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Our Separatism? Voting Rights as an American Nationalities Policy

Pamela S. Karlan†

One of the salient characteristics of contemporary global politics is the disintegration of empires and multiethnic nation-states and the resurgence of separatism. The breakup of the Soviet Union, the breakdown of Yugoslavia, tribal warfare in Africa, and the emergence of separatist political parties in Western democracies such as Italy and Canada occupy the political foreground. One of the urgent questions of political structure is how multiethnic nations respond to these nationalist and separatist impulses.

My argument in this Article is that the voting-rights system is a key element in the American response. I begin by describing how the Voting Rights Act and much of its case law use a vocabulary that draws sharp ethnic and territorial distinctions. Not only does voting-rights law use the language of separation, it also employs an apparently separatist practice of allocating voters among territorially defined voting districts.

Recent judicial responses to voting-rights claims have picked up on this vocabulary and practice. In light of the devastating effects separatism is having around the world, it is hardly surprising that critics of race-conscious districts have articulated their concerns in rhetoric reflecting a “separation anxiety”—a fear that contemporary voting-rights law either causes, solidifies, or exacerbates racial and ethnic tension. This rhetoric, however, obscures as much as it illuminates, because it rests on a series of dubious factual premises. The critics’ exclusive focus on districts and voting behavior fails to recognize the Voting Rights Act’s central role as a tool for integrating the larger American political process. The Voting Rights Act reflects a national consensus that

† Professor and Roy L. and Rosamond Woodruff Morgan Research Professor of Law, University of Virginia. I presented earlier versions of this Article at Virginia’s summer works-in-progress lunch, at Harvard’s faculty workshop, and at the University of Chicago Legal Forum Symposium. Each time I benefitted tremendously from my colleagues’ many insights. I especially appreciate comments and suggestions made by Richard Briffault, Bruce Cain, David Codell, Dick Fallon, Sam Issacharoff, Elena Kagan, and Eben Moglen.
American politics and governance should be racially integrated; nonwhite voters use the Act to become part of, rather than to separate from, the political process.

The critics' real quarrel is with the Act's realism. Unlike other pieces of American antidiscrimination doctrine, voting-rights law entertains the possibility that geographic and political separation may remain facts of life, and it responds with the second-best solution of adjusting political rules to this unfortunate reality. If we are not to abandon entirely the quest for political fairness in a multiethnic polity, we must consider mechanisms for recasting voting-rights remedies to accommodate the claims for representation made by ethnic and racial groups, while promoting greater integration of the political process. In the final section of this Article, I offer two suggestions for avoiding the hardening of racial and ethnic lines in congressional elections: nonterritorial districting and relaxation of the absolute-equipopulosity requirement.

I. THE LEXICAL SEEDS OF THE SEPARATISM CRITIQUE: VOTING-RIGHTS DOCTRINE

The Voting Rights Act of 1965 ("Act") is the centerpiece of federal regulation of the electoral process. In addition to various sorts of protection for individuals—such as suspension of literacy tests or the provision of assistance for voters who are illiterate or disabled—the Act protects certain classes of voters against dilution of their group voting strength. Most contemporary litigation under the Act involves these group-based claims. In contrast to individual-oriented claims, which tend to focus on political inputs—namely, the right to participate in the formal process of casting a ballot—these group-based dilution claims look at political outcomes: are members of the defined group able to elect the candidate or candidates of their choice?

Both with regard to the groups covered by the Act and with regard to liability and remedy, the Voting Rights Act highlights discreteness or separation. The Act's protection does not reach all

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2 See 42 USC § 1973aa (banning literacy tests nationwide); 42 USC § 1973aa-1a (requiring bilingual voting materials); 42 USC § 1973aa-6 (requiring assistance for blind, disabled, or illiterate persons).
4 For an extensive discussion of this taxonomy, see Pamela S. Karlan, The Rights To Vote: Some Pessimism About Formalism, 71 Tex L Rev 1705, 1709-20 (1993).
groups of voters. Purely political blocs—like Democrats or farmers, for example—are simply outside the Act’s scope. Their group interests are left essentially to the workings of the political process. Only if these groups can show purposeful and consistent degradation of their influence on the process as a whole—a showing that is virtually impossible to make—will a court intervene on constitutional grounds.\(^5\) With regard to these political blocs, Congress and the judiciary apparently assume that they will be able to influence elections even if they do not control outcomes and that elected representatives will serve their interests fairly even if those representatives were elected by opposing blocs.\(^6\)

