DIFFUSION OF POLITICAL POWER AND THE VOTING RIGHTS ACT

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I. THE TENSION

As we enter the first redistricting of the new century, the explosive mix of race and politics continues to fuel two fundamentally opposed positions. Redistricters and reviewing courts will have to contend not only with the manner in which the federal statutory and constitutional frameworks express both these polar positions, but also with a constitutionally required *via media* between these poles that the current Court has sought to map out.[1]

The first pole might be labeled equal opportunity for "full and fair representation." Put briefly, this position holds that majoritarian institutions suffer the potential defect of enabling a dominant and unified majority to use its power over the design of democratic institutions in such a way as to effectively exclude political minorities from meaningful political participation, even when the formal right to vote is respected. When that kind of majoritarian domination occurs in a sustained and systematic way over multiple election cycles—and when institutions designed in such a way then produce outcomes that result in differential provision of public goods and services to political minorities (for example, in the rural

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1. The most important cases that will define the constitutional constraints on the role of race in the next redistricting include: Hunt v. Cromartie, 120 S.Ct. 2715 (2000) (currently pending) [hereinafter *Shaw IV*]; Hunt v. Cromartie, 526 U.S. 541 (1999) [hereinafter *Shaw III*]; Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996) [hereinafter *Shaw II*]; Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993) [hereinafter *Shaw I*]; Dewitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995). For a summary of current law, see Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731 (1998).

South fewer roads being paved in the black side of town)—it seems difficult to resist the conclusion that Madison's nightmare of "majority factionalism" has become a reality.[2] Healthy democratic systems, and morally justified ones, afford structural devices that destabilize systematic majoritarian domination in order to enhance the opportunity for representation of potentially exploitable and excludable groups.

The Voting Rights Act[3] is the central device for this purpose in the United States. Starting from the Act, advocates of "full and fair representation" often assert (given the history and, where it exists, continuing presence of racially-polarized voting,[4] as well as the reality of majoritarian-dominated city councils, county commissions, legislatures, and other elective bodies) that most means of drawing election districts that enhance minority representation ought to be permitted. This includes intentionally drawing black-majority election districts; for many advocates, it also includes districts of whatever shape or design, including highly "bizarre"[5] ones, if such districts are necessary to ensure full and fair representation.[6] From this

2. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961). *See generally* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1861 (1992) ("Persistent polarized voting is the courtroom proof of the existence of not only a permanent faction, but a majority faction.").

3. 42 U.S.C. § 1973 (2000).

4. The systematic social science studies of the extent of polarized voting depend upon variables such as region, level of election, and decade that make simple summary hazardous. In my view, a few of the most careful and reputable recent studies include DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS (1997); QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 (C. Davidson & B. Grofman eds., 1994); David Epstein & Sharyn O'Halloran, *A Social Science Approach to Race, Redistricting and Representation*, 93 AM. POL. SCI. REV. 187 (1999); Lisa Handley, Bernard Grofman & Wayne Arden, *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, *in* RACE AND REDISTRICTING IN THE 1990S (Grofman ed., 1998); David Lublin & D. Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 AM. J. POL. SCI. 792 (2000). For a synthesis of the empirical studies as of the mid-1990s, see Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH, *supra*).

5. *E.g.*, *Shaw I*, 509 U.S. at 645.

6. These positions remain subject to the constraint, of course, that the vote of any legally cognizable group is not being diluted, including white as well as black voters. As is acknowledged by the plaintiffs in all the racial gerrymandering cases, the districting plans at issue do not dilute the voting power of white voters as a group. *See, e.g.*, *id.* at 641.

viewpoint, the problem with the Supreme Court's racial gerrymandering decisions is that they stand as obstacles to the "full and fair representation" ideal.

The other pole in this conflict could be labeled the ideal of "democratic citizenship." Put briefly, proponents of this view assert that, whatever the merits of affirmative-action type policies in other remedial contexts, there is something distinctly and profoundly troubling about using race to design the fundamental democratic institutions of the State. On this view, a practice of self-consciously creating black, Hispanic, or Asian-majority districts, or white-majority districts, expresses a view of political identity inconsistent with democratic ideals. In addition to what such a practice represents about the nature of citizenship, it might have the consequentialist effect of encouraging citizens and representatives increasingly to come to experience and define their political identities and interests in partial terms.[7]

The more extreme democratic institutional structures in use in other countries, but not yet widely proposed here, might readily be thought to have such expressive and consequential effects. Belgium's consociational democracy, for example, constitutionally requires concurrent majorities of legislators from both the Dutch-speaking majority and the French-speaking minority to approve any legislation affecting the "cultural and educational interests" of each group.[8] If the United States moved toward similar consociational forms, in which concurrent majorities of both black and white legislators were required on certain issues, is it implausible to imagine that the racialization of politics would be enhanced, while the sense of common democratic citizenship would be diminished? Religious, cultural, and linguistic cleavages in Belgium are perhaps so deep that such consociational structures are the best

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7. This concern is clearly expressed in Justice O'Connor's opinion for the Court in *Shaw I*:

> "[R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."

