The Equal Protection Clause and the Legislative Redistricting Cases-Some Notes Concerning the Standing of White Plaintiffs

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INTRODUCTION

A well-known contradiction resides at the core of modern equal protection jurisprudence. On the one hand, equal protection doctrine depends intimately on the concept of groups and group identity. Although doctrinal and scholarly consensus regards the equal protection guarantee as an individual right,¹ rather than a group or communal right,² the first step in evaluating most individual claims is to determine in what group the individual litigant claims membership. Is the group discrete and insular? Has it otherwise been subject to historic disadvantaging such that its members comprise a suspect class? The right may be individual, but proving that the right was abridged will inevitably entail a discussion of groups.

On the other hand, the very idea of membership in a group implies stereotype, and stereotyping is regarded as anathema by equal protection law. In the recent decision striking down the Virginia Military Institute's policy of denying admission to women, for example, the Court noted that VMI defended its policy as reflecting "real" differences between the sexes rather

¹ The classic citation is Paul Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1 (1976) (examining the Supreme Court's use of the equal protection doctrine in race discrimination cases).

² But see Owen M. Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFFAIRS 107 (1976) (arguing that the Equal Protection Clause should be used to protect groups).
than mere "stereotypes." VMI's insistence that it was not relying on stereotypes reflects the popular viewpoint that decisions resting on stereotype are not merely unlawful; they are pernicious and vile. This view also appears to dominate the Court, and the legislative redistricting cases have been but the most recent vehicle for allowing the Justices to express the belief that stereotyping is far worse than unconstitutional; it is abhorrent. Thus in Miller v. Johnson, the major redistricting case from two terms ago, Justice Kennedy's majority opinion argued:

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." ... Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.

Similarly, in last term's decision in Bush v. Vera, Justice O'Connor deplored the use of racial stereotype "as a proxy for political characteristics." As a doctrinal matter, therefore, group membership is germane to a constitutional claim; in contrast, as a political matter, treating individuals by virtue of their membership in a group is—at least sometimes—offensive, if not impermissible.

Of course, politics itself is a group phenomenon. This truism was captured in the short-lived phrase "governing majority." In Castaneda v. Partida, the Court decided the case of a Hispanic Texan who argued that his indictment was defective because the method used in Texas to constitute grand juries discriminated against Mexican Americans. Partida grounded his claim in the Equal Protection Clause. The Court, by a five to four vote, ruled in Partida's favor, largely because the State of Texas had presented no evidence rebutting Partida's prima facie showing of discrimination.

But Justice Blackmun's majority opinion is notable for a reason other than its holding. The district court had ruled against Partida, in part based on the theory that Mexican Americans constituted a "governing majority" of the county.

where Partida had been indicted. Partida was indicted and tried in Hidalgo County, the population of which was eighty percent Mexican American. In addition, three out of the five grand jury commissioners—the officials who chose the members of the grand jury—were Mexican American. Finally, half the members of the grand jury that indicted Partida were Mexican American. These demographic criteria contributed, according to the district court, to a rebuttal of Partida's prima facie showing. The district court reasoned that a Mexican American could not establish impermissible racial discrimination if the decision maker herself was Mexican American. Justice Blackmun's opinion explicitly rejected the lower court's reasoning and unequivocally dismissed the view that the "existence of a 'governing majority'... can rebut a prima facie case of discrimination." The fact that the decision maker was Mexican American does not necessarily mean, the majority held, that she did not impermissibly discriminate against a Mexican American.

Justice Powell dissented. In Powell's view, "The most significant fact in this case... is that a majority of the jury commissioners were Mexican American." He then continued:

In these circumstances, where Mexican-Americans control both the selection of jurors and the political process, rational inferences from the most basic facts in a democratic society render improbable respondent's claim of an intent to discriminate against him and other Mexican-Americans. As Judge Garza [the district court judge] observed: "If people in charge can choose whom they want, it is unlikely they will discriminate against themselves."

In this Article I propose to resurrect the concept of the "governing majority," if not the phrase itself. However, I do not focus on the concept's relevance to equal protection doctrine per se; instead, I suggest that the idea inherent in this shunned locution is critically important to the concept of justiciability and to the notion of how a constitution mediates between right and power. Part 1 of the Article discusses the important value served by justiciability doctrine generally. Part 2 summarizes the Court's decisions in Miller v. Johnson, Shaw v. Hunt, and Bush v. Vera. Part 3 argues that the doctrinal fo-

8. Id. at 486-89.
9. Id. at 484.
10. Id. at 486.
11. Id. at 492.
12. Id. at 515 (Powell, J., dissenting).
13. Id. (quoting the district court's opinion at 384 F. Supp. 79, 90 (1974)).
cus in Miller, Hunt, and Vera continues to reflect a misstep that occurred some two decades ago in Bakke; this Part also defines the Article's central terms. Part 4 advances the argument that white plaintiffs in cases demographically similar to the redistricting scenarios should be deemed not to have standing to sue.

1. A WORD ABOUT JUSTICIABILITY

In a constitutional democracy, a citizen aggrieved by government action can pursue relief in two different ways. She may try to persuade a majority of the citizens (or legislators) to alter whatever it is that has caused her injury; she may also sue and ask a court to strike down whatever it is the state has done. Whereas the door to the legislature is always open, however, the courthouse door is sometimes closed.

The doctrine of justiciability determines whether, in a given situation, an aggrieved citizen has the power to sue. For example, political question doctrine, one aspect of justiciability, establishes that certain issues can be addressed only by the political branches. If a question is deemed political, the federal courts may not act; an aggrieved citizen must go to the legislature, not the courthouse. Political question doctrine is one of a variety of jurisdiction-avoiding devices that permits federal courts to avoid doing what so many judges and justices truly dread: overturning actions of the political majority.