The Act’s decidedly more plaintiff-friendly standard forbids using electoral rules that result in an unequal opportunity to elect a protected group’s candidates of choice, regardless of the purpose behind the challenged system, or the postelectoral behavior of elected officials.\(^7\) But this protection extends to only two classes. First, the Act protects groups defined in terms of race, usually, but not always, African-Americans.\(^8\) Thus, the Act

\(^5\) This constitutional standard for claims of “political vote dilution” was set out by the plurality opinion in *Davis v Bandemer*, 478 US 109, 127-33 (1986). Since *Bandemer*, only one reported challenge on political vote-dilution grounds has survived a motion to dismiss, and that case involved a unique set of facts—the use of statewide, at-large elections for seats on the trial court. See *Republican Party of North Carolina v Martin*, 980 F Supp 943 (4th Cir 1992), cert denied, 114 S Ct 93 (1993), on remand, 841 F Supp 722 (E D NC 1994)(granting a preliminary injunction), aff’d, 980 F2d 943 (4th Cir 1992)(per curiam). For a particularly pointed example of an extensive political gerrymander that did not violate the Equal Protection Clause, see *Badham v Eu*, 694 F Supp 664, 667-72 (N D Cal 1989).

\(^6\) *Bandemer*, 478 US at 131-32 (plurality opinion). See also id at 152-53 (O’Connor concurring in the judgment).

\(^7\) 42 USC § 1973(b). The legislative history of the 1982 amendments, which established this standard, clearly rejected both a purpose test and any requirement that plaintiffs show elected officials were unresponsive to the distinctive needs of the minority community. See Voting Rights Act Extension, S Rep No 97-417, 97th Cong, 2d Sess 28-29 n 116 (1982). Many voting-rights scholars have argued for a view of the political process that extends beyond the outcome on Election Day. See Kathryn Abrams, “Raising Politics Up”: Minority Political Participation and Section 2 of the Voting Rights Act, 63 NYU L Rev 449, 489 (1988); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va L Rev 1413, 1458-93 (1991); Karlan, 71 Tex L Rev at 1716-17 (cited in note 4). However, none of the scholars whose work starts from the premise that the Act properly protects against racial vote dilution have argued that an inability to elect can be cured by the postelectoral responsiveness of officials not directly elected by minority voters. For a contrary view, see, for example, Carol M. Swain, *Black Faces, Black Interests: The Representation of African Americans in Congress* (Harvard University Press, 1993); Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Harvard University Press, 1987).

\(^8\) For example, white voters in Birmingham, Alabama, challenged the city’s continued use of at-large elections. See *White Minority Wins Right to Challenge At-large Voting*, Chi Trib 1-7 (June 18, 1988).
is itself explicitly race conscious,9 and demands that courts consider the racial fairness of challenged districts.

Second, the Act protects "member[s] of a language minority group"10 . . . sometimes. The Act specifically defines "language minorities" to include only "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."11 Notably, only one of the language minority groups is defined by the specific language its members speak (Spanish), and, even there, the protections extend beyond simply ensuring access to own-language election materials.12 For example, even if most of the members of a Hispanic-American community in fact speak English, they are nonetheless protected as a "language minority" from dilution of their group's voting strength.13 By contrast, other language minorities—such as Yiddish-speaking Hasidim in New York City—are not protected by the Act's prohibition on vote dilution.14 Thus, in both racial- and language-minority cases, an underlying assumption of the Act is that people may share political interests correlated with their membership in racial or ethnic groups, and that these interests may be valued unfairly by the existing electoral structure.15