Id. at 650.

8. *See* AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 38, 60-61 (1977).

gamble for holding the country together. But is the role of race, despite its terrible and pervasive presence in the history of the United States, enough to justify similar consociational structures here?

Many who support affirmative action in other contexts, such as academic admissions, are more troubled and uncomfortable about the use of race in the design of democratic institutions. That greater discomfort reflects the force this conception of "democratic citizenship" exerts. For example, the African National Congress in South Africa, staunchly committed to affirmative action in most spheres, opted for the proportional representation electoral system, rather than the territorial election districts of the Anglo-American model. Territorial districting would have required public decisions about the racial composition of such districts, and even to the ANC Leadership, such decisions were considered too divisive and polarizing.[9] Indeed, from the viewpoint of some advocates of the "democratic citizenship" ideal, the problem with the Supreme Court's racial redistricting decisions is not that they go too far, but that they do not go far enough. By not prohibiting altogether the purposeful use of race in the design of electoral institutions, the Court's decisions compromise one of the constitutive and constitutionally-binding principles of the democratic state.[10]

Must public policy or constitutional law choose between these antithetical and polar opposite positions? Many people resist this stark choice because they seem to feel the simultaneous pull of both of those moral and legal ideals I have sketched briefly. Pressed by Justices who adopt the "full and fair representation" view, as well as by Justices who embrace the "democratic citizenship" view, the law has staked out a position somewhere between these two poles. The compromise inherent in the racial redistricting decisions reflects the tension

9. Conversation with Firoz Cachalia, Speaker of the Gauteng (Johannesburg) Provincial Delegation to the National Council of Provinces (comparable to the United States Senate) and participant in the ANC negotiations on an interim South African constitution (March, 1996).

10. *See, e.g.*, James F. Blumstein, Shaw v. Reno *and* Miller v. Johnson*: Where We Are and Where We Are Headed*, 26 CUMB. L. REV. 503, 509 (1996); Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 595-96 (1995); Timothy G. O'Rourke, Shaw v. Reno*: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 736 (1995).

between these competing polar principles. As a result, the rules these cases provide are elusive and, in the redistricting that looms, will be difficult to apply with any legal certainty. Is there an equilibrium that can hold here, both in terms of principle and practical administrable legal doctrine?

II. STRUCTURES OF REPRESENTATION AND THE INTERESTS OF PARTISAN, REGIONAL, AND NON-RACIAL MINORITIES

To gain some purchase on these deeper underlying questions about the philosophy of representation and democratic citizenship, it is helpful to step back from the charged issue of race and explore more systematically the ways in which the American constitutional order structures political representation and governance. The problem of minority representation in majoritarian institutions is not confined to the area of race, nor to potential factionalization along lines of race. Indeed, in modern heterogeneous democracies the problem of fair representation of minority interests in majoritarian institutions is one of the central problems of political morality and institutional design. Consider three examples.

1. Districted Elections

Why do we have districted elections in the first place for our major representative institutions, such as the Congress? Districted elections for Congress are not constitutionally required, nor have they been universally used. Federal statutory law did not require them until 1842.[11]

When districted elections became nationally required in 1842, this requirement emerged in response to particular constellations of political and cultural forces. The first congressional elections in the State of Pennsylvania illustrate the motivations and justifications for districted elections. That initial election was conducted on an at-large basis; voters statewide collectively chose all of the State's eight congressional seats.[12] The same statewide majority, if it had

11. Reapportionment Act of 1842, 5 Stat. 491 (1842). For a summary of the history of territorial districting, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 769-73 (1998) [hereinafter THE LAW OF DEMOCRACY].

12. *See* ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850, at 113 (1987).

cohesive preferences, could therefore control all eight seats. Yet Pennsylvania was a deeply divided State, both in partisan terms and in terms of the material and ideological interests of its citizens. In the east, Federalists dominated, while in the more rural, western part of the state, Anti-Federalist sentiment was strong.[13] Despite these statewide differences, in the first congressional elections all eight congressmen elected were Federalists, and six of the eight came from the eastern part of the State.[14]

This pure majoritarian system had produced a delegation viewed as sufficiently unrepresentative such that the result was public outrage. As one aggrieved critic put it, "I am sure that Pennsylvania will never again suffer eight representatives to be elected out of a mere corner of the state."[15] Enough pressure was put on the State legislature that it created eight individual districts for the next congressional elections. Given that districted elections were a response to the partisan and regional hegemony of the previous delegation, it would have been strange had district designers not consciously constructed at least some of the new, single-member districts so that Anti-Federalists in the west would have sufficent control to ensure some representation in the overall delegation.

