.* at 2827-28 (citing Justice Douglas's dissenting opinion in Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964)).
30. *Id.* at 2827.
31. *Id.* at 2827-28.
32. That the harms identified by O'Connor have their source in aspirations for representative government that work for the common good is confirmed by O'Connor's citation to Justice Douglas's reminder that in elections, "communities" (not individual voters) ideally seek the best representative, not the best racially or religiously partisan advocate. 113 S. Ct. at 2827 (quoting Justice Douglas's dissent in Wright v. Rockefeller, 376 U.S. 52, 67 (1964)). *See also infra* notes 62-68 and accompanying text for a fuller discussion of the constitutional nature of this aspiration.

As *Shaw* itself implicitly attests, rarely are government structures likely to inherently preclude representation on behalf of the community. For example, the Court's vote dilution decisions repeatedly state that there is nothing intrinsically unconstitutional about multimember districts. *See* Thornburgh v. Gingles, 478 U.S. 30 (1986); White v. Regester, 412 U.S. 755 (1973). If race is not the sole criterion but only a significant one of many factors used, a Section 2 majority-minority district would not inherently preclude the possibility of community. This view is arguably suggested in *Shaw* by the majority's note that *Shaw* does not address the more typical Section 2 district, in which race is merely one (albeit a significant one) of many factors taken into account.
33. 113 S. Ct. at 2834.

cern about harms flowing from artificial political communities. In his view, the majority did no more than hold that of "two districts drawn on similar, race-based grounds, . . . one . . . become[s] more injurious than the other simply by virtue of being snake-like . . . ."[34] He accused the majority of focusing on "superficialities"[35] rather than on real harms flowing from exclusion and the inability of minority groups to achieve a meaningful "voice in the political process."[36]

Justice Stevens maintained that constitutional harm arises from a breach of a "duty to govern impartially [which] is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group."[37] If the group in power acts "to facilitate the election of a member of a group that lacks . . . power because it remains underrepresented," as the white-dominated North Carolina legislature did in creating District 12, there is no breach of duty.[38]

Justice Souter interpreted the Court's vote dilution cases to set forth a narrow exception to the general principle that the Constitution protects against only direct deprivations of individual voting rights.[39] The *Shaw* plaintiffs did not allege the type of harms recognized in vote dilution cases, and Justice Souter saw no individual harm linked to District 12. In districting, he stated, "the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others"[40] even if the placement is on the basis of race. In a footnote, he acknowledged the validity of an aspiration to representative democracy that works for the benefit of all, but had "difficulty seeing how [the aspiration] is threatened (indeed why it is not, rather, enhanced) by districts that are not even alleged to dilute anyone's vote."[41]

Although the dissenting opinions do not offer precisely the same analysis, all dissenting Justices are primarily concerned with aspirations of political equality derived from the Equal Protection Clause of the Fourteenth Amendment and with the discrepancy between those aspirations and the realities of racial politics.[42] That discrepancy, although not one that mattered to the *Shaw* plaintiffs,

34. *Id.* at 2841.
35. *Id.*
36. *Id.* at 2843.
37. *Id.* at 2844.
38. *Id.*
39. *Id.* at 2845-49. Justice Souter's approach–like O'Connor's–treats voting rights cases as unique. O'Connor sees them as unique in the harms they can entail for the political process of representative democracy. Souter, however, sees them as unique in the Court's willingness to recognize group harms. *See generally* Justice Souter's concurrence. *Id.*
40. 113 S. Ct. at 2846.
41. *Id.* at 2848-49 n.9.
42. Justice Blackmun's short opinion simply reflects an aspiration to see African-Americans elected from North Carolina. *Id.* at 2843.

defined the only harms the dissenting Justices were willing to consider.[43] Because, under North Carolina's districting plan, whites–seventy-nine percent of the voting population–would constitute a voting majority in eighty-three percent of the state's congressional districts, the *Shaw* plaintiffs could make no claim of harm recognized by the dissenters.