One emerging question under the Act is the extent to which the covered groups are not opaque, that is, the extent to which component parts of protected groups can raise voting claims on behalf of their subgroups. For example, do Caribbean-born African-Americans in Brooklyn have a claim distinct from that of African-Americans generally? What about a conflict between particular Eskimo tribes in Alaska: if Alaskan Natives as a class are represented proportionally in the state legislature, does the

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9 See 42 USC § 1973(b)(providing that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered" in assessing claims of vote dilution). See also David A. Strauss, The Myth of Colorblindness, 1986 S Ct Rev 99 (1986).
11 42 USC § 1973l(c)(3).
13 42 USC § 1973(b).
14 See also United Jewish Organizations v Carey, 430 US 144, 152-53 (1977)(finding no dilution because overall white voting strength within Brooklyn was fairly represented). And because African-Americans, unlike Hispanic-Americans, are protected solely as a racial group, a Haitian community whose members are literate only in Creole is not entitled to the bilingual materials to which a similarly sized, Spanish-speaking Dominican population within the same jurisdiction would be entitled. 42 USC § 1973l(c)(3).
15 The legislative history makes clear that this commonality of interests must be shown and cannot be assumed. See Thornburg v Gingles, 478 US 30, 46 (1986); S Rep No 97-417 at 33-34 (cited in note 7).
decision to create majority Inupiaq rather than majority Yupiq districts raise a claim under Section 2? If the Act protects only certain classes, it creates an incentive for groups to define themselves, if they can, in terms of triggering ethnic characteristics, rather than in terms of purely political affinities, since this brings them within the Act's more solicitous standards for showing liability. By contrast, if the covered groups are treated as opaque, the Act may mask real intragroup conflict.

Beyond the threshold question of coverage, the standard for assessing liability in a Section 2 vote-dilution case also focuses on geographic and political separation. Each of the elements of the threshold liability test delineated by the Supreme Court in *Thornburg v Gingles* involves a form of separation. The first element focuses on geographic segregation: a group of voters must show that it is both sufficiently large and geographically compact to form a majority in one or more fairly drawn single-member districts. The second and third elements revolve

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17 A converse incentive is also created. For example, defendants faced with claims of racial vote dilution may argue, sometimes successfully, that candidates supported by African- or Hispanic-American communities lost, not because their supporters were African- or Hispanic-American, but because they were Democrats. See, for example, *Gingles*, 478 US at 83 (White concurring)(raising such possibility); *Whitcomb v Chavis*, 403 US 124, 150-53 (1971); *League of Latin American Voters v Clements*, 999 F2d 831, 850-55 (5th Cir 1993)(en banc), cert denied, 114 S Ct 878 (1994). The relationship between race and politics is one of the central controversies of contemporary Section 2 litigation; particularly as, in some jurisdictions, the Democratic Party becomes predominantly African-American, this controversy may become increasingly important.

A related question—the extent to which distinctive groups under the Act (for example, African-Americans and Mexican-Americans) can be aggregated to be treated as a single "minority" under the Act—has generated a substantial debate, but is beyond the scope of this Article. See, for example, Katharine I. Butler and Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 Pac L J 619 (1990).


19 Id at 50.
around political discreteness: the group must show that it is
politically cohesive, and it must show that members of the (usu-
ally white) majority vote sufficiently as a bloc so as to defeat the
minority's candidates of choice.\textsuperscript{20} Gingles's emphasis on geographic
segregation (a point I criticized in an earlier work\textsuperscript{21}) and on
racial polarization makes separation—physical and political—the
hallmark of a voting-rights claim. A group cannot successfully
challenge the existing rules for allocating political power unless it
can prove its utter distinctiveness from its neighbors. Thus, to
succeed, Section 2 litigants must emphasize their degree of differ-
ence from the majority within their jurisdiction. To the extent
that the characterizations made during the litigation carry over
into postlitigation politics—and they may do so because political
activists are often the guiding force behind Section 2 litiga-
tion—the insistence on political polarization may affect the larger
political environment.

