In Search of Democracy: Reconciling Majority Rule, Minority Rights, and Group Rights in South Africa and the United States

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IN SEARCH OF DEMOCRACY: RECONCILING MAJORITY RULE, MINORITY RIGHTS, AND GROUP RIGHTS IN SOUTH AFRICA AND THE UNITED STATES

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"We are born into certain groups, others we choose, and still others choose us. Life not subject to the call of groupness is as difficult for us to imagine as life not subject to the individuating call of personhood or to the sociating call of sociality."

I. Introduction

The post-Cold War era allows us to reflect on the recent changes that have occurred internationally due to a multiplicity of technological advances. As governmental systems in the former Soviet Union were dismantled, legal scholars, economists, as well as social and political theorists began to analyze which governmental systems allow for a more substantial recognition and respect for the rights of citizens. Currently, we bear witness to some of the most complex and challenging issues as majority and minority alliances shift, re-align themselves, and attempt to restructure the legal relationships which govern their lives. Although historically the reallocation of power between majority and minority groups is clearly far from a new phenomenon, recent events illustrate the universality of these issues. Particularly, current events show the importance of developing cogent strategies to prevent tensions from exacerbating into violent conflict. Implicit in the acknowledgement of the need to address the concerns of groups of people who share racial, religious, and cultural commonalities that

* Executive Editor—Book Reviews, Boston College Third World Law Journal.
4 See id. at 2.
differ from the majority of the population, is the understanding that, for whatever reason, numerous minority groups feel that the political, legal, and social institutions as they currently exist may not fully respect or protect minority group norms, and their minority status prevents them from fully availing themselves of the political process.

The recent political changes in South Africa which have resulted in a substantial modification of the distribution of political power between members of majority and minority groups, and the continued debate over minority group rights in the United States, provide for an interesting comparative analysis of majority rule, minority group rights, and the extent to which racial group discrimination highlights the tension between individual rights and majoritarian democracy, as well as the tension between community-oriented rights and race-based group privilege. However, this analysis must allow for notable variables. Although the wide economic and social disparities between Whites and Blacks in both countries are somewhat analogous, the power dynamics are incredibly significant. In South Africa, there are numerical variations which alter traditional views on the distribution of power between majority and minority groups. These variations clearly modify the nature of the terms "group rights" and "minority rights."5

This Note will explore the political and philosophical theories which embody democracy and majority rule as well as their apparent complication due to race-based group discrimination and group-oriented policies. Part II will briefly highlight the current issues that confront both nations regarding individual and group rights. Part III will focus on group formation and identification. Utilizing a social and historical perspective, it will briefly outline some of the factors that help shape group identity and explore to what extent groups are recognized as having distinct rights under international law. In addi-

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5 In 1993, Whites in South Africa, including Afrikaners and other White ethnic groups, were in the minority and formed approximately 13% of the population (Coloureds are 8.5%, Indians are 2.5%, and Blacks are 76% of the South African population respectively). SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, RACE RELATIONS SURVEY 1994/1995 (1995), at 1. In the United States, Blacks—who are one of several designated minority groups—form approximately 11% of the population. JAMES MacGregor Burns, Cobblestone Leadership: Majority Rule, Minority Power 73 (1990). An important distinction between the minorities in South Africa and those in the United States is: defensive versus affirmative and negative versus positive aspects of their minority status. ALBIE Sachs, Protecting Human Rights in a New South Africa 154 (1990) [hereinafter Sachs, Human Rights]. The White minority in South Africa have been afforded exclusive privileges while affirmatively engaging in discriminatory actions. See id. Conversely, the Black minority in the United States, have been singled out as a subject of discriminatory actions. See id.
tion, Part III will briefly outline some of the group protectionary measures proposed in South Africa, as well as key examples of racial group rights and methods of protection offered in the United States.

Part IV will reconcile some of the competing theories of democracy, majority rule, and minority rights with group racial discrimination. It will highlight the complexity of a majority-rule centered system where individuals are sharply categorized according to race. Focusing on both actual and proposed initiatives to protect minority groups, it argues that although whites in South Africa are delegated to the position of "minority," their need for constitutional protection is distinguishable from that of Blacks in the United States. Part V will discuss individualism and communitarianism, two ideological theories which influence democratic applications. Importantly, this Note will discuss how these ideologies have impacted and influenced the governmental systems in South Africa and the United States. In addition, it will address individualism and communitarianism in the context of group rights, and attempt to reconcile the impact of racial group discrimination on individual and group rights. Finally, Part VI will offer suggestions on how individual and group rights may be harmonized, and illustrate potential directions for the future of both countries. This Note does not attempt to serve as an exhaustive study of these issues, but rather seeks to analyze some of the commonalities in an effort to contribute to the growing amount of literature on comparative international law and minority/human rights.

II. THE PRELIMINARIES: WHERE ARE WE?

On April 27, 1994, the Republic of South Africa conducted its first "all race" democratic election. This long-awaited event signified a

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6 Bronwen Manby, South Africa: Minority Conflict and the Legacy of Minority Rule, 19 FLETCHER F. WORLD AFF., Winter/Spring 1995, at 28. In South Africa, the concept of "universal suffrage" has continued to diminish in meaning for nearly 150 years. DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA? 105 (1991). When the Cape Province, one of four provinces in South Africa, first received representative government in 1853, the franchise was "color blind." Id. By 1910, and with the creation of the Union of South Africa, Blacks had been stripped of their right to be elected to Parliament, but many Blacks in the Cape Province still held the franchise. Albie Sachs, A Bill of Rights for South Africa: Areas of Agreement & Disagreement, 21 COLUM. HUM. RTS. L. REV. 13, 13 (1989) [hereinafter, Sachs, A Bill of Rights]; HOROWITZ, supra note 6, at 105. From 1930-31, the franchise was extended to all White adults, but there were property qualifications for all other groups. Id. In 1936, Blacks in the Cape Province were removed from the common roll and placed on a separate roll whereby they could elect three white representatives. Id. Under the authority of the Bantu Self-Government Act (1959), all but white voters were removed from the electorate. Id. at 11. The amended portion of the Electoral Act of 1979 extended the right to vote in
dramatic step away from the overriding presence and impact of the institutionalized legal, social, economic, and political system of racism, known as apartheid. In addition, this election signified the beginning of a nation’s arduous journey toward democratization. Numerous political leaders have successfully negotiated critical aspects of an interim Constitution and Government, in order to witness the dramatic rebirth of a “new South Africa.”

This journey, while marked by what could be easily characterized as extreme problems of “difference, division, and antipathy,” has tremendous significance throughout the international community. 


8 See Horowitz, supra note 6, at xi–xiii. It should be noted that prior to the election, Black South Africans consistently engaged in forms of organized resistance against Afrikaner rule through worker strikes, boycotts, arrests, protests, and armed struggles. See Charles Villa-Vicencio, Whither South Africa?: Constitutionalism and Law-Making, 40 Emory L.J. 141, 142 (1991); Adrien Katherine Wing, Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa, 11 Wis. L. Rev. 295, 351–52, n.279–82 (1993). In February 1990, the South African government lifted a ban on the African National Congress (ANC), Pan-Africanist Congress (PAC), and South African Communist Party (SACP). Id. This event, in addition to former President de Klerk’s release of political prisoners—such as Nelson Mandela who served a twenty-seven year prison term—and the easing of some emergency restrictions; are widely heralded as dramatic events that signified the beginning of the transition to democracy. Lynn Berat, A New South Africa?: Prospects for an Africanist Bill of Rights and a Transformed Judiciary, 13 Loy. L.A. Int’l & Comp. L.J. 467, 467 (1991); Villa-Vicencio, supra note 8, at 141; Hugh Corder, Towards a South African Constitution, 57 Mod. L. Rev. 491, 495 (1994).

9 Corder, supra note 8, at 500–05.

10 Horowitz, supra note 6, at xii. The degree of division and difference is evidenced by the extreme level of violence that has continued to plague this nation for many years. In the period from 1983–92, there were more than 118,000 murders, of which more than 15,000 arose from political violence. Corder, supra note 8, at 494 n.10. Most recently, the violence has centered around rival ethnic groups in the townships. Manby, supra note 6, at 39–40. The level of violence in the year preceding the elections escalated to extreme levels. A total of 4,502 people died in political violence in 1993. Africa Review 1995 Economic and Business Report 175 (1994) [hereinafter Africa Review]. Although the first four months of 1994 resulted in a total of 1,601 deaths, remarkably, the violent disturbances ended at the start of the elections. Id. at 171. The cessation of violence provides evidence of the hope and promise surrounding the implementation of democracy.

11 Africa Review, supra note 10, at 181. This historical transition is a milestone due to South Africa’s acceptance back into the international community, after being virtually ostracized and
The community watches in awe with the hope that South Africa is able to do what so many countries have failed to do: unite its citizens under a governmental system which encourages the respect of difference among members of a vastly heterogeneous society; and simultaneously, ensure that all people are treated as equals, without any discrimination on the basis of race, color, ethnicity, religion, gender or other distinction.

This dual-goal, to a large degree, highlighted the close relationship between process and substance during the transition to democracy. Not only is South Africa divided racially and ethnically, but it is also polarized within and across racial groups on the basis of ideological differences. Witnessing a full and legitimate transition to democracy requires leaders to construct inclusive policies and institutions which reduce conflict, foster conciliation, and promote intergroup accommodation. Although there are still tremendous hurdles to overcome, implementing a “non-racial democracy” seems to be a sensible
means of resolving conflict initiated by the former unrestrained Parliament. However, one critical yet unresolved issue, which warrants a detailed focus, is how the new democratic regime will balance its history, heterogeneity, and group-based stratification, with the need for a greater recognition of individual rights.

Although the United States has a well-established democratic system that strongly endorses, promotes and seeks to protect individual rights; there are unresolved issues regarding the distribution of political power—particularly with regard to racial divisions. The United States 1994 midterm elections resulted in sweeping changes in Congressional membership. Although it has been estimated that sixty-two percent of all eligible voters did not vote, members of the Republican party gained a majority in both the Senate and the House of Representatives. More important than Congressional partisan affiliations, the auspices under which these electoral changes occurred seems to suggest that many citizens are frustrated by the means with which power is allocated. However, party affiliations cannot be overlooked, particularly since they seem to bear a significant relationship to racial divisions. Ongoing racial divisions foster a climate in which the dialogue becomes one of “us” versus “them,” and the primary motivation

“nonracialism” does not establish “colorblindness” as its ultimate goal, but rather focuses on efforts of the state to no longer recognize or tolerate race as a criterion for exclusion. Herbert Adam & Kogila Moodley, The Opening of the Apartheid Mind: Options for the New South Africa 24 (1993) [hereinafter, Adam & Moodley, The Apartheid Mind].

See Villa-Vicencio, supra note 8, at 145. The former South African Parliament relied upon the British tradition of parliamentary supremacy as explicit authority to exploit the disenfranchised black majority. Id. at 147.


Lani Guinier, Don’t Scapegoat the Gerrymander, N.Y. TIMES, Jan. 8, 1995, (Magazine), at 36 [hereinafter Guinier, Gerrymander]. This event is considered significant since Democrats maintained a majority in Congress for decades. Richard L. Berke, N.Y. TIMES Nov. 9, 1994, A6. Some suggest that the Democrats could have lost for a number of other possible reasons, some of which include: one, white voters fled the party, two, the traditional base of Democratic supporters—minorities, labor and city dwellers—were given little incentives to vote, while marginal Democratic voters were courted via large television promotions, and three, negative campaigns and scare tactics—initiated by both parties—were moderately successful. Guinier, Gerrymander, supra note 18, at 36; John Fund, Republicans Sweep to Power in Congress, Crippling Clinton and the Democrats, SAN DIEGO UNION & TRIB., Nov. 13, 1994, at G1.