The *Shaw* majority is accused of "imagining an entirely new cause of action"[44] and of inappropriately expanding the types of harms redressable through voting rights litigation. These accusations are exaggerated.[45] The harms alleged by the *Shaw* plaintiffs have been recognized and their aspirational benchmark appears in other voting rights decisions. This is true even of the early vote dilution decisions.[46]

The aspirational benchmark more recently appeared in *Davis v. Bandemer*,[47] a non-racial gerrymandering case. In *Davis*, the plaintiffs' harms were linked by a majority of Justices to a constitutional aspiration of "fair and effective representation."[48] Speaking for himself and three other Justices, Justice White said that the Constitution protects against a diminished ability of constituent groups "to secure the attention of the winning candidate."[49] Although he was unwilling to presume

43. It should be noted that, although the *Shaw* majority's approach to harm differs from the dissents', even the majority opinion remains faithful to the Court's historical practice of analyzing voting rights claims under conventional equal protection doctrine. O'Connor's decision to stick with equal protection language is unfortunate. It tends to confuse the analysis and to obscure the nature of the *Shaw* plaintiffs' harms. More importantly, it does nothing to help ensure that, in the next voting rights case, conventional equal protection doctrine will not inappropriately obscure real constitutional harms.

44. 113 S. Ct. at 2834 (White, J., dissenting).

45. Constitutionally-cognizable harms may come in a variety of shapes and forms in voting cases. For example, in a number of districting cases plaintiffs' harms are related to a deprivation of influence rather than an inability to elect representatives. *See, e.g.*, Wright v. Rockefeller, 376 U.S. 52 (1964); *cf.* Voinovich v. Quilter, 113 S. Ct. 1149 (1993) (assuming without deciding that an influence-dilution claim could be based on Section 2 of the Voting Rights Act). Voinovich exemplifies a recurring confusion about the nature of the harms asserted by voting rights plaintiffs. Although assuming Section 2 authorizes influence-dilution claims, the Court nonetheless required plaintiffs asserting such claims to prove that whites vote sufficiently as a bloc to defeat minority-preferred candidates. One might well argue that white crossover voting strengthens, rather than undercuts, an influence-dilution claim.

46. In the early districting cases, plaintiffs alleged harms associated with general exclusion from the political community, an exclusion that seemed to have more to do with unresponsive government and the deprivation of government benefits enjoyed by others than with any other factor. Concerns about this aspect of exclusion figured prominently in the "totality of circumstances" test of White v. Regester, 412 U.S. 755 (1973). Issacharoff, *supra* note 23, at 1884, argues that current vote dilution doctrine can be viewed merely as "an evidentiary proxy for the cumbersome examination of the responsiveness of governmental institutions to the needs of all citizens." One might argue, for example, that the only difference between White v. Regester and Shaw v. Reno is that in *White* the minority plaintiffs had to introduce evidence that multimember districts undercut representative democracy–since multimember districts (originally adopted as good government measures intended to counteract special interest government) are not per se unconstitutional–while the *Shaw* plaintiffs were permitted to rely on a presumption that a district constructed *only* with respect to race will *intrinsically* undercut representative democracy.

47. 478 U.S. 109 (1986).

48. *Id.* at 170 (Powell, J., concurring in part and dissenting in part). In Justice White's opinion, the principle is expressed as "political fairness." *See, e.g., id.* at 131. The notion of fairness-as-responsiveness embodied in *Davis* should not be confused with fairness-as-proportional-representation. The latter concept of fairness is conventionally associated with vote dilution analysis. *See, e.g.*, Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, *in* CONTROVERSIES IN MINORITY VOTING, *supra* note 22, at 85.