Justiciability doctrine, therefore, is animated in significant part by the important idea that federal courts are neither debating societies nor refuges for political losers. Rather, it is fair to say that federal courts serve three essential functions. First, they mediate the relationship among the three federal


16. Id. The classic statement is found in Baker, ironically a legislative apportionment case, where the Court defined a political question as one involving "a textually demonstrable commitment of the issue to a coordinate political department." Id. at 217.
branches; this aspect of federal court responsibility is generally referred to as separation of powers doctrine. Second, they mediate the relationship between the federal sovereign on the one hand and the state sovereigns on the other; this falls under the rubric of federalism. Finally, they safeguard individual rights through statutory and constitutional interpretation. Where the federal court is safeguarding individual constitutional rights, it is useful to recall that what the Constitution does is remove certain decisions from the realm of ordinary majoritarianism. Thus, when the courts are safeguarding constitutional rights, they are protecting members of the political minority against the power of the political majority.

Justiciability doctrine runs through each of these aspects of the judicial function. In this Article I propose that legislative redistricting decisions—that is, the activity of state legislatures in drawing congressional district boundaries—exemplify an additional category of cases to which federal jurisdiction should not extend when certain demographic criteria are satisfied. To date, courts have been deciding challenges to legislative redistricting on the merits. I will argue that most of these suits should be dismissed: Courts should ordinarily deem white plaintiffs not to have standing to challenge the drawing of district lines; further, where whites are a "governing majority," they should generally lack standing to challenge legislative decisions that aim to and succeed in strengthening nonmajority groups.

One preliminary matter merits brief mention. In an article published in 1987, I defined the term "societal rights" to refer to a relatively small universe of rights held in common by all Americans such that when the right is violated no particular individual is distinctively injured. My argument was prompted by a trilogy of standing cases, culminating with Valley Forge Christian College v. Americans United for the Separation of Church and State, all of which held that certain constitutional provisions are nonjusticiable. A plaintiff lacks standing,

18. 454 U.S. 464 (1982); United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). Valley Forge was in fact an Establishment Clause challenge to the government's decision to transfer substantial assets to an avowedly Christian college. The college's mission was the training of clergymen, and the Court's denial of standing to the plaintiffs was especially troubling. Valley Forge Christian College v. Americans United for the Separation of Church and State, 454 U.S. 464, 488-90 (1982).
according to these cases, when the injury she asserts is an injury shared in common by the population generally. As then Justice Rehnquist put it: "Even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amounted to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."\(^{19}\) When a constitutional violation injures a significantly large number of citizens, no one has standing to sue. Or, put differently, the asserted abrogation of various constitutional provisions creates a claim that must sometimes be raised not before a court but before the legislature. When citizens claim violation of these provisions, the Supreme Court concluded, they lack standing and must therefore seek political rather than judicial relief. The provisions that necessitate this result are those that, when abridged, cause an injury that is widely shared. This "generalized grievance" barrier to standing appears to be a prudential limitation on the Court's power rather than a constitutional one.\(^{20}\)

In view of the Court's cases denying standing in contexts where the plaintiff's injury was deemed to be widely shared, its recent decisions in the legislative redistricting cases are simply astonishing. An even-handed application of the doctrine developed in the *Valley Forge* cases would surely require that courts deny standing to plaintiffs in these cases. If the Establishment Clause injury complained of in *Valley Forge* can be deemed to be widely shared, it is nonsense to say that the putative equal protection injury caused by redistricting that increases minority representation is not just as widely shared.

But in this Article I do not wish to make solely an *a fortiori* argument, nor do I wish to argue that the Equal Protection Clause constitutes a societal right. Indeed, one need not even concede the correctness of *Valley Forge* in order to attack the Court's analysis in the redistricting cases. Instead, I propose that although the Court got it wrong in *Valley Forge*,\(^{21}\) it did in

\(^{19}\) *Id.* at 474-75.
\(^{20}\) *Id.* at 475-76.
\(^{21}\) My argument as to why the Court got it wrong is contained in Dow, *supra* note 17. In short, I maintained that the Court's slippery slope argument for denying the plaintiffs standing failed to notice that the universe of asserted rights which, when abridged, cause no distinctive injury, is in fact rather small.
fact recognize a crucial truth: that rights are functional; that
the role of the federal courts is not to expound jurisprudential
truths, but to effectuate the function of constitutional rights.
Put differently, the Court's mistake in Valley Forge was a
small one: It was correct in saying that citizens must some-
times go to the legislature rather than the courts; it simply
misidentified those times. The Court attempted to define non-
justiciable constitutional violations by looking to the number of
citizens injured by the violation. In fact, however, constitu-
tional theory requires us to look not only at the numerosity of
those injured, but also at who is doing the injuring.

2. MILLER V. JOHNSON, SHAW V. HUNT, BUSH V.
VERA, AND LEGISLATIVE REDISTRICTING

In its last three terms, the Supreme Court has decided
four major redistricting cases. The first of the quartet, Shaw v.
Reno,22 established that in order for a plaintiff's complaint
which challenges the drawing of a legislative district to state a
cause of action, the plaintiff must live inside the district. The
next case, Miller v. Johnson,23 established the doctrinal frame-
work for reviewing the constitutionality of redrawn congres-
sional districts. The two most recent cases, Shaw v. Hunt24
and Bush v. Vera,25 are essentially applications of the Miller
framework. Both decisions emphasize the fact-intensive na-
ture of judicial review in legislative line drawing cases. For
heuristic purposes, therefore, I will focus primarily on Miller,
where the Court first articulated the equal protection doctrine
it has applied in subsequent redistricting decisions. But this
focus should not obscure the fact that the argument I develop
here applies to any lawsuit directed against redistricting legis-
lation; it applies with equal force, in fact, to any scenario where
a political majority chooses to share power with some or all
members of the political minority.

The decision in Miller grew out of a challenge brought by
white Georgia citizens to the Georgia legislature's drawing of
congressional district lines.26 Under the 1980 census, Georgia

24. 116 S. Ct. 1894 (1996). Shaw is the same case as Shaw v. Reno, 509
U.S. 630 (1993), following the remand.
had ten seats in the House of Representatives. Based on 1990 census figures, the state's population entitled it to an additional seat. The Georgia legislature thus had the task of modifying the state's legislative district boundaries.