The very theory of districted elections, in other words, is that democratic institutions are best designed by diffusing political power and fragmenting majoritarian domination. Districted elections empower local minorities who would otherwise be swallowed up in a system not self-consciously designed to ensure some representation of their interests. Do districted elections, designed with the aim of diffusing political power and ensuring representation of diverse partisan or regional groupings, disturb us? Or rather, do we see them as a healthy and justifiable mechanism for democratic systems to respect and protect minority political interests that would be lost in an overly-majoritarian process—such as at-large statewide congressional elections?

13. *See id.*
14. *See id.*
15. *Id.*

2. Local Government Structures

Consider the way local governance structures have addressed problems of regional differences in interest and ideology. These problems are particularly salient at the local government level, especially when larger entities, such as cities, are being forged from pre-existing political units. Consolidating these pre-existing jurisdictions might portend several advantages in the efficiency with which public goods can be distributed or in the capacity to engage in redistributive social policies. Yet towns or boroughs with small populations might fear that, to the extent the new city will contain intraregional distributional conflicts, those smaller units will be dwarfed by cohesively-voting majorities living in the dominant units of the new city.

The founding of the modern City of New York in 1898 offers a provocative example.[16] Greater New York was formed out of previously existing jurisdictions that differed dramatically in population, ranging from Staten Island to the mammoth jurisdictions of Brooklyn and Manhattan (then New York City). The formation of the modern city occurred after more than a decade of "intensive debate, deliberation, legislative lobbying, and political jockeying."[17] Much of this process remains shrouded in mystery, but we might imagine that the smaller jurisdictions would have had great concern were the new City to be governed on a straight population basis in a one-person, one-vote majoritarian system. Distinct interests associated with smaller units like Staten Island would then be vulnerable to easy domination by the interests of Brooklyn and Manhattan voters. How might political leaders seek to enlist the cooperation of these potentially exploitable minority interests in accepting the legitimacy of the City and its City-wide governing power?

They could do so by committing to governing structures in which power was distributed on a geographic or jurisdictional basis rather than on the basis of strict population equality. This is the governing structure that, in fact, did result. Three years

16. The best account of this story in the legal literature is Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775 (1992).

17. *Id.* at 780.

after the modern city's creation, the city came to be governed by a central political authority, the Board of Estimate, in which each of the boroughs, as such, had representation. Three board members were elected citywide, while the elected presidents of each of the city's five boroughs also became members by virtue of their local election.[18] In this way, the very structure of this central governing body built in a credible commitment that the majority (based on total population) was willing to prescind from complete domination and ensure that minority regional interests, as such, would retain effective political representation and power. In these circumstances potentially vulnerable minorities seek credible commitments, not general promises or vague reassurances.[19] The most convincing of such commitments are those built into the very governing structure of the jurisdiction. Although the borough-based governing structure does not appear, in fact, to have been part of the original deal made in the years leading up to 1898, over time smaller boroughs, particularly Staten Island, did perceive this structure as crucial to the fair representation of their interests.[20] The Board of Estimate governed the City from 1901 until 1989, when the Supreme Court held that this structure violated the post-1960s constitutional requirement of one-person, one-vote.[21] That decision then became a "catalyst for secession" on Staten Island,[22] although the secession movement seems to have quieted in the intervening years.

The Supreme Court's initial development of the one-person, one-vote doctrine came in the context of the grotesque, massive malapportionments characteristic at the time of *Baker v. Carr*[23] and *Reynolds v. Sims*.[24] That doctrine resulted in the necessary

18. When the Board was created initially in 1901, Manhattan and Brooklyn had two votes each, the other three boroughs one vote. In 1958, all five borough representatives were given one vote each. The three officials elected citywide have two votes each. *See id.* at 790-91.

19. For a general analysis of the importance of governments being able to institutionalize credible commitments in order to pursue optimal policy, see Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129 (1996).

20. *See* Briffault, *supra* note 16, at 780-91 (discussing the original history and the modern view).

21. *See* Board of Estimate v. Morris, 489 U.S. 688 (1989).

22. Briffault, *supra* note 16, at 788.

23. 369 U.S. 186 (1962) (holding that claims of malapportioned legislatures are justiciable).

