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Stop Ignoring Pork and Potholes: Election Law and Constituent Service

ABSTRACT. This Note addresses a persistent gap in election law—the failure of scholars and judges to incorporate constituent service considerations into their theories and approaches. I argue that constituent service activities are both important aspects of representation and responsive to legal regimes governing the political process. I first examine the constituent service implications of the classic election law proposal that courts should intervene in the political process to ensure political competition. I then explore how voting rights law might better protect the constituent service interests of residents in minority-majority districts.

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INTRODUCTION

The July 9, 2009 edition of a local South Florida paper, the *Hometown News*, reported a story about Ellie DeStephan's ninety-second birthday cruise.[1] After booking Ms. DeStephan's trip, her home health aide, Marilyn Angel, realized that Ms. DeStephan would need a passport to board the ship. Normally, applying for a passport is a simple task. But, in Ms. DeStephan's case, "the passport agency wouldn't accept her birth certificate because it was issued when she was 35 years old."[2] Realizing that the cruise line would accept an original copy of the birth certificate in lieu of a passport, Ms. Angel frantically tried to get the birth certificate back from the passport agency. She couldn't get anyone to return her calls. Fortunately, the office of Ms. DeStephan's U.S. representative came to the rescue. A caseworker reached someone at the passport agency and ensured that the agency shipped back the birth certificate in time. As a result, Ms. DeStephan enjoyed a ninety-second birthday celebration aboard the *Freedom of the Seas*.

What's most remarkable about this story might be that it's not remarkable at all. On a daily basis, representatives help constituents in a variety of ways. In the case of Ms. DeStephan, a representative helped fulfill a birthday dream. But often representatives help constituents address much more serious problems, such as ensuring that a constituent receives a public benefits check that staves off eviction.[3] Representatives understand the importance of constituent service.[4] So do political scientists, who have long recognized that

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1. Jessica Tuggle, *Passport Snafu Posed No Problem for Congressional Staff*, HOMETOWN NEWS, July 9, 2009, http://www.myhometownnews.net/index.php?id=59594.

2. *Id.*

3. *See, e.g.*, Press Release, Congressman Ron Barber, U.S. Rep. Ron Barber's Office Helps Constituent Collect $83,000 from Social Security (Feb. 5, 2013), http://barber.house.gov/press-release/us-rep-ron-barber%E2%80%99s-office-helps-constituent-collect-83000-social-security (describing Rep. Barber's successful efforts to help constituents, including assisting an unemployed disabled veteran "threatened with being evicted and having his power cut off" receive disability payments that had been improperly withheld).

4. *See, e.g.*, Nichole Kelley & David Haynes, *An Interview with Senator Christopher D. Dingell*, 77 MICH. B.J. 952, 952 (1998) (quoting State Senator Dingell as stating that "[c]onstituent service is easily the best part of the job"); Terri Sewell, *Sewell: Constituent Service Involves Listening, and Then Doing Something to Help*, ROLL CALL, Jan. 12, 2012, http://www.rollcall.com/features/Freshman-Congress_Policy-Briefing/policy_briefings/-211471-1.html ("I have committed myself to focusing on areas where we can make a difference. . . . In 2011, we helped constituents receive more than $1,375,000 in benefits owed to them by the federal government, and organizations in the district were awarded more than $20 million in federal grants."); *Statement by Senator Strom*

representatives develop a "home style" distinct from the partisan style they employ within the legislature.[5] Yet constituent service has almost entirely escaped the attention of one notable group – legal scholars and judges.

To be sure, constituent service has made occasional appearances in legal scholarship, notably in discussions of term limits,[6] political corruption,[7] and the proper role of legislators.[8] But it has never featured prominently. Perhaps most surprisingly, election law scholars have largely ignored constituent service despite working on topics with significant implications for the relationship between representative and represented.[9] While some, most notably Heather

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Thurmond, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/generic/Leaders_Lecture_Series_Thurmond.htm (last visited Oct. 30, 2013) ("Certainly, it is our job as legislators to make the law, but as public servants, it is our duty and responsibility to come to the aid of the citizens of our states. . . . By simply helping someone resolve a problem with their Social Security check or secure a passport, we can have a tangible and positive impact in the lives of others.").

5. Richard F. Fenno popularized this phrase, which is commonly used in political science to refer to representational activities that take place outside the legislature. *See* RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).

6. During the early 1990s, legal scholars discussing the merits of term limits consistently trotted out various arguments related to constituent service. Some argued that term limits "reduce the incentives for legislators to be responsive to constituent concerns." Erik H. Corwin, Recent Developments, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 606 (1991). Others claimed that constituent service begets electoral advantage, requiring the imposition of term limits. *See, e.g.*, Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L.J. 1913, 1916 (1992).

7. A number of scholars have suggested that constituent services, and particularly pork barreling, involve delivery of public benefits to favored private parties or for campaign-related purposes. *See, e.g.*, James M. Falvey, *The Congressional Ethics Dilemma: Constituent Service or Conflict of Interest?*, 28 AM. CRIM. L. REV. 323, 325-26 (1991); Theresa A. Gabaldon, *The Self-Regulation of Congressional Ethics: Substance and Structure*, 48 ADMIN. L. REV. 39, 52 (1996); Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 715, 732-33 (2006); Mark W. Lawrence, Comment, *Legislative Ethics: Improper Influence by a Lawmaker on an Administrative Agency*, 42 ME. L. REV. 423, 424-25 (1990).

8. Some scholars have suggested that time spent serving discrete constituent needs could otherwise be spent addressing substantive policy matters. *See, e.g.*, Joseph Cooper, *Foreword: Strengthening the Congress: An Organizational Analysis*, 12 HARV. J. ON LEGIS. 307, 321-22 (1975); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1958-59 (2008).

9. In all of their many works on the law of the political process, Samuel Issacharoff, Richard Pildes, and Pamela Karlan have used the terms of art "constituent service" or "constituency service" rarely and in limited contexts: as a justification for districted elections and in a description of Downsian public choice theory, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 678, 708 (1998) (noting that "[a] major advantage of districted elections is that they tie constituents

Gerken, have acknowledged the importance of constituent service,[10] none have rigorously incorporated constituent service considerations into election law debates.[11]

This Note argues that election law scholars and judges dealing with election law claims should take constituent service more seriously. Part I draws on insights from the political science literature to describe constituent service activities. These activities largely fall into three categories: representative-as-ombudsman, accessibility, and appropriations. Part I then argues that all three categories of constituent service activities are important, and often valuable, components of the representation that constituents receive. Part II demonstrates how these different aspects of constituent service might inform two crucial areas of election law. Section II.A focuses on the constituent service implications of the classic structuralist thesis that courts should prevent mapmakers from designing legislative districts that undermine political competition. Specifically, this Section proposes amending the structuralist approach to permit some deviation from partisan equality within districts to facilitate effective constituent service delivery. Section II.B focuses on the constituent service implications of minority-majority districting, arguing that Congress should require that jurisdictions impose no unnecessary or unjustified structural barriers to effective constituent service delivery in minority-majority districts.

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and representatives together far more tightly than [proportional representation] systems do" and that Anthony Downs "suggested that legislators defined utility as the delivery of a bundle of constituent services that would maximize the likelihood of building a winning coalition for the next election"); as part of broader arguments about the justiciability of partisan gerrymandering claims, Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 564 (2004); for the idea that constituent service can help incumbents win over skeptical voters, Pamela S. Karlan, Cousins' *Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521, 532 (1996); and as part of an argument about the limited importance of territoriality in districting, Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 104; *see also* Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 308 (1997) ("When it comes to policy, rather than territorially allocated pork, the 'real' representatives of black southerners who live in majority-white districts are Democrats from districts where a majority of the electorate supports those policies.").

10. *See, e.g.*, Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1135 (2005) ("Whether one envisions constituent services as power or pork, individual election districts sometimes allow representatives to distribute political goods independently of one another.").

11. Possible reasons for this glaring omission include justiciability concerns, difficulties quantifying constituent services, and a belief that constituent services are at best a necessary evil.

I. CONSTITUENT SERVICE ACTIVITIES AND WHY THEY MATTER

The term "constituent service" involves a set of relationships between individuals and their representatives that are often personal, idiosyncratic, and hidden from public view.[12] Before applying lessons of constituent service to ongoing election law debates, it is therefore important to unpack the concept of constituent service itself, both in order to identify its various elements and to explore its contribution to the quality of representation that constituents receive. It would be impossible, for instance, to argue convincingly that some deprivation of constituent service constitutes a legally cognizable injury without first identifying what constituent services are and then explaining why the deprivation of those services might matter to a constituent or a court.

Recognizing that representatives play a multifaceted role in modern democracies, political theorists have long understood that the concept of representation includes non-policymaking functions. Hanna Pitkin, for example, posited that political representation is a broad concept involving "acting in the interests of the represented, in a manner responsive to them."[13] For Pitkin, responsiveness—and, hence, representation—results from many different types of interactions between representatives and constituents.[14] Building on this insight, Heinz Eulau and Paul D. Karps argue that responsiveness in modern democratic systems can come from providing services, allocating funds, and remaining accessible to constituents.[15] I refer to such activities as "constituent service." Eulau and Karps do not necessarily

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12. *See, e.g.*, BRUCE CAIN, JOHN FEREJOHN & MORRIS FIORINA, THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE 36 (1987) ("Home style is in part a unique, individualized response of members to their districts and the natural inclinations of their personalities.").

13. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 209 (1967). The classic "delegates" and "trustees" model—in which representatives serve either as "delegates," who simply vote their constituents' positions in the legislature, or as "trustees," who vote based on their own personal views—is an exception insofar as it focuses exclusively on policymaking within the legislature. *See, e.g.*, Justin Fox & Kenneth W. Shotts, *Delegates or Trustees? A Theory of Political Accountability*, 71 J. POL. 1225, 1225 (2009) (arguing that "whether the public evaluates the executive based on the policies she chooses or the outcomes that her policies generate determines whether elections encourage her to behave as a delegate or a trustee").

14. PITKIN, *supra* note 13, at 221-22.

15. Heinz Eulau & Paul D. Karps, *The Puzzle of Representation: Specifying Components of Responsiveness*, 2 LEGIS. STUD. Q. 233, 247-48 (1977). Eulau and Karps outline three varieties of responsiveness that, along with policy responsiveness, "capture the complexities of the real world of politics": service responsiveness, allocation responsiveness, and symbolic responsiveness. *See id.* at 241.

argue that constituent service comprises an inherent component of representation itself. Rather, Eulau and Karps argue that as long as these non-policymaking avenues for responsiveness remain open in *our* political system, they contribute to the overall quality of representation that constituents receive.

The political science literature reveals that most constituent service activities fit into one or more of three broad categories: (1) "representative-as-ombudsman," i.e., a representative's attempts to help constituents or groups navigate government bureaucracies; (2) "accessibility," i.e., a representative's efforts to keep in touch with constituents and, particularly, district stakeholders; and (3) "appropriations," i.e., a representative's use of influence within the legislative process to deliver discretionary funds back to district interests.[16] While these categories certainly fail to cover all constituent service activities, they are meant to capture most of the ways in which legislators serve their constituents. Each is subject to criticism but also capable of improving the quality of representation that constituents receive.