It has been estimated that party lines have been polarized along racial lines for the past twenty-five years, with non-whites tending to belong to the Democratic party. Bruce E. Cain, Voting Rights and Democratic Theory: Toward a Color-Blind Society, in Controversies In Minority Voting: The Voting Rights Act In Perspective 271 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter Cain, Voting Rights]. However, it should be noted that this division isn’t
for voting seems to be a way to prevent the ubiquitous "Other" from winning.²¹

The accompanying electoral politics, which have been subtitled by one scholar as "the politics of exclusion,"²² seemed to foster a climate nurtured by blame, anger, and fear across clearly delineated racial lines.²³ The subtext that accompanied much of the 1994 electoral dialogue signified the degree to which issues of race continue to polarize and divide the nation.²⁴ As several scholars have noted, the 1994 political campaigns frequently incorporated racial code words—minority, affirmative action, inner-city, crime rate, criminal, welfare mother, social program participant, and special interests—to manipulate Whites' fears of Blacks.²⁵ In addition, code words for Whites—Republican, conservative, and suburban—further highlight the chasm between the races.²⁶

Despite formal declarations that the United States is committed to the notion of "colorblindness,"²⁷ or equality for all, there appears to be wide-spread disagreement as to what constitutes "equal citizen-
This disagreement may be magnified by what many have astutely characterized as a tension between liberalism and democracy. Under democratic liberalism, the individual is the prominent entity whereby rights are respected; however many suggest that the ongoing presence of racial group discrimination strongly negates the value of individual rights especially when minority interests remain devalued in a majority-rule centered democratic regime. Therefore, an unresolved issue is how the United States will reconcile its racially-divided history and existing group divisions with the ongoing debate regarding group rights.

### III. Group Formation, Identification, and Rights

Before analyzing the conflict between individual rights and group rights within the democratic regimes of South Africa and the United States, it is necessary to briefly consider some of the competing theories on group rights. These theories, particularly their implications with regard to disempowered racial groups, provide a basic framework for the analysis. Group dynamics, in both countries, have a significant impact on how citizens interpret the role of democracy. In addition, since competition among groups is often viewed as an integral part of the democratic process, it is imperative that the complex issues surrounding racial group divisions be addressed.

Generally, the term "group" is a very broad concept which refers to "a number of persons classified together because of common characteristics or interests." In general, groups are largely defined, recog-
nized, and understood by their purpose, goals, membership, and relationship to other groups. The legal, political, and social significance of a group may be largely determined by the extent to which it is formed voluntarily or involuntarily.

In a given society, individuals are often members of a large number of distinct groups. These groups may, and often do, constitute a "minority" in relation to other groups within the larger society. Similarly, a "majority" group is often comprised of a number of individuals who in and of themselves are members of different "minority" groups with particular interests. Despite the apparent fluidity of this broad conception of "group," the classification has been used in many nations as a fixed method of allocating citizenship rights. As such, group membership becomes problematic when individuals, on the basis of something seemingly as permanent as race, are excluded or denied certain citizenship rights.


34 See John H. Garvey, The Rights of Groups, 80 Ky. L.J. 860, 862 (1991); Lerner, Group Rights, supra note 32, at 29. However this distinction is not absolute or definitive, specifically when referring to racial groups. If one characterizes racial groups as voluntary, the nature of group identity would be attributed to one's self-identity and self-perception. See Lani Guinier, Tyranny of the Majority 273 n.46 (1994) [hereinafter Guinier, Tyranny]. Conversely, if one characterizes racial groups as involuntary, the legitimacy, accuracy, and relevance of such a classification could very well depend on who or what is classifying and what the classification scheme purports to achieve. See Horowitz, supra note 6, at 24; Sigler, supra note 30, at 12. Involuntary groups have been characterized as those groups that we are born into, and subsequently, may not be able to leave. Aviam Soifer, On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition, in The Protection of Minorities & Human Rights 233, 235 n.6 (Yoram Dinstein & Mala Tobory eds., 1992) [hereinafter Protection of Minorities]. Despite competing views whether such groups are indeed imputed or chosen, membership within racial groups may center around a shared history, culture, language, religion and/or other social rituals. Addis, supra note 35, at 656.

35 Cass R. Sunstein, Voting Rights, New Republic, Apr. 1994, at 37. Membership often ranges from groups united by political affiliation, profession, hobbies, social interests, and sports to race, religious beliefs, language, national origin, gender, and sexual orientation. Id. However, it should be noted that membership in groups solely formulated around issues or interests, unlike that of racial groups, are less likely to define a person's social relations on numerous levels. Cain, supra note 20, at 270–71.

36 Sunstein, supra note 35, at 36. This illustration highlights the fact that most groups, by their nature, are contingent and their meaning may be rearranged and recast through dialogue. Addis, supra note 33, at 650.

37 See Manby, supra note 6, at 51.

38 It has been suggested by many that race is merely a social construct, imposed out of necessity or purpose. See Horowitz, supra note 6, at 47; Adam & Moodley, The Apartheid Mind, supra note 15, at 2; Lawrence, supra note 24, at 835. These terms are not constant and often reflect a combination of culture, politics, and ideology. Id. An obvious concern arises when
International law has recognized that minority groups have rights against majority populations. Although until recently this area of the law had been largely neglected, it is widely understood that the need to protect religious, racial, ethnic, and other minorities is a growing international societal concern.

Obviously, the implications for this such terms are imputed by another group and are subsequently used as a divisive tool. One illustrative example is the South African use of the term "Coloured." Horowitz, supra note 6, at 47. Although the South African government intended for this term to signify a distinct and separate race, under a social system that grants explicit privilege based on skin color, the term Coloured merely became a midpoint on a continuum of racial group hierarchy. See id. at 24. Interestingly, in South African political discourse, the term "Black" is used in reference to all three groups of color. Adam & Moodley, The Apartheid Mind, supra note 15, at 2-3; Horowitz, supra note 6, at 23.

Minority rights are generally classified under the rubric of international human rights law. Historically, the recognition of minority group concerns dates back to the Seventeenth century and the need to protect religious minorities. Francesco Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities 1 (1991). It has been stated that the most comprehensive attempt to protect minorities internationally is found in the "Minorities Treaties," adopted in 1919–1920 at the end of the First World War and monitored by the League of Nations. Richard B. Lillich & Hurst Hannum, International Human Rights, 324 (3rd ed. 1995). These five treaties focused primarily on equality (of treatment, civil and political rights, and employment), but also on special issues such as: the acquisition of nationality, the freedom to practice religion, and to use one's own language. Capotorti, supra note 39, at 18–19. These rights were considered to vest only in individuals. Id. at 19.

Under the United Nations regime, Article 27 of the Civil and Political Covenant is the primary statement of minority rights that is legally binding on a majority of states. Lillich & Hannum, supra note 39, at 326. It provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." International Covenant on Civil and Political Rights, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter Civil and Political Covenant]. Incidentally, following 1950, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities determined that the term "racial" should be replaced with "ethnic" in minority rights discourse. It was believed that the term "ethnic" refers to all biological, cultural, and historical characteristics, while "racial" referred primarily to inherited physical characteristics, and "ethnic" would allow for a the broadest possible expression. Capotorti, supra note 39, at 34–35. Under Article 27, the rights guaranteed are bestowed upon individuals who belong to minority groups rather than the groups themselves. Id. at 35. This stems from an historical protection of individual rights, a need for a coherent formulation of rights under the Civil and Political Covenant, the political concern that allocating rights to a group could potentially create tension between groups and states, and the belief that an individual's choice to preserve group characteristics or voluntarily assimilate into the majority may be impeded by the need for a minority group to preserve its viability as a group. Id. However, it should be noted that these rights are to be exercised "in community with the other members of their group." Id. at 36.

politically sensitive area of the law make the adoption of a distinct legal definition of "minority group" somewhat unrealistic. In addition, since the social, economic, and political needs among minority groups vary considerably between nations, there are also logical differences in treatment.

Despite the failure to construct a consistent definition or international standard of protection, an overriding characteristic of minorities in a majority society is their existence in a "disadvantageous situation." This situation is described as those circumstances where persons belonging to a minority group are required to exert greater efforts than those members of the majority to participate in everyday life. In the international community, the recognition of minority rights centers primarily on the principle of "non-discrimination." There have been

LAW, (Catherine Brolmann et al. eds., 1993) [hereinafter Peoples and Minorities]. The issue of collective group rights incorporates a number of specific issues including: the right to self-determination (i.e., territorial autonomy via the establishment of a separate and independent state), secession, and emigration. Baka, supra note 40, at 234; Addis, supra note 33, at 625, 628.

41 See LERNER, supra note 32, at 8–11; Baka, supra note 40, at 231–32. In international law, legal recognition of a "group" will only arise with the presence of permanent factors that are beyond the control of the group members. LERNER, supra note 32, at 30–31. This caveat is important in order to distinguish between casual groups or associations of a limited duration and groups with racial, religious, and/or linguistic commonalities. See id.

42 Baka, supra note 40, at 232. Nations often have varied and complex types of minorities within a given society: multiple groups with varying needs, characterized by overlap and difference among groups. Id. It has therefore been impossible to generally express the concept of "minority" in order to determine who is subject to international protection. Id.

43 Id. In addition, other factors that have been cited which could be considered defining characteristics of a minority group include such objective and subjective criterion as: existence of a distinct group, numerical proportion, non-dominance, being a nationality of the state, existence within the state, a sense of community, collective goals and wills, and self-identification. Malcolm N. Shaw, The Definition of Minorities in International Law, in PROTECTION OF MINORITIES, supra note 34, at 23–30. An expressly held belief by the majority that a particular group is inferior to the majority group, which subsequently perpetuates low self-esteem and self-hatred by the subordinated group, is a critical factor to consider when determining the existence of a minority group. SIGLER, supra note 30, at 5. Although Blacks in South Africa fulfilled much of the criterion for minority group protection, the fact that they constituted a majority within the population required the United Nations regime to create a special category of protection: self-determination for colonized peoples. Manby, supra note 6, at 31.

44 Baka, supra note 40, at 233. These efforts run the gamut from seeking access to education and housing to overcoming language barriers and ensuring uninhibited religious expression. See id. Importantly, these additional efforts by members of a racial group are often insufficient, which often suggest the need to grant certain positive rights to minority groups to ensure civic equality. Id.

45 LERNER, supra note 32, at 23. The term "non-discrimination" is commonly used in "the pejorative sense of an unfair, unreasonable, unjustifiable or arbitrary distinction," applicable to
a number of international treaties that address discrimination and other issues of concern to minorities.46

Legal rights may be considered moral concepts that arise from a community's historical development.47 More importantly, the exercise of such rights greatly depends on the existence of a valid claim.48 Although some could argue that rights are inherently vested within individuals, it may be more accurate to assert that they are ascribed to those bodies that a society deems worthy of exercising such rights.49 Legal rights may be allocated along group lines.50 Rights have been ascribed to groups in both negative and positive form.51 The extent to which rights are assigned or attributed to groups as a whole, or whether rights may only be exercised by individuals within a group, largely depends on a nation's interpretation of the nature and function of groups in relationship to individuals, communities, and the governing political structure.52

As minority groups attempt to gain social, political, or economic power, there have been a multitude of responses by dominant groups or regimes.53 These responses range from cases of total negation to

"any act or conduct which denies to individuals equality of treatment with other individuals because they belong to particular groups in society." Id. at 25. Although this definition highlights individuality, it should be noted that discrimination—particularly racial discrimination—is usually based on group membership and not on one's individual qualities or flaws. Id. at 27.


47 DEMOCRATIC LIBERALISM IN SOUTH AFRICA: IT'S HISTORY AND PROSPECT, 244 (Jeffrey Butler et al. eds., 1987) [hereinafter, Butler].