24. 377 U.S. 533 (1964).

destabilization of a democratic system that had become captured by a small oligopoly that had no interest in changing the rules under which it had been elected.[25] But over time the one-person, one-vote doctrine has become its own kind of legal formalism—a rigid formula mechanically applied to any and all governance contexts, including ones in which the original purposes and justifications for the doctrine are not involved and where applying the doctrine actually *undermines* the very purposes that had justified one-person, one-vote in the first place.[26] Professor McConnell makes a similar point in his contribution to this Symposium.[27] When majorities cede some degree of political power to minorities, in order to create representational structures that will be more widely perceived as fair, legitimate, and likely to provide sufficient protection to minority interests, what conception of the relevant constitutional provisions should deny majorities that choice?

The application of one-person, one-vote to strike down these local power-sharing arrangements seems to turn the *Carolene Products*[28] "discrete and insular minority"[29] justification for judicial review on its head: here the Court is telling dominant political majorities that the Equal Protection Clause prohibits them from extending representational protections to discrete and insular minorities. *Baker v. Carr*, applied in this manner, threatens to become the *Lochner*[30] of the voting-rights field. Before the recent application of voting-rights doctrine to local

25. In *Reynolds*, the population disparity for the Alabama Senate was a stunning 41-to-1, and in *Baker*, Tennessee had a disparity of 23-to-1. *See* DAVID BUTLER & BRUCE E. CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 29 (1992). On the general problem of legislative self-entrenchment and the need for judicial destabilization of contexts in which existing partisan forces have "locked-up" the electoral process, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999); *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997) (describing the entrenchment phenomenon).

26. For criticism along these lines of the momentous Supreme Court decision in *Lucas v. The Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964), see THE LAW OF DEMOCRACY, *supra* note 11, at 11-16 (1998).

27. *See* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000).

28. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

29. *Id.* at 152 n.4.

30. Lochner v. New York, 198 U.S. 45 (1905).

government structures,[31] many local governments and special-purpose units were designed to achieve the *Carolene Products* goal of protecting "discrete and insular minorities" from majoritarian domination. Such regionally-inclusive local government structures enabled majorities to overrepresent certain minority interests to enhance the perceived fairness, impartiality, and stability of democratic institutions. Should a healthy democratic system not do precisely that: enable majorities, through the design of democratic representational structures, to ensure greater protection for easily exploitable regional or partisan minorities? A cost of the Court's recent local-government decisions, no doubt, will now be disincentives for future experimentation with local government arrangements, along the lines that enabled the political stability of the City of New York, unless minorities can be credibly promised comparable political protections in advance.

3. Supermajority Voting Rules

Another common structural device for reducing the prospect of political majorities undermining the most intensely held interests, rights, or values of minorities is the supermajority voting rule. Many state constitutions have supermajority voting requirements for specific issues, such as issues of taxation and bonded indebtedness. As long as these supermajority requirements are genuinely issue-oriented, as opposed to covert means of diminishing the political standing of identifiable and protected groups, they are constitutionally permissible.[32] As the Court has put it, "there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue."[33]

Consider the current governmental structure of Mobile, Alabama, whose pre-voting rights history I will discuss in a moment. In the wake of judicial findings of Voting Rights Act liability,[34] Mobile abandoned at-large elections for its powerful

31. The Court first announced that the one-person, one-vote principle would apply to local governments in *Avery v. Midland County*, 390 U.S. 474 (1968).

32. *See* Gordon v. Lance, 403 U.S. 1 (1971) (upholding state requirements that political subdivisions not incur bonded indebtedness or increase tax rates without sixty percent voter approval in a referendum).

33. *Id.* at 6.

34. Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982).

County Commission and shifted to a system of seven single-member election districts, three of which were designed to be majority black. In addition, to ensure that these minority representatives had effective leverage, Mobile's statutes were amended to provide that a supermajority vote of five Commission members was required for any action.[35] Initial reports in the late 1980s suggested that this structure had improved political interaction across racial lines in the County Commission.[36] Supermajority requirements can, of course, give minorities too strong a veto power in some contexts, but they are also regularly used in American governance to ensure greater consensus and inclusion on specific issues or on action more generally, rather than a strict majority-rule structure. In some contexts, such supermajority requirements are thought to provide necessary protection of minority interests that a pure majoritarian system, it is though, would not provide. Should Mobile be praised or condemned when it adopts a similar supermajority requirement as a means of credibly pre-committing, through formal law, to a structure of government perceived as more impartial and more inclusive, in light of Mobile's history, than a pure majoritarian system would be?