A. Representative-as-Ombudsman

John R. Johannes describes the ombudsman role as being, "[i]n short, the function of [the legislature] as intermediary between the government and the governed—between citizens and the bureaucracy."[17] He describes two primary aspects of this role—casework and federal projects assistance.[18] Casework, which Johannes defines as "intervention for individuals, groups, or organizations (including businesses) that have requests of, grievances against,

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16. Some political scientists have engaged in extended observation of the constituent service habits of individual representatives. Fenno, a practitioner of this approach, provides an extensive discussion of such observation's pros and cons. FENNO, *supra* note 5, at 249-95. Other political scientists have employed empirical methods. *See, e.g.*, John C. McAdams & John R. Johannes, *Constituency Attentiveness in the House: 1977-1982*, 47 J. POL. 1108, 1114-15 (1985) (attempting to determine factors that lead representatives to adopt various constituent service strategies by examining various dependent variables); Glenn R. Parker & Suzanne L. Parker, *Correlates and Effects of Attention to District by U.S. House Members*, 10 LEGIS. STUD. Q. 223, 224 (1985) (attempting to determine factors that lead representatives to pay more attention to constituent concerns by using time spent in the district as the dependent variable). Even Fenno engages in some data-driven analysis. *See* FENNO, *supra* note 5, at 279-93. While most scholars have studied members of Congress, their general insights might apply as strongly at the local level. In fact, Gerken has suggested that some local officials exercise power primarily through constituent service delivery. *See supra* note 10 and accompanying text.

17. JOHN R. JOHANNES, TO SERVE THE PEOPLE: CONGRESS AND CONSTITUENCY SERVICE 3 (1984).

18. *Id.* at 2.

or a need for access to federal (and occasionally state or local) government departments or agencies,"[19] might include, for instance, helping a constituent demonstrate eligibility for social security benefits,[20] or nudging a local highway department to fill a pothole. "Projects" assistance, which Johannes describes as "assisting state and local governments in their attempts to secure federal grants from agencies that possess discretion in allocating such funds,"[21] might include, for instance, helping a local advocacy organization receive Department of Housing and Urban Development funding.[22] Fenno's observational studies suggest that representatives spend some of their own time on ombudsman tasks, but also frequently delegate such tasks to trained, full-time staffers.[23] While most legislative offices receive many casework and projects assistance requests, the precise number varies between offices and between different levels of government.[24]

The ombudsman function improves quality of representation in several ways. First, it helps constituents successfully navigate administrative bureaucracies. Representatives and staffers develop expertise evaluating and defending casework and projects assistance requests; agency staffers rely on this expertise to reduce the amount of time they must spend interpreting and responding to requests.[25] Moreover, insofar as representatives control agency

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19. *Id.*

20. *See, e.g.*, *Frequently Asked Questions About Social Security*, CONGRESSMAN GREGORY W. MEEKS, http://meeks.house.gov/serving-you/help-social-security-case-work-issues (last visited Oct. 30, 2013) ("My office assists many constituents with issues involving Social Security eligibility and benefits.").

21. JOHANNES, *supra* note 17, at 2.

22. *See, e.g.*, Press Release, Congressman André Carson, Congressman Carson Announces the Damien Center and City of Indianapolis as Recipients of $1.4M Federal Grant (Mar. 30, 2012), http://carson.house.gov/media-center/press-releases/congressman-carson-announces-the-damien-center-and-city-of-indianapolis (describing Representative Carson's efforts to secure such a grant for a non-profit organization in his district).

23. *See* FENNO, *supra* note 5, at 67-68 ("[Congressman A] has a small district staff—three people, one full-time office, and one half-time office. . . . When he is touring around he is as apt to hear someone's personal problems and jot them down on the back of an envelope as he is to find out about these problems from his district aides.").

24. *See* John R. Johannes & John C. McAdams, *Entrepreneur or Agent; Congressmen and the Distribution of Casework, 1977-1978*, 40 W. POL. Q. 535, 539 (1987) (finding that the average congressional office received 95.7 casework and projects assistance requests per week between 1981 and 1983, that 85.3 of those requests involved casework and 10.3 involved projects assistance, and that the average number of total per-week requests ranged from 13 to 354).

25. *See generally* R. ERIC PETERSEN, CONG. RESEARCH SERV., RL33209, CASEWORK IN A CONGRESSIONAL OFFICE: BACKGROUND, RULES, LAWS, AND RESOURCES (2012),

purse strings, agencies have incentives to take requests from representatives seriously.[26] Second, and relatedly, the ombudsman function helps reduce status inequalities between petitioners for agency services. The representative-as-ombudsman not only distributes requests to the proper agencies and bureaucrats, but also knows how to present those requests in convincing ways.[27] As a result, constituents with little relevant education or background can, with the help of their representative, receive treatment comparable to what the more educated and politically connected receive.[28] Third, the ombudsman function provides an important policy feedback mechanism for representatives and for agencies. As Johannes notes, "casework is . . . a way not only of keeping track of what executive agencies are doing but also of staying in touch with people and their problems."[29] With accurate and timely information about the effects of legislation on constituents, representatives are better able to reform existing programs and to identify problems that might plague future legislation.[30] Similarly, agencies rely on representatives and their casework teams to provide informed feedback on agency service provision.[31]

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http://www.fas.org/sgp/crs/misc/RL33209.pdf (describing the laws, internal rules, and regulations governing casework provision and outlining casework best practices).

26. JOHANNES, *supra* note 17, at 59 ("It is widely believed that by handling casework and other congressional demands, agencies will ingratiate themselves with senators, representatives, and their staffs.").

27. *See* CAIN, FEREJOHN & FIORINA, *supra* note 12, at 58 ("[C]asework frequently provides an opportunity for elected representatives to help constituents challenge the decisions of bureaucrats.").

28. Unsurprisingly, political scientists have determined that the likelihood of making a casework request generally decreases as education level increases, though the likelihood ticks up again for the most educated. Johannes & McAdams, *supra* note 24, at 543-44; McAdams & Johannes, *supra* note 16, at 1113.

29. JOHANNES, *supra* note 17, at 17 (describing the observations of several members of Congress).

30. *See id.* at 165 ("[T]hese legislative efforts are remedial; they seldom deal with sweeping changes or major innovations in public policy."); Larry P. Ortiz et al., *Legislative Casework: Where Policy and Practice Intersect*, 31 J. SOC. & SOC. WELFARE 49, 53 (2004) ("As a result of constituents bringing problems they are having with federal agencies to their congressperson's office, many programs have been amended." (citation omitted)).

31. *See* JOHANNES, *supra* note 17, at 61 ("If agencies process constituent and congressional casework input effectively, one form of output is likely to be an improvement in agency programs or operations due to correcting weaknesses turned up in congressional complaints."). Several legal scholars have posited that this "oversight" function replaces the proper form of legislative oversight: drafting legislation that defines the scope of agency authority. *See, e.g.*, Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 491 (1985). In so doing, the legislature functions, inappropriately, as a counter-executive. *See, e.g.*, Peter L. Strauss, *When the Judge Is Not the*

B. Accessibility

A second category of constituent service activities involves a representative's accessibility to constituents. "Accessibility" is of course a vague term. The idea behind it is that representatives should make an effort to, among other things, explain decisions, keep abreast of district interests, and respond to individual constituent questions and concerns.[32] Representatives use various methods to remain accessible to their constituents. For instance, a representative might hold town hall meetings and open office hours in the district, attend events in the district, speak regularly with various district stakeholders, publish online newsletters describing legislative activity, and participate in live video chats with constituents.[33] Additionally, representatives might initiate efforts to resolve local problems, perhaps by hosting events that bring together community stakeholders.[34]

Accessibility can provide various representational benefits for constituents. First, legislators improve the quality of public debate when they take the time to explain their views and activities and allow constituents to argue in favor of alternative approaches.[35] Moreover, willingness to explain decisions helps

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Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 CHI.-KENT L. REV. 321, 340 (1990) (noting that Congress often attempts to "influence agency action in the here and now, without passing statutes – acting, as has been fashionable to accuse it recently, as a counter-executive"). But these criticisms assume that Congress performs only a policymaking function and ignore the importance of the "ombudsman" function. Moreover, some non-systemic problems are likely difficult to resolve through the cumbersome legislative process.

32. FENNO, *supra* note 5, at 54 ("Politicians, like actors, speak to and act before audiences from whom they must draw both support and legitimacy."); *id.* at 240 ("Although the congressman can engage in [two-way] communication with only some of his supportive constituents, he can give many more the assurance that two-way communication is possible.").

33. *See generally* David Lazer et al., *Online Town Hall Meetings: Exploring Democracy in the 21st Century*, CONG. MGMT. FOUND. (2009), http://www.congressfoundation.org/storage/documents/CMF_Pubs/online-town-hall-meetings.pdf (noting various ways in which representatives keep in touch with constituents and arguing that online communication tools have facilitated more frequent and efficient contact between representatives and their constituents, thus developing increased constituent trust).

34. *See infra* note 40 and accompanying text.

35. Not all interactions of this sort are productive, of course. For example, the health care town halls of summer 2009 hardly exemplify quality political discourse. *See, e.g.*, Paul Krugman, *The Town Hall Mob*, N.Y. TIMES, Aug. 6, 2009, http://www.nytimes.com/2009/08/07/opinion/07krugman.html (discussing unruly town halls "where angry protesters – some of them, with no apparent sense of irony, shouting 'This is America!' – have been drowning out, and in some cases threatening, members of Congress trying to talk about health

representatives develop constituent trust, which increases constituents' satisfaction with their representation.[36] Second, accessibility allows representatives to remain aware of discrete district interests. Identifying and balancing interests is no easy task; even minor demographic or economic changes might demand that representatives reevaluate assumptions about the districts they represent.[37] Accessible representatives are likely better able to maintain an accurate impression of constituent characteristics, preferences, and intensities of preference,[38] and as a result to know when particular decisions might be unacceptable to constituents.[39] Third, representative-initiated efforts can bring together community leaders and government figures to address district problems.[40]

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reform"). Yet many forms of dialogue between representatives and constituents can be productive. Such interactions provide a rare opportunity for individuals to hold their representatives to account and to express how particular pieces of legislation might affect their personal interests.

36. *See* FENNO, *supra* note 5, at 56 ("[I]t takes an enormous amount of time to build and to maintain constituent trust. . . . And that is why [House members] spend so much of their working time at home."); Glenn R. Parker, *The Role of Constituent Trust in Congressional Elections*, 53 PUB. OPINION Q. 175, 193 & n.19 (1989) (noting that "[t]rust is primarily a message that is most effectively conveyed when delivered in person," and finding that "[a]bout 40% of those mentioning trust as something liked or disliked about their congressman had either personally met the incumbent or attended a meeting or gathering where the incumbent spoke").

37. *See* JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 31-32 (1973). Studies have found that representatives vary significantly in their ability to accurately predict constituent opinion on even highly salient issues. *See* Ronald D. Hedlund & H. Paul Friesema, *Representatives' Perceptions of Constituency Opinion*, 34 J. POL. 730, 735-36 (1972) (explaining this finding and arguing that "[r]epresentative democracy requires at least a fairly high level of accurate information about constituency attitudes and opinions. Without that, legislative institutions . . . do not provide a decision-making system that reflects the views and values of the citizenry . . . .").

38. *See* John W. Kingdon, *Politicians' Beliefs About Voters*, 61 AM. POL. SCI. REV. 137, 137-38 (1967). Similarly, Richard Fenno describes the efforts of Rep. Chaka Fattah, from Philadelphia, to make himself accessible to "the policy-oriented groups with whom he works." RICHARD F. FENNO, GOING HOME 133-34 (2003) ("[M]ultiple, overlapping neighborhood involvements give him a depth of constituency immersion that is remarkable and – in my experience – unique.").

39. FENNO, *supra* note 5, at 151 ("On the vast majority of votes . . . representatives can do as they wish – provided only that they can, when they need to, explain their votes to the satisfaction of interested constituents."); KINGDON, *supra* note 37, at 47 ("Congressmen sometimes find themselves in the position of being unable to devise an acceptable explanation. In such a situation, especially if they do not feel intensely about the matter, they often vote so as to avoid the predicament.").