The preferred remedy in Section 2 cases exploits the exist-
tence of geographic isolation to combat political exclusion. Absent
an agreement to adopt a modified at-large remedy,\textsuperscript{22} courts gen-
erally order defendant jurisdictions to create single-member dis-
tricts, some of which are majority nonwhite, to remedy Section 2
violations.\textsuperscript{23} This remedial strategy necessarily calls on courts
and legislatures to be race conscious, since they must allocate
voters among districts based on race to ensure that minority
voters control the outcome in a "fair" number of districts.\textsuperscript{24} Com-
plying with one person, one vote and satisfying the political reali-
ties of partisanship and incumbent protection may make the
resulting districts look quite ungainly.\textsuperscript{25} Even a minority group

\begin{footnotes}
\item[20] Id at 51.
\item[21] See Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compact-
\item[22] For a discussion of these remedies at greater length see notes 87-101 and accompa-
nying text.
\item[23] On the general preference for single-member districts, see, for example, Gingles,
478 US at 50 n 17; Connor v Finch, 431 US 407, 415 (1977). On the frequent rejection of
alternatives, see Cane v Worcester County, Md, 35 F3d 921 (4th Cir 1994) cert denied, 115
S Ct 1097 (1995); McGhee v Granville County, NC, 860 F2d 110 (4th Cir 1988). Indeed,
Justice Clarence Thomas apparently views the possibility of alternatives to single-member
districting as one of the reasons for refusing to entertain claims of racial vote dilution
altogether. See Holder v Hall, 114 S Ct 2581, 2593-95 (1994)(Thomas concurring in the
judgment).
\item[24] See Johnson v De Grandy, 114 S Ct 2647, 2658-59 (1994)(discussing proportionality
among districts and fair representation).
\item[25] Many of these districts are no more ungainly than some of the grotesque political
gerrymanders permitted under the current constitutional standard. For example, the
\end{footnotes}
whose members all live quite segregated lives—in the sense that they live in overwhelmingly, if not exclusively, minority neighborhoods and suffer exclusion from a variety of majority-controlled institutions\(^2\)—can seek relief through relatively race-neutral remedial districting only if they live in large ghettoes that form seemingly "natural" districts. Otherwise, smaller minority communities must be strung together like pearls on a necklace to create a majority-nonwhite district. It would strain credulity to claim that the Act's solicitude for sizeable concentrations of nonwhite voters creates an incentive for groups to continue to live separately in order to maintain their political power. As a practical matter, there is little or no evidence that this occurs. But there is evidence that increasing suburbanization, even if it does not mean any real increase in economic or social integration, has begun to limit the potential political power of protected groups.\(^27\)

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\(^2\) See, for example, *Potter v Washington County*, 653 F Supp 121, 123 (N D Fla 1986)(noting that African-American residents of county lived in three small, segregated pockets); Chandler Davidson, *Biracial Politics: Conflict and Coalition in the Metropolitan South* 19-20 (Louisiana State Press, 1972)(explaining three types of racial residential patterns: (1) "back yard," where African-American residences are scattered throughout the city; (2) "ghetto," involving a "single intense concentration of Negro residences"; and (3) "urban clusters," involving one to three large concentrations of Negroes, as well as up to twenty smaller clusters scattered across the city").

\(^27\) See *Vera*, 861 F Supp at 1320 (summarizing the testimony of the African-American state legislator who drew Dallas's majority African-American district and who explained its shape as in part a function of its following African-American middle-class flight from the city's urban core); Swain, *Black Faces* at 201-03 (cited in note 7).
II. THE EMERGENCE OF THE SEPARATISM CRITIQUE

The 1990 reapportionment was the first decennial redistricting governed from its inception by amended Section 2 of the Voting Rights Act. Faced with objections or potential objections by the Department of Justice and the prospect of liability under Thornburg v Gingles if they failed to draw majority-nonwhite districts, states drew significantly more majority-nonwhite districts than they had in prior rounds of redistricting. The shape of the new districts reflected a panoply of factors—the imperatives of one person, one vote; partisan considerations; incumbency protection; and the requirement of more majority-nonwhite districts. Consequently, the shape of many new districts confronted the public with the messy reality that race had been taken into account in drawing the lines.