49 See id.

50 SIGLER, supra note 30, at 12.

51 Negative rights refer to the right to prevent a state from engaging in certain acts, while positive rights refer to the right to have a state affirmatively act, often for the advancement of subordinated groups. See BUTLER, supra note 47, at 245.


53 By the term "dominant," this author refers to those groups that are in a position of political power, authority and control. See SIGLER, supra note 30, at 9–10.
forced assimilation and examples of pluralism. As such, there is considerable disagreement as to whether group rights should be recognized.

The growing international concern for group rights as well as the complexity of group formation and identification are exemplified by the citizens in South Africa and the United States. Both countries have some interest constituencies that have been formulated and classified primarily by race. In South Africa and the United States, there currently exists, in varying degrees, a sense of group affiliation, group identification, and in many respects group allegiance. Group identification in these two societies becomes increasingly problematic due to the common practice of categorizing groups according to their numerical proportion within the State. This practice implicitly ascribes the superior-subordinate relationship that embodies racial discrimination. The notion of majority rule and minority rights in both countries, when asserted under the guise of race, has serious implications and increases the need for ongoing dialogue on the significance of group rights.

Due to the widespread impact of racism and the historical sanctity placed on racial distinctions, group-oriented measures geared toward the advancement of subordinated groups continue to be an important

54 Addis, supra note 33, at 619. One form of response views the minority as a negation of the majority group and seeks to eliminate it—as with the Nazi’s in Germany—or physically separate it—as in the United States and South Africa. Id. Assimilation seeks to convert and conform the minority group into an image of the majority group. Id. at 619–20. Similarly, “paternalistic” pluralism often regards minority groups as the “Other”—i.e. indigenous groups such as Native Americans in the United States and Aborigines in Australia. Id. at 620.

55 See Addis, supra note 33, at 632; Garet, supra note 1, at 1001–02. Interestingly, disagreement over the recognition of minority or group rights echoes the recent debates concerning the “right to development” under international law. Some critics argue that this right should not be recognized since it is viewed as a “collective” right rather than an “individual” right. See Jack Donnelly, Third Generation Rights, in Peoples and Minorities, supra note 40, at 131–37.

56 Guinier, Tyranny, supra note 34, at 278 n.77; See Manby, supra note 6, at 28–29, 51.

57 See Manby, supra note 6, at 48; Lani Guinier, (E)racing Democracy: The Voting Rights Cases, 108 Harv. L. Rev. 109, 137 (1994). Throughout this Note, I make frequent references to racial groups—particularly, Black and White Americans and Black and White South Africans. However, it should be noted that I do not intend to imply that these groups are monolithic or that all members of these identifiable groups share identical positions on critical issues.

58 Shaw, supra note 43, at 24–25. The term “minority” literally refers to those persons who belong to a racial, ethnic, religious, or linguistic group or culture that differs from that of the greater number of persons in a given nation or society. Id. However, use of the term minority can be troubling, especially in light of Patricia Williams’ observation that the term “implies a certain delegitimacy in a majoritarian system.” Patricia Williams, The Alchemy of Race and Rights: Diary of a Law Professor 257 (1991).

59 See Horowitz, supra note 6, at 42.

60 See id. at 92–94.
issue in both countries.61 In South Africa, it has been suggested that
there will be efforts to introduce a system of "affirmative action" to
rectify past injustices.62 As such, the South African government faces
an additional challenge of rectifying this program, that specifically
highlights race, with the overall goal of non-race democracy.63 Al­
though there is an assumption that the equal protection of all indi­
viduals, despite their majority or minority status, negates the need for
group-oriented policies within a democratic government, in racially-
polarized societies this assertion seems debatable.64

Similarly, in the United States, there have been urgent claims to
make the political process more inclusive for historically disadvantaged
groups.65 Specifically, the area of voting rights has received in-depth
attention through federal legislation, case law, and numerous works by
voting rights scholars.66 However, there is widespread disagreement
over the continued necessity of improved civil rights for minority
groups through group-targeted legislation, specifically race-based in­
tiatives.67 The growing resentment of group protectionary measures in
the United States seems to highlight the dichotomy between individual
and group rights under a system of democracy.

61 See Sigler, supra note 30, at 199; See e.g., Sachs, Human Rights, supra note 5, at 169–73
(affirmative action in South Africa).
62 Sachs, Human Rights, supra note 5, at 12–13, 19–21, 169–73. To a large degree, a system
of affirmative action has been in place for quite some time in South Africa. Manby, supra note 6, at 37.
One scholar notes that the proposed South African system would be distinguishable from
the affirmative action program initiated in the United States because the system will favor the
majority of the population, and therefore, will not contain such a strong paternalistic element as
that found in the United States. Sachs, Human Rights, supra note 5, at 171–72.
63 Id. at 170–73.
64 See Lawrence, supra note 24, at 822–25; Phillips, supra note 28, at 130, 132–33.
65 Guinier, Tyranny, supra note 34, at 44–45, 24–25. Historically disadvantaged groups typi­
cally refer to racial and language minorities. See Kathryn Abrams, "Raising Politics Up:” Minority
(1960); City of Mobile v. Bolden, 446 U.S. 55 (1980); Thornburg v. Gingles, 478 U.S. 30 (1986);
See generally Grofman, Minority Representation, supra note 26; Alexander Athan Yanos,
67 A recent poll revealed that 51% of whites agree that "equal rights have been pushed too
far,” Guinier, Conversation, supra note 21, at 85. The legitimacy, interpretation, and continued
necessity of federally-sponsored initiatives such as the Voting Rights Act remains a widely-con­
tested issue. Yanos, supra note 66, at 1835; Anthony Lewis, Is it Time to Ease Up on Voting Rights?
L.A. Daily J., June 15, 1993, at 6 (argues the disagreement over voting rights is actually a
fundamental disagreement over how the federal government should act to eradicate racism).
IV. VARIATIONS ON A COMMON THEME: DEMOCRACY

Democratic theories seem to be rather enigmatical, subject to wide variations in interpretation and application. These variations stem in part from the blurred distinctions between the function, responsibility, and limits of democracy as a governmental system and as a social concept. In actuality, there is no one theory of democratic governance, but rather wide varieties due to differing ideological perspectives on the structure of society and the role of its citizenry.

Generally, democracy as an ideal may be defined as "government by the people, for the people." Arend Lijphart, a well-respected scholar in the area of comparative democratic regimes, highlights two basic models of democracy that are fundamentally in opposition: majoritarianism and consensus. Variations on these two models have been adopted by the United States and South Africa. These variations bear a profound relationship to the extent to which there is interaction and dialogue between and among societal groups.

One model, majoritarianism, requires "government by a majority of people." As such, majority rule is considered a fundamental element of majoritarian politics. It has been suggested that majority rule is a useful democratic decision-making tool and alternative methods would violate popular sovereignty and political equality. Conversely, it has also been suggested that majority rule may not work well in heterogeneous societies since it may not adequately serve the best

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68 See Ziyad Motala, Constitutional Options For A Democratic South Africa 19 (1994). Interestingly, a number of regimes, which vary from strict totalitarian to liberal democratic have all utilized "democracy" as a descriptive term. Butler, supra note 47, at 8.

69 See Motala, supra note 68, at 19.

70 Arend Lijphart, Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries 1 (1984) [hereinafter Lijphart, Majoritarian and Consensus]. Typically, the wills of "the people" are expressed by elected representatives of the people. Id.

71 Id. at 2–3.

72 Id. at 21. This abstract Westminster model, which originated in Great Britain, incorporates a number of elements, including: concentration of executive power (e.g., one party and bare-majority cabinets), fusion of power and cabinet dominance, asymmetric bicameralism, two-party system, one-dimensional party system (e.g., focus on socio-economic policies), plurality system of elections (majority rule), unitary and centralized government, unwritten constitution and parliamentary sovereignty, and exclusively representative democracy. Id. at 6–9. Clearly, this model has a number of contemporary variations and deviations.

73 Id. at 4. However, democracy and majority rule are not synonymous terms. Guinier, Tyranny, supra note 34 at 78; Horowitz, supra note 6, at 91.

interests of minorities.\textsuperscript{75} Both of these claims highlight a number of assumptions as to the equality of actors within the political process.\textsuperscript{76} One assumption centers around the means by which the process of majority rule ensures that a "[d]iscussion advances awareness of clashing viewpoints and promotes mutual understanding."\textsuperscript{77} This assumption fails to consider the extent to which ongoing racial group discrimination stifles or prevents minority groups from "shar[ing] in the discussion" and becom[ing] part of the "consciousness of community."\textsuperscript{78} Second, there is an assumption that minority and majority groups are fungible and that voting outcomes merely depend on how preferences are distributed rather than the extent to which voters hold certain preferences.\textsuperscript{79}

There are two kinds of majority rule: ascriptive and non-ascriptive.\textsuperscript{80} Ascriptive majority rule often occurs in racially polarized societies where elections lock out minorities from the possibility of gaining significant political power.\textsuperscript{81} With non-ascriptive majority rule, the outcome isn’t pre-determined numerically, but marginal voters may choose among competing parties.\textsuperscript{82} The process whereby marginal voters choose candidates has led to the assertion that majoritarian democracies produce "winner-take-all" and "zero-sum" politics.\textsuperscript{83} This

\textsuperscript{75} Horowitz, \textit{supra} note 6, at 91–92; Lijphart, \textit{Majoritarian and Consensus}, \textit{supra} note 70, at 22–23. In divided societies, such as South Africa and the United States, under conditions of free elections, polarized groups are more likely to support parties that represent their group interests—which are often, but not always, divided along racial lines. Horowitz, \textit{supra} note 6, at 96.

\textsuperscript{76} See Spitz, \textit{supra} note 74, at 211.

\textsuperscript{77} Id. at 151.

\textsuperscript{78} Id.

\textsuperscript{79} Guinier, \textit{Tyranny}, \textit{supra} note 34, at 77. Professor Guinier expands on this idea by asserting that this assumption relies on four additional assumptions that are inherent within the practice of majority rule. \textit{Id.} First, the system relies on some degree of reciprocity. \textit{Id.} Although a majority of the body elects their representative of choice, it is understood that they will respect and adhere to the interests of the minority since the majority of today could conceivably become the minority of tomorrow in a true representative democracy. \textit{See id.;} Spitz, \textit{supra} note 74, at 163. In addition, if a majority of citizens elect their representatives of choice, these leaders, "virtually represent" the interests of citizens who are in the minority. \textit{See Guinier, \textit{supra} note 34, at 77.} This concept of reciprocity seems unrealistic if a system involves permanent majority and minority groups that do not engage in a true, open and sincere dialogue. Second, there is an assumption that a system of majority rule reduces conflict, and is therefore more stable, since the minority will be outnumbered and accept the position of the majority. \textit{Id.} Third, the system is considered a more efficient means of distinguishing competing views. \textit{Id.} Finally, the system assumes that those who rule are held accountable through periodic elections. \textit{Id.}

\textsuperscript{80} See Horowitz, \textit{supra} note 6, at 97–98.