40. For instance, Fenno lauds the efforts of Stephanie Tubbs Jones, a former representative from Cleveland. FENNO, *supra* note 38, at 190-250. Because she was both a government

C. *Appropriations*

The appropriations category includes earmarks ("pork"),[41] but also includes other targeted government spending designed to serve particular district interests.[42] The main advantage of the appropriations process for constituent service is that it allows representatives to target state and federal money to areas of significant local need that might otherwise remain unmet. Staffers at administrative agencies, which largely control the distribution of federal and state funds, are generally less aware of distinct district interests and more likely to distribute money in accordance with national and statewide policy goals.[43] Providing representatives with some leeway to target small amounts of money to discrete district interests ensures that district needs are not perpetually ignored in favor of statewide and national interests.[44] Importantly, despite the risk of earmark abuse, the system seems in many cases

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official and a concerned member of the community, Rep. Tubbs Jones was able to bring together various adults with professional or personal perspectives on youth violence for a conference attended by 105 high school students. *Id.* at 214-16.

41. *See, e.g.*, Rob Porter & Sam Walsh, *Earmarks in the Federal Budget Process* 4 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 16, 2006), http://www.law.harvard.edu/faculty/hjackson/Earmarks_16.pdf (emphasizing that earmarks share four characteristics: "specificity of the entity receiving funding, congressional origin, exemption from normal competitive requirements for agency funding, and presence in statutory text").

42. Though congressional leaders implemented an unofficial federal earmark ban in early 2011, the ban has no effect on state earmarks or other types of targeted federal appropriations and in practice has hardly eliminated federal earmarks. *See* Jonathan Allen & Jessica Meyers, *Don Young's Railroad to Nowhere*, POLITICO, July 10, 2012, http://www.politico.com/news/stories/0712/78318.html; Molly K. Hooper, *House GOP Sets Its Sights on Earmark Ban*, THE HILL, May 18, 2012, http://thehill.com/homenews/house/228245-republicans-taking-aim-at-earmark-ban; Kimberly Kindy, *Despite Earmark Ban, Lawmakers Try to Give Money to Hundreds of Pet Projects*, WASH. POST, Nov. 29, 2011, http://www.washingtonpost.com/politics/after-earmark-ban-lawmakers-try-to-direct-money-to-hundreds-of-pet-projects/2011/11/29/gIQA2L2WAO_story.html.

43. Members of Congress often emphasize this justification for earmarks when defending the practice. *See, e.g.*, Jon Tester, *In Defense of Earmarks*, INDEP. REC. (Helena, Mont.), Dec. 5, 2010, http://helenair.com/news/opinion/article_4974cdd0-003a-11e0-aa29-001cc4c03286.html; Shira Toeplitz, *Harry Reid Defends Earmarks in Omnibus*, POLITICO, Dec. 16, 2010, http://www.politico.com/news/stories/1210/46505.html (quoting Senate Majority Leader Harry Reid).

44. *See* Brian Friel, *Defending Pork*, NAT'L J., May 8, 2004, http://www.nationaljournal.com/member/magazine/transportation-defending-pork-20040508. For instance, an Alaska representative is likely to understand that, in Alaska, air travel often provides the only link between communities. *See* 157 CONG. REC. S721-22 (daily ed. Feb. 15, 2011) (statement of Sen. Mark Begich) (discussing the importance of air travel for Alaskans); *infra* notes 54-55 and accompanying text (discussing Alaska's "Bridge to Nowhere").

to serve constituent interests rather than nefarious "special interests" or the whims of representatives. For example, the Department of Transportation, which administers perhaps the most earmark-laden appropriations bill, attempted to discredit earmarks by studying how many earmark-funded projects would have received funding under the normal, merit-based system.[45] But "[a]fter finding that most of them would have qualified, the department abandoned its probe."[46]

Although many legislation scholars have argued that the appropriations process is nontransparent, wasteful, and inequitable,[47] these criticisms may be overstated. First, recent reforms demonstrate that even the federal earmarking process can operate with a reasonable degree of transparency.[48] Congress passed various reforms between 2007 and 2009, which, combined with changes in House and Senate rules, mandated that members of Congress publicize earmark requests in order to provide other members and constituents an opportunity to scrutinize them.[49] As a result, in the words of one expert, "[s]hafts of light . . . illuminate[d] these small but previously shadowed pockets of discretionary spending . . . ."[50]

As for wastefulness, it is certainly true that earmarking reduces the total amount of money available for projects serving national and statewide policy goals. But earmarking doesn't take up much of the total pie. According to a

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45. Friel, *supra* note 44.

46. *Id.*

47. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 26-27 (1994) (criticizing some earmarking as rent-seeking); James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DEPAUL L. REV. 1, 15 (1991) (arguing that "pork-barreling" inequitably distributes federal resources to districts with more senior representatives); Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79, 122 (1997) (arguing that pork barreling "fosters a 'redistributive disaster that no one would defend if they thought about it'" (quoting Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 34 (1995))).

48. *See* Richard Doyle, *Real Reform or Change for Chumps: Earmark Policy Developments, 2006-2010*, 71 PUB. ADMIN. REV. 34, 37-40 (2011).

49. *Id.* These reforms require the same level of transparency for conference reports and committee recommendations. *Id.* at 37-39; *see also* Jason Heaser, Note, *Pulled Pork: The Three Part Attack on Non-Statutory Earmarks*, 35 J. LEGIS. 32, 33 (2009) ("The modern trend of earmarking legislation is moving away from earmarks within legislation and instead placing the earmarks in conference reports and committee recommendations."). The House and Senate Administration Committees have established other rules for earmarks, including, for instance, requiring that representatives announce earmark requests on their official websites. Doyle, *supra* note 48, at 39-40.

50. Doyle, *supra* note 48, at 42.

study conducted prior to implementation of the federal earmarking "ban," total spending on pork never exceeded $30 billion, and was often far less than that.[51] By comparison, in 2008, Congress authorized approximately $1.1 trillion in total discretionary spending.[52] Moreover, even many of the projects generally considered entirely wasteful benefit local residents.[53] For instance, Alaska's infamous "Bridge to Nowhere," though criticized in the national media,[54] was hardly as wasteful as depicted. Although most believed that the bridge's exclusive purpose was to connect a sparsely populated island with the small municipality of Ketchikan, in truth the project was meant to provide the first non-ferry link between Ketchikan and its airport, a major transportation hub for southeast Alaska.[55] Even projects that appear to serve no existing constituency interest might be designed to stimulate future demand.[56]

Finally, the distribution of discretionary funds by representatives is not as inequitable as some critics have claimed. District interest groups exert pressure on all representatives to deliver earmarks.[57] Representatives in turn have incentives to support others' earmark requests in order to ensure that their own

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51. *See* Michael H. Crespin, Charles J. Finocchiaro & Emily O. Wanless, *Perception and Reality in Congressional Earmarks*, 7 FORUM: J. APPLIED RES. CONTEMP. POL. 1, 5 (2009) (noting that earmarks made up one half of one percent of total FY 2008 federal outlays); *see also* Doyle, *supra* note 48, at 41 (noting that after enactment of the 2007 reforms, total earmark spending stabilized at approximately $20 billion a year).

52. Crespin, Finocchiaro & Wanless, *supra* note 51, at 4; *see also id.* at 5 (concluding that earmarks made up one half of one percent of total FY 2008 federal outlays).

53. *See id.* at 3.

54. *See, e.g.*, Ronald Utt, *The Bridge to Nowhere: A National Embarrassment*, HERITAGE FOUND. (Oct. 20, 2005), http://www.heritage.org/research/reports/2005/10/the-bridge-to-nowhere-a-national-embarrassment.

55. *See* Alaska Editorial, *Again, Yet? Back to Talk of the 'Bridge to Nowhere,'* JUNEAU EMPIRE, Mar. 1, 2012, http://juneauempire.com/opinion/2012-03-01/alaska-editorial-again-yet#.T5BChI6jLkB.

56. Those seeking state funding to build another Alaska "bridge to nowhere" emphasize that the bridge will facilitate suburban development and pay for itself over time through toll revenues. *See* Steven Mufson, *Alaska "Bridge to Nowhere," the Knik Arm Crossing Project, Still on the Table*, WASH. POST, Sept. 25, 2011, http://www.washingtonpost.com/business/economy/alaska-bridge-to-nowhere-the-knik-arm-crossing-project-still-on-the-table/2011/08/02/gIQApu7vwK_story.html.

57. ROBERT M. STEIN & KENNETH N. BICKERS, PERPETUATING THE PORK BARREL: POLICY SUBSYSTEMS AND AMERICAN DEMOCRACY 30-32 (1995) (arguing that interest groups "can serve as the eyes and ears of individual voters" and, as such, can pressure representatives to distribute discretionary federal funds in ways that serve constituent preferences).

requests also receive support.[58] This process, sometimes skeptically referred to as "logrolling," generally results in the delivery of some discretionary funds to most districts,[59] even though more discretionary funds go to districts represented by senior, powerful representatives.[60] Relying on interest groups to exert pressure is of course imperfect—such groups might merely amplify the voices of already powerful local interests—but accessible representatives can make their own determinations about constituent need.[61] Thus, through earmarking, accessible representatives are able to contribute federal money to important local projects that other political actors might have little ability or incentive to fund.

In this Part, I have argued that ignoring constituent service means ignoring avenues for responsiveness that can enhance the quality of representation that constituents receive. The next Part, which incorporates constituent service considerations into ongoing election law debates, relies heavily on these insights.

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58. Political scientists generally call this model of the appropriations process—the idea that representatives generally support each other's earmark requests in order to ensure that their own earmarks also receive support—"universalism," though some political scientists attach other labels, such as "blame avoidance," to variants of the same thesis. *See, e.g.*, Steven J. Balla et al., *Partisanship, Blame Avoidance, and the Distribution of Legislative Pork*, 46 AM. J. POL. SCI. 515, 516-18 (2002).

59. While empirical results cast some doubt on simplistic versions of universalism, *see, e.g.*, Christopher R. Berry, Barry C. Burden & William G. Howell, Congress, in Theory: Subjecting Canonical Models of Distributive Politics to Basic (but Long Overdue) Empirical Tests (2008) (unpublished manuscript), http://harrisschool.uchicago.edu/programs/beyond/workshops/ampolpapers/spring08-howell.pdf (finding substantial variation in the amount of discretionary funds returned to individual districts in each legislative session), more nuanced models provide more robust empirical support, *see* STEIN & BICKERS, *supra* note 57, at 135-36 (finding empirical support for a universalist model); Jeffrey Lazarus, *Giving the People What They Want? The Distribution of Earmarks in the U.S. House of Representatives*, 54 AM. J. POL. SCI. 338, 346-51 (2010) (finding that the distribution of earmarks depends in part on "local demand-side factors").

60. *See, e.g.*, Frances E. Lee, *Geographic Politics in the U.S. House of Representatives: Coalition Building and Distribution of Benefits*, 47 AM. J. POL. SCI. 714, 726 (2003) ("Funds that were allocated on an individual project basis were distributed in clearly 'political' fashion: House members serving on the committee of jurisdiction secured more of these, as did members advantaged by seniority or majority party status. Electorally vulnerable members—especially those of the majority party—also received an added bonus."). *But see* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 146 (1974) (arguing that individuals who attain positions of influence in Congress are often selected because they are "upholders of the institution" who "engag[e] in institutionally protective activities that are beyond or even against their own electoral interests").

61. *See supra* notes 37-39.