According to the 1990 census, twenty-seven percent of Georgia's population is black. When it met to revise the boundaries, the Georgia legislature originally intended to draw the eleven congressional districts such that two of them would be "black" districts. A "black" district is one in which the majority of voters is black. Eventually, because of pressure from the United States Justice Department, Georgia instead drew the lines such that three of the eleven districts were black districts.27 In other words, the black population in Georgia is twenty-seven percent and the Georgia legislature aimed to make twenty-seven percent of the state's congressional districts black districts.

Dividing five to four,28 the Supreme Court held that this redistricting plan violated the Equal Protection Clause because the legislature's predominant motivating factor in drawing the district lines as it did was race.29 In reaching its decision in *Miller*, and in the redistricting cases that followed it, the Court continued a debate that began in *Regents of University of California v. Bakke* 30 pertaining to the appropriate standard of review in cases where a legislature uses race as a relevant characteristic in enacting some statute or program. The issue of which standard of review to use is pivotal because the choice of standard typically dictates the outcome: When so-called "strict scrutiny" is applied, the legislative enactments rarely survive; when the Court applies a lesser standard, the legislative enactments ordinarily do survive.31 The strict scrutiny standard

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27. See id. at 2484-85 (noting that the U.S. Department of Justice essentially forced Georgia to create a third black district).
28. *Shaw v. Hunt* was decided by the same five to four split. *Bush v. Vera* was five to four with respect to the judgment, but Justice O'Connor's opinion was simply for a plurality, with Justice Thomas, joined by Justice Scalia, writing separately.
evolved, of course, in the context of race-based legislation that tended to require racial segregation for whites and nonwhites.

In *Bakke*, the Court considered for the first time the use of a racial classification designed not to separate the races but, instead, to increase the nonwhite representation in a state medical school.\(^{32}\) Justice Powell\(^{33}\) concluded that why the state chooses to use race as a factor is of no moment in determining the appropriate standard of judicial review.\(^{34}\) The use of race as a factor necessarily triggers strict scrutiny, regardless of whether the state uses race to separate or for some other, more "benign" purpose. Thus, such legislation will survive constitutional attack only if the state's objective is compelling and the means chosen to accomplish it are narrowly tailored.\(^{35}\) Justice Brennan offered a different approach. In an opinion joined by three other Justices, Brennan proposed that a different standard be used when the racial classification was enacted for "ostensibly benign purposes."\(^{36}\) Under such circumstances, Brennan argued, the state need only point to "an important and articulated" purpose, rather than a compelling interest and narrowly tailored means.\(^{37}\)

The standard of review debate begun in *Bakke* continued through the major affirmative action cases of the 1980s\(^ {38}\) and has now filtered into the legislative redistricting cases. Thus, Justice Kennedy, writing for the majority in *Miller*, repeated the idea that insofar as the Georgia legislature used race as a factor in drawing the lines of the Eleventh Congressional District, strict scrutiny would be applied to evaluate the constitutionality of its actions. Consequently, the "State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest."\(^ {39}\) In contrast, Justice Gins-

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32. 438 U.S. at 269-71. Actually, the issue of benign racial classifications was first touched on in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

33. Justice White joined this portion of the opinion.

34. 438 U.S. at 287-91.

35. *Id.* at 305 (opinion of Powell, J.).

36. *Id.* at 361.

37. *Id.* (opinion of Brennan, J.).


burg's dissent maintained that when a state's drawing of district lines enhances (rather than dilutes) minority voting strength, strict scrutiny is not the appropriate standard of review.\(^4\) Similarly, in \textit{Shaw v. Hunt}, Chief Justice Rehnquist's majority opinion insisted on applying strict scrutiny to race-conscious redistricting in North Carolina,\(^4\) while Justice Stevens maintained that a lesser standard ought to apply.\(^4\) Justice O'Connor's plurality opinion in \textit{Bush v. Vera} concluded that strict scrutiny is appropriate when the plaintiff demonstrates that traditional districting principles were "'subordinated' to race";\(^4\) Justice Thomas insisted that strict scrutiny is demanded whenever racial considerations play any role at all.\(^4\)

While the \textit{Miller} majority concluded that the use of race as a factor in the drawing of legislative lines is not per se forbidden by the Equal Protection Clause, a legislature's reliance on race as a predominant factor is problematic. Further, the Court held that no compelling state interest justified the Georgia legislature's use of race as a signal factor. Accordingly, its action in drawing District Eleven violated the Equal Protection Clause. For the same reason, the Court struck down the North Carolina legislature's action in the drawing of two congressional districts in \textit{Shaw v. Hunt}, and the Texas legislature's drawing of three district lines in \textit{Bush v. Vera}.

3. \textit{EQUAL PROTECTION DOCTRINE'S WRONG TURN}

Ever since \textit{Bakke}, the Supreme Court has been debating the wrong question. To be sure, the debate over the appropriate standard of review has obvious practical importance to the outcome of much constitutional litigation; adopting the Brennan-inspired standard would mean that the use of racial classifications for so-called benign purposes would survive constitutional challenge more often than they would under strict scrutiny. Nevertheless, this attention to the standard of review elides the more pertinent constitutional question: whether it is coherent to allow a member of a political majority to raise a consti-
tutional challenge to action undertaken by the majority of which she is a member. 

Bakke, the affirmative action cases of the 1980s, and the redistricting cases of the 1990s all raise the same threshold question: namely, whether a white citizen ever has a cognizable constitutional claim (i.e., standing) to challenge legislation enacted by a majority of whites that allegedly diminishes the power of whites. I propose that the answer is no. As a matter of traditional standing doctrine, a white citizen lacks standing to challenge a legislature's drawing of district lines where that drawing augments the political power of the political minority.\(^4\) The reason is that the white citizen does not suffer a constitutionally cognizable injury.