III. STRUCTURES OF REPRESENTATION AND RACIAL MINORITIES[37]

The problem of "fair" minority representation in majoritarian institutions is, as these remarks have sought to suggest, an enduring one. Districted elections, local government structures, and supermajority voting rules are just a few of the means the American political system has used to enhance various minorities' representation and to fragment otherwise dominant majoritarian power. Some of these structures, such as districted

35. ALA. CODE § 11-44C-28 (Supp. 1988).

36. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 247 (1989).

37. I will use "racial" to refer to the various groups specifically protected by the Voting Rights Act against any voting procedure that, in the language of the 1982 Amendments to the Act, "results in a denial or abridgment" of the right to vote. 42 U.S.C. § 1973(a) (1994). This results test has, since its inception, been understood to include abridgment through the technique of vote dilution. *See* Thornburg v. Gingles, 478 U.S. 30 (1986). The Act as amended also protects "language minorities," including persons who are "American Indian, Asian American, Alaskan Natives, or of Spanish heritage." 42 U.S.C. § 1973l(c)(3). Black voters were the original focus of the Act, and I use "racial" for ease of exposition, though many of the groups now protected are not defined in racial terms.

elections, we take so much for granted that we may have forgotten their animating purpose. Others, including geographic-based local governments, were deeply embedded in political practice until the Court's one-person, one-vote jurisprudence recently and controversially eliminated them. We think of these various efforts as healthy or desirable means by which majorities choose to overrepresent minority interests in the service of constructing more representative, more legitimate, or more fair, political institutions.

Returning to the Voting Rights Act: the challenge for those who feel the pull only of the "democratic citizenship" pole in this debate (those who would endorse a categorical, per se bar on the use of race or race consciousness in the districting process) is to explain why, when majoritarian power is permissibly diffused to ensure more adequate representation of various minority interests in so many other settings, the singular interest for which this process should not be permitted—indeed, for which it should be constitutionally prohibited—is where that interest is defined in racial terms. No doubt, race *is* different for constitutional and other purposes. But is it so different that a process our system engages in across the board—accommodating minority interests in the design of majoritarian institutions—should suddenly become invidious and corrupt when the particular minority interests are racially-identified ones?

With that question in mind, consider now the concrete contexts to which the Voting Rights Act was a response. I do not mean in the distant past, nor even when the Voting Rights Act was first enacted in 1965. Instead, consider the 1980s, when Congress amended the Act to create the current governing regime. These 1982 amendments were in response to the 1980 Supreme Court decision in *Mobile v. Bolden*,[38] which found no constitutional violation in Mobile, Alabama's century-long use of at-large elections to select the three City Commissioners who jointly exercised *all* legislative, executive, and administrative power in Mobile.[39] Although black residents constituted more than thirty-five percent of the population, none had ever been elected to the City Commission. Statistical analysis of city

38. 446 U.S. 55 (1980).
39. *See id.* at 59.

commission races, school board elections, city referendums, and countywide legislative races revealed "severe racial polarization" in voting patterns during the 1960s and 1970s, with "'white voting for white and black for black if a white is opposed to a black,' resulting in the defeat of the black candidate or, if two whites are running, the defeat of the white candidate most identified with blacks."[40] Nearly every active candidate for public office testified that because of polarized voting patterns "it is highly unlikely that anytime in the foreseeable future, under the at-large system, . . . a black can be elected against a white."[41]

In addition, the trial court further found that Mobile had adopted at-large elections (most recently in 1911) in part to minimize black political power.[42] Before the Civil War, the city used ward-based, districted elections. After the war, the Governor used his appointment power to appoint, over time, at least ten blacks to a twenty-four member board that governed Mobile for a time. As whites regained control toward the end of Reconstruction, they agreed to shift to at-large elections to avoid election of black officials. This agreement was codified in 1874, re-enacted in 1911, and not subsequently changed before it was challenged in court in 1980. As for measurable political outcomes, the trial court found that the elected commissioners, due to "the political fear of a white backlash vote when black citizens' needs are at stake," had been unresponsive to Mobile's black residents in the provision of municipal services, employment, and appointments to public boards and committees.[43]

If this is not Madison's "majority factionalism" run amok, what is? For those who fear concentrated governmental power as a threat to personal liberty, and who seek the dispersion of political power precisely to avoid majoritarian domination, the City of Mobile would seem to offer a Madisonian nightmare. Nor is there any reason to think Mobile was a dramatic

40. *Id.* at 98 (White, J., dissenting) (quoting trial evidence).