II. THE IMPACT OF CONSTITUENT SERVICE ON ELECTION LAW

One of the most important recent debates in election law is over what role courts should play in regulating the political process. Those advocating what is often called the "individual-rights approach" believe that courts are ill-equipped to identify and protect democratic values, and as a result support limiting judicial intervention to cases where individuals or groups suffer identifiable injuries. On the other side of the debate, so-called "structuralists" favor a more active role for the judiciary, one that focuses more on policing "the structures by which preferences are aggregated" rather than "the treatment of individual voters."[62]

Neither side has paid much attention to constituent service. Judges following the individual-rights approach have acknowledged that legally cognizable injuries might arise if political rules degrade the quality of policy responsiveness.[63] But, likely assuming that the Constitution has little to say about constituent service activities, few courts have considered whether the deprivation of constituent services might ever give rise to legally cognizable injuries.[64] Similarly, structuralist scholars have almost entirely ignored the constituent-service implications of their proposals.

In this Part, I first introduce constituent service considerations into the debate over the classic structuralist claim that courts should police partisan lockups. I then examine constituent service from the perspective of individual rights and argue that current voting rights law ignores important constituent service tradeoffs. To illustrate, I reexamine the districts challenged in *League of*

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62. Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1455 (2002); *see also* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics*, 80 N.C. L. REV. 1103, 1148-52 (2002) (suggesting that responsiveness is itself a structural democratic value that courts should protect). Gerken mentions "effective representation"—a concept that lends itself to no precise definition but involves "the dynamics of the legislative process and representatives' day-to-day relationship with their constituents"—as a potential structural mediating theory for the Supreme Court's "one person, one vote" doctrines, but neither describes how courts might regulate political structures to achieve "effective representation" nor argues that courts should try. *See* Gerken, *supra*, at 1425. Courts in Canada do take questions of "effective representation," including the representative's role as ombudsman, into account when reviewing reapportionment. Robert W. Behrman, *Equal or Effective Representation: Redistricting Jurisprudence in Canada and the United States*, 51 AM. J. LEGAL HIST. 277, 290-92 (2011).

63. *See* Vieth v. Jubelirer, 541 U.S. 267, 309-17 (2004) (Kennedy, J., concurring in the judgment) (suggesting that political gerrymandering can impose legally cognizable injuries).

64. *But see infra* notes 109-111 and accompanying text.

United Latin American Citizens v. Perry (*LULAC*)[65] and *Shaw v. Reno*[66] in light of the constituent service interests of minority constituents.

A. *Constituent Service and Structuralists*

Even though structuralist arguments depend on designing political incentives to increase the likelihood that constituents receive optimal representation, no one engaging in the debate over policing partisan lockups has seriously considered constituent service tradeoffs. In this Section, I focus on arguments presented by three of the most prominent participants in that debate: Richard Pildes and Samuel Issacharoff, authors of the most influential structuralist argument for policing partisan lockups, and Nathaniel Persily, who criticizes their approach. Unlike Persily, who maintains that seniority provides representational benefits for constituents, I argue that seniority might actually undermine the quality of representation that constituents receive. I then argue that Pildes and Issacharoff's proposal to police partisan lockups should be modified to account for constituent service considerations.

1. *Contours of the Current Debate over Partisan Lockups*

The standard partisan lockup—and the one I will focus on here—is a partisan or bipartisan gerrymander, in which political parties succeed in manipulating districts to minimize the likelihood of competitive elections.[67] Because these gerrymanders entrench incumbents, the aggregate outcome of elections—the division of power in the legislature—fails to match the distribution of political support within the electorate. Issacharoff and Pildes propose that courts should police partisan lockups to ensure political competition and electoral accountability.[68] As Issacharoff explains, "the electorate can only express a free and uncorrupted choice if it has the ability to select among competing political prospects."[69] Underlying Issacharoff and Pildes's argument is a commitment to the idea that courts should ensure a high quality of political responsiveness. The thesis of their article *Politics as Markets* makes this link explicit: "[W]e propose that a self-conscious judiciary should

65. 548 U.S. 399 (2006).

66. 509 U.S. 630 (1993).

67. *See* Issacharoff & Pildes, *supra* note 9, at 651.

68. *See id.* at 646.

69. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 615 (2002) (internal quotation marks omitted).

destabilize political lockups in order to protect the competitive vitality of the electoral process and facilitate more responsive representation."[70] They use similar language in other works:

> The key to this approach is to view competition as critical to the ability of voters to ensure the responsiveness of elected officials to the voters' interests through the after-the-fact capacity to vote those officials out of office. In turn, the accountability to the electorate emerges as the prime guarantor of democratic legitimacy.[71]

But like most structuralist election law scholars, Issacharoff and Pildes evaluate responsiveness in terms of the overall partisan balance within the legislature. Such an approach makes sense only from the perspective of policy responsiveness; constituent service is largely unaffected by the distribution of Democrats and Republicans.[72] Rather than an oversight, this failure to consider constituent service reflects a broader assumption that policy responsiveness trumps all. As Issacharoff and Pildes acknowledge in *Politics as Markets*, "Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens."[73]

One prominent election law scholar, Nathaniel Persily, has criticized Issacharoff and Pildes for ignoring the district-level representational effects of their proposal. Persily claims that safe seats are "neither inherently undesirable

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70. Issacharoff & Pildes, *supra* note 9, at 649.

71. Issacharoff, *supra* note 69, at 615; *see also* Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999) ("The way to sustain the constitutional values of American democracy is often through the more indirect strategy of ensuring appropriately competitive interorganizational conditions. It is in this way that central democratic values, such as responsiveness of policy to citizen values and effective citizen voice and participation, are best realized in mass democracies.").

72. *See* Balla et al., *supra* note 58, at 521, 523 (finding that earmarks are distributed largely evenly among House members, but that members of the majority party tend to receive the most valuable earmarks); Johannes & McAdams, *supra* note 24, at 547 (finding no connection between political party and likelihood to focus on casework); *cf.* James A. Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized?: The Case for a Return to Fixed Election Districts*, 90 MARQ. L. REV. 555, 575 (2007) ("[U]sing partisanship as a vehicle for representation may actually *impede* the satisfaction of local, territorially-defined interests . . . . Because they are members of statewide political parties, representatives are no longer responsive only to the voters in their districts, but are linked through party membership to representatives of the same party from districts across the state.").

73. Issacharoff & Pildes, *supra* note 9, at 646.

nor easily avoidable."[74] He notes that "the competitiveness maximization strategy seeks to limit the opportunity for long-term relationships to form between representatives and the represented."[75] He argues that these long-term relationships facilitate better responsiveness because "[l]ong-term representatives have a chance to learn about and understand the unique problems of their districts and to pursue legislation that remedies those problems," while "novice representatives are likely to be systematically inferior to 'entrenched' representatives when it comes to the effective representation of their constituents' views."[76]

Persily's argument, though critical of Issacharoff and Pildes's, shares in common with it a tendency to focus on the legislative process rather than on representatives' "home styles." As we have already seen, political science literature supports Persily's assertion that seniority allows representatives to deliver a greater amount of money back to their districts through lawmaking and appropriations.[77] Yet Persily fails to justify his assumption that seniority also contributes to a better understanding of distinct district interests. Nor does he consider other aspects of constituent service delivery to determine whether a senior representative's greater capacity to return political "goods" to his constituents actually translates into a higher quality of constituent service delivery – and a higher quality of representation more generally.

2. *Seniority and Constituent Service*

Taking those other aspects of constituent service into account, it becomes clear that, contrary to Persily, partisan gerrymanders and safe seats likely reduce the overall quality of constituent service delivery. This is true for at least four reasons. First, even assuming that senior representatives are accessible enough and motivated enough to deliver appropriations that constituents find valuable, every extra discretionary dollar that senior representatives return to their districts imposes a cost on constituents in districts without senior representatives. Inequalities inherent in the appropriations process are perhaps more defensible if individual constituents are advantaged at some times and disadvantaged at other times. Insofar as partisan lockups result in certain districts consistently having more senior representation, those particular

74. Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002).

75. *Id.* at 671.

76. *Id.*

77. *See supra* note 60 and accompanying text.

districts will consistently receive a disproportionate percentage of total discretionary funds. Policing partisan lockups would decrease the likelihood that the same districts would receive a disproportionate share of appropriations year after year.

Second, it is not at all clear that seniority actually leads to a greater awareness of distinct district interests.[78] In fact, political scientists have often found that senior representatives, particularly from safe seats, are *less* accessible to constituents,[79] and thus less likely to remain aware of shifting district interests. One explanation for this phenomenon is that senior representatives prefer expending energy influencing and passing legislation on national issues to addressing discrete district needs. Fenno quotes one long-time incumbent as stating: "What's the use of having high seniority with the opportunity of being influential in Congress if you have to spend all your time in your district?"[80] He also describes a long-time incumbent who was less involved in "civic engagement" and had a less "grassroots-oriented" frame of reference as compared to a less-senior colleague; the more senior representative preferred to address policy issues at a "broad level," mostly through legislative work in Washington.[81] By contrast, backbencher representatives—likely to be junior—might find that they can make more positive change by working to address district problems than by focusing on national issues. Furthermore, junior representatives, who have yet to build up positive reputations for constituent service provision, might have greater electoral incentives to contact

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78. The assumption that it does pervades much election law scholarship. *See, e.g.*, Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 31 (2004) (noting that the Supreme Court's decision to endorse influence districts in the Voting Rights Act context "ignores, for example, the importance of legislative seniority: winning several elections in a row from the same district may be preferable to winning the same number of seats spread among several districts").

79. Fenno observes that "the frequency of trips home is much greater for the low seniority groups than it is for the high seniority group." FENNO, *supra* note 5, at 37. Other studies have drawn similar conclusions. *See, e.g.*, KINGDON, *supra* note 37, at 62 ("Independent of their margins of victory, senior members of the House appear to be less preoccupied with their constituencies than are junior congressmen. . . . [J]unior congressmen pay more careful attention to constituency opinions. . . . These differences . . . persist while controlling for other third variables."); GLENN R. PARKER, HOMEWARD BOUND: EXPLAINING CHANGES IN CONGRESSIONAL BEHAVIOR 88-89 (1986) (noting that frequency of elections are a major factor leading representatives to return to their districts and pay attention to discrete district interests); Scott Ashworth, *Reputational Dynamics and Political Careers*, 21 J.L. ECON. & ORG. 441, 443 (2005) (finding that representatives spend a diminishing amount of time on constituent service tasks as they become more senior).

80. FENNO, *supra* note 5, at 188.

81. FENNO, *supra* note 38, at 217-18.

constituents and appear responsive.[82] Thus, while a senior safe district incumbent might be more *capable* of exerting influence on behalf of discrete district interests, it is less clear that the senior safe district incumbent would be motivated to remain aware of shifting discrete interests and able to prioritize them appropriately.

Third, political scientists have generally found that senior representatives are less focused on casework.[83] Casework is hardly a representative's or staffer's favorite responsibility. While a powerful senior representative in a safe seat might employ a district staff to handle casework concerns, that representative is unlikely to play any personal role in casework or to invest significant resources in casework.[84] Fenno notes that in one instance a senior representative from a majority poor, urban district consolidated his separate urban and suburban district offices into one suburban office because it was in a "[n]icer neighborhood" and his "staff like[d] it better," despite the fact that many of his urban constituents lived far from the new district office and had no easy way of accessing it.[85] This lack of attention to casework is made more problematic by the fact that senior representatives tend to receive more casework requests than junior representatives, largely due to greater name recognition and reputation lag.[86] Although the larger number of requests senior representatives receive might suggest that they are better positioned to provide constituent services, the fact that they focus less overall attention on

82. *See* Jon R. Bond, *Dimensions of District Attention over Time*, 29 AM. J. POL. SCI. 330, 342, 344 (1985) (finding that unlike institutional leaders who hold positions of significant power within Congress, junior representatives and representatives in less politically secure districts have a large incentive to focus on discrete district interests in order to establish constituent trust and build relationships).