49. 478 U.S. at 133.

that "those who are elected will disregard [a] disproportionately underrepresented group,"[50] he would recognize a claim based on evidence that the electoral system "is arranged in a manner that . . . consistently degrade[s] . . . influence on the political process as a whole."[51] Justices Powell and Stevens concurred, but were a little less willing than Justice White to presume that representatives in gerrymandered districts take into account all constituent groups. They expressed concern that artificially gerrymandered districts would interfere with the ability of citizens to associate effectively for purposes of democratic government.[52] They acknowledged that harm might be caused by political structures incompatible with the formulation of policies reflecting community interests.[53]

The Justices in *Davis* did not characterize the primary harms resulting from artificially gerrymandered districts in terms of a group's inability to elect a representative. Rather, they spoke of harms suffered when an elected representative has no practical incentive or reason in principle to represent any persons other than a subset of constituents.[54] The harms exist when there is a discrepancy between the aspiration of representation benefiting the common good and the real consequences of political structures that by their very nature obstruct any possibility of achieving that representation.[55] The harms are those identified in *Shaw.*

B. *Aspiration and Reality in* Shaw v. Reno

It is difficult to explain the differences between the *Shaw* majority and dissenting opinions in terms of specific constitutional doctrine. Justice White–who has consistently emphasized the failure of representatives to respond to the needs of all constituents as a telling factor in challenges to multi-member districts[56]–

50. *Id.* at 132 (people who vote for a losing candidate are "usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district").

51. *Id. See also* Badham v. Eu, 694 F. Supp. 664, 670-71 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) (plaintiffs must show that the majority will entirely ignore the interests of the minority).

52. 478 U.S. at 173 n.13.

53. *Id.* at 177-78. They expressed concern that districting might send a message to citizens that representation or government is simply a game of power politics. *Id.*

54. *Id.*

55. Compare special district cases like Ball v. James, 451 U.S. 355 (1981). In these cases, the Court has recognized an exception to the artificial community concern. Special districts are artificial communities in which voting rights are distributed based on an assumption that representatives have no obligation to the general resident populace. Perhaps this is because special districts have no general powers over the resident population. Should such powers exist–and residents generally feel impacts of the powers of special district government–a constitutional principle of reciprocity-as-fairness would arguably demand extension of the franchise. See discussion in Calhoun, *supra* note 21, at 572-76.

56. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973).

rejected the claim of similar harms in *Shaw*.[57] Justice Rehnquist–in a completely uncharacteristic move–was willing to recognize a constitutional harm of the broadest and most amorphous sort.[58] Justice Stevens–who argued in *Davis* that "artificial communities" pose a justiciable voting rights claim and who was not willing to assume that representatives elected from gerrymandered districts would always respond to the interests of all district constituents[59]–criticized Justice O'Connor for placing so much weight on the artificial construct of District 12.[60]

The opinions in *Shaw* are better explained in terms of the constitutional aspirations they recognize and the realities they accord significance. The majority opinion rests on aspirations for representative government for the benefit of the common good as opposed to special-interest constituencies.[61] The aspirations are not usefully labeled either liberal or conservative.[62] They were espoused by James Madison, who saw representative democracy as a guard against potential dangers of majority rule and as a mechanism for promoting the common good.[63] They are also historically associated with Thomas Jefferson's belief that public virtue

57. 113 S. Ct. 2816, 2834 (1993). Justice White was, however, consistent with his position in United Jewish Org., Inc. v. Carey, 430 U.S. 144 (1977). In *UJO*, White forced the Hasidic Jews' complaint into a conventional vote-dilution mold. Ignoring the fact that the complaint characterized harms in terms of the Jewish community rather than whites as a whole, he focused his analysis of harms on impacts on white voters. The challenged districting plan did not stigmatize whites, did not fence whites out of elections, and did not cancel out the voting strength of a white racial voting bloc. Therefore, he concluded, white voters were fairly represented as a group in the legislature and no harms to be redressed existed.

58. 113 S. Ct. at 2823. For example, Justice Rehnquist joined Justice White in finding no constitutionally-cognizable harm to the plaintiffs in United Jewish Org., Inc. v. Carey, 430 U.S. 144 (1977). While White adhered to his position in *Shaw*, Rehnquist did not. In *UJO*, Rehnquist joined with White in holding that a state can treat race just like it treats political party affiliation, a position he arguably rejected in joining Justice O'Connor's opinion in *Shaw*.