More generally, and extending the argument beyond the redistricting cases,\(^5\) my claim is this: (1) Where a statute clas-

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45. Although no member of the Court has made the precise argument put forward here, several Justices have indeed expressed skepticism as to the standing of white plaintiffs in the redistricting context. For example, both Justice Stevens and Justice Souter have suggested that the Court's redistricting decisions have failed clearly to delineate the injury suffered by the plaintiffs. See Bush v. Vera, 116 S. Ct. 1941, 1997-98 (1996) (Souter, J., dissenting) (arguing that the Court failed to describe the elements of a vote-dilution claim); Miller v. Johnson, 115 S. Ct. 2475, 2490 (1995) (Stevens, J., dissenting) (arguing that the Court dispensed with its previous insistence on a showing of injury to an identifiable group of voters). In addition, Stevens has observed "that the Court has failed to supply a coherent theory of standing to justify its emerging and misguided race-based districting jurisprudence." Shaw v. Hunt, 116 S. Ct. at 1907 (Stevens, J., dissenting). Justice White specifically concluded that the plaintiffs in Shaw v. Reno lacked standing, and Justice Souter likewise wondered about the injury. See 509 U.S. 630, 674 (1993) (White, J., dissenting) (disagreeing with Court's holding that appellants asserted a cognizable claim); id. at 682 (Souter, J., dissenting) (arguing that the mere placement of voters in a district, even on the basis of race, does not diminish the effectiveness of individual voters). Moreover, the Court did hold in a redistricting case out of Louisiana that voters who do not live in the allegedly gerrymandered district lack standing to challenge its creation. United States v. Hays, 115 S. Ct. 2431, 2433 (1995).

46. In the redistricting context, a number of commentators have expressed puzzlement at the notion that white citizens have standing to challenge a decision of a predominantly white legislature to create an additional minority voting district. Scholarly commentary that I have found amenable in developing my thesis (which does not mean that these writers necessarily subscribe to my broader claim) includes the following: Pamela S. Karlan, All Over the Map, 1993 SUP. CT. REV. 245 (1994); Frank R. Parker, The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno, 3 D.C. L. REV. 1 (1995); Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 MICH. L. REV. 483 (1994); Girardeau A. Spann, Color-Coded Standing, 80 CORNELL L. REV. 1422 (1995); Robert A. Curtis, Note, Race-
sifies on the basis of characteristics X and Y, and (2) where those with characteristic X represent a majority of the legislative body as well as a majority of the polity, and (3) where the statute which classifies on the basis of characteristics X and Y cedes political power (or some other good) to those with characteristic Y, then (4) those with characteristic X lack standing to challenge the legislation on constitutional grounds. Whether citizens with characteristic X are "injured" in some sense is irrelevant; what is determinative is that they lack a judicially cognizable injury, for the injury they have, if indeed they have one, is politically redressable.

3.1. DEFINITIONS AND PREMISES

When deciding questions of constitutional law, it is useful to remember what a constitution is. A constitution limits the power of the majority; it does so by delineating specific exceptions to the ordinary democratic rule of decision, which is fifty percent plus one. Thus, a constitution mediates the relationship between state power and individual rights, with state power defined as the ordinary democratic rule of decision (ODRD).

The ODRD is itself a normative rule. Likewise, constitutional rights exemplify certain cultural norms. These norms are best thought of as a universe of constraints on the exercise of legitimate power. They are the sole exceptions to the ODRD.

Constitutional rights, including the equal protection right, are constraints on the political majority's political power. They are thus, by definition, available only against the political majority. While a group or faction may have the political power to accomplish its will under the ordinary democratic decision-making rule, that power is insufficient in certain constitutionally enumerated contexts. The essential dynamic presupposed by and reflected in the concept of a constitution is the ten-


47. "State," as used here, connotes government generally, not an individual state in the federalist sense.

sion between right and power, where power refers to the ODRD and right refers to the insufficiency of the ODRD. But the ODRD is always sufficient except when the Constitution removes certain norms from the realm of ordinary politics.\textsuperscript{49} And even when the Constitution renders the ODRD insufficient, the Constitution may be amended by supermajority vote such that the ODRD will be adequate in the future.\textsuperscript{50}

Although conceptually it is elegant to view the political majority as coterminous with those who wield political power, in truth the notion of political power is more fluid. Because the ordinary democratic decision-making rule requires fifty percent plus one, there is a sense in which it is apt to say that an individual has political power if he or she votes in the majority with respect to a given piece of legislation. This view of political power is a bit reductionist, however, and it renders the notion of power so evanescent as to make it meaningless. Moreover, this view is at odds not only with the idea of political parties, which are central to American politics, but also with legal doctrine. Consequently, although it is certainly true that a given individual may be a member of a political majority with respect to one legislative act but not another, an individual is a member of a political majority more generally if he or she shares the characteristics of most of those who make the decisions (be they voters or legislators).\textsuperscript{51} Political majorities ordinarily seek

\textsuperscript{49} "Ordinary politics" are distinguished from "constitutional politics," which are those periods when the polity debate constitutional amendments. See Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 YALE L.J. 453, 461-62 (1990) (describing a dualistic theory of democracy that distinguishes between normal lawmaking and higher, or constitutional, lawmaking).

\textsuperscript{50} The claim that anything in the Constitution is subject to amendment is not wholly uncontroversial. My position is contained in Dow, supra note 48, at 52-56. But see Douglas Linder, What in the Constitution Cannot Be Amended?, 23 ARIZ. L. REV. 717 (1981) (suggesting that framers did not consider the possibility of unamendable provisions); Jeffrey Rosen, Note, Was the Flag Burning Amendment Unconstitutional, 100 YALE L.J. 1073 (1992) (arguing that the proposed amendment to prohibit flag burning would have been unenforceable even if properly ratified).

\textsuperscript{51} Two important points bear mention here. First, my thesis is potentially vulnerable to the argument that legislatures do not in fact represent the populations that elect them. In other words, the fact that both the majority of the population and the majority of the legislature share characteristic $X$ might not necessarily mean that the legislature perfectly represents citizens $X$ qua $X$. This argument has its roots in David Mayhew's highly regarded CONGRESS: THE ELECTORAL CONNECTION (1974), and a vast literature has flourished around it. My view, however, is that the representation debate does not affect the
thesis. Although I do not defend this point at length here, the essence of my argument is adumbrated in my following response to a second point.