83. *See* CAIN, FEREJOHN & FIORINA, *supra* note 12, at 95-96 ("[M]embers who were more recently elected and those who represent marginal seats indeed have a greater casework orientation."); John C. McAdams & John R. Johannes, *Does Casework Matter? A Reply to Professor Fiorina*, 25 AM. J. POL. SCI. 581, 586 (1981) ("Senior congressmen, even those in insecure electoral situations, solicit cases less, have fewer district staff persons doing casework, and do a smaller proportion of their casework in the district. Younger, less experienced congressmen behave just the opposite, even if they are electorally rather safe."). *But see* Mark C. Ellickson & Donald E. Whistler, *Explaining State Legislators' Casework and Public Resource Allocations*, 54 POL. RES. Q. 553, 563 (2001) (failing to find similar results at the state legislative level).

84. *See* John R. Johannes, *Explaining Congressional Casework Styles*, 27 AM. J. POL. SCI. 530, 538-39 (1983) ("House juniors, and especially freshmen, spend more time on casework than senior members.").

85. FENNO, *supra* note 38, at 180.

86. Johannes & McAdams, *supra* note 24, at 544-45.

casework means that they actually spend significantly less time addressing each casework request they receive.

Fourth, senior representatives might be most likely to provide constituent services inequitably. Because senior representatives often rely on the same coalition of supporters election after election, such representatives have an incentive to target constituent service benefits to particular constituents at the expense of others. Fenno argues that:

> Constituency careers have two recognizable stages, *expansionist* and *protectionist*. In the expansionist stage, the member of Congress is still building a reliable reelection constituency. . . .
>
> . . . .
>
> During the protectionist stage of their constituency careers, House members become less interested in building supportive constituencies and most concerned about keeping the electoral support already attained, about maintaining the existing primary-plus-reelection constituencies. . . . Once the members are in the protectionist stage, home activities are dominated by preventive maintenance.[87]

Thus, once more-senior representatives enter the protectionist phase, they likely target constituent services to members of their supportive constituencies at the expense of other constituents. They might expedite casework requests from supportive district stakeholders and become less accessible to non-supportive stakeholders.[88] And they might target discretionary funds to serve the needs of supportive stakeholders, because of their greater awareness of the distinct interests of supportive stakeholders and their desire to reward those stakeholders.[89]

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87. FENNO, *supra* note 5, at 172-73.

88. *See id.* at 186-89 (noting that some senior representatives, even when facing competitive elections, tend not to reach out to district interests outside of their supportive constituencies); *cf.* Robert P. Weber, *Home Style and Committee Behavior: The Case of Richard Nolan*, *in* HOME STYLE AND WASHINGTON WORK: STUDIES OF CONGRESSIONAL POLITICS 74 (Morris P. Fiorina & David W. Rohde eds., 1989) (noting that Rep. Richard Nolan, as he entered the protectionist phase of his career, largely ignored constituencies with interests opposed to those of his reelection constituency).

89. *See, e.g.*, Michael Luo & Mike McIntire, *Donors Gave as Santorum Won Earmarks*, N.Y. TIMES, Jan. 15, 2012, http://www.nytimes.com/2012/01/16/us/politics/as-rick-santorum-secured-earmarks-2006-donations-flowed-in.html (noting that while in the Senate, Rick Santorum delivered earmarks desired by campaign contributors).

3. *Policing Lockups and Constituent Service*

The constituent service arguments I outline, combined with the policy responsiveness arguments offered by Issacharoff and Pildes, suggest that some checks on entrenched incumbency are necessary to ensure optimal representation. That said, while partisan lockups may hinder constituent service delivery, courts should not indiscriminately break up partisan lockups without considering whether doing so would degrade constituent service quality. After all, as already noted, political competition of the sort Issacharoff and Pildes seek is competition between political parties; constituent service provision is largely exogenous to this type of political competition.[90]

Issacharoff and Pildes might assume that removing partisan lockups would allow candidates to compete on any number of issues, including constituent service provision. On this theory, what matters most is that voters are able to select the candidates they want without incumbents establishing self-serving barriers to competition. However, it is almost certainly hard, if not impossible, to predict a challenger's constituent service potential prior to an election. Many "competitive" elections will likely feature candidates who would follow identical constituent service strategies if elected. As a result, there is no reason to think that partisan lockups systematically stymie voters who seek to oust their representatives because of poor constituent service provision.[91]

In fact, there are several reasons to suspect that Issacharoff and Pildes's proposal might impose barriers to effective constituent service delivery. First, and most importantly, since partisan competition bears no relationship to quality of constituent service delivery, maximizing political competition might force jurisdictions to design districts in ways that undermine constituent service quality. After all, anytime a jurisdiction chooses to design districts with one objective exclusively in mind, that jurisdiction might end up undermining other valuable objectives.

Second, policing partisan lockups might keep constituents from being able to use the ballot box to express accurate judgments about the quality of constituent service they receive, decreasing representatives' incentives to provide such services. Incumbents who have established positive reputations

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90. *See supra* notes 68-72 and accompanying text.

91. Campaigns that focus on the quality of an incumbent's constituent service provision can and do occur in primaries. *See, e.g.*, David Welna, *Republican Challenges Pile On in Ohio House Race*, NPR, Mar. 5, 2012, http://www.npr.org/2012/03/05/147992064/super-Tuesday-also-hosts-congressional-primaries (describing a primary election in which the incumbent's constituent service record came under fire).

for constituent service provision reap electoral benefits.[92] Indeed, positive reputations for constituent service provision help explain why voters tend to think more highly of their own representatives than of the institution of Congress as a whole.[93] But constituent service is generally a factor in elections only after representatives have built up reputations for constituent service provision.[94] A representative is unlikely to develop such a reputation—positive or negative—until many different voters and interest groups have interacted with or attempted to interact with that representative.[95] Insofar as policing lockups decreases the average length of a representative's career and increases electoral instability, there is a risk that Issacharoff and Pildes's proposal would reduce the electoral incentive that drives representatives to provide constituent services in the first place. After all, representatives in competitive seats at the outset of their careers are less likely to prioritize the long-term electoral gains they might derive from constituent service provision given greater need for short-term political advantage.

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92. *See* Persily, *supra* note 74, at 670-71. Some see this advantage of incumbency as a structural flaw: reputations for providing a high quality of constituent service allow incumbents to win reelection even when voters might receive better policy responsiveness from someone else. *See, e.g.*, Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 646, 673-74 (1996); Levy, *supra* note 6, at 1916. But if, as I argue, constituent service is an important component of responsiveness, then the actual structural flaw is that reputations often lag behind reality.

93. *Cf.* Frank Newport, *Congress' Job Approval Falls to 11% Amid Gov't Shutdown*, GALLUP (Oct. 7, 2013), http://www.gallup.com/poll/165281/congress-job-approval-falls-amid-gov-shutdown.aspx ("Americans now give their own representative a 44% approval rating, which is not an extremely high rating on an absolute basis, but is certainly high compared with Congress' overall 11% rating in the same survey.").

94. Legal scholars almost universally assume that focusing on constituent service provides an electoral advantage to incumbents. *See, e.g.*, Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 13 (2007); Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 21-24 (1996). The claim is slightly more controversial among political scientists, though most accept it. *See, e.g.*, Gary King, *Constituency Service and Incumbency Advantage*, 21 BRIT. J. POL. SCI. 119, 127-28 (1991); Douglas Rivers & Morris P. Fiorina, *Constituency Service, Reputation, and the Incumbency Advantage*, *in* HOME STYLE AND WASHINGTON WORK: STUDIES OF CONGRESSIONAL POLITICS, *supra* note 88, at 17, 20-22 ("Constituents who expect their representatives to be helpful when contacted are much more likely to rate the incumbent favorably and to vote for him."). *But see* John R. Johannes & John C. McAdams, *The Congressional Incumbency Effect: Is It Casework, Policy Compatibility, or Something Else? An Examination of the 1978 Election*, 25 AM. J. POL. SCI. 512, 530-38 (1981) (arguing that casework provision did not have a statistically significant relationship with incumbent reelection in 1978).

95. *See* Rivers & Fiorina, *supra* note 94, at 19-20.

Finally, even if entrenched incumbency is undesirable from a constituent service perspective, so is constant turnover. Representation has a learning curve. Persily is doubtless right that representatives need to serve for *some* length of time before they understand how best to deal with casework requests, prioritize distinct district interests, and engage in legislative bargaining for desired earmarks. It is doubtful that implementing Issacharoff and Pildes's proposal would lead to an optimal average length for congressional careers from a constituent service perspective.[96]

4. *A Possible Solution*

To avoid undermining constituent service delivery, Issacharoff and Pildes's proposal should be adjusted to recognize a constituent service affirmative defense to a partisan lockup challenge.[97] This defense would be objective in the sense that it would inquire into the structural incentives for a hypothetical representative to deliver constituent services, not into the actual or likely constituent service delivery patterns of any existing or presumed representative. Such a defense could be articulated in terms of either intent or effect. On the intent side, courts might uphold a challenged map if a defendant jurisdiction could provide sufficient evidence to demonstrate that the mapmakers' primary motivation for deviating from partisan balance was maximizing the quality of constituent service delivery.[98] Since an intent-based affirmative defense would justify deviation from partisan neutrality only when

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96. Putting aside all other considerations, including the quality of legislative output, legislative term limits would seem the most direct way of resolving problems related to entrenched incumbency. *But see* Corwin, *supra* note 6, at 601-02, 605-06 (noting that lame ducks are particularly likely to ignore constituent interests).

97. Just like the Issacharoff and Pildes proposal itself, this discussion is largely theoretical. The Supreme Court has yet to articulate a test to evaluate the constitutionality of partisan gerrymanders. In fact, a plurality of the Court has suggested that no workable standard exists, *see* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004), though Justice Kennedy, while agreeing that no workable standard exists at this time, has refused to foreclose the possibility that a workable standard might emerge in the future. *Id.* at 309-10 (Kennedy, J., concurring in the judgment). Thus, this proposal rests on the assumption that, contrary to current doctrine, courts have embraced the Issacharoff and Pildes "partisan lockups" approach. In other words, this proposal assumes that courts have taken on responsibility for examining whether districts, as designed, promote partisan competition, and have decided to dismantle district maps that advantage one party over the other.

98. This approach would be consistent with Justice Stevens's preferred approach to adjudicating partisan gerrymandering claims. *See id.* at 339 (Stevens, J., dissenting) ("[I]n evaluating a challenge to a specific district, I would . . . ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles.").

constituent service delivery was a primary motivation for drawing challenged district lines, it could not justify a true partisan gerrymander.

The problem, though, is that determining true intent is difficult. While courts evaluating racial gerrymandering claims have looked to mapmakers' "predominant intent" in designing individual districts,[99] a plurality of the Supreme Court has expressed well-placed skepticism about the ability of judges to identify predominant motivations outside the racial gerrymandering context.[100] As the Court put it:

> Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it.[101]

Here, the intent test would examine whether the "shape of a particular district is so substantially affected by the presence of . . . an ordinary and lawful motive as to" *validate* it.[102] But that seems a distinction without a difference. Courts would still have to engage in the difficult process of determining whether one particular motive – maintaining constituent service quality – sufficiently predominated over other permissible considerations – such as respecting natural geographic boundaries – that might not justify deviation from partisan equality.