In addition, Justice Rehnquist and other typically conservative Justices stretched the concept of constitutional harm in voting rights cases beyond prior limits not only in voting rights cases but in other cases in which citizen-plaintiffs have challenged government structures. *See, e.g.*, the discussion of Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992), in Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993). They disregarded their usual demand that the Court recognize only harms susceptible to being analyzed through judicially manageable standards and capable of being redressed by meaningful remedies. *See, e.g.*, Thornburgh v. Gingles, 478 U.S. 30 (1986). Compare White's dissent in *Shaw*, 113 S. Ct. at 2834 n.1.

59. *See supra* text accompanying notes 52-55.

60. 113 S. Ct. at 2844. Justice Stevens argued that the majority opinion is self-contradictory, since Justice O'Connor stated that the Constitution imposes no independent requirement of compactness or contiguity in districting. *Id.* A constitutional prohibition on artificial, general government districts, however, does not necessarily translate into a constitutional requirement of district compactness or contiguity. The constitutional prohibition simply invalidates structures that intrinsically obstruct representative democracy.

61. *See supra* text accompanying notes 27-32.

62. Issacharoff, *supra* note 23, at 1873-76. As appropriated by liberals, Issacharoff argues, the ideas tend to become unduly optimistic and naive. As appropriated by conservatives, the ideas are used as a "shill for unchecked majoritarianism." *Id.* at 1878.

63. *See, e.g.*, THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 7-20 (1989); GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 42-43, 223-24 (1981). Madison hoped representative government would minimize the divisive forces of faction, which he defined as "a number of citizens, *whether amounting to a majority or a minority of the whole*, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community." *Id.* at 193-94 (emphasis added).

should guide official action.[64] They are a necessary feature of a reciprocal relationship in which government's conferred powers to act for the general good (and to demand support of all citizens) are balanced by the rights of all citizens to government access.[65] They complement the idea that government is a trustee, acting for the benefit of all the people, an idea widely accepted and incorporated into state charters of government after the Revolutionary War.[66] Ordinary people "starved for unitary democracy"[67] and community understand the aspirations. Finally, minority groups–which by definition do not constitute a majority political bloc–have typically depended on the aspirations.[68]

It is somewhat difficult to describe the constitutional aspiration in the opinions of the dissenters.[69] Assuming that Justices White, Blackmun, and Stevens would each describe his aspirations as related to equality, the dissenting opinions reveal several things. First, equality means different things to different people, especially when equality is related to groups or when it may be construed to implicate affirmative action. As a constitutional aspiration, therefore, it is arguably weaker than the aspiration to representative government for the common good. If an aspiration to political equality is to function vigorously in civil rights litigation, its content must be more clearly described.[70]

Second, the aspiration to equality did not neatly comport with what was at stake for either the plaintiffs or for African-Americans in *Shaw*. The *Shaw* plaintiffs repeatedly said they were not concerned with equality. In addition, the North Carolina districting scheme gave only two of twelve congressional seats to African-Americans, a number hardly sufficient to constitute a strong faction, much less equality within the state's congressional delegation. Thus, the equality aspiration

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64. GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 190, 215-16, 251-55 (1978). Compare the arguments of civic republicanism described in Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1560-61 (1988).

65. *See, e.g.*, Crandall v. Nevada, 73 U.S. 35 (1867) (because government has the power to act for the benefit of the common good and to require all citizens to contribute to that action, some rights are a necessary, equal, and reciprocal right of citizenship). Compare the special district cases like Ball v. James, 451 U.S. 355 (1981), in which the Court permits special districts to distribute the franchise in unconventional ways because government powers of special districts are comparably restricted. *See supra* note 55.