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Guinier, \textit{supra} note 34, at 82, 102–03.
belief stems from the competitive nature of the system and the risk that majority groups may permanently exclude minority groups.84 "Winner-take-all" is a term that may be illustrated by a situation where a candidate wins forty-nine percent of the votes, but nevertheless loses an election where the opposing candidate wins fifty-one percent.85 This example highlights that some votes are "wasted" by a process where candidates who do not have ample numerical support have no chance of winning.86 "Zero-sum" politics refers to the outcomes and the experience from the viewpoint of the "losers."87

Another model, consensus88 democracy, attempts to focus on consensus rather than opposition—inclusion rather than exclusion.89 Lijphart suggests that consensus is necessary in plural societies that are "deeply divided along religious, ideological, linguistic, cultural, ethnic, or racial lines into virtually separate subsocieties" in order to account for the flexibility that may not exist within majoritarianism.90 Under this system, power-sharing between majority and minority groups is encouraged through the use of several devices which by their nature limit the power of the majority.91

Despite the methodological differences, a common thread that unites these often conflicting democratic models generally incorporates the idea of citizens openly participating in discussions about government in order to hear opposing views, clarifying common aspirations, and reaching some form of accommodation.92 The ultimate question becomes: how are minority group rights to be balanced against the will of the majority (or dominant group), specifically under a system that is tainted with group racial discrimination?93
A. Application in South Africa

In South Africa, the definition and significance of democracy varies among the citizenry. As such, the proposed transition to a democratic government has been met with similar reactions, albeit for significantly different reasons. Blacks have viewed the concept of democracy with suspicion due to the historical manipulation of legal norms by former governments. Similarly, Whites have viewed the transition to democracy with trepidation due to the assumption that democratization would be predicated on the implementation of majority rule.

Before change was initiated, it was critical that all South Africans understand that the concept of majority rule, under a system of democracy, should be distinguished from the idea of strict governance according to race. The notion of "Black rule," not only discourages Whites from participating in the democratic process but also perpetuates the myriad of problems that the country is currently fighting to resolve. Since South Africa aspires to become a non-racial democracy, it is critical that race no longer serve as the sharp dividing line that dictates and governs political, social, economic and legal relationships.

The 1994 election resulted in a power-sharing government led by the newly-elected President, Nelson Mandela. The current govern-

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94 See Horowitz, supra note 6, at 1.
95 See id. at 22. However, this suspicion may have been balanced with the possibility of implementing a majoritarian system, in which Black South Africans would potentially have an opportunity to have their interests respected.
96 For many White Afrikaners, the dissolution of "white minority rule" with "black subordi-
nation" signified the implementation of "black majority rule" with "white subordination." Horowitz, supra note 6, at 92-93. However, the underlying implication of such a belief merely suggests a formal transfer of power without any consideration of the theoretical underpinnings which embody democracy. See id. at 104. Interestingly, White South Africans were joined by a great number of Western Europeans and North Americans, who believe that the concept of majority rule in South Africa implies the natural meaning of the words. Yet, it is unlikely that these individuals would support such an implication in the United States. See id. at 93. Obviously, characterizing majority rule in the United States as one of "white rule" carries a connotation of exclusion and discrimination. Id. at 94.
97 See id.
98 The African National Congress was conscious of the fears of White South Africans and did not frame a potential majority rule-based system as one of "Black rule." Id. at 95.
99 Africa Review, supra note 10, at 171. The interim government will consist of a 400-member National Assembly, and a 90-member Senate, both of which will sit for five years. Id. at 175. For the first five years, a transitional government of national unity (TGNU) has been established to consist of representatives of all parties which received over five percent (20 seats) of the national vote. Id. Local government is largely considered non-racial, but during the transition
ment unites a range of political constituencies, including the African National Congress (ANC), the National Party (the ruling party until the 1994 election), and the Inkatha Freedom Party.\textsuperscript{100} This power-sharing arrangement allows for minority representation in the Cabinet and Legislature.\textsuperscript{101} The national governmental structure has been labeled a “quasi-consociational” government in that it incorporates a division of power between the federal government and local provinces as well as increased minority power on the local level.\textsuperscript{102} The process by which subgroup leaders were elected to the TGNU reveals an attempt to create the grand, elite coalition required under consociationalism.\textsuperscript{103} In addition, proportional representation will be implemented throughout the election process.\textsuperscript{104}

Since this democratic system has only been in place for one year, it is difficult to assess its worth or predict future outcomes. Nevertheless, it is worth noting that the presence of all interested individuals period, voting will ensure that White voters elect 30% of the councilors, Blacks elect another 30%, and 40% will be elected on a non-race basis. \textit{Id.}

\textsuperscript{100} \textit{Id.} The ANC won 62.6\% of the national vote, which entitled it to 252 of the 400 available seats in the National Assembly. \textit{Id.} Although the ANC did not receive the requisite number of votes which would allow the party to independently structure the draft Constitution, it did receive enough votes to allow Nelson Mandela to appoint key cabinet positions. \textit{Id.} at 173. Some individuals were pleased that the ANC was unable to unilaterally draft the Constitution since the power-sharing arrangement would prevent leaders from enacting radical changes that may be considered to “revolutionary.” It is believed that Nelson Mandela shares this view. \textit{Id.} The National Party, second in terms of the national vote, received 20.39\% of the votes and 82 parliamentary seats and gained the majority of the White vote, a substantial portion of the Coloured and Indian vote, and a small portion of the Black conservative vote. \textit{Id.}


\textsuperscript{102} AREND LIJPHART, \textit{Democracy in Plural Societies} 4-5 (1977) [hereinafter LIJPHART, \textit{Plural Societies}]. It has been suggested that consociationalism may serve as a more beneficial form of government for divided societies as it attempts to recognize and address conflicting group interests. \textit{Id.} at 1. Born in the 1960’s and 1970’s, consociationalism hails from an observation that a number of countries—divided along ethnic, linguistic, racial or religious lines—had stable systems due to the cooperation of political leaders. BURNS, \textit{supra} note 5, at 85. By delegating the decision-making process, with regard to critical issues affecting a specific section of society, group leaders are able to remove controversial issues from the political arena, in order to address them in a more peaceful manner. Most importantly, it would help ensure collective decision-making by requiring the concurrence of all representative groups (but the governmental process is slowed and may increase bureaucracy and inefficiency). Although it has been argued that consociationalism has worked well at some point in time in diversely-populated countries such as Malaysia, Canada, Cyprus, Austria, and the Netherlands; critics often cite one notable less successful example—Northern Ireland. BURNS, \textit{supra} note 5, at 85–86.

\textsuperscript{103} Ellman, \textit{supra} note 101, at 13–14.

\textsuperscript{104} \textit{Id.} at 14.
and groups throughout the transitory process is sure to bear a significant impact on its success.

B. Application in the United States

The United States is firmly rooted in the Western-based liberal democratic tradition. Although majority rule has been established as the means by which the majority of citizens may be able to have their individual interests respected, the United States has not adopted a strict majoritarian system. There are a number of elements within this system, such as the firmly entrenched mechanisms to curb the will of the majority and adequate checks and balances, which could arguably allow one to classify it as a combination of both majoritarianism and consensus. This United States "hybrid" electoral system has nonetheless been criticized as being a "winner-take-all" and "first past the post" system in that minority votes are wasted and it is unlikely that minority voters will be able to have their voting preferences actualized—particularly due to ongoing racially-polarized voting practices.\(^{105}\)

Recently in the United States, critics argue that race-conscious policies, specifically in the area of voting rights, are undemocratic.\(^{106}\) This argument relies on the belief that democracy rests on two general tenets: popular sovereignty and relative equality.\(^{107}\) It has been suggested that race-conscious policies undermine sovereignty and equality by resorting to practices that are in conflict with what many characterize to be the only legitimate rights in a democracy—individual rights.\(^{108}\)

C. Interpretive Criticism of Democratic Formations

Democratic interpretations in South Africa and the United States are not without limitations. Consociationalism has a significant number of limitations. First, its acknowledged emphasis on groups may enhance and intensify divisions, which may thwart inter-group dialogue.\(^{109}\) Second, it operates on the premise that all societal groups are evidenced by individually organized political parties. This presumption

\(^{105}\) See Guinier, Tyranny, supra note 34, at 102-03.
\(^{106}\) Cain, supra note 20, at 266; Guinier, Tyranny, supra note 34, at 120.
\(^{107}\) Cain, supra note 20, at 266. Popular sovereignty requires that options with the most support should prevail. Id. Relative equality requires that in the aggregate, individual preferences should be weighted equally. Id.
\(^{108}\) Id. at 264.
\(^{109}\) Phillips, supra note 28, at 154.
does little to empower or encourage disadvantaged groups that are small in number or have not organized themselves into cohesive, recognizable political parties. In addition, many authors have criticized the role of the grand coalition of group leaders, namely its elitism and ability to fairly represent group members. Finally, it has been suggested that this model falls short of democratic ideals by placing a greater emphasis on the proportional treatment of groups than on individual equality.

Although the consociational power-sharing South African government could increase emphasis on group affiliations, it may over time actually diminish group hostility and bitterness. Perhaps in other circumstances the grand coalition may stifle inter-group dialogue, but the unique historical factors that exist within South Africa may actually have the effect of blurring some of the rigid lines between groups in order to reach some common understanding. Perhaps the group-oriented policies could assist in the recognition of common national goals and aspirations.

The majoritarian system also has its limitations. While there is nothing inherently suspect about the utilization of majority rule as a tool of governance, there appears to be a correlation between one's faith in democratic principles and majority rule and an identification with the values—or perceived values—possessed by those in the majority. The suspicion toward majority rule, felt by some Whites in South Africa is comparable to the views of some Blacks in the United States. There is an overriding concern that the interests of the majority may not adequately reflect the interests of the minority.

In the United States, there is a distinct tension between majority rule and individual rights—particularly with the presence of group racial discrimination—that exists within liberal democratic theory. This tension is exacerbated by an electoral system that has the effect of shutting out minority voters, who are numerically inferior. The presence of group racial discrimination challenges the legitimacy of a system of majority rule where groups are fixed and permanent—in this

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110 Id. at 152–53.
111 Id. at 154. Particularly, if a group has conflicting and multiple ideological interests or identities, there may be heightened competition among leaders. Id.
112 LIJPHART, MAJORITARIAN AND CONSENSUS, supra note 70, at 49.
113 Macey and Miller, supra note 29, at 294; SIGLER, supra note 30, at 32.
114 Macey & Miller, supra note 29, at 281.
case racial groups. Although the practice of majority rule is considered the best tool to ensure or uphold democracy, it is important that people refrain from relying on the practice as if it was a fundamental group right—granted to those privileged enough to be in the majority—rather than one of many potential tools to ensure fairness and equal treatment of everyone involved in the democratic process.\textsuperscript{116}

Overall, South Africa has introduced a democratic system that mirrors its political reality. There are serious group divisions and the system purports to recognize the needs of all group members—which raises the above-mentioned concerns. Similarly, the United States' democratic system reflects its idealism—universal recognition and respect of all individual citizens. However, the political reality may in fact highlight that there is a need for additional steps to be taken in order to reach such an ideal. The governmental systems within South Africa and the United States not only reflect societal and political concerns, but may also highlight philosophical views that are rooted in history and ideology.

V. INDIVIDUALISM AND COMMUNITARIANISM

Individualism and Communitarianism are two theoretical constructs that have greatly influenced political philosophical discourse.\textsuperscript{117} Both ideological perspectives highlight fundamental disparities between the relationship of an individual and society, as well as how such relations translate into legal norms.