This second point calls into question the very coherence of the concept of groups. For example, suppose that a legislature consists of 10 representatives, 5 rich and 5 poor. Suppose also that the population likewise consists of 50% rich and 50% poor. Because the ODRD requires 50% plus 1, this legislature will find itself deadlocked with respect to every issue characterized as a rich versus poor debate. The legislature will find itself able to act only when at least one defector votes with the other group. If, therefore, the poor legislators desire to enact a massive wealth redistribution scheme, such as an exceedingly steep progressive tax, and if all the poor legislators vote to enact this proposal, it will go into effect if and only if one of the rich legislators votes for it as well. Suppose that one and only one of the rich legislators, motivated by altruism, defects to vote with the poor legislators. Under these circumstances, the legislature enacts the steep tax. My thesis will suggest that whatever the substantive merits of any constitutional challenge to this wealth redistribution scheme, none of the legislators and none of the citizens have standing to bring it. Hence, there is no justiciable constitutional challenge to the tax.

No one has standing to challenge the enactment of this tax because everyone in the polity—the rich as well as the poor—have adequate political protection. No one requires additional constitutional protection because either group can thwart any enactment. In the example above, rich citizens opposed to the new tax can pressure the defecting representative to return to the fold and vote with the rich bloc to rescind the tax. (Of course, to succeed, they will need their own defector from the poor bloc.) When a group has access to adequate political protection, even if that group decides to forsake that protection, constitutional rights are conceptually inapt.

In a sense, there is something deeply unsatisfying about this answer. Perhaps the dissatisfaction stems from the fact that the answer relies quite heavily on the coherency of ostensibly salient groups. In other words, it requires the coherence and continued existence of the rich group and the poor group. Such groups, however, may not exist or maintain their coherence over time. Furthermore, assuming the existence of such groups in the first place tends to reify them and is, therefore, affirmatively pernicious. This observation constitutes powerful criticism. In a sense, it raises the same issues that are at stake in the debate about the role of stereotypes in redistricting legislation. Likewise, it veers off into discussion of special interest groups and election reform. Yet despite the importance of this issue, it is exceedingly complex and so I avoid saying much more about it in this Article. The conventional wisdom, however, seems to accept group identification, at least in the political realm, as a fact of nature. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno, 92 Mich. L. Rev. 588, 601 (1993) (concluding that voters can assert their rights to meaningful participation in the political process only as members of a group). Though the conventional wisdom may overstate the situation somewhat, one can fairly say that the concept of groups and group identity has embedded itself so deeply in doctrinal and political life in America that it seems quixotic to imagine how things would look without it. Thus, the rich legislator may on occasion vote with the poor bloc, but that legislator nevertheless belongs to the rich group. See generally COMMON CAUSE, TOWARD A SYSTEM OF FAIR AND EFFECTIVE REPRESENTATION (1977); REAPPORTIONMENT IN THE 1970S (Nelson W. Polsby ed., 1971); Bruce E. Cain, Voting Rights and Democratic Theory, in CONTROVERSIES IN MINORITY VOTING 261 (Bernard
to augment their own power but may sometimes seek to share power. This point is empirical, not doctrinal or definitional.

3.2. STANDING DOCTRINE

Asking whether a plaintiff has standing is like asking whether the plaintiff is an intended beneficiary of the right being asserted. For example, an ordinary citizen who is opposed to capital punishment lacks standing to challenge a condemned inmate’s death sentence because the intended beneficiary of the Eighth Amendment’s prohibition against cruel and unusual punishment is the condemned prisoner himself, not members of the general public. The basic methodology for determining whether a party has standing is the same in both the constitutional and the statutory contexts. Because a right allows an individual to deflect (or thwart) the political majority’s power, it may be invoked only by one against whom that power is wrongly exercised. Constitutional rights are not precatory; they are functional.


52. See Gilmore v. Utah, 429 U.S. 1012, 1014 (1976) (Burger, C.J., concurring) (permitting a third party to apply for stay of execution only when a prisoner cannot seek relief on his/her own).

53. See Dow, supra note 17, at 1199 n.11.

54. There are a limited number of exceptions to this rule, i.e., cases where a third party may raise another’s claims. But third party (jus tertii) standing is an exception available only when (1) rights of the third party will be affected by the decision, or (2) the intended beneficiary of the right is unable to assert claims on his or her own behalf. See id. at 1198 n.9. In Craig v. Boren, the Court observed that the ordinary rule barring assertion of jus tertii is not constitutionally rooted. 429 U.S. 190, 193 (1976). The requirement that there be some injury, however, is constitutionally anchored, see infra note 61, and I would argue that the jus tertii rules are also best viewed as constitutionally based. In any event, the significance of this point to my present thesis is that it may imply that standing should be denied to white plaintiffs in redistricting cases for prudential, rather than constitutional, reasons.

55. Actually, they may be precatory as well, but their functional role is paramount.
ual may choose, faced with invasive state power, either to use her shield or to succumb. 6

The idea that the only individual who may challenge state action is the individual injured by that action is the essence of standing doctrine. This dimension of standing doctrine is not merely prudential, it is constitutional. 5

An individual whose rights are assertedly abridged by the action of a political majority may sue to restrain the majority's actions, but need not do so; nor can that individual be compelled to do so.

3.3. LEGISLATIVE CLASSIFICATIONS

A legislative classification is simply a device to divide individuals into two or more groups. Statutes which, for example, require that individuals have adequate vision in order to receive a driver's license classify the universe of citizens into those with adequate vision and those without. Generally, legislation that distributes wealth, power, privilege, or some other good (WPPG) does so by classifying. Those in a certain class receive the WPPG being distributed; those outside it do not. Unless there is a specific constitutional limitation involved, the ODRD dictates which classifications are acceptable. Thus, unless there is a specific constitutional provision which dictates that vision cannot be deemed relevant to the distribution of drivers' licenses, a state may use vision as a classifying trait simply by the exercise of ordinary political power.

When a legislative classification establishes that individuals with characteristic $Y$ will receive some WPPG, we can say that all those in the polity with characteristic $Y$ are beneficiaries of the legislation. I assume that an individual cannot be injured by having her WPPG augmented by the state. This is both a crucial assumption and one that is constitutionally rooted; for when majoritarian power adds to an individual's WPPG, there is no conflict between individual right and state power upon which to rest a claim of constitutional injury.

56. Justice White, in *Gilmore v. Utah*, argued, however, that an individual cannot validate unconstitutional state conduct by consenting to it. 429 U.S. at 1018 (White, J., dissenting).