Advocates of an intent test might respond that courts could look to the evidentiary record mapmakers compiled to support the maps they drew. But mapmakers might use constituent service as a pretext, hiding true partisan motivations by discussing decisions exclusively in terms of constituent service quality. Indeed, in a world where courts police partisan lockups, political parties would likely take any opportunity to slip favorable maps through the cracks. Parties thus might invest significant resources in developing rich evidentiary records to support the notion that, contrary to reality, the mapmakers' primary motivation was constituent service quality.

Because of the difficulties inherent in identifying the mapmakers' "predominant motivation" – and because what matters ultimately is the quality of representation that constituents receive, not the mapmakers' intent – I

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99. *See Vieth*, 541 U.S. at 284-85 (citing Miller v. Johnson, 515 U.S. 900 (1995), and Shaw v. Reno, 509 U.S. 630 (1993)).

100. *Id.* at 285-86.

101. *Id.* at 286.

102. *See id.*

suggest that courts instead apply an effects test. Under such a test, courts might allow defendant jurisdictions to justify challenged maps on the ground that those maps have positive effects on constituent service delivery compared to partisan-neutral baselines. The defendant jurisdiction would have the burden of showing that the proposed map would provide specific constituent service benefits that could not be replicated under a partisan-neutral map.

Since entrenched incumbency often comes to undermine constituent service delivery, courts should not allow an effects-based constituent service affirmative defense to justify long-lasting incumbent protection schemes. Thus, courts should require defendant jurisdictions to demonstrate increasingly significant constituent service benefits as deviation from partisan neutrality increases. For example, to justify small but hardly insubstantial deviation from a partisan-neutral baseline, a jurisdiction might have to show that adoption of a partisan-neutral map would impose significant constituent service costs. Small but hardly insubstantial deviation might describe a district that on average supports the Republican presidential nominee by a 55/45 margin but, depending on the local and national political climate and the specific candidates, has a realistic chance of electing a Democrat to Congress in any given election.[103] By contrast, justifying large deviation—say, a 70/30 Democratic district—would require showing that any possible partisan-neutral map would deprive a certain large group of constituents of virtually all constituent services, leaving them unrepresented as far as constituent service is concerned. Such a showing would likely prove impossible in all but the most extreme cases.

Of course, this test would require judges to engage in some intensive fact finding and critical evaluation of proffered justifications. To prevent use of constituent service as an excuse for partisan entrenchment, courts might require jurisdictions to prove constituent service benefits by clear and convincing evidence rather than by just a preponderance. To make the required showing, jurisdictions might rely on various types of evidence. For example, they might present expert testimony from political scientists discussing structural disincentives to constituent service delivery and the advantages of

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103. For instance, many congressional districts gerrymandered after the 2000 Census to favor Republicans elected Democrats to Congress in 2006. *See, e.g.*, Richard E. Cohen, *GOP Plays It Safe on Redistricting*, POLITICO, Mar. 16, 2011, http://www.politico.com/news/stories/0311/51370.html. Many of those same districts reverted to form in 2010 and elected Republicans, again as a result of the national political climate. *Id.* The possibility that a national wave might overcome a slight partisan lean motivated Republicans, after the 2010 census, to focus on protecting incumbents rather than "pushing GOP-controlled state legislatures to turn the screws on incumbent Democrats." *Id.* As Rep. Lynn Westmoreland put it, "Pigs get fat. Hogs get slaughtered." *Id.*

the challenged map in overcoming those disincentives.[104] Or they might present expert evidence from political scientists, demographers, or economists explaining that no partisan-neutral map could avoid diluting representation of a particular group of residents who share a common racial, socio-economic, or geographic profile.[105] Plaintiffs, of course, could then present their own evidence rebutting the defendant jurisdiction's showing. They might try to demonstrate, for instance, that a plausible partisan-neutral alternative exists, or that the asserted constituent service benefits are illusory, or that the jurisdiction's preferred map imposes countervailing constituent service costs.

Some might argue that fact-intensive review of the political process is inconsistent with the judicial role.[106] But courts evaluating claims brought under section 2 of the Voting Rights Act are already forced to resolve complicated factual disputes regarding the representational effects of district maps.[107] And Part I suggests some possible judicially manageable standards for determining constituent service quality. Courts could look to whether and to what extent the challenged map: (1) aids representatives in performing their ombudsman function; (2) helps representatives remain accessible to constituents; and/or (3) facilitates effective delivery of appropriations to district interests.

Others might worry that an effects test would simply facilitate a war of experts, who might lack access to reliable evidence demonstrating how a challenged map would improve or degrade constituent service quality. But Part I illustrates that political scientists can employ traditional methodologies to evaluate the constituent service implications of challenged district maps.[108] And it might not be all that bad if many cases devolve into unresolvable battles between experts. Under the "clear and convincing evidence" standard, courts in such circumstances would simply reject the constituent service affirmative defense and dismantle the partisan lockup. Given the representational harms—including constituent service harms—that result from entrenched partisan

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104. This evidence might be particularly appropriate in a case where, for instance, the defendant jurisdiction argues any partisan-neutral map would require drawing at least one long and skinny district in which constituent service delivery might prove difficult. I discuss such disincentives in detail in Subsection II.B.2.

105. This evidence might be particularly appropriate in a case where, for instance, any partisan-neutral map would result in splitting an agricultural part of the state into districts dominated by urban interests. I discuss such dilution in detail in Subsection II.B.1.

106. *See Vieth*, 541 U.S. at 288 (expressing skepticism about the justiciability of an effects test in the partisan gerrymandering context).

107. *See infra* notes 114-115 and accompanying text.

108. *See supra* note 16.

lockups, the constituent service affirmative defense should perhaps only apply when a challenged map clearly and convincingly enhances constituent service quality.

B. Constituent Service and Individual Rights

Constituent service provision should also matter for scholars and judges who prefer to think about election law issues in terms of individual rights. In fact, some judges have already acknowledged as much. All courts to have considered the issue have held that jurisdictions may, consistent with the "one person, one vote" principle, design districts with equal total populations, rather than equal numbers of eligible voters, in order to ensure that each resident has an equal ability to petition for services.[109] The Ninth Circuit has even suggested—albeit in dictum—that the Equal Protection Clause requires jurisdictions with large numbers of non-citizens to design districts with equal total populations to guarantee what Judge Alex Kozinski, in dissent, termed "equality of representation."[110] But this technical issue rarely arises.[111]

In this Section, I will examine an issue with potentially broader implications: race and reapportionment. I limit my analysis to minority-majority districts because I want to avoid overstating my case. Inadvertent structural disincentives for constituent service provision cannot always be legally actionable. Whenever districts are redesigned during reapportionment, some residents will, for whatever reason, end up receiving a lower quality of representation, but this fact alone cannot be enough to support a legal

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109. *See* Chen v. City of Houston, 206 F.3d 502, 528 (5th Cir. 2000) (deferring to the mapmakers in the absence of clear constitutional standards for choice of measurement); Lepak v. City of Irving, 453 F. App'x 522, 523 (5th Cir. 2011) (per curiam) (reaffirming *Chen* and holding that total population is a permissible baseline); Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996) (same); Garza v. Cnty. of Los Angeles, 918 F.2d 763, 775 (9th Cir. 1990) ("Non-citizens are entitled to various federal and local benefits, such as emergency medical care and pregnancy-related care provided by Los Angeles County. As such, they have a right to petition their government for services and to influence how their tax dollars are spent." (citation omitted)); Calderon v. City of Los Angeles, 481 P.2d 489, 494 (Cal. 1971) ("[M]uch of a legislator's time is devoted to providing services and information to his constituents, both voters and nonvoters. A district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide such assistance and to listen to concerned citizens.").

110. *Garza*, 918 F.2d at 775; *see also id.* at 782 (Kozinski, J., concurring and dissenting in part).

111. *See supra* note 109. In fact, the Supreme Court apparently assumed that principles of equal voters and equal representation would never conflict. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives.").

challenge.[112] The minority-majority district context is distinct, however, because Congress and the courts have consistently emphasized the importance of protecting the representational interests of minorities.[113] In this Section, I first articulate a new proposal for protecting the constituent service interests of minorities. I then reexamine two recent Supreme Court cases to see what difference my proposal might have made if it had been in effect at the time they were decided. My discussion of these cases illustrates how my proposal might operate in practice and underscores the importance of constituent service considerations in the minority voting rights context.

1. *A New Proposal for Protecting Minority Representational Rights*

The Voting Rights Act of 1965 is perhaps the best example of America's commitment to protecting minority representational rights.[114] But, notwithstanding its importance, the Voting Rights Act falls prey to the same problem plaguing the rest of the election law field: a failure to adequately consider aspects of representation other than policy responsiveness. Section 2, for instance, precludes a state or political subdivision from implementing any

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112. For instance, some urban voters will inevitably be placed in majority rural districts, and vice versa. The fact that a representative from the rural part of a district might provide a higher quality of constituent service to rural residents—perhaps because the representative is more familiar with the concerns of rural residents, or because rural residents comprise the representative's reelection constituency—does not mean that urban residents have suffered legally cognizable injuries.

113. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 47 (1986) ("The essence of a [Voting Rights Act] § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."); *see also* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1448 (1991) ("[S]econd-generation litigation is premised on the assumption that, by increasing the number of black representatives, single-member district voting will ensure that blacks have effective representation."). Even *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), acknowledges the continuing need to protect minority voting rights. *See id.* at 2631 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

114. 42 U.S.C. § 1973-1973aa-6 (2006). The Senate Report accompanying passage of the 1982 amendments to section 2 of the Voting Rights Act reiterates the broad remedial purpose of the Act—"the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,'" S. REP. NO. 97-417, at 30 (1982) (quoting White v. Regester, 412 U.S. 755, 766, 770 (1973)), *reprinted in* 1982 U.S.C.C.A.N. 177, 208—and notes that one factor that may "have . . . probative value as part of plaintiffs' evidence to establish a violation [is] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," *id.* at 29, 1982 U.S.C.C.A.N. at 207.

"voting qualification or prerequisite to voting or standard, practice, or procedure" if its implementation would provide members of a minority group with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[115] Yet once minority voters have been provided the right to cast undiluted votes and elect representatives of their choice, section 2 stops guaranteeing minority representational rights. No part of the Voting Rights Act looks beyond the legislature to the quality of constituent services that representatives, once elected, actually provide, or to the second-order structural effects of minority-majority districting requirements on constituent service delivery.[116]

This failure seems inconsistent with the Voting Rights Act's broad remedial purpose of ensuring that minorities receive fair and equal representation. For one thing, insofar as constituent service facilitates a high quality of representation, voting rights law should prevent the political process from unfairly degrading the quality of constituent services that minority constituents receive. Moreover, since virtual representation—the concept that individuals can be "represented" by any representative who shares their traits or views regardless of what district that representative officially serves—is generally unavailable in the constituent service context,[117] minority constituents might have a particular interest in electing candidates who will provide them a high quality of constituent services. Thus, expanding the voting rights arsenal to take constituent service interests into account would further promote political and representational equality.

At the broadest level, Congress could authorize minority constituents to bring voting rights claims based on a deprivation of equal access to constituent services. Under this approach, minority plaintiffs could challenge district maps on the ground that they dilute the quality of constituent services that minorities receive. While this broad approach has some merit, it also poses challenges, including the potential need for courts to weigh competing representational interests—such as policy responsiveness and constituent service—against each other. As a result, I will focus on a more modest

115. 42 U.S.C. § 1973(a)-(b).

116. Even prior to invalidation of the coverage formula for section 5 preclearance, *see Shelby Cnty.*, 133 S. Ct. 2612, a jurisdiction could hardly have been accused of retrogression merely because minority residents were likely to have received a lower quality of constituent services on the new map compared to the old.