Individualist theories derive from the following: (1) a belief, based on an Enlightenment assumption, that there is a universal, stable, and pre-social individual identity which is owed fundamental rights due to one's human status rather than social, political, or historical conditions, (2) a belief that the only unit of our moral concern is and should be the individual, (3) a belief that it is only by treating people as individuals that we may show that individuals have equal moral status, and (4) a belief that through individualism, peace and social harmony will be ensured.\textsuperscript{118} With regard to specific individual rights, this theory


\textsuperscript{117} Shlomo Avineri & Avner de-Shalit, Introduction, in COMMUNITARIANISM AND INDIVIDUALISM 1 (Shlomo Avineri & Avner de-Shalit ed., 1992). In 1971, after the publication of A THEORY OF JUSTICE by John Rawls, a leading political theorist, numerous scholars rejected the fact that rights were constructed in individualist terms. \textit{Id.} Beginning in the 1980's, a widespread debate ensued between these two theories. \textit{Id.}

\textsuperscript{118} Addis, supra note 33, at 633.
pinpoints civil and political rights as the primary rights that should be respected.119

Individualists postulate that the individual is the ultimate agent of action, and that groups are merely a collection of individual agents.120 They argue that recognizing group rights is problematic due to its apparent paradoxical relationship to individual and societal rights.121 According to the individualist, "artificial" groups—like a state or corporation—may be granted certain group rights; however, "natural groups"—like a racial or ethnic group—have no moral rights in need of legal recognition.122 Although some proponents may concede that group rights could exist to remedy "structural or institutional defects," a point of disagreement arises when there is a discussion of the "moral rights" of groups.123

With specific regard to racial groups, individualists contend that rights should assure that members of racial groups are not treated in a discriminatory manner and also that group members should be ensured the same rights as members of the majority group.124 They believe that conferring rights on groups would have a profound impact on social peace and political harmony since it heightens group affiliation and makes politics a battle between warring factions.125 The argument concludes that the recognition of group rights could potentially lead to a dangerous consequence such as "apartheid."126

119Wing, supra note 8, at 298.
120Addis, supra note 33, at 630–31. They argue that since only individuals may be treated justly or unjustly, only individuals have rights. Id. at 631. Some individualists also argue that "only individuals make judgements; groups do not have minds and cannot exercise will except metaphorically." Spitz, supra note 74, at 46.
121See Addis, supra note 33, at 631–32. Their primary contention is that the recognition of group rights undermines individual rights. Garet, supra note 1, at 1036.
122See Addis, supra note 33, at 630 n.43. It is argued that moral rights are attached solely to individuals. Id.
123Structural or institutional defects are viewed as those impediments which prevent people from being treated as—individuals. Id. at 631. When these defects occur, it is argued that rights may be attributed to "natural" groups—on a temporary basis. Id. at 631.
124Id. at 633.
125Id. at 632. In addition, individualists contend that recognizing group rights would ultimately harm minority group members since intolerance, prejudice, and stereotyping would govern the interaction between group members. Id. However, this would not necessarily be the result if, in a heterogeneous society, group cultural differences were equally valued and affirmed. Groups should be encouraged to participate in institutional dialogue and viewed as equally valuable to the political process. See id. at 621.
126Id. at 632. Some critics in South Africa and the United States argue that affirmative action programs are similar to apartheid in that they both rely on a system of "group privilege." Id. at 632 n.50. However, these claims are arguably invalid in that apartheid is premised on the belief
Despite the emphasis placed on individual autonomy, proponents of individualism have recognized the interdependence of people in society. They recognize that one's social ties, obligations, and existence in a larger community often help to shape one's interests. The question remains to what degree community impacts and influences individuality, and whether such an influence may be translated as the need to recognize group-based rights.

Communitarianism, a popular counter-response to the individualist theory, argues that focusing solely on the individual—divorced from their interaction with others—constructs an "autonomous individual" that simply does not exist in real life. Communitarians argue that one's roles, relationships, and commitments define, inspire, and intricately connect with individual action. In addition, communitarians argue for the recognition of the importance of local and national communities on individuals. They also argue that individualism fails to take into consideration the importance of culture and tradition which are formulated through groups.

Proponents of communitarianism contend that groups, while distinct from individuals and the greater society, have a legitimate value that should be recognized as complementary to rather than in competition with other entities. These theorists also suggest that "a group
of persons, predominately of common descent, who think of themselves as collectively possessing a separate identity based on race or on shared cultural characteristics," may constitute units of moral value and are therefore worthy of legal rights.\textsuperscript{134} With regard to specific forms of individual rights, communitarians suggest that economic, social and cultural rights should be respected in addition to civil and political rights.\textsuperscript{135} Clearly, these two theories are not rigid and, as evidenced by South Africa and the United States, a nation may formulate systems which simultaneously reflect these ideologies, or fluctuate between the two.

\section*{A. South Africa}

African history does not reveal a strong adherence to the tradition of individualism, which is most commonly associated with Western liberal democracy.\textsuperscript{136} Most countries on the African continent, dating from periods following independence from colonial rule, were governed by rigid authoritarian governments which failed to give credence to individual rights.\textsuperscript{137} Although there are disparate views on the role of communitarianism in traditional African society, several authors have agreed that during pre-colonial rule in several countries, group or community-centered values and traditions bore a significant relationship to the governmental structure.\textsuperscript{138}

Interestingly, South Africa, in particular, arguably has simultaneously adhered to both individualist and communitarian notions by creating a social system whereby groups are the most respected entity in society and the recognition of individual rights hinged on group membership. Although the notion of individual rights was not a foreign or unrecognized concept, the innovation in South Africa stems from the lack of universality.

\footnote{note 30, at 8. Such rights are not interpreted to mean the right to subjugate, discriminate against, or dominate any other group.}
\footnote{\textsuperscript{134} Butler, \textit{supra} note 47, at 245.}
\footnote{\textsuperscript{135} Wing, \textit{supra} note 8, at 302.}
\footnote{\textsuperscript{136} \textit{Id.} at 306 n.40. It has been suggested that Africa does not have the necessary preconditions for the successful implementation of Western-styled liberal democracy: an open class system, a capitalist economy, a high literacy rate, and participation from voluntary organizations. \textit{Id.}}
\footnote{\textsuperscript{137} \textit{Id.} at 306–07.}
\footnote{\textsuperscript{138} \textit{See id.} at 310–13; \textit{Motala, supra} note 68, at 29–31. Traditionally, a chief or king, in addition to the elders of the community, served as the primary governmental leaders. \textit{Motala, supra} note 68, at 29. Discussion and consultation were key features of this structure. \textit{Id.} In social and economic terms, the notion of equality extended beyond that of individualism and was representative of the desire of the community. \textit{Id.} at 30–1.}

\cite{note 30, at 8. Such rights are not interpreted to mean the right to subjugate, discriminate against, or dominate any other group.}
1. Apartheid: A Formal Sanction of Group Hierarchy

The prior discussion on group formation and identification, when applied to South Africa, is best understood in its proper historical context. Many of the current issues that confront South Africa stem from firmly entrenched practices of racial exclusion and group privilege. These practices relied on the belief that one's physiognomy predetermined one's destiny.\textsuperscript{139} In addition, skin color determined one's individual rights, how such rights were executed, and the extent to which such rights would be respected.\textsuperscript{140}

Prior to British overthrow in the early nineteenth century, descendants of the first Dutch and European settlers of the Cape Colony in South Africa began to form a distinctive group of people, now known as the Afrikaners.\textsuperscript{141} Confronted by increasingly powerful British colonialism, the Afrikaners intended to create and preserve a nation that, in their view, was threatened with "extinction."\textsuperscript{142} This fear prompted a strategic attempt at Afrikaner nationalism.\textsuperscript{143}

Following the 1948 elections, where the Afrikaner-based National Party took political control of the country, the formal segregation of people according to race, became the official state policy.\textsuperscript{144} Acting with the unquestioned force and legitimacy of Parliament, the National Party began to introduce its system of apartheid.\textsuperscript{145} The nature of apartheid, which literally means "apartness," required that all races be economically, physically, and socially separate.\textsuperscript{146}

This system was refined, perfected, and enforced in the 1960's following a number of statutes enacted in the 1950's to separate the races spatially and socially.\textsuperscript{147} The government passed the following legislation to separate the races: Population Registration Act (1950) (assigned everyone to a racial category), Abolition of Passes and Coordination of Documents Act (1952) (required Africans to carry iden-
tification papers), the Reservation of Separate Amenities Act (1953) (provided for segregation in public facilities), the Native Laws Amendment Act (1952) and the Native Resettlement Act (1954) (limited the rights of Africans to live in urban areas), the Group Areas Act (1950) (segregated every locality by race).

Ultimately, segregated housing, education, and employment supported the Afrikaner ideology of "separate development." This system, prompted by nationalist aspiration and racist ideology, created a divided society that bore little respect for individualism or individual rights, by distributing rights along group lines. Importantly, however, this system may have been communitarian in nature—since it sought to preserve Afrikaner "culture". However, the methodological approach to such preservation is questionable. Consequently, ranking by birth created an antagonistic social system emphasized by subordinate classes.

2. A Bill of Rights: Towards Recognizing Individual Rights

The historical emphasis on group rights led to considerations of a national Bill of Rights. The possibility of implementing a Bill of Rights evoked notable reactions among South African citizens. A number of misconceptions prompted a serious debate which focused not only on how the document could best protect individual interests, but what types of interests would indeed be protected. The initial misconception stemmed from the historical perception of individual rights. In 1910, the country adopted the British system of Parliamentary supremacy whereby all legislation passed by a majority of Parliament

148 Horowitz, supra note 6, at 11.
149 van der Vyver, supra note 6, at 748 n.17.
150 Horowitz, supra note 6, at 11.
151 Id.
152 Id.
153 Id.; van der Vyver, supra note 6, at 746. It has been suggested that the Afrikaners relied upon the self-determination clauses of the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights to justify their separatist demands. Manby, supra note 6, at 31–3. Article 1 in each document states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Civil and Political Covenant, supra note 39; International Covenant on Economic, Social and Cultural Rights, U.N. GA res. 2200A (XXI), 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). However, the term "people" was included as a territorial concept, rather than an ethnic one. Manby, supra note 6, at 32.
154 Horowitz, supra note 6, at 9; See Wing, supra note 8, at 353.
155 See Wing, supra note 8, at 353.
became the supreme law of the land.\textsuperscript{156} South African law, which combined Roman, Dutch, and English legal norms, did not allow for substantial protection for citizens against the potential abuse of power.\textsuperscript{157} As a result, Afrikaners, who were suspicious of British colonists, and Black South Africans, who were devalued through this legal process, had reservations as to the function, necessity, and potential danger of implementing a Bill of Rights.\textsuperscript{158}

The Bill of Rights debate focused specifically on the definition and purpose of the document. While members of various groups saw the document as an instrument to enact specific changes, the biggest misconception surrounding the document was the initial view that it was necessary to counter majority rule.\textsuperscript{159} Eventually, Blacks began to view it as the means by which majority rule could potentially be secured and a way to ensure political, cultural and economic rights; while Whites began to view it as an instrument to protect group rights.\textsuperscript{160} As early as 1986, the ANC issued a statement supporting the implementation of a Bill of Rights within the new Constitution to protect the fundamental rights of all South Africans.\textsuperscript{161} In 1989, a Law Commission was appointed by the ruling National Party to determine how group rights could be included in a potential Bill of Rights.\textsuperscript{162} In subsequent years, this topic was met with widespread disagreement as to the compatibility of constitutionally-protected individual and group rights.\textsuperscript{163} Most leaders had agreed that the system of apartheid should end and that a non-racial democratic society was the ultimate goal.\textsuperscript{164} However, a conflict arose due to the fact that members of different racial and ethnic groups looked to a potential Bill of Rights as a means of ensuring vastly different outcomes.\textsuperscript{165} Therefore, the challenge was to structure a Bill of Rights that harmonized individual needs with potential social and group-based needs. However, there appeared to

\begin{footnotes}
\item[156] Berat, \textit{supra} note 8, at 469.
\item[157] Villa-Vicencio, \textit{supra} note 8, at 143–44.
\item[158] \textit{Id.} at 141.
\item[159] Sachs, \textit{Human Rights}, \textit{supra} note 5, at 33.
\item[160] Specifically, Whites were fearful of property losses due to potential land redistribution proposals. Berat, \textit{supra} note 8, at 469.
\item[161] Sachs, \textit{A Bill of Rights}, \textit{supra} note 6, at 16.
\item[162] \textit{Id.} at 16–17. However, a report later confirmed that a Bill of Rights should not be designed to protect groups but rather individuals. \textit{Id.} at 17.
\item[163] Berat, \textit{supra} note 8, at 477–78. The primary areas of disagreement centered around social, economic, and cultural rights. Sachs, \textit{A Bill of Rights}, \textit{supra} note 6, at 29–30.
\item[164] Sachs, \textit{A Bill of Rights}, \textit{supra} note 6, at 18.
\item[165] \textit{Id.} at 21. Specifically, Blacks were sure to seek protection from abuse and reduce the gross inequalities between racial groups. Conversely, Whites would seek protection against retaliation or revenge and prevent economic and social collapse. \textit{Id.} at 21–2.
\end{footnotes}
be an overriding assumption that securing individual rights, on a non-race basis, obviates the need for racial group rights.\textsuperscript{166}