41. *Id.*

42. These findings about the history of the at-large structure came on remand from the Supreme Court's decision and led the District Court to strike down the at-large election structure based on its original racially-discriminatory purpose and its present day differential racial effects. *See* Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982).

43. *Bolden*, 446 U.S. at 98 (citation omitted).

aberration in the South of 1980.[44] And if ensuring more accepted and legitimate democratic structures meant, in the 1790s, shifting from at-large to districted elections to avoid Federalist domination of Pennsylvania's congressional delegation, why should breaking up Mobile's at-large election structure and moving to districted elections to make effective black participation more likely not be though similarly to improve democratic representation?

There is much room left for debate, of course. We can debate whether the flaw in Mobile's election structures should be taken as its original purpose to exclude, or whether even absent a hostile intent, such a structure should be illegal when it has such significant exclusionary effects (does it matter whether Federalists *designed* at-large congressional elections to exclude Anti-Federalists, or only that such was their effect?). We can also argue about the general extent of racially-polarized voting patterns today and whether they have diminished significantly since 1982. Discussion can quickly become mired in the particularities of individual cities, states, and electoral contests.[45] But what must be appreciated is that the Voting Rights Act requires proof in each and every case that racially-polarized voting patterns continue to exist in the specific jurisdiction whose electoral structure is being challenged.[46] Absent proof of contemporary polarized voting, there can be no Voting Rights Act liability. Generalized political debates about the continuing significance or non-significance of race do not matter, in other words; the facts must be established jurisdiction by jurisdiction before the Voting Rights Act requires race-conscious districting. But debates about empirical issues in this field often seem thin veils over what are, more deeply, fundamental and opposed philosophical positions.[47] Many who embrace the "democratic citizenship" view of these

44. *See* sources cited *supra* note 4.

45. *See id.*

46. This has been true as a matter of law since the crucial decision interpreting the then recently enacted 1982 Amendments. *See* Thornburg v. Gingles, 478 U.S. 30, 48-50 (1986) (requiring minority voters to "prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates."); *see generally* Issacharoff, *supra* note 2.

47. For an argument that such use of empirical veils is a pervasive feature of policy debate, see Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

issues appear to believe that intentional race-conscious districting is wrong (or bad policy, or unconstitutional) *regardless of what the actual facts might be concerning the existence and extent of racially-polarized voting.*

This position, it seems to me, must carry a very heavy burden of explanation. Given that we generally consider it desirable, even admirable, when political majorities choose or are required to cede some of their power to enhance the representation of partisan or regional minorities, why should the political domination of a consistently bloc-voting white majority not be viewed in similar terms? In contexts such as Mobile's, why should the Constitution prohibit federal law from demanding the dismantling of the at-large structure and the substitution of individual election districts, some of which are designed to be majority black? Those who reject the "full and fair representation" position and endorse instead a categorical ban on the use of race in designing electoral institutions must explain why racialized majoritarian power should be constitutionally immune from techniques for diffusing political power that our system otherwise endorses, indeed celebrates, in other contexts.

Moreover, I do not think it likely that this position could be sustained by a categorical principle rejecting any "race consciousness" when it comes to the design of democratic institutions. That would sweep more broadly than I suspect even the staunchest critics of racial redistricting would accept. For example, several local governments in Alabama have recently shifted to the use of cumulative or limited voting systems.[48] The motivation for this shift is unquestionably race conscious, in that its purpose is to enhance the opportunity for racial minorities to elect candidates of their choice. Yet these systems give all voters the same number of votes and use jurisdiction-wide elections; they do not require the drawing of individual districts, be they black or white majority districts. Cumulative voting systems *are* designed to enhance minority representation, but they employ race-neutral means. Despite their race-conscious aims, these systems have, at least

48. *See* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241.

tentatively thus far, been found constitutional.[49] Suppose Mobile had decided voluntarily to shift to districted elections, with a race-conscious aim of enhancing minority representation. Would the mere shift from at-large to districted elections be unconstitutional, because merely intentionally done to enhance minority representation? If not, would it not be strange were Mobile precluded from drawing the specific districts in a way that actually countered polarized voting—by intentionally making certain districts majority black?

All this is to say that when we situate the racial redistricting controversies in broader issues concerning the aims and justifications of democratic representation, it becomes hard to reject out of hand the "full and fair representation" position in this debate. Yet such a rejection is required by those who would categorically ban race-conscious design of electoral institutions or, more narrowly, race-conscious districting in the face of polarized voting. The "full and fair representation" ideal, in the contexts to which the bipartisan 1982 Voting Rights Act was a response, exercises significant gravitational pull on notions of legitimate democratic processes. Given the power of this ideal in so many contexts of representation, it is not easy to dismiss the force of this ideal altogether in the context of race.