These districts spawned constitutional litigation, largely by disaffected white voters who challenged the use of race in the districting process. The Supreme Court apparently rejected the argument that race can play no role in apportionment, but it recognized a new cause of action for what might be described as wrongful districting. In Shaw v Reno, the Court seemed to limit wrongful districting claims to plans involving districts that were facially “irregular” or “bizarre,” but in Miller v Johnson, the Court extended its analysis to render all plans constitutionally suspect if “race was the predominant factor motivating the legislature’s decision to place a significant number of voters with-

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28 Section 5 of the Voting Rights Act of 1965, 42 USC § 1973c (1988), applies only to specified jurisdictions with a history of depressed political participation (largely the Deep South, Southwest, and parts of New York City). It requires these jurisdictions to obtain federal approval, either from the Attorney General or the United States District Court for the District of Columbia, before making any change in their existing election laws. To obtain such approval, jurisdictions must convince the federal authorities that the proposed change will have neither the purpose nor the effect of diluting minority voting strength. Redistricting is a covered change. Georgia v United States, 411 US 526 (1973).

29 In Texas, for example, the state legislature's desire to preserve the seats of Martin Frost and John Bryant, two white incumbents, while creating a new majority African-American district in Dallas, led the legislature to draw three irregularly shaped districts. See Vera v Richards, 861 F Supp 1304, 1338-39 (S D Tex 1994), prob jur noted, 115 S Ct 2639 (1995); Michael Barone and Grant Ujifusa, eds, The Almanac of American Politics: 1994 1222, 1265, 1277-78 (National Journal, 1993).

30 See, for example, Miller v Johnson, 115 S Ct 2475, 2490 (1995); Johnson v De Grandy, 114 S Ct 2647, 2651 (1994); Shaw v Reno, 113 S Ct 2816, 2824 (1993); Voinovich v Quilter, 113 S Ct 1149 (1993).

31 113 S Ct at 2820, 2825, and 2826.

32 115 S Ct at 2488.
in or without a particular district.” As I have explained elsewhere, the cases betoken a jurisprudence that is both incoherent and doctrinally unstable; for present purposes, however, the relevant issue is not the application of, but rather the motivation for, the Court’s recognition of this new “analytically distinct” cause of action.

The wrongful districting cases express deep misgivings over excessively race-conscious districting. At one level, the courts’ reservations rest on predictions about the empirical consequences of conspicuously relying on race to create legislative districts. First, the government’s reliance on race may signal to voters that race is supposed to matter in their choice among candidates and may therefore produce the very sort of racially polarized voting the Act condemns. Second, when a district has expressly been drawn to contain a majority of a particular race, this may signal to “filler people”—the numerically subordinate group within a district—that their voting preferences do not, and should not, count. Third, representatives elected from racially identifiable districts may ignore the viewpoint of voters who are not members of the district majority. The “liberal” version of this last argument points to conservative Republicans elected from the overwhelmingly white suburban districts created as a side effect of creating majority-nonwhite urban districts; the “con-
servative” version claims that representatives elected from overwhelmingly African-American districts are outside the political mainstream, even of their districts. Thus, this third objection looks beyond participation and the election of representatives to the question of postelectoral governance: to the extent that voting is viewed instrumentally, these judges and commentators argue, the deliberate creation of majority-nonwhite districts may disserve the very interests of minority citizens that the Voting Rights Act was intended to safeguard and may further polarize American politics.

On another level, however, the critique is not about empirical predictions at all. Instead, the critique asserts a set of value judgments about what politics should be. The critique is permeated with images of “political apartheid” and “balkanization.” This invocation of South Africa and the former Yugoslavia sends a normative message: the form of ethnic politics encouraged or enabled by the Voting Rights Act is somehow “un-American.” Other countries may face intractable racial or tribal politics; other countries, like South Africa, may resolve these tensions by resorting to explicitly race-conscious allocations of power.

be responsive to their nonwhite constituents.