Unlike the circumstances surrounding the enactment of the Bill of Rights in the United States, the South African Bill of Rights debate was largely framed and defined by individuals who sought to uphold the status quo.\textsuperscript{167} Specifically, White conservatives focused their attention on group rights.\textsuperscript{168} This fact had a profound impact on the substance of the debate since it aroused fears and suspicion as to what the document had the potential to achieve: covertly reenact a form of apartheid.\textsuperscript{169}

\textbf{B. United States}

The United States is firmly rooted in the Western liberal democratic tradition that places a primary emphasis on individual rights.\textsuperscript{170} Some common characteristics of this tradition include: popular participation through regular elections, social equality of all citizens, governmental concern for public welfare, and a united government.\textsuperscript{171}

Although the U.S. Constitution does not explicitly endorse group rights,\textsuperscript{172} numerous groups have received privacy, speech, association, and religious protection under contemporary constitutional law.\textsuperscript{173} In addition, the Thirteenth and Fourteenth Amendments, have been interpreted as bestowing on members of racial groups the right to be free from discrimination or stigmatization from the state.\textsuperscript{174} However,

\textsuperscript{166} Sachs, \textit{A Bill of Rights}, supra note 6 at 19.
\textsuperscript{167} The early amendments to the U.S., Constitution were adopted by freedom-fighters rather than the ousted colonial authorities. Sachs, Human Rights, supra note 5, at 9–10. The objective of the amendments was to eliminate the oppression of Crown-supporters. Id. Each amendment focused on a specific denial of rights: freedom of speech, assembly, freedom from cruel punishment, etc. Id. Most importantly, these rights were sought in response to direct forms of domination. Id.
\textsuperscript{168} Berat, supra note 8, at 472–73.
\textsuperscript{169} See Villa-Vicencio, supra note 8, at 147–49; See Sachs, Human Rights, supra note 5, at 6. It has been argued that Whites proposed a Bill of Rights to protect them from potential vindications of the Black majority. Id. at 9–10. These rights were sought in advance and in anticipation of oppression. Id. This posture, in effect, deprived the document of its function—to protect the future rights of the entire population, and ironically would have become an “instrument of injustice”. Id. at 10.
\textsuperscript{170} Macey & Miller, supra note 29, at 294–95.
\textsuperscript{171} Wing, supra note 8, at 306 n.40.
\textsuperscript{172} The Constitution makes reference to U.S. “citizens” and “persons”. The First and Fourth Amendments ascribe rights to “the people”. U.S. Const. amend. I, IV.
\textsuperscript{173} See e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (upholding freedom of association rights); Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding right to free exercise of religion); Garet, supra note 1, at 1006.
it is not clear whether the language in the Constitution refers to "the people" as merely a plural reference to the individual person, or to the rights of groups.\[^{175}\]

The Fourteenth Amendment’s Equal Protection Clause restricts the principle of electoral equality to apply solely to individuals.\[^{176}\] In *Reynolds v. Sims*,\[^{177}\] the Court, relying on a "one person one vote" standard, wrote that the Equal Protection Clause implies the "uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."\[^{178}\] This right is "individual and personal in nature."\[^{179}\]

The area of minority voting rights provides an example of the complexities surrounding legislative and judicial attempts at reconciling individual and group rights with democratic theory.\[^{180}\] This area is also illustrative of the vulnerable position of minority groups within the United States, due to their historical inability to fully participate in one of the most powerful and important tools of citizenship: voting.\[^{181}\]

1. Race-Based Group Disenfranchisement

In order to fully understand the nuances surrounding group rights, it is imperative to provide a historical framework of minority voting rights in the United States.\[^{182}\] Black Americans have struggled against more than a century of opposition in order to establish and exert some form of political power. Often viewed by white Southerners as "[un]fit to perform the supreme function of citizenship," Blacks were disenfranchised under a deliberate scheme to inhibit their political activity.\[^{183}\] The elusive quest for equal voting rights dates back to before the

\[^{175}\] Garet, *supra* note 1, at 1007.
\[^{176}\] U.S. CONST. amend. XIV; Yanos, *supra* note 66, at 1816.
\[^{177}\] 377 U.S. 533 (1964).
\[^{178}\] Id. at 565.
\[^{179}\] Id. at 561. *See also* Shelley v. Kramer, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the 14th Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights"); United States v. Bathgate, 246 U.S. 220, 227 (1918) ("The right to vote is personal").
\[^{180}\] Specifically this area reveals a striking paradox between the degree to which a majoritarian system of democracy can be considered legitimate where it ignores minority rights, or conversely, where it may lose legitimacy by rewarding a great deal of power to the minority. Cain, *supra* note 20, at 262.
\[^{181}\] *See* Yanos, *supra* note 66, at 1815 n.24.
\[^{182}\] Although many of the issues discussed here are relevant to other American minority groups, this section focuses specifically on Black Americans.
\[^{183}\] JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 266 (1980) [hereinafter, *FRANKLIN, FROM SLAVERY*].
Fourteenth Amendment which, in 1868, granted full citizenship to individuals born or naturalized in the United States.\(^{184}\) Due to the ambiguous language of this Amendment, Blacks were not protected from voter discrimination on racial grounds.\(^{185}\) During the period known as Reconstruction, from approximately 1861–1874, Black voter participation was increasingly high on both the state and federal levels.\(^{186}\) Blacks began to hold political offices in many Southern states\(^{187}\) as well as nationally.\(^{188}\) However, such positions did not normally allow for any substantial exercise of political influence.\(^{189}\)

The passage of the Fifteenth Amendment was a Congressional attempt to provide explicit Constitutional protection for Black suffrage.\(^{190}\) However, this Amendment was rendered insignificant in many Southern states due to a period of radical departure from Reconstruction ideals.\(^{191}\) By 1870, several Southern outlaw organizations and se-

\(^{184}\) U.S. CONST. amend. XIV, § 1. It’s precursor was the Thirteenth Amendment, which, in 1865, abolished slavery and granted some form of citizenship to Blacks. U.S. CONST. amend. XIII, § 1. Soon after the ratification of this Amendment, a Republican-dominated Congress attempted to ensure that Black men were granted voting rights. Chandler Davidson, The Voting Rights Act: A Brief History in Controversies, supra note 20, at 8. [hereinafter Davidson, Voting Rights Act]. In the Reconstruction Acts of 1867, passed despite President Johnson’s veto, Congress required that states, as a prerequisite to re-admittance into the Union, call conventions whereby Black men could serve as delegates and revise state constitutions. Id. As a result, that year, 700,000 Blacks were on the voting rolls in the South and constituted a majority of registered voters in numerous Southern states. Id.

\(^{185}\) Davidson, Voting Rights Act, supra note 184, at 9. Interestingly, § 2 of the Amendment implicitly affirmed the right to deny Black suffrage, so long as states were willing to surrender their right to representation. See Eric Foner, Reconstruction: America’s Unfinished Revolution 255 (1988).


\(^{187}\) Franklin, supra note 183, at 244; Carter, supra note 186, at 570. For example, during the first legislature after Reconstruction, there were fourteen Blacks in the Texas Republican legislature, twenty-one in North Carolina’s General Assembly, and Blacks constituted large portions of the legislatures in Mississippi, Alabama, and Louisiana. Foner, supra note 185, at 354. Most significantly, in South Carolina throughout Reconstruction, Blacks dominated the legislative process by forming a majority in the House of Representatives and heading key committees. Id. In 1872, Blacks were elected as speakers and in 1873, Blacks formed the majority in the Senate. Id.

\(^{188}\) Franklin, supra note 183, at 246. Significantly, between 1869 and 1901, two Blacks served in the Senate, and twenty Blacks served in the House of Representatives. Id.

\(^{189}\) Id. at 248. With the exception of the circumstances in South Carolina, most bills introduced by Blacks were deemed unworthy of serious consideration, no Blacks chaired any committee, and Blacks had great difficulty gaining the respect of their colleagues, even those members of their own political party. Id.; Foner, supra note 185, at 354.

\(^{190}\) Carter, supra note 186, at 570. The Fifteenth Amendment granted the right to vote to all citizens regardless of race. U.S. CONST. amend. XV.

\(^{191}\) See Davidson, Voting Rights Act, supra note 184, at 7, 11.
cret societies, such as the Ku Klux Klan, the White Camelia, and the White Brotherhood, began to use violence and intimidation to force Blacks from office and run individuals out of their communities who refused to refrain from voting.\textsuperscript{192}

As a result of the pervasiveness of white supremacy, Enforcement Acts were passed in 1870 and 1871 in order to appoint election supervisors to try voting rights cases in federal court.\textsuperscript{193} Despite these efforts, in 1875, two Supreme Court cases seemed to implicitly support the agenda of the racist white Southerners, who vehemently opposed Reconstruction. In \textit{United States v. Reese},\textsuperscript{194} the Court held that the Enforcement Act of 1870 covered more offenses than were punishable under the terms of the Fifteenth Amendment and was, therefore, unconstitutional.\textsuperscript{195} In \textit{United States v. Cruikshank},\textsuperscript{196} the Court held that the Fifteenth Amendment guaranteed citizens a right not to be discriminated against on account of race or color, but not a right to vote.\textsuperscript{197} These cases starkly contradict the overall purpose of early Congressional efforts to enforce widespread black suffrage. Beginning in the 1890's, Blacks faced a wide variety of formal barriers erected to perpetuate disenfranchisement. Some of the barriers faced in the South included: literacy tests, "understanding" tests, grandfather clauses, poll taxes, intimidation and violence.\textsuperscript{198} These outward barriers successfully prevented and discouraged active voter participation. Therefore, all of

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\textsuperscript{192}Franklin, \textit{supra note 183}, at 254. These orchestrated acts of violence and murder, were geared toward individual Black leaders, the more "successful" Black population, and eventually even White Republican leaders. Foner, \textit{supra note 185}, at 425–44.
\textsuperscript{193}See Enforcement Act of 1870, ch. 114, 16 Stat. 140 (May 30, 1870) (this Act imposed criminal sanctions where state officials were found discriminating against voters on the basis of race).
\textsuperscript{194}92 U.S. 214 (1875).
\textsuperscript{195}Id. at 221. Here, two defendant inspectors of a municipal election refused to receive and count the vote of a Black resident of Kentucky. The Court underwent a lengthy analysis of the statutory provision and determined that "Congress has not as yet provided by 'appropriate legislation' for the punishment of the offence charged" by the plaintiff. \textit{Id}.
\textsuperscript{196}92 U.S. 542 (1875).
\textsuperscript{197}Id. at 555. Here, defendants were charged with multiple counts of conspiring to injure, oppress, threaten, and intimidate two Black citizens of Louisiana following a local election. The Court affirmed the circuit court judgement which overturned their conviction based on "vague and general counts [which] lack[ed] the certainty and precision required by the established rules of criminal pleading." \textit{Id}. at 559. Most significantly, this case was brought in response to the Colfax Massacre, on Easter Sunday 1873, where two hundred and eighty Blacks were murdered by opponents of Reconstruction, after attempting to protect themselves through armed self-defense. Foner, \textit{supra note 185}, at 437, 530–51; J. Morgan Kousser, \textit{Voting Rights Act & Two Reconstructions, in Controversies}, \textit{supra note 20}, at 160–61 [hereinafter Kousser, \textit{Voting}] .
\end{flushleft}
the progressive efforts previously exerted in order to achieve black enfranchisement were virtually eliminated.199

Voting rights activism was modified in both method and form, in order to effectively overcome the specific efforts toward continued group disenfranchisement. The first generation of voting rights activism, during Reconstruction, centered entirely on acquiring the right to cast a ballot in light of the numerous exclusionary barriers.200 In the early 1960's, the civil rights movement began to shift its focus from "protest to politics," and voting rights were viewed as a necessary vehicle to implement a broad group political empowerment scheme.201

2. The Voting Rights Act

The passage of the Voting Rights Act of 1965202 was a radical attempt by Congress to redistribute political power.203 The Act was passed in direct response to formal electoral discrimination, and as a result, suspended literacy tests, deployed federal registrars when necessary, and created a system of federal administrative review over the registration procedures in certain designated jurisdictions.204

199 Davidson, Voting Rights, supra note 184, at 11. As an example, during the early years of Reconstruction, two-thirds of eligible southern Black males cast ballots in presidential and gubernatorial contests. Id. at 10. In contrast, during 1890, black registrants in Mississippi dropped to six percent of the eligible Black population. Id. at 11. In 1906, Alabama's Black registrants equaled two percent. Id.