IV. CONSTRAINTS ON FULL AND FAIR REPRESENTATION?

Given the force of the "full and fair representation" ideal, why not simply embrace *it* wholeheartedly? Why should there be any constraints of the kind the Court's racial gerrymandering cases impose, or for that matter any other restraints, on the pursuit of this objective? What conception of "democratic citizenship" can continue to linger and weigh against the "fair representation" position with sufficient force to justify any limitations on full realization of the fair representation ideal?

I do not have the space to elaborate on that conception here. I have tried to do so in other writings, more by way of seeking to

49. *See, e.g.*, Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs, 965 F. Supp. 72 (D.D.C. 1997), *vacated*, 142 F.3d 468 (D.C. Cir. 1998) (vacating the district court decision on the ground that the Board was without authority under state law to consent to the change in the election plan, but not reaching constitutional claims).

understand the Court's position than to justify it.[50] Suffice it to say, it is not difficult to imagine means of enhancing minority representation beyond those which have actually been employed to date. While different readers would no doubt become troubled at different stages along the spectrum of available techniques, I suspect even those readers most committed to the "full and fair representation" position would find at least some of these techniques troubling. We could, of course, mandate racially proportional representation directly. Or as noted earlier, we could have "consociational" racialized structures of representation. Perhaps concurrent black and white legislative majorities would be considered by some. If the goal of full and fair minority representation is to be maximized subject to no constraints, these are surely the most immediate means. For example, instead of drawing two black-majority congressional districts in 1990, as North Carolina did, we could imagine the State setting aside two of its twelve congressional seats and declaring only black candidates eligible for them. Perhaps only black citizens would be permitted to vote for those seats. Either option, of course, would be unconstitutional under current law, but it is worth reflecting on why that is. Similarly, instead of drawing a sprawling district connected only through the formal link of an interstate highway, suppose the State dispensed with this formality and simply declared that certain islands of black population, typically areas of urban centers, comprised the twelfth congressional district. What would be wrong with a districting system in which most congressional districts were conventionally contiguous and reasonably compact, but "special districts," designed to be majority black, constituted instead of disconnected islands of black voters throughout the State? From the "full and fair

50. *See* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997) [hereinafter *Principled Limitations*]; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 MICH. L. REV. 483 (1993). Needless to say, that view has drawn academic criticism, much of it thoughtful and important to consider. *See, e.g.*, K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 151-162 (1996); J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999); MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION (1998); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of the Century*, 50 VAND. L. REV. 291 (1997).

representation" view, why should this be troubling? Special island districts would indeed serve the end of enhancing minority representation. Yet, if such island districts are troubling, they differ only slightly from what North Carolina in fact did.[51]

Whatever the point at which some constraint begins to pull against single-minded maximization of the one goal of "full and fair representation"—whether at proportionate racial representation, or at non-contiguous island districts, or at "extremely bizarre" non-compact districts—the source of that constraint will be found in some principle like that reflected in the "democratic citizenship" ideal. Put in overly simplistic terms: at some point, political institutions can be designed in such a way that they express and encourage identification of citizens in partial and racialized terms, rather than as equal democratic citizens. Just as it is difficult not to feel the force of the "full and fair representation" pole on these debates, it is also difficult not to feel the pull of this "democratic citizenship" principle.

Law is often an attempt to accommodate conflicting values, without maximizing one to the exclusion of others. That is how I understand the current state of the racial redistricting doctrine. The net result of all the Court's "pulling and hauling" is that where the Voting Rights Act requires race-conscious districting, such districting is constitutionally permissible.[52] But where districts designed to enhance minority representation depart substantially from "conventional" or "traditional" districting practices, the Voting Rights Act neither requires such districts, nor does the Constitution permit them. Thus, where racially-polarized voting patterns exist, remedies that include the drawing of black-majority election districts are constitutionally permissible, as long as pursued within the constraints of the districting practices that apply to all other districts.[53] But where fair representation is pursued to such an

51. For a map showing the geographic configuration of the district, see Pildes & Niemi, *supra* note 50, at 492.

52. *Cf.* Johnson v. De Grandy, 512 U.S. 997, 1020 (1994) (describing the need "to pull, haul, and trade" in redistricting).

53. This is all much more complicated in light of the tension between different Court opinions, particularly the tension between *Shaw I*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), or between majority and concurring opinions in the same case, but delving into those complexities would distract from the

extent that it abandons the "conventional" constraints on districting—for the present Court, that moment occurs when the design of such districts becomes "highly irregular"[54] or "bizarre on [its] face"[55]—the Court is going to conclude that the democratic citizenship ideal is too compromised and that the Equal Protection Clause is therefore violated.