57. The injury requirement's constitutional roots emerge from the very definition of the word "case." *See U.S. CONST art. III* (limiting the judicial power of the federal courts to the resolution of cases and controversies). It bears mention, however, that some confusion reigns in the *jus tertii* cases concerning whether the plaintiff who asserts another's rights must also suffer a personal injury. *See Note on Asserting the Rights of Others, in HART AND WECHSLER*, supra note 14, at 166-75.
3.4. ALL POSSIBLE WORLDS

Political majorities sometimes choose to make themselves beneficiaries of legislation and sometimes choose not to; that is, they sometimes classify so as to augment their own WPPG and sometimes so as to diminish their own WPPG (by distributing WPPG to those outside the political majority). When legislation confers WPPG on those with characteristic $Y$, and both a majority of legislators and a majority of citizens have characteristic $Y$, then the legislation augments the power of the majority. This can be called a distribution "to" the majority. Conversely, when the legislation confers WPPG on those with characteristic $Y$, but both a majority of legislators and a majority of citizens have characteristic $X$, then the legislation diminishes the power of the majority. This can be called a distribution "from" the majority.

With respect to bipolar ($X$ and $Y$) classifications, in which every member of the polity and every legislator will have either characteristic $X$ or characteristic $Y$, but not both, there are four possible relationships between the profile of the polity and the profile of the legislature.

1. Both the population and the legislature may be majority $X$. For example, if the classifying trait is race, with $X$ defined as being white and $Y$ defined as being nonwhite, then, if the majority of the members of the polity are white and the majority of legislators are white, this condition is met. We can refer to this condition as $X-X$, the first $X$ referring to the polity and the second to the legislature.

2. The population may be majority $X$ and the legislature majority $Y$. For example, if the classifying trait is gender, with $X$ defined as being female and $Y$ defined as being male, then, if the majority of members of the polity are female but the majority of legislators are male, this condition is met. We can refer to this condition as $X-Y$, the $X$ referring to the polity and the $Y$ to the legislature.

3. Both the population and the legislature may be majority $Y$ ($Y-Y$). This scenario is the simply the converse of the first possible relationship.

4. The population may be majority $Y$ and the legislature majority $X$ ($Y-X$). This scenario is simply the converse of the second relationship.

Consequently, we can denominate the four possible relationships between the demography of the general population and the make-up of the legislature as $X-X$, $X-Y$, $Y-Y$, $Y-X$. The
latter two possibilities may be discarded insofar as they are mere converses of the first two. Thus, for present purposes, the relevant distributions are \(X-X\) and \(X-Y\). In this Article I limit my analysis to \(X-X\) distributions, i.e., those cases where the distribution of characteristics \(X\) and \(Y\) in the legislature roughly mirrors the distribution of those traits in the state's general population.

4. THE ARGUMENT

The equal protection right is not \textit{sui generis}. It is a right like all (or most) other individual constitutional rights.\textsuperscript{58} Rights are shields available to individuals against action of the majority. Consequently, if we determine that, for purposes of a given state act, an individual is part of the majority, then it follows, from the purpose of constitutional rights generally, that that individual lacks standing to challenge the act.

In the argument developed here, two factors must be examined to determine whether there is constitutional injury sufficient to confer standing. First, the population of the polity as well as the legislature must be evaluated in terms of the classifying characteristic used by the legislature. For example, if the legislature uses visual acuity as a classifying trait, and divides the population into those whose vision is 20-20 or better and those whose vision is worse than 20-20, we must determine what percentage of the population generally, as well as what percentage of the legislature, has 20-20 or better vision. Second, we must ascertain whether the legislature has directed WPPG to or from the majority. Put differently, whom does the classification strengthen and whom does it weaken?

My claim is as follows: Whenever condition \(X-X\) is satisfied, and when WPPG is distributed "from" the majority, there is \textit{either} no injury at all to anyone with characteristic \(X\) or no constitutionally cognizable injury. Hence, no one with characteristic \(X\) will be able to challenge the distribution. I refer to such transfers symbolically as: \(X-X \rightarrow Y\).\textsuperscript{59} The trait used to

\textsuperscript{58} In the terminology of the \textit{Valley Forge} line of cases, when the Equal Protection Clause is violated, an individual or readily identifiable group of individuals, suffers a distinctive injury. \textit{See}, e.g., \textit{Valley Forge Christian College} v. \textit{Americans United for the Separation of Church and State}, 454 U.S. 464, 473 (1982) (recognizing the constitutional limit on the exercise of federal judicial power to those litigants who can show injury in fact). This clause therefore constitutes an individual right rather than a societal right.

\textsuperscript{59} The weaker claim, which I do not advance at this time, is that when
classify will often be apparent from the face of the legislation, but will not always be so. I assume, however, that ascertaining this trait is not substantially difficult.

In any bipolar world (such as the one I am assuming here), where $X - X \rightarrow Y$, the legislature's decision can come under attack in at least six analytically distinct lawsuits. Because there are six conceivable modes of challenging the legislature's action, and because each citizen in the polity can be characterized as either X or Y, then, because the identity of the litigant affects the viability of any lawsuit, there are twelve imaginable cases (that is, six suits where the plaintiff is X and six where the plaintiff is Y). The twelve cases are as follows:

Plaintiff X argues that
1. the distribution of WPPG does not help Y enough;
2. the distribution does not help Y at all;
3. the distribution injures Y (i.e., decreases Y's WPPG);
4. the distribution injures X (i.e., decreases X's WPPG);
5. the distribution advantages X;
6. the distribution advantages Y.

Plaintiff Y argues that
7. the distribution of WPPG does not help Y enough;
8. the distribution does not help Y at all;
9. the distribution injures Y (i.e., decreases Y's WPPG);
10. the distribution injures X (i.e., decreases X's WPPG);
11. the distribution advantages X;
12. the distribution advantages Y.

Most of these scenarios can be quickly disposed of, but several demand more serious attention. My thesis, to reiterate, is that none of these suits is tenable; and that because this list of potential suits exhausts the universe of conceivable attacks, there is no justiciable challenge to distributions that can be accurately characterized as $X - X \rightarrow Y$.