But see Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978). In *Holt*, persons living outside municipal boundaries but subject to extraterritorial, city police jurisdiction unsuccessfully argued that they should have municipal voting rights. The dissenters argued that the geographic municipal boundaries delineated an artificial community and should not determine the outcome of the case:

> At the heart of our basic conception of a "political community" . . . is the notion of a reciprocal relationship between the process of government and those who subject themselves to that process by choosing to live within the area of its authoritative application . . . . [The extraterritorial jurisdiction of the City of Tuscaloosa] fracture[s] this relationship by severing the connection between the process of government and those who are governed . . . .

Id. at 82 (Brennan, J., joined by White, J., & Marshall, J., dissenting).

66. HOFFER, *supra* note 5, at 78-79.

67. JANE MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 301 (1983).

68. In this regard, it is important to emphasize that the aspiration is not necessarily assimilationist. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

69. *See supra* notes 33-42 and accompanying text.

functioned weakly in context.

Finally, the dissenting opinions assumed that an equality aspiration would necessarily trump any other constitutional aspiration. They largely ignored the constitutional aspiration on which the majority opinion rested. One may debate whether District 12 actually causes the harms alleged, or whether–if they exist–the harms must be tolerated because they are outweighed by compelling interests in remedying effects of discrimination. One should not, however, peremptorily reject either the plaintiffs' harms or the aspiration from which they derive.[71] As noted earlier, the aspiration is one on which minority groups have depended historically. It may be especially critical to minorities as a check against the intense majoritarianism of policymaking by direct democracy, a device increasingly used to make end runs around representative forms of government.[72]

Aspiration is not, of course, the whole story in *Shaw*. Even a strong constitutional aspiration must not be so divorced from the context of a specific case that its invocation produces an outcome that perverts the very meaning of the aspiration. The *Shaw* majority permitted aspiration to be used in this way. Certainly many who are outraged by *Shaw* are reacting to the majority's apparent determination not to acknowledge the realities of the problem of race in this country.

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70. Issacharoff, *supra* note 23, at 1880 provides an illustrative argument that links equality to the aspirations on which the *Shaw* majority relied. Issacharoff proposes that majority-minority districts may serve to reduce racial bloc voting and so tend to contribute positively to representative government. This appears to have been Congress's attitude when it rejected arguments that Section 2 of the Voting Rights Act would result in racial polarization. Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, *in* CONTROVERSIES IN MINORITY VOTING, *supra* note 22, at 66, 74-79. In addition, some have argued that whether or not majority-minority districts reduce racial bloc voting–which does persist–the districts promote community by resulting in more inclusive government policies. *Id.* at 79 (summarizing social science data); Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?*, *in* CONTROVERSIES IN MINORITY VOTING, *supra* note 22, at 261, 271.

To develop a satisfactory aspiration of equality, we will have to listen more carefully to minorities themselves, and not dismiss their arguments out of hand. *See, e.g.*, Guinier, *supra* note 22, arguing that a strong conception of political equality for minorities will focus on the "'black voters' dignity, autonomy, and interest in self-government as citizens in a democracy;" on "legislative influence, not just legislative presence;" on the "extended political process;" and on "equal status for minorities as full participants in the broad range of political decisionmaking in order to bring about fair results." *Id.* at 287-88.

71. When Justice O'Connor expresses great concern that the challenged district will incite racial hostility, reinforce racial stereotypes, and promote continued racial bloc voting, I must confess that I am reminded of some colleagues who object to attempts to introduce diversity to the curriculum, faculty, and student body on the ground that the attempts are divisive. Of course, the attempts always seem to make women and minorities feel much more a part of community; only those whose previous, privileged status is at risk see a threat to community. Nonetheless–as amused and impatient as minorities or women may be by these grumblings–an aspiration to community and government for the common good requires us to take into account the harms to all members of the community.

One cannot *a priori* discount–*e.g.*, as Justice White does in refusing to address the harms identified by O'Connor–the harms to community felt by those who are being asked to adjust to a new political reality. Perhaps the alleged harms are entirely specious, but the plaintiffs insist that they are not. Only a careful fact-based inquiry–which the *Shaw* dissenters would deny by refusing to recognize even a cause of action–will provide a basis on which to make that judgment.