V. IS RESOLUTION FORTHCOMING?

That the net result of the Court's struggles with racial redistricting is to resist the polar positions many advocates advance is not surprising. The doctrine reflects understandable tension between the principle of "full and fair representation" and that of "democratic citizenship." But just because two principles of constitutional and moral value both exert their pull, and the Court might in principle aspire to accommodate both, it does not follow that such a reconciliation is in fact attainable in practical and administrable legal doctrine. Thus far, after recognizing a cause of action in 1993 for excessive racial redistricting, the Court has done little to give that doctrine the kind of reasonably predictable, operative content that is needed for future redistricting. In redistricting the stakes are exceptionally high, and the mix of partisan, racial, and incumbent interests is incendiary. Indeterminate legal doctrine encourages political actors to game the system, as they calculate whether they are better off taking their chances in court than with a legislative solution. It likely also embitters even further what is already the ugliest and nastiest of all political processes. At the same time, it virtually ensures that most redistricting plans in states with significant minority populations will end up in litigation.

Are there alternatives? The Court might search for more readily identifiable external constraints on districting. The most likely would involve greater obligations on the part of states to respect pre-existing political subdivision boundaries, such as counties and towns, or compliance with more quantitative compactness standards.[56] Instead of confining these constraints

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essential point the text seeks to make.

54. *Shaw I*, 509 U.S. at 646.

55. *Id.* at 644.

56. For further elaboration of this possibility, see Pildes & Niemi, *supra* note 50. For other legal strategies that might be applied to constrain redistricting excesses,

to districts drawn for race-conscious reasons, the Court might also extend these constraints to all districts (or to districts drawn for partisan reasons, which amounts to the same thing). In the 1990s, the Court was aggressive about policing racial redistricting, but utterly indifferent about policing partisan redistricting.[57] Yet the divide between the two is artificial; in actual redistricting practices, the two are almost inextricably intertwined, given the overwhelming correlation between race and partisan political preferences. Any doctrine that seeks to single out racial gerrymandering without simultaneously addressing partisan gerrymandering is destined to be highly artificial, at best, and perhaps altogether unintelligible.[58] Courts will have to determine whether black voters are placed in districts because of their race, as opposed to political affiliation.[59] This ensures that cases will bounce back and forth between different levels of review for years to come, a foreshadowing of which North Carolina has already provided: its districts were in litigation the entire decade of the 1990s and remain so at this moment.[60] Perhaps the whole system will collapse under the weight of this relatively indeterminate legal doctrine. To avoid such collapse, several States with highly politicized redistricting processes have already turned the process over to independent commissions.[61] Indeed, this trend of shifting redistricting out of the self-interested hands of the very officeholders whose seats are at issue and into the hands of relatively more independent commissions is one of the most significant developments in recent years—ranging from statewide voter-initiated shifts in the fall 2000 elections, such as

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see Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993).

57. The Court has held partisan gerrymandering claims to state a Fourteenth Amendment cause of action. *See* Davis v. Bandemer, 478 U.S. 109 (1986). I am aware, however, of only one federal case that has even considered striking down any electoral structure on partisan gerrymandering grounds. *See* Republican Party of N.C. v. Martin, 980 F.2d 943 (4th Cir. 1992) (reversing dismissal for failure to state a claim). Moreover, subsequent events almost immediately mooted that case. *See* Republican Party of N.C. v. Hunt, 77 F.3d 470 (4th Cir. 1996).

58. For further development of this critique, see *Principled Limitations*, *supra* note 50.

59. This is required by *Shaw III*, 526 U.S. 541 (1999).

60. *See Shaw IV*, 120 S.Ct. 2715 (2000) (currently pending); *Shaw III*, 526 U.S. 541 (1999); *Shaw II*, 517 U.S. 899 (1996); *Shaw I*, 509 U.S. 630 (1993).

61. For an optimistic analysis of the emerging role of such commissions, see Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997).

in Arizona,[62] to city-based redistricting commissions, such as employed in New York City since 1989.[63] Thus, however unintended, perhaps the long-term effect of the Supreme Court's redistricting doctrines will ultimately be to drive the redistricting process out of the hands of current officeholders—no small contribution to the ideal and practice of democratic politics.

62. In November 2000, Arizona voters amended the State Constitution to place redistricting for congressional and state legislative seats in the hands of an independent five-member commission. ARIZ. CONST. art. IV, pt. 2, § 1.

63. *See* Frederick A.O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723, 788-798 (1998).