See United States v Dallas County Comm’n, 850 F2d 1433, 1444 (11th Cir 1988)(Hill specially concurring), cert denied, 490 US 1030 (1989); Carol M. Swain, Black Faces, Black Interests: The Representation of African Americans in Congress 55-59, 203 (Harvard University Press, 1993)(cited in note 7); Peter Applebome, Fitting Designer Districts Into Off-the-Rack Democracy, NY Times 4-4 (Sept 25, 1994)(arguing that the creation of majority African-American districts will result in a Congress, as one commentator put it, “infested with David Dukes and Louis Farrakhans”); Jim Wooten, Racial Electoral Districts Create Division, Atlanta J and Const G7 (Apr 23, 1994)(claiming that Representatives Cynthia McKinney and John Lewis, each of whom was elected from a majority African-American congressional district, “are decidedly more liberal than most Georgians, black or white” and that their districts lack “[t]he moderating influences genuine diversity offers”). See also Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy 60 (Free Press, 1994)(“[W]here blacks form a core but passive electorate, some [black representatives] may simply manipulate racial symbols and language to enlist support from the poorest black constituents. . . . [while failing to] respond to constituent needs . . . .”)(internal quotation marks omitted).

See, for example, Holder v Hall, 114 S Ct 2581, 2598 (1994)(Thomas concurring in the judgment); Shaw, 113 S Ct at 2827; Vera, 861 F Supp at 1309, 1335 n 44; Jeffers v Tucker, 847 F Supp 655, 674 (E D Ark 1994)(three-judge court)(Eisele concurring); Hays v Louisiana, 839 F Supp 1188, 1194 (W D La 1993)(three-judge court), vacated and remanded, 114 S Ct 2731 (1994). I have not even tried to catalog the extent to which editorial writers and commentators in the popular press have picked up on the courts’ rhetoric.

See, for example, Hall, 114 S Ct at 2592 (Thomas concurring in the judgment); Shaw, 113 S Ct at 2832; Johnson v Miller, 864 F Supp 1354 (S D Ga 1994), aff’d, 115 S Ct at 2475; Vera, 861 F Supp at 1335 n 44.

South Africa chose an election system characterized by proportional representation and power sharing, deliberately rejecting an American-style, first-past-the-post wholly
America, by contrast, is dedicated to principles of integration and color blindness. The rhetoric of apartheid and balkanization attempts to offer a normative, not a descriptive or predictive, claim. The question of how, or whether, the votes of nonwhite voters are translated into legislative seats and legislative policies is thus quite beside the point.

Two terms ago, in *Holder v Hall*, Justice Clarence Thomas, joined by Justice Antonin Scalia, advanced a particularly radical version of this position. Justice Thomas repeated, in even more heated language, the charge of balkanization: race-conscious districting “systematically divid[es] the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of political apartheid.” But his criticism ran deeper: the very concept of group vote dilution, and not merely prevailing remedial practices, is disintegrative. As a matter of statutory and constitutional construction, Justice Thomas argued that “voting” means “citizens’ access to the ballot” and nothing more. In Justice Thomas’s democracy, voters who are part of the minority are supposed to lose: “[i]f a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections.” For Justice Thomas, then, there would apparently be nothing surprising, or perhaps even distressing, in a majority-white nation having an exclusively white governing body.


44 *114 S Ct* at 2591-2602 (Thomas concurring in the judgment).

45 Id at 2598 (internal quotation marks omitted). See also, for example, id at 2592 (“[W]e have collaborated in what may aptly be termed the racial ‘balkanization’ of the Nation.”).

46 Id at 2592, 2603, 2608. Justice Thomas’s assertion that this approach is a product of statutory construction, see *Hall*, *114 S Ct* at 2602-11, is hard to take seriously, given the legislative history, language, and consistent judicial and administrative interpretations of the Act. See id at 2625-30 (Stevens separate opinion); Lani Guinier, [*E]*racing *Democracy: The Voting Rights Cases*, 108 Harv L Rev 109, 120-26 (1994).