72. Cain, *supra* note 70, at 273. The current challenge to Colorado's anti-gay Amendment 2, adopted through the direct democracy initiative process, relies on a variant of this constitutional aspiration. A discussion of the aspiration and Amendment 2 as part of a Petitions Clause analysis is contained in Emily Calhoun, *Voice in Government: The People*, NOTRE DAME J.L. ETHICS & PUB. POL'Y (forthcoming Spring 1994).

Whereas the dissenters in *Shaw* carefully described the reality of power, racial politics, and resulting harms to African-Americans, the majority spoke primarily in abstractions. As Randall Kennedy has said:

> the . . . majority [in *Shaw*] appeared captivated by the idea that purposefully creating black majority districts "may balkanize us into competing racial factions"–as if before affirmative race-conscious measures were introduced the state's political arena was a Garden of Eden.
>
> It was left to the dissenting Justices to observe that North Carolina had traditionally been balkanized, with a white majority faction monopolizing all the Congressional seats; that it was only after the 1990 redistricting that, for the first time since the turn of the century, blacks were able to join the state's Congressional delegation and that even after the creation of the two black majority districts, whites remain a voting majority in 10 of the 12 Congressional districts.[73]

Nothing in the majority opinion in *Shaw* responds to this reality. Worse, by reserving questions in an inviting way[74]and by not clearly articulating the limited basis for its holding,[75] the majority opened up the possibility of challenges to many majority-minority districts across the country. By unnecessarily and unrealistically exaggerating possible "balkanizing" impacts of District 12,[76] the majority did little to promote the constitutional aspiration invoked in its opinion.

Even if *Shaw's* decision to recognize the plaintiffs' harms was appropriate, surely the Justices in the majority had an obligation to explain their decision in a way that would honor the aspiration on which they based their holding. Surely they had an obligation to make every effort to write an opinion that would not exacerbate racial division and hostility in the name of promoting community. Surely they might have spent as much time writing about the reality of the concerns that resulted in the adoption of the Voting Rights Act as they spent responding dismissively to North Carolina's potential justifications for District 12.[77]

Shaw v. Reno gives us a way of mapping the domain of civil rights litigation. It locates aspiration and reality prominently within that domain, and also clearly reveals the dangers that lie beyond its border.

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73. Randall Kennedy, *Still a Pigmentocracy*, N.Y. TIMES, July 21, 1993, at A17.

74. For example, Justice O'Connor stated that the Court was not deciding whether the intentional use of race in all decisions involving the creation of majority-minority districts would be constitutionally suspect, 113 S. Ct. at 2828, rather than stressing the unique nature of the majority-minority district challenged in North Carolina. *See supra* note 32.

75. For example, the Court might have emphasized that a mere allegation that race has been used as the sole criterion for districting is not enough to withstand a motion to dismiss given Wright v. Rockefeller, 376 U.S. 52 (1964), and might have reminded states that they are free to contradict the basis of the complaint at the outset of litigation, as seems to have happened in *Wright*.

76. *See supra* note 70.

77. 113 S. Ct. at 2830-32.

Shaw sits perilously close to that dangerous border, for it remains to be seen how the decision will be used. It is unclear whether the realities and equality aspirations neglected by the *Shaw* majority will be given their due weight when the merits of the controversy are addressed. It is unclear whether, because of *Shaw*, Section 2 or 5 of the Voting Rights Act will be substantially undercut, or the ability of states to respond to the realities of racial bloc voting and racial discrimination significantly curtailed. It is unclear whether *Shaw's* constitutional voting rights aspirations will be permitted to serve the interests of all members of the political community, or will only be invoked to derail aspirations to equality. Those of us who aspire to representative government that transcends adversarial, power politics–but who also understand the discrepancy between that aspiration and the reality of racial politics–wait hopefully but with considerable trepidation.