200 GUINIER, TYRANNY, supra note 34, at 49 n.58; THERNSTROM, WHOSE VOTES COUNT?, supra note 198, at 2.

201 GUINIER, TYRANNY, supra note 34, at 44.


203 Benny Miller, Who Shall Rule & Govern? Local Legislative Delegations, Racial Politics, & the Voting Rights Act, 102 YALE L.J. 105, 106 (1992). President Johnson responded to "sustained national pressure" and the Act was passed and made law four months after its introduction. GUINIER, TYRANNY, supra note 34, at 44-45.

204 Pamela S. Karlan, Maps and Misreading: The Role of the Geographic Compactness in Racial Vote Dilution Litigation, 24 HARV. C.R.-C.L. L. REV. 173, 179-82, 183-4 (1989) [hereinafter Karlan, Maps and Misreadings]. The Act designated "covered" jurisdictions which were defined as those areas with a history of abuse— as evidenced where less than 1/2 the population was registered to vote. § 1973(b)-(c); Karlan, Maps and Misreadings, supra note 204, at 184. Each jurisdiction had to submit to the Attorney General or the U.S. District Court for the District of Columbia, any changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," for preclearance. § 1973(c). The Attorney General could recommend that such changes be denied, if found to be discriminatory. GROFMAN, MINORITY REPRESENTATION, supra note 26, at 17.
The second generation of voting rights activists soon recognized that the acquisition of formal election rights failed to completely eliminate existing barriers to full black political empowerment.\textsuperscript{205} Activists during this generation were faced with indirect barriers to equal representation in the form of gerrymandering and vote dilution.\textsuperscript{206} Gerrymandering is the process of re-drawing electoral districts, based on race, which unfairly exclude or disadvantage groups of people.\textsuperscript{207} Although this process could conceivably be designed to benefit groups, historically it has been used to disadvantage a competing group of voters.\textsuperscript{208} This process has often been used to segregate Black voters and guarantee a white majority in surrounding areas.\textsuperscript{209} As a result, this practice prevented Blacks from selecting their own representatives. The political interests of racial minority groups could be either exaggerated or diminished by variations in the drawing of representational district lines. Therefore, the use of political gerrymandering became an effective means of rendering black votes practically useless.\textsuperscript{210}

Vote dilution, achieved through bloc voting by a white racial majority, refers to the extent to which "the potential effectiveness of a group's voting strength" is reduced "by limiting its ability to translate strength into control or influence of elected public officials."\textsuperscript{211} Courts

\textsuperscript{205} Karlan, \textit{Undoing the Right Thing}, supra note 115, at 6.
\textsuperscript{206} Guinier, \textit{Tyranny}, supra note 34, at 49 n.58. Vote dilution is a process where members of a certain group systematically incorporate bloc voting as a means to ensure that the voting strength of another group is significantly diminished. Chandler Davidson, \textit{Minority Vote Dilution}, \textit{in Minority Vote Dilution} I, 4 (Chandler Davidson ed., 1984) [hereinafter, Davidson, \textit{Vote Dilution}].
\textsuperscript{207} See Gomillion v. Lightfoot, 364 U.S. 338 (1960) (gerrymander changed municipal boundary by creating a twenty-eight sided figure and removed all Blacks—with the exception of four—from the city limits); Guinier, Tyranny, supra note 34, at 65 n.182. One scholar categorizes multiple forms of gerrymandering that were typically used against Black voters: "cracking" (splitting minority voters into different districts to prevent majority presence), "stacking" (large minority population placed in single district with a larger White population who could outvote the minority group), "packing" (packing minority voters into one district to eliminate minorities from other districts). Jefferey G. Hamilton, \textit{Deeper Into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court}, 43 Emory L.J. 1519, 1525 n.31 (1994).
\textsuperscript{208} Yanos, supra note 66, at 1811 n.9. This term was coined on March 26, 1812, by the \textit{Boston Gazette}, to describe a district shaped like a salamander that Massachusetts Governor Elbridge Gerry created to benefit his political party. \textit{Id}.
\textsuperscript{210} See \textit{id}. Recently, the Supreme Court has heard cases alleging that "political gerrymandering"—districts drawn to create majority-minority districts—are unconstitutional. See Hamilton, supra, note 207. Hamilton highlights that the Court has utilized an individual and group right approach to voting rights cases, and suggests that both racial and political gerrymandering are unconstitutional. \textit{Id} at 1560–61.
\textsuperscript{211} Grofman, \textit{Minority Representation}, supra note 26, at 25.
soon began to realize that diminishing the weight or value of an individual's vote is as significant as disallowing an individual to freely exercise such a vote.\textsuperscript{212} More importantly, courts realized that, in the aggregate, groups of Black voters could not effectively assert their constitutionally-certified right to the franchise.\textsuperscript{213}

The next phase of litigation focused on the effect of minority votes in comparison to votes cast by white voters.\textsuperscript{214} Vote dilution cases frequently confronted the use of multi-member electoral districts and at-large elections.\textsuperscript{215} As a result of several "vote dilution" cases,\textsuperscript{216} Congress amended the 1965 Act and incorporated new language which provided the right to a more meaningful vote.\textsuperscript{217} The subsequent interpretation of the amended sections of the Act led to contradictory statements on the Supreme Court's analysis of individual and group rights.

Due to the growing need for increased minority participation in the nation's legislature, the amended Voting Rights Act re-interpreted by the Courts.\textsuperscript{218} The new standard, adopted to determine if a districting plan violated the Act, focuses on "proportional representation."\textsuperscript{219} As such, the nature of the Act has been characterized by some as one of "group-based rights."\textsuperscript{220} The group-oriented nature of the Act has resulted in disagreement as to its electoral strategy and intent.\textsuperscript{221} Critics

\begin{itemize}
  \item \textsuperscript{212}Id.; see e.g., Reynolds v. Sims, 377 U.S. 535, 555 n.29 (1964).
  \item \textsuperscript{213}Karlan, Undoing the Right Thing, supra note 115, at 6.
  \item \textsuperscript{214}Guinier, Tyranny, supra note 34, at 50.
  \item \textsuperscript{215}Karlan, Undoing the Right Thing, supra note 115, at 7. Incidentally, the solution to these concerns centered around the creation of single-member Black majority districts. These districts, as a remedial strategy, have been criticized as an ineffective means to ensure political equality and empowerment. Guinier, Tyranny, supra note 34, at 74. Professor Guinier argues that this method fails to ensure accountability.
  \item \textsuperscript{216}See Reynolds v. Sims, 377 U.S. 533 (1964) (litigation sought to equalize the power of different groups of voters who could otherwise register and vote freely); White v. Regester, 412 U.S. 755 (1973) (defined test for racial vote dilution under a group analysis: whether "[group] members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice"). 412 U.S. at 766.
  \item \textsuperscript{217}Section Two required that Blacks be afforded equal opportunities "to participate in the political process and to elect representatives of their choice." § 1973(b) (1982).
  \item \textsuperscript{218}Yanos, supra note 66, at 1821.
  \item \textsuperscript{219}Id. The idea of "proportional representation" stems from Justice O'Connor's concurring opinion in Thornburg v. Gingles. 478 U.S. 30 (1986). There, she asserts that the Court makes "usual, roughly proportional success the sole focus of its vote dilution analysis." Id. at 57. Subsequently, many authors have questioned whether Section Two of the Act requires proportional representation. Bernard Grofman & Chandler Davidson, Postscript: What is the Best Route to a Color-Blind Society?, in CONTROVERSIES, supra note 20, at 302-03 [hereinafter Grofman & Davidson, Color-Blind].
  \item \textsuperscript{220}Thernstrom, Who's Votes Count?, supra note 198, at 227.
  \item \textsuperscript{221}There is little dispute that the Act, in effect, eliminated the formal barriers which pre-
argue that the Act constitutes "special and unwarranted protection for racial and language minority groups." Some contend that proponents of the Act have shifted their focus from securing equality and individual opportunity to securing equal social conditions. These criticisms highlight the fundamental differences in opinion, and inherent difficulty, in reaching a consensus on group-oriented policies in the United States.

C. Interpretive Criticism of Individualism and Communitarianism

The experiences in South Africa and the United States highlight legitimate strengths and weaknesses of both individualism and communitarianism as theoretical constructs. In theory, individualism is ideal in that it ensures that individual rights are maintained and respected. Similarly, communitarianism brings to light critical aspects of individuality that cannot be ignored—particularly group identification. However, the underlying weaknesses of both theories suggest a need for a greater understanding of where these points intersect and overlap.

The individualist perspective is limited in many ways. First, it fails to take into consideration the nature of group racial discrimination. Racial discrimination is not merely a personal injustice inflicted on the

ventilated minorities from exercising their right to vote. Evelyn E. Shockley, Note, Voting Rights Act Section 2: Racially Polarized Voting & the Minority Communities Representatives of Choice, 89 Mich. L. Rev. 1038, 1038 (1991). However, Professor Guinier proposes that the concept of voting, as shaped by the vision of early civil rights activists and supported by the legislative intent of the Voting Rights Act, has been altered through judicial interpretation, administrative application, and other forms of legal advocacy. Guinier, Tyranny, supra note 34 at 49. She asserts that the concept of equal representation has evolved from broad empowerment schemes to a narrow emphasis solely on the election of Black representatives. Id. Guinier argues that this statutory configuration, while both vague and broad, led to a search for a justifiable formula to determine when the statute had been violated. Id. at 50. As a result, the courts reasoned that the eradication of vote dilution, which existed due to racially polarized elections, would occur when minorities had the ability to elect their own minority representatives. Id. This concept of electing Black representatives, known as the "Black Electoral Success Theory," is ineffective, according to Guinier, because it fails to establish leadership accountability or representational effectiveness during the legislative and coalition-building process. Id. at 54. Conversely, Professor Abigail Thernstrom argues that the way in which the Voting Rights Act has been enforced has effectively resulted in an affirmative action-based legislation which ensures that minorities are elected to public office. Thernstrom, Who's Votes Count?, supra note 198, at 6. Thernstrom argues that the Act's sole intent was to ensure that minorities could participate in the electoral process. Id. at 3–4. Thernstrom argues that the Act, as it has been later interpreted, has become merely an example of affirmative action and creates group rights that do not and should not stand up to equal protection review. Id. at 227. These diverging views are at the heart of the debate on voting rights for minorities.