117. Representatives rarely—if ever—provide constituent services to residents of other districts. *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1609-11 (1993) (noting that for this reason, virtual representation does not apply to constituent service).

alternative. My proposal would come into play when a jurisdiction has some preexisting legal obligation to draw a minority-majority district and must select between several different potential minority-majority districts to satisfy that obligation. In such circumstances, the jurisdiction should not be allowed to select a district in which, all else equal, minority constituents would receive a lower quality of constituent services than minority constituents would have received had the jurisdiction selected a different district.[118] Thus, my proposal treats constituent service as a factor only when jurisdictions can select among various potential districts, any of which would satisfy all other Voting Rights Act obligations.

My purpose here is to explain in a general way why such a reform is needed, not to resolve all the procedural and legal problems that might plague implementation. Nevertheless, it is worth fleshing out a few specifics. First, I offer this proposal as a modification to available statutory remedies for Voting Rights Act violations, rather than as an interpretation of the Equal Protection Clause.[119] Congress could conceivably enact such a reform pursuant to its powers to implement the Fourteenth and Fifteenth Amendments, the same powers Congress relied on when it originally enacted sections 2 and 5 of the Voting Rights Act.[120]

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118. Because my proposal applies regardless of the statutory basis for the requirement that a jurisdiction draw a minority-majority district, and section 2 remains a valid basis for such a requirement, *Shelby County* does not render my proposal moot. Moreover, the Department of Justice has indicated a willingness to use section 3's bail-in provision to maintain a preclearance requirement for certain jurisdictions. *See* Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. TIMES, July 25, 2013, http://www.nytimes.com/2013/07/26/us/holder-wants-texas-to-clear-voting-changes-with-the-us.html. Finally, Congress might pass a new coverage formula, making the demise of section 5 only temporary.

119. It might be possible to implement my proposal, along with the broader version elaborated in the previous paragraph, under the Equal Protection Clause, but the legal issues would be complicated. For one thing, were plaintiffs to bring such claims directly under the Equal Protection Clause, they would likely have to show discriminatory intent. *See* Washington v. Davis, 426 U.S. 229, 240-42 (1976). For another, courts might prove ill-equipped to determine proper equal protection standards in this context, given that reapportionment necessarily involves a complicated balance of various representational interests. Congress, by contrast, can develop appropriate standards through the legislative process. *See supra* notes 113-115 and accompanying text.

120. *See, e.g.*, *Shelby Cnty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting) ("It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The [Voting Rights Act] addresses the combination of race discrimination and the right to vote, which is 'preservative of all rights.'").

Second, insofar as procedure is concerned, a plaintiff would start with the burdens of production and persuasion. The plaintiff initially would have to make out a prima facie case demonstrating, by a preponderance of the evidence, that the jurisdiction selected a minority-majority district featuring structural barriers to constituent service delivery not present in an alternative district the jurisdiction could feasibly have selected. This prima facie case would likely turn on the same types of expert evidence that jurisdictions would present to support a constituent service affirmative defense to a partisan lockup claim.[121]

The jurisdiction could try to rebut the prima facie case by challenging the sufficiency of the plaintiff's evidence or the significance of the asserted structural barriers to constituent service delivery, or by arguing that the plaintiff's preferred district imposes its own structural barriers to constituent service delivery that are at least as serious as those imposed by the proposed district. However, if the plaintiff were to succeed in proving a prima facie case by a preponderance of the evidence, the burden would shift to the jurisdiction to justify its district choice according to neutral principles. Such neutral principles might include, for instance, maintaining the compactness and contiguity of a district, or respecting existing municipal boundary lines.[122] Since the purpose of minority-majority districting is to facilitate effective representation for minority constituents, courts and Congress should not allow pursuit of partisan advantage to constitute a neutral principle. If the jurisdiction shows, by a preponderance of the evidence, that it has some valid neutral justification for its decision, courts should defer to the jurisdiction.

It is worth noting that the prima facie case looks only to effects, while the neutral principles inquiry looks to both intent and effects.[123] Under the neutral principles requirement, the jurisdiction must be able to show that it has selected certain district lines in order to serve some legally permissible purpose (intent) and that the district lines in fact serve that purpose (effect). This hybrid test addresses a major problem facing courts in the racial reapportionment context: isolating only those district maps that impermissibly discriminate. After all, the constituent service interests of minority residents are just one category of representational interests mapmakers must take into

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121. *See supra* notes 104-105 and accompanying text.

122. *Cf.* Reynolds v. Sims, 377 U.S. 533, 578-81 (1964) (discussing various neutral principles that might justify deviation from one person, one vote).

123. This combined "intent and effect" test is hardly unprecedented in election law. *See* Davis v. Bandemer, 478 U.S. 109, 127 (1986) (requiring plaintiffs asserting a partisan gerrymandering claim "to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group").

account when drawing districts. By looking both to intent and effect, the neutral principles inquiry avoids invalidating maps that are designed to serve and actually do serve valid representational interests. For instance, mapmakers might select a certain minority-majority district, knowing full well that minority residents would receive a higher quality of constituent service delivery in an alternative district, because mapmakers wanted to prevent splitting a municipality into multiple districts. While it is certainly possible to argue that constituent service should predominate over at least some other permissible districting considerations, my intent and effects test leaves those tradeoffs to the political process.

To illustrate how minority-majority districting schemes might implicate constituent service delivery and to explore how my proposal might better protect constituent service interests, I examine the factual backgrounds of two well-known election law cases: *League of United Latin American Citizens v. Perry* (*LULAC*)[124] and *Shaw v. Reno*.[125] *LULAC* and *Shaw* feature different structural barriers to constituent service delivery: lack of cultural compactness in *LULAC* and bizarre district shape in *Shaw*.

2. LULAC *and Cultural Compactness*

LULAC arose out of Texas's 2003 mid-decade congressional redistricting. Compelled by section 5 of the Voting Rights Act to maintain a certain number of minority-majority districts, Texas replaced a district in which minorities shared common interests, District 23, with one that "combine[d] two farflung segments of a racial group with disparate interests," District 25.[126] The plaintiffs brought a section 2 claim challenging the state's decision to dismantle District 23 in favor of District 25. The Court, per Justice Kennedy, agreed with the plaintiffs.[127] As Pildes explained:

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124. 548 U.S. 399 (2006).

125. 509 U.S. 630 (1993).

126. *LULAC*, 548 U.S. at 433; *see also id.* at 424 ("The Latino communities at the opposite ends of District 25 have divergent needs and interests, owing to differences in socio-economic status, education, employment, health, and other characteristics." (citations and internal quotation marks omitted)). Because I discuss generally the constituent service implications of the state's choice of one district over another, the basis for the requirement that the state draw a minority-majority district in the first place is immaterial. Thus, the modifications to the minority-majority districting requirements of the Voting Rights Act that result from *Shelby County* fail to diminish the relevance of this example.

127. *Id.* at 441-42.

> [District 25] joined together poor rural Hispanics along the Texas border with the far more well-off Hispanics living in the urban, state capitol area of Austin. . . . [F]or Justice Kennedy, the Austin and Rio Grande Hispanic communities lived in worlds far apart, not just physically, but culturally, economically, educationally, and in other ways—differences that were decisive.[128]

In other words, District 25 was insufficiently "culturally compact."[129] In *LULAC*, the Supreme Court for the first time held that the selection of one minority-majority district instead of another could impermissibly dilute minority voting power.[130] Given traditional vote dilution jurisprudence, which has tended to focus on the number of minority-majority districts rather than the choice of minority-majority district, *LULAC*'s reliance on "disparate interests" seems misplaced. As Chief Justice Roberts pointed out in dissent in *LULAC*, the number of Latino-majority districts in Texas remained the same after implementation of court-mandated changes to the district map.[131]

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128. Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1144 (2007).

129. Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48, 50 (2006).

130. *See LULAC*, 548 U.S. at 429 ("The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others. As set out below, these conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." (citation and internal quotation marks omitted)).

131. *See id.* at 497 (Roberts, C.J., dissenting) ("Here the District Court found that six Latino-majority districts were all that south and west Texas could support. Plan 1374C provides six such districts, just as its predecessor did. This fact, combined with our precedent making clear that § 2 plaintiffs must show an alternative with *better* prospects for minority success, should have resulted in affirmance of the District Court decision on vote dilution in south and west Texas."). Several election law scholars have attempted to justify the *LULAC* decision based on conventional legal principles. Pildes argues that Justice Kennedy's concern in *LULAC* was with what the Justice perceived to be "racial essentialism" in the design of District 25, thus violating the legal principle of dignity. *See* Pildes, *supra* note 128, at 1144. Treating voters as members of racial groups rather than as individuals might somehow impinge on dignity, but Pildes fails to adequately explain why the state in *LULAC* committed such a serious violation of human dignity as to make its map legally impermissible given that the state had to draw a minority-majority district one way or the other. Guy-Uriel Charles posits that *LULAC* might represent the vindication of "representational rights." Guy-Uriel E. Charles, *Race, Redistricting and Representation*, 68 OHIO ST. L.J. 1185, 1197 (2007). Charles argues that, for Justice Kennedy in *LULAC*, incumbency advantage constituted an impermissible justification for burdening the minority voters of District 23, who had been mobilizing to defeat their incumbent representative. *Id.* at 1201-02. His argument, however, fails to explain why politically

Under my proposal, the Court would have reached the same result—invalidation of District 25 in favor of District 23—but for different reasons. Instead of straining conventional Voting Rights Act principles, the Court would have rested its decision on a more concrete representational injury: districts lacking cultural compactness likely foster less effective constituent service delivery when compared with culturally compact alternatives. This is for several reasons. First, a representative from District 25 would have less reason to focus on the particularized interests of minority constituents because those interests would be diffuse rather than discrete. Representatives are more likely to make themselves accessible to district stakeholders and advance district interests when those interests are shared—and prioritized—by large numbers of constituents.[132] As the number of distinct interests in a district increases—and particularly when those distinct interests conflict—the advantages that a representative derives from remaining accessible and responsive to discrete district interests decline, as do the disadvantages of ignoring those interests.[133] Even if a representative from a heterogeneous district were to make herself accessible to all constituents despite the diminished value of each hour spent in the district, that representative would likely have a difficult time identifying which interests she should prioritize.[134] In addition, remaining accessible to all district interests in a heterogeneous district would potentially take so much time that other responsibilities—such as policymaking—might suffer.

Second, constituents in districts such as District 25 receive fewer benefits from the delivery of discretionary funds. For one thing, insofar as accessibility facilitates more effective earmarking, the quality of earmarking would suffer as

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organized groups retain rights against the state. The state has not deprived these individuals of their right to vote or organize; the state has merely changed district boundaries such that a majority of constituents in the newly constituted district oppose the preferences of the organized group. Reapportionment frequently reorganizes groups of voters and upsets settled voting patterns.

132. *See* CAIN, FEREJOHN & FIORINA, *supra* note 12, at 19 ("A representative elected with the votes, efforts, and resources of the people of a specific geographic area naturally attaches special importance to their views and requests . . . ."); Thomas E. Cavanagh, *The Calculus of Representation: A Congressional Perspective*, 35 W. POL. Q. 120, 125-26 (1982) (suggesting that representatives are more likely to take district preferences seriously when a "district-wide consensus" exists); *cf.* Gardner, *supra* note 72, at 577-80 (noting that designing districts that split up political communities undermines the representation of discrete district interests).

133. *See* KINGDON, *supra* note 37, at 36-37 (noting that representatives are highly likely to take action when they "see the whole economy of their area at stake [because] when the economy is at stake, jobs are on the line").