In considering each of these scenarios, it is important to stress that, by hypothesis, the real world can in fact be aptly

condition $X - Y$ is satisfied, and WPPG is distributed to those with characteristic $Y$—that is, $X - Y \rightarrow Y$—citizens with characteristic $X$ lack standing unless there is some demonstrable barrier to the exercise of the franchise. This weaker claim, while not defended here, appears to me to be implicit in the famous theory of judicial review developed by Professor Ely. See JOHN HART ELY, DEMOCRACY AND DISTRUST 135-79 (1980) (arguing in favor of a representation-reinforcing theory of judicial review that would better protect minorities).
characterized as \( X \rightarrow Y \). The quantum of the increase in WPPG to citizens with characteristic \( Y \) is not defined.

Law suits (1), (2), (7), and (8) will be dismissed for failure to state a claim unless there is an independent statutory or constitutional basis that requires the legislature to augment the WPPG of citizens with characteristic \( Y \). In the absence of such a provision, the effect of each of these suits is simply to aver that the legislature has failed to accomplish its objective to benefit group \( Y \). Of course, legislatures routinely fall short of their goals. This common occurrence, however, cannot provide a basis for judicial relief.

Law suits (3) and (9) must be dismissed for violating an assumption of the hypothesis. That is, both aver that \( Y \)'s net WPPG has been diminished, when in fact the scenario assumes that \( Y \)'s WPPG has actually been increased.

The remaining scenarios—(4), (5), (6), (10), (11), and (12)—require more discussion. Law suit (4) is the one that the plaintiffs actually brought in Miller, Shaw, and Vera.

Law suits (5) and (12) both involve claims by plaintiffs who say they were aided by legislative action. Standing requires that a plaintiff suffer an injury-in-fact.\(^\text{60}\) Consequently, claims (5) and (12) fail to generate a case or controversy within the meaning of Article III because neither suit avers any injury. The plaintiffs in suits (5) and (12) are complaining about a decision of the legislature that has made them wealthier. Saying that either of these plaintiffs has standing would be like saying that a citizen has standing to challenge a decision of the Internal Revenue Service that diminishes her tax burden. To be sure, this citizen may genuinely want to pay more taxes out of civic duty, perhaps, but she manifestly lacks a judicially redressable injury.\(^\text{61}\)

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\(^\text{60}\) See, e.g., Sierra Club v. Morton, 405 U.S. 727, 733 (1972) (recognizing a shift in standing doctrine from legal interest and legal wrong to injury in fact). In addition, lawsuit (3) arguably violates the argument's premise by denying the increase in WPPG of \( Y \).

\(^\text{61}\) The Court has indicated that the so-called redressability prong of standing doctrine—the prong which holds that the injury complained of must be susceptible of judicial relief in order to confer standing—has a constitutional basis. See Allen v. Wright, 468 U.S. 737, 751 (1984) (noting that the standing requirement derives directly from the Constitution). Allen v. Wright in general, and the redressability requirement in particular, have come under well-deserved criticism. See, e.g., Gene R. Nichol, Jr., Injury and the Disintegration of Article III, 74 CALIF. L. REV. 1915, 1924-39 (1986) (exploring the limits of the injury calculus); Gene R. Nichol, Jr., Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint, 69 KY. L.J. 185, 192
Scenario (10) does not present a justiciable controversy under the rules pertaining to *jus tertii* standing. The potential plaintiff in this scenario, a citizen with characteristic Y, is attempting to assert an injury to a citizen with characteristic X. Absent an argument that citizens with characteristic X are barred from bringing suit on their own behalf or a claim that citizen Y herself suffers a cognizable injury, citizen Y cannot maintain this action.62

Scenarios (6) and (11) are not cognizable because they assert no injury at all. That is, the plaintiff in scenario (11) cannot complain that the statute benefits X unless she can also assert that the statute injures Y. But if she can say that, then scenario (11) is just like scenario (9), which we dismissed for violating our assumption. Similarly, scenario (6), in which citizen X complains that the legislation advantages Y, cannot be maintained absent a concurrent claim that the statute injures X. But once that claim is added, then scenario (6) is just like scenario (4).

Scenario (4), of course, is the real world scenario that underlies the actual challenges to redistricting legislation. The plaintiff in scenario (4) lacks standing because there is no conflict between right and power. Before elaborating on this conclusion in Section 4.2 below, two potential difficulties with the argument are worthy of mention.

4.1. TWO DIFFICULTIES

As I have indicated, applying my argument requires that we be able to ascertain two empirical facts: first, the demography of the general population and of the legislature, and second, the effect of a given legislative act on the distribution of WPPG. My argument has assumed that (1) defining the classifying characteristics (e.g., people with 20-20 vision or better and those whose vision is worse than 20-20) and then (2) ascertaining the distribution of those characteristics X and Y within

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the population and legislature are fairly simple matters. Determining the direction in which WPPG is distributed, on the other hand, might sometimes prove more troublesome. One can imagine an argument, for example, that having the opportunity to obtain a driver's license actually decreases a person's WPPG—by, say, exposing the driver to an increased likelihood of death.

Although the distinction between intent and effect is relevant to determining whether the state has violated the Equal Protection Clause, with a plaintiff having to show intent to discriminate in order to make out a constitutional claim, the fact that the consequences of legislative action routinely diverge from the legislature's aspirations is not truly germane to the redistricting cases. When a legislature acts in the manner that the Georgia legislature did in creating District Eleven, it can be said to have a certain intention: to increase the WPPG of citizens with characteristic Y by a certain quantum. This quantum can be defined as [I]. If the legislature's action actually increases the WPPG of the target group by a different amount, say by [E], there is no injury to the intended group unless [I] + [E] < 0. If the problem is simply that [I] > [E] > 0, then the legislature has evidently not accomplished all it set out to do, but neither has it injured the target group. Indeed, the fact that [I] will ordinarily not be equal to [E] is simply another way of saying that legislatures frequently do not accomplish precisely what they intend. This truth is irrelevant to the question of who has standing to sue the state. The only factor relevant to determining whether there is a cognizable legal injury—and hence, standing to sue—is [E]. If [E] < 0, meaning that [E] makes the target group (the minority) worse off than they were before the legislation, then there is injury; otherwise, there is not. The fact that the legislature might have miscalculated or otherwise erred does not affect the essence of the argument.