222 Guinier, Tyranny, supra note 34, at 120.
223 See Cain, Voting Rights, supra note 20, at 261.
224 Addis, supra note 33, at 653.
basis of individual characteristics, but rather is a social injustice that is inflicted on the basis of common group characteristics.\textsuperscript{225} Therefore, injustice that is inflicted on groups of people, could reasonably lead to the recognition of rights of that group.\textsuperscript{226} Second, the view that members of a minority group should be treated the same as members of a majority group implies assimilation: that members of a minority group should be turned into a version of members of the majority group.\textsuperscript{227}

The communitarian theory is also limited. It can be exclusionary when individuals do not conform to other people’s conception of “the group.”\textsuperscript{228} Another realistic concern of this theory is that people may come to understand and communicate with one another only within the context of one’s group affiliation, which could potentially thwart dialogue across group lines.

While both of these perspectives are flawed and a rigid implementation of either theory seems potentially harmful, there appears to be a need to synthesize them both into one cogent theory. An individual should not be placed in a position where they would feel forced to choose between their individuality and their cultural, religious, or racial identity—particularly when the recognition of legal rights are at stake.\textsuperscript{229}

\textsuperscript{225}Significantly, many racist actions are not directed at individuals, but rather at general types of people. \textit{Id.} at 653.

\textsuperscript{226}\textit{Id.} at 652. There are some rights that may only be exercised collectively—as a group.\textit{Id.} There are some things that only a group can have the right to have, for example socialization, and religious, kinship, or tribal structures. Garet, \textit{supra} note 1, at 1038. It is critical to recognize the potential of group-oriented behavior. Groups can treat others justly or unjustly in the same manner that groups can be treated justly or unjustly. \textit{Id.} at 654. As such, it is also reasonable to conclude that groups can, and often do, serve as agents of action and could have a moral claim to the recognition of certain rights. \textit{Id.}

\textsuperscript{227}This observation is derived from the assertion that in order to treat individuals equally, they must be compared from a certain point of view. Addis, \textit{supra} note 33, at 643. The individualist perspective argues that the point of view is the abstract individual. However, presumably since this abstraction does not exist, the comparison will be made in relation to an individual in the dominant culture. \textit{Id.} Some argue that the differences in perspective among social groups stem from power and social inequalities. \textit{Id.} at 631 n.46. As such, these differences will be transcended when social conditions no longer perpetuate the differences. \textit{Id.} However, this view seems to adopt the view that assimilation is the ultimate goal. This view fails to take into consideration the value attached to different groups. Fannie Lou Hamer, noted civil rights activists, advocated for “true democracy,” rather than mere equality within the existing social order. Guinier, \textit{Tyranny, supra} note 34, at 46. At a 1964 Democratic Convention, Ms. Hamer distinguished between equality—as in being equal with members of the dominant culture—and true democracy. Abrams, \textit{supra} note 65, at 449 n.1.

\textsuperscript{228}Wing, \textit{supra} note 8, at 303.

\textsuperscript{229}\textit{Id.} at 305.
VI. CONCLUSION: TOWARD HARMONIZING INDIVIDUAL AND GROUP RIGHTS IN SOUTH AFRICA AND THE UNITED STATES

Hopefully, the above discussion has highlighted that there is a potential for abuse in solely recognizing individual or group rights. In addition, it should have been noted that both majority and minority groups have the potential to be the perpetrator or recipient of discriminatory actions. While there is a need to strike an intricate balance between individual and group rights, a much larger, yet related, question which is fundamental in the preceding analysis is: what steps are being taken to eradicate group racial discrimination?

In order to overcome social systems which rely on group privilege and initiate a system of equal respect, there needs to be a re-evaluation of race and groups. Racial groups, or any group for that matter, are not inherently problematic. Instead, it is the perception and subsequent treatment of groups by dominant groups that is disconcerting.

The question of valuation and respect is, to a large degree, integral to an understanding of group rights. Group discrimination is premised on fundamental stereotypes and negative views of group members. One fundamental problem is the way in which minority group cultures are particularized or conversely, the way that majority group cultures are viewed as universal. This view has a profound impact on the extent to which groups are perceived as “equal” and worthy of full participation of all the benefits of citizenship. If groups are to effectively engage in critical yet constructive dialogue, it is imperative that dominant groups refrain from viewing minority groups as deviants, but rather learn to specify and localize their own experiences. Once this is done, all people, regardless what their group cultural history entails, will be considered of equal value.

Before individual rights can begin to be recognized, there needs to be an understanding of the negative effect of group race-based discrimination. This is vitally important before any transition is likely to emerge. In racially-divided nations, it seems unrealistic for citizens to view each other solely as “individuals”—divorced from a group that they are a part of. People are not mere individuals, instead, families,

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230 The result is that marginalized groups are viewed as outside of, and often inferior to, the "mainstream" culture. Addis, supra note 33, at 630.
231 Id. at 629, 650.
232 Although it seems readily apparent the degree to which racial discrimination can influence group identification, it has yet to be understood the impact of racism on the concept of individual rights.
culture, history, and experiences help shape and influence perceptions and one’s individuality. As such, an analysis of group racial discrimination sets the tone for a realistic inter-group dialogue.

Although the United States is formally committed to ensuring that all citizens are equal, the extraordinary emphasis on individual rights, without a similar emphasis on racism as a societal concern; may need to be re-evaluated. It seems unrealistic and contradictory for a society to be committed to general ideas of social justice and colorblindness yet perpetuate an individualistic conception of the self.\textsuperscript{233} Rather than highlight individual acts of racism or ostracize individual proponents (and therefore force victims to internalize racist acts and look inward to their group for support), there needs to be a commitment by all citizens that white supremacy (or group privilege) can no longer exist. Until people are respected, both for their individuality and their group identity—two concepts that are inextricably bound—the rights of the individual, community, and society will continue to be in conflict.

While the United States continues to struggle with the nature of “group rights,” South Africa too must strategically balance the needs of all its citizens and, in effect, create a system of government that will eliminate past injustices and conform to notions of democracy.\textsuperscript{234} This goal has been centered on becoming what is translated as a “non-race” democracy.\textsuperscript{235} One scholar has characterized the nature of the conflict in South Africa as the struggle for the right to be the same and the right to be different.\textsuperscript{236} The struggle, when viewed this way, provides support for the proposition that individual and group rights are not mutually exclusive concepts—but can be viewed, understood, and exercised concurrently.\textsuperscript{237}

The struggle for sameness focuses on equal citizenship rights.\textsuperscript{238} There needs to be a value placed on citizenship in which the country belongs equally to all and all belong equally to the country.\textsuperscript{239} Importantly, this protection applies to individuals and groups so that neither

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\textsuperscript{233} Id. at 643 n.74.

\textsuperscript{234} Horowitz, supra note 6, at 1.

\textsuperscript{235} Sachs, Human Rights, supra note 5, at 92. Others contend that the goal should be characterized as “multi-racial” democracy. Horowitz, supra note 6, at 4, 5, 7, 156.

\textsuperscript{236} Sachs, Human Rights, supra note 5, at 160.

\textsuperscript{237} See id. at 161.

\textsuperscript{238} Id. These rights are translated as a struggle against being treated differently on account of race, religion, language, etc. Id.

\textsuperscript{239} Id. Specifically, these rights refer to positive rights of access to education, to travel freely, and to fully participate in the political and social life of the nation. Id. Negative rights include the right to be free from discrimination. Id.
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shall be discriminated against nor receive the benefits of discrimination against others. The quest for equal citizenship rights refers to one’s status as a citizen, voter, scholar, etc., but is distinct from one’s identity. Identity refers to such concepts as one’s personality, culture, tastes, and beliefs. Therefore, the struggle to be different suggests the ability to have one’s identity respected and equally valued. Rather than viewing equality in a hemonic culture, as appropriating the dominating culture, political equality becomes the foundation for cultural diversity.

The political arena remains the most appropriate forum whereby group rights can be addressed. It has been suggested that political representation does not have individualistic nor communitarian goals; rather, it enables individuals to register preferences and settle differences. However, one cannot disregard the “group nature of political participation.” Democratic systems may be characterized as exclusionary or inclusionary. These terms refer to the extent to which a system has certain citizenship prerequisites—such as race, class, or gender—or extends full citizenship rights to everyone. Although both South Africa and the United States have moved away from exclusionary governmental systems by extending full citizenship rights to everyone, there are particular issues that should be resolved concerning the role of racial groups in society. Interestingly, democratic interpretations vary considerably when the issue of race is introduced.

240 Id.
241 With social status, it is argued, differences on account of appearance, ethnic origin, and language should be considered irrelevant. Id.
242 Id.
243 Id.
244 Spitz, supra note 74, at 39. Although the act of voting is an individual act, it is argued that this act can only obtain value when it is aggregated with other voters. Guinier, Tyranny, supra note 34, at 93, 249 n.62.
245 Guinier, Tyranny, supra note 34, at 121.
246 Macey & Miller, supra note 29, at 290.
247 Id.
248 The interrelationship between race and democracy evoke notable reactions by different people. Several authors refer to enlightenment-style Western democracy as the source of Black people’s subordination and argue that racism and enlightenment are actually synonymous. Richard Delgado, Rodrigo’s Seventh Chronicle: Race Democracy, and the State, 41 UCLA L. Rev. 721, 729-30 (1994); Martin Chanock, Race and Nation in South African Common Law, in Nationalism, Racism and the Rule of Law 195, 196 (Peter Fitzpatrick ed., 1995). Professor Delgado highlights numerous Enlightenment writings which highlight color-imagery, symbols, myths and metaphors which de-value dark skin and value white skin. Id. at 730. These writings include philosophers such as Locke, Hobbes, Mill, and Rousseau, who wrote essays which either supported slavery, emphasized a “hierarchy of cultures,” or argued in support of the “natural subservience of the
Specifically, some critics argue that the recognition of racial groups—be it in the context of group rights, group identity, or group representation—negatively impacts and inhibits democracy. The critical point of analysis centers on the appropriate response in a democratic regime where inequality too often coincides with racial division.

Overall, both nations have to begin to reconcile race-based distinctions when considering majority rule and minority rights. Although the United States has a long-established tradition of democracy, this tradition could benefit from a close observation of the events as they unfold in South Africa. These events could assist in the interpretation of democracy, and more importantly, how on-going racial discrimination exacerbates group affiliation which in turn questions the legitimacy of majority rule and the value of individual rights. Regardless of the current status of both nations on these issues, a long journey lay ahead as citizens continue to grapple with these concepts and simultaneously push for true equality for all.

darker-skinned ones to the lighter.” Id. Finally, he contends that in the West, domination and exclusion—often on the basis of color, sex, and property—are implicit in the concept of democracy. Id. at 734. In contrast, Alan Wolfe, who labeled Professor Lani Guinier’s writings as “undemocratic,” seems to characterize democracy as an enumerated set of rights that are distributed among and between different groups of people. See Wolfe, supra note 116, at 7. With regard to the issue of minority rights under the Voting Rights Act, he states “[M]ore democracy for selected minorities inevitably means less democracy for majorities.” Id. This view pits members of majority groups against members of minority groups in an apparent attempt to secure the largest piece of democracy’s “pie”. See id.

See Guinier, Tyranny, supra note 34, at 120; Sigler, supra note 30, at 176. This criticism relies on the belief that groups are inherently at war with other groups which interferes with the likelihood of compromise and coalition. Sigler, supra note 30, at 176.

Phillips, supra note 28, at 130.