134. *See* Donald J. McCrone & Walter J. Stone, *The Structure of Constituency Representation: On Theory and Method*, 48 J. POL. 956, 971-73 (1986).

a result of reduced accessibility.[135] For another, since constituents in heterogeneous districts share fewer priorities, each dollar brought back to such a district likely benefits fewer residents than if it had been brought back to a homogeneous district. Since outcomes of the appropriations process reflect in part the degree of constituent need, representatives from heterogeneous districts are likely at a disadvantage in the legislative negotiating process.[136] Moreover, the diminished per-constituent value of projects in heterogeneous districts reduces representatives' electoral incentive to raise funds for and personally contribute time to such projects. Thus, fewer dollars would likely have returned to District 25, and the projects funded in District 25 would likely have done less good for constituents.

Third, representatives in homogenous districts usually have an easier time fulfilling their ombudsman function. The types of requests constituents make differ depending on socioeconomic status. Lower-income constituents might seek assistance navigating government benefits bureaucracies while wealthier constituents might seek assistance navigating the licensing rules for small businesses. In a district split between rich and poor constituents, casework staffers would be less able to develop expertise dealing with a single category of requests. In addition, heterogeneous districts require representatives to prioritize different types of requests, which is bound to be a difficult task. Finally, when communities of interest are split up between various districts, constituents might have difficulty determining whom they should call with casework requests.[137]

Some might argue that a non-culturally compact district is superior from a constituent service perspective because its representative must take into account a broader cross-section of interests within the minority community. This argument has some force, but it suffers from two defects. First, in actuality a representative is unlikely to take a broad cross-section of interests

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135. *See supra* notes 37-39 and accompanying text.

136. *See* W. Mark Crain, *Districts, Diversity, and Fiscal Biases: Evidence from the American States*, 42 J.L. & ECON. 675, 687-91 (1999) (finding some empirical support for the proposition that intra-district homogeneity leads to delivery of more money through the appropriations process); *supra* note 59 and accompanying text; *cf.* Mark S. Hurwitz et al., *Distributive and Partisan Issues in Agriculture Policy in the 104th House*, 95 AM. POL. SCI. REV. 911, 917-18 (2001) (observing that members of House committees responsible for distributing agriculture appropriations overwhelmingly come from districts dominated by agricultural interests).

137. *E.g.*, RICHARD F. FENNO, JR., CONGRESS AT THE GRASSROOTS: REPRESENTATIONAL CHANGE IN THE SOUTH, 1970-1998, at 94-95 (2000) (noting that Congressman Mac Collins experienced this problem when his district included parts of many different counties but few complete counties).

into account. Given no easy way to prioritize various interests, representatives are likely to favor the interests of the constituents who share their background at the expense of others.[138] After all, remaining accessible to one's strongest supporters is easier—calling up friends takes less time and effort than attending constituency town halls. Additionally, a representative—particularly a reasonably safe, senior representative from a minority-majority district—is likely to derive more electoral benefits from remaining accessible to her strongest supporters.[139] And, insofar as the interests of those supporters differ from those of many other constituents, she is likely to ignore vital district interests. The second problem is that a good faith effort to represent a broad cross-section of minority interests is likely to provide a lower average level of constituent service to each minority constituent. The choice here is between effective representation of common interests shared by a large number of minority residents and diluted representation of multiple different interests.

Thus, Texas likely selected a district in which constituents would receive a lower quality of constituent services than they would have received in an alternative district. Assuming plaintiffs were able successfully to make out their prima facie case by a preponderance of the evidence, Texas would then have had to justify its choice according to neutral principles. Texas's primary motivation for its selection of District 25—partisan advantage—would not have constituted a valid neutral principle. Assuming Texas proved unable to provide evidence supporting an alternative motivation, it would have been proper for a court to require Texas to abandon District 25 in favor of District 23.

3. Shaw *and District Shape*

The dispute in *Shaw* began when the Attorney General denied section 5 preclearance for North Carolina's initial reapportionment map:

> The Attorney General specifically objected to the configuration of boundary lines drawn in the south-central to southeastern region of the State. In the Attorney General's view, the General Assembly could have created a second majority-minority district "to give effect to black and Native American voting strength in this area" by using boundary lines

138. *See* FENNO, *supra* note 5, at 8-26, 172-73 (distinguishing a representative's "reelection constituency"—made up of all supporters—from his "primary constituency"—made up of his "strongest supporters"—and suggesting that representatives from safe seats tend to focus attention on the needs of their "primary constituencies").

139. *See supra* notes 87-89 and accompanying text.

> "no more irregular than [those] found elsewhere in the proposed plan," but failed to do so for "pretextual reasons."[140]

Instead of drawing the district described by the Attorney General or challenging the Attorney General's conclusions in court, North Carolina enacted a new reapportionment scheme that:

> [L]ocated [a] second district not in the south-central to southeastern part of the State, but in the north-central region along Interstate 85. . . . It is approximately 160 miles long and, for much of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." Northbound and southbound drivers on I–85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them.[141]

In evaluating the validity of this new map, the Supreme Court held that district maps that "purposefully distinguish[] between voters on the basis of race" must withstand strict scrutiny to comply with the Equal Protection Clause.[142] Ever since, scholars have struggled to determine the harms that give rise to so-called "*Shaw* claims,"[143] and, thus, who should have standing to bring such claims.[144]

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140. Shaw v. Reno, 509 U.S. 630, 635 (1993) (alteration in original) (quoting Appendix to Brief for Federal Appellees at 10a-11a, *Shaw*, 509 U.S. 630 (No. 92-357)). *Shelby County* does not diminish the force of this example. *See supra* note 126.

141. *Shaw*, 509 U.S. at 635-36 (citation omitted) (quoting Shaw v. Barr, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part)).

142. *Id.* at 646; *see also id.* at 649 ("[W]e conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.").

143. Justice White, writing in dissent in *Shaw*, noted: "Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury." *Id.* at 659 (White, J., dissenting). Scholars have frequently bemoaned the "legal incoherence and political chaos" of the Supreme Court's *Shaw* claim jurisprudence. *See* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2505 (1997); *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium:* Hunt v. Cromartie *as a Case Study*, 58 WASH. & LEE L. REV. 227, 232 (2001)

Rather than enter into that debate, I argue that, under my approach, the Court could have reached the same result by focusing on constituent service injuries. Like Texas in *LULAC*, North Carolina selected one minority-majority district over another even though constituents in the rejected district would likely have received a higher quality of constituent services. As an initial matter, if, as seems likely, the redrawn district grouped together many different members of a minority group from different parts of the state and different socioeconomic classes, it might have presented the same "cultural compactness" issues plaguing the district at issue in *LULAC*.[145] But the bizarre shape of the redrawn district also created distinct barriers to effective delivery of constituent services.

For one thing, the snakelike design of the district—and particularly the fact that the district is often as narrow as a highway—might have left many residents unsure of the identity of their representative.[146] Not only would many residents likely have lived on or near a district boundary line, but the district would also have lacked contiguity with any meaningful political community with which residents might have affiliated. Constituents who do not know the identities of their representatives likely make fewer casework requests and misdirect more requests. As a result, even a diligent representative from the redrawn district might have struggled to carry out casework responsibilities. But the district's odd design also could have reduced incentives for casework diligence: a reason that representatives focus on casework responsibilities is to create reputations for being "diligent servants of their constituents."[147] The "indirect contacts" that give rise to such reputations—one constituent telling another about a positive experience—are less likely to occur when next-door neighbors live in different districts.[148]

The snakelike design of the redrawn district would also have inhibited accessibility and effective appropriating. On the accessibility side, the district's

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(agreeing with Pildes's view). Perhaps the most persuasive understanding of *Shaw* is that it addresses "expressive harms." *See* 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, 501-03, 507-08 (1993).

144. *See* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2285-88 (1998).

145. *See supra* notes 132-137 and accompanying text.

146. Unfortunately, no political scientists seem to have studied the relationship between casework, district compactness, and representative name recognition, so this discussion is to some degree conjectural.

147. Rivers & Fiorina, *supra* note 94, at 20.

148. *Id.* at 19.

narrowness would have caused much of the territory inside a ten- or twenty-mile radius from the site of a public event to fall outside the district. As a result, constituents on average would have had to travel longer distances to attend public events in the redrawn district than in the proposed district. To maintain the same level of accessibility and develop the same level of constituent trust, therefore, a representative would probably have needed to hold more public events in the redrawn district than in the proposed district.[149] Moreover, as a result of its narrowness, the redrawn district would have consistently divided political and geographic communities, such as towns, cities, counties, and regions, as well as communities of interest. A senior center in a community split between a snakelike district and other districts benefits fewer residents of any single district than a similar center entirely contained within one district. A representative has a greater electoral incentive to appropriate funds for a project when that project is designed to benefit a greater number of that representative's constituents.[150]

Thus, as in *LULAC*, the state chose to draw a minority-majority district in which constituents were likely to receive a lower quality of services than constituents would have received in an alternative district. Under my approach, assuming plaintiffs successfully made out this prima facie case by a preponderance of the evidence, North Carolina would have had to articulate a neutral justification for its selection. As with Texas, North Carolina's predominant motivation was pursuit of partisan advantage. Thus, unless North Carolina provided evidence demonstrating an alternative valid motivation, it would have been proper for a court to invalidate this aspect of North Carolina's map.[151]

In this Section, I have attempted to outline how Congress and courts might expand the tools in the racial reapportionment arsenal to protect the constituent service interests of minority groups. While I have laid out the broad parameters of one proposal, many questions still remain. For instance,

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149. *See supra* note 33 and accompanying text.

150. *See supra* notes 44-61 and accompanying text.

151. An advantage of this approach is that it avoids relying on the *Shaw* theory that a jurisdiction may not rely too heavily on race even when engaging in the permissible but inherently racially motivated process of designing minority-majority districts. *See supra* notes 141-144 and accompanying text. Identifying how much reliance on race is too much requires that courts strike a delicate balance between permissible and impermissible race conscious districting. *Cf.* Miller v. Johnson, 515 U.S. 900, 915-16 (1995) ("The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.").

what level of likely difference in constituent service quality would be significant enough to require a jurisdiction to justify its selection of one district over the other? Who would have Article III standing to bring a claim challenging a jurisdiction's selection of one minority-majority district over another on this basis?[152] What would happen if a defendant jurisdiction could show that better protecting the constituent service interests of minority residents would come at the cost of degrading the quality of constituent service that white residents would receive, or the overall quality of constituent service across all districts? These issues, as well as others, would need to be worked out. My goal has been to demonstrate that a constituent service claim along the lines of what I propose—or a different proposal with a similar purpose—is necessary to more fully protect the political rights of minorities.

CONCLUSION

One purpose of this Note has been to bring election law up to date with the political science literature addressing constituent service. My typology of constituent service activities is meant to show election law scholars that, contrary to a commonly held view, constituent service considerations can be incorporated into legal analysis. A second purpose has been to argue that election law scholars and judges should take constituent service seriously. I have attempted to illustrate the significant representational benefits that a high quality of constituent service can provide. Moreover, I have attempted to show how current debates focusing on political competition and minority-majority districting might benefit from a richer consideration of constituent service implications. As long as scholars and judges are "enter[ing] [the] political thicket" at all,[153] they should keep in mind that policymaking is far from the only aspect of representation that matters.

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152. It might be that any constituent in the challenged district would have standing. It might be that only minority constituents in the challenged district would have standing. It might be that only constituents who lived in both the challenged district and the alternative district would have standing, as only these constituents would have suffered redressable injuries. If courts take this last approach, it is unclear whether any plaintiffs would have had standing in *Shaw*. Alternatively, it might be that an organization such as LULAC could assert associational standing on behalf of its members, some of whom live in the challenged district and some of whom live in the alternative district.

153. Colegrove v. Green, 328 U.S. 549, 556 (1946).