A second difficulty that might arise in determining the actual distribution of WPPG stems from the fact that a given classification can be characterized in a variety of ways. Although the model I am using is a simple bipolar model, where


64. Mere intentions can lead to constitutional violations, but the injury must be established by recourse to some datum other than intent.
there are only two salient variables, $X$ and $Y$, and where every member of the polity is characterized by either $X$ or $Y$ but not both, it is still obviously possible to characterize the flow of WPPG in more than one way.

For example, in *Miller v. Johnson* the creation of District Eleven was regarded by all involved—the Georgia legislature, the litigants, and the Supreme Court—as evincing a distinction between white voters and black. Further, most (though not all) of the participants in the debate acknowledged that a consequence of the legislature's redistricting was to direct an increase in WPPG to black voters of Georgia relative to white voters. But the debate might well have focused not on the distinction between white and black voters but on that between Democrats and Republicans, or perhaps liberals and conservatives, or rural dwellers and urbanites. A conservative Republican black voter might well have rejected the conclusion that the creation of District Eleven increased her WPPG.

This problem of defining the classification is a genuine one. Nevertheless, it does not have any impact on the claim that legislative redistricting actions present no justiciable controversy, because if the classification is defined in terms other than race, the standard of review used to evaluate the legislature's action will be toothless. Indeed, the fact that the standard of review would be rationality review (rather than heightened scrutiny) if the classification were liberal versus conservative or Democrat versus Republican underscores the idea that the drawing of legislative district boundaries is fundamentally a political matter, rather than a judicial one.

4.2. **STANDING IN SCENARIO (4)**

When a citizen with characteristic $X$ argues that a legislative classification is unconstitutional because it succeeds in augmenting the WPPG of $Y$ and that augmentation injures citizens with characteristic $X$ by diminishing their own WPPG—when, in other words, we confront scenario (4)—the plaintiff might be asserting one of three different types of harm. First, she might be arguing that her vote has been diluted: that it is now worth less than another citizen's vote. If this is indeed the essence of her argument, the plaintiff has

65. See supra note 31 and accompanying text (describing the historical fact that the relevant standard of review used in a case typically determines its outcome).
stated a claim under the one person-one vote principle of *Baker v. Carr*. This claim is surely justiciable, but it has nothing necessarily to do with race. Vote dilution, however, was not the injury complained of in the redistricting cases. Second, she might be positing a stigmatic harm. Many of the race cases, to be sure, do include the notion of stigmatic harm. Yet it is difficult to see how a white plaintiff could suffer such a harm, and in any event, this was not the injury complained of in the redistricting cases. Finally, the plaintiff might be asserting what has been called a representational harm. The gist of such a claim appears to be that a white citizen is not as well represented by a black congressional representative as she would be by a white one.

The very idea of representational harm embodies racial stereotype and thus generates significant discomfort, which explains, perhaps, why the precise injury complained of is so muted in the redistricting cases. Nevertheless, even in the face of such an asserted injury, there are two reasons why the plaintiff lodging this complaint must be understood to lack standing. The first is that his grievance is the quintessential generalized grievance. It is exactly the same injury shared by every other citizen with characteristic X—which, by hypothesis, is a majority of the citizens. *Valley Forge* dictates that, for prudential reasons, such a citizen not have standing. There is a second, constitutional basis for concluding that this citizen ought not be deemed to have standing. Irrespective of whether the generalized grievance component of standing doctrine is sound, the injury suffered by a citizen with characteristic X is political in the truest sense of the word. This citizen is a member of a group that makes up a majority of the voters as well as a majority of the legislators. This group, defined by characteristic X, has decided to share power with the

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66. See 369 U.S. 186, 207-10 (1962) (recognizing vote dilution as a cognizable injury presenting a justiciable question under the Equal Protection Clause).


68. See *Shaw v. Hunt*, 116 S. Ct. 1894, 1909-11 (Stevens, J., dissenting) (questioning why the Court recognized the merely speculative harm that race-influenced redistricting might lead to inadequate representation).

69. See, e.g., *Bush v. Vera*, 116 S. Ct. 1941, 1997-98 (Souter, J., dissenting) (noting that the Court failed to identify a distinct injury resulting from race-based redistricting).
less powerful. Thus, the political majority has voted to circumscribe its own power.\footnote{See supra note 51 (discussing the role of group identification in American politics).}

A constitution, and hence constitutional rights, have no pertinence to such a dynamic. A constitution exists solely to preclude the majority from using its power to act against the political minority. When a citizen with characteristic $X$ complains about the decision to share political power, his argument is that the group which holds power—of which he himself is a member—has acted recklessly or imprudently. He does not suffer a constitutional injury because the group of citizens whose WPPG has been adversely affected already possesses the political power to protect themselves. When a citizen with characteristic $X$ asserts that a legislative action will hurt him as a member of the group of citizens with characteristic $X$, and when he argues further that all citizens of characteristic $X$ will likewise be injured, the question of whether the plaintiff is correct and, if so, what ought to be done about it, are prototypical political questions. Members of the polity have considered an issue. They have debated. They have rejected the argument of the hypothetical plaintiff and decided to cede power to members of the minority. If they grow unsatisfied with this redistribution of power, they may, in accordance with the ODRD, recover their power. But there is simply no conflict between majority power and minority right. The Constitution, therefore, does not apply to this dispute.

CONCLUSION

Two simple (and related) ideas underlie my thesis. The first is that constitutional rights must be understood functionally: as weapons held by the minority to thwart the ODRD. The second is that a majority will sometimes act in a manner exactly opposite to that anticipated by the idea of constitutional rights. In other words, whereas the idea of constitutional rights supposes that the majority will endeavor to implement its own will and seek its own benefit by the ODRD—often at the expense of the political minority—my argument supposes that the majority will sometimes choose to cede WPPG to the minority. In such circumstances, the idea of constitutional rights simply has no application. Standing doctrine
should therefore bar legal challenges brought by members of the majority against a decision of the majority.