47 *Hall*, *114 S Ct* at 2596 (Thomas concurring in the judgment).

48 The fact that Bleckley County (whose form of government was at issue in *Hall*) had a 20 percent eligible African-American voting population but had never elected an Afri-
Justice Thomas rejects on both empirical and normative grounds the idea that some numerical minorities—those identifiable in racial or ethnic terms—are distinct political groups.\textsuperscript{49} He simply rejects the proposition that elections are "a device for regulating, rationing, and apportioning political power among racial and ethnic groups" since he rejects the very idea that race should have any relevance to political belief or affiliation. In essence, Justice Thomas's view is even more simultaneously atomistic and majoritarian than the position expressed thirty years before in \textit{Reynolds v Sims},\textsuperscript{50} which saw voting as the quintessential individual right, and viewed majority control over legislative composition as the core democratic value. Concern with racial groups is, in Justice Thomas's opinion, inherently balkanizing, and a remedial strategy that focuses on single-member districts only highlights this flaw.

As a piece of descriptive political science, the separatism critique is deeply flawed. To begin with, its factual equation of segregation and race consciousness is suspect. The districts challenged as unconstitutional racial gerrymanders are actually among the most integrated districts in the country. The electorate of North Carolina's Twelfth Congressional District—the district described in \textit{Shaw}—is only 53.5 percent African-American;\textsuperscript{52} the districts condemned in Louisiana, Georgia, and Texas had roughly similar racial compositions.\textsuperscript{53} These districts, what-

\textsuperscript{49} See id at 2597-98 (Thomas concurring in the judgment).
\textsuperscript{50} Id at 2592.
\textsuperscript{52} \textit{Shaw}, 113 S Ct at 2820; \textit{Shaw v Hunt}, 861 F Supp 408, 472 (E D NC 1994)(three-judge court), prob jur noted 115 S Ct 2639 (1995). House District 1, the other challenged majority African-American district, had an African-American majority in the electorate of only 50.5 percent. \textit{Shaw}, 113 S Ct at 2820; \textit{Shaw}, 861 F Supp at 472. In the November 1992 elections, both the First and Twelfth Districts elected African-American representatives. See Barone & Ujifusa, \textit{Almanac} at 946, 970 (cited in note 29).
ever their topological similarity to South African "homelands," are as demographically unlike the bantustans—or the Tuskegee gerrymander—as possible. The subtext of the comparisons to South Africa, though, is instructive, because it hints that what is troubling is not the segregation but is instead the prospect of African-American control. The description of barely majority African-American or Hispanic-American districts as "segregated" suggests that only majority-white, and therefore white-controlled, jurisdictions can be integrated.54

Moreover, to the extent the critique assumes that the interests of white voters within majority-nonwhite districts will be ignored, it is hard to understand why the critique's proponents do not acknowledge the logical corollary: in majority-white districts, the interests of nonwhite voters are already ignored. The empirical assumption that African-American voters can influence elections even in districts where they form only a small part of the electorate—say, 10 to 20 percent of the electorate—has little empirical foundation.55 Indeed, Morgan Kousser has shown that there was virtually no difference in legislative voting among the members of North Carolina's pre-1992 congressional delegations, regardless of the proportion of African-Americans in their districts; but the two representatives from the state's current majority African-American districts have dramatically different voting records from their counterparts who represent white districts.56 At least to the extent that incumbency tends to increase the number of white voters who vote for African-American candidates,57 some evidence exists that creating nonwhite districts diminishes the level of white-bloc voting and racial polarization.

Finally, the critique makes a debatable choice about what sorts of integration and segregation electoral structures can produce. Neither the Voting Rights Act nor apportionment policy

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55 These figures come from Justice Thomas's assertion of "considerable" influence for such a bloc. See Hall, 114 S Ct at 2596 (Thomas concurring in the judgment). The footnote appended to his statement provides no empirical basis whatsoever, but merely a citation to earlier opinions by the Court that presuppose such influence.
generally can do much to affect people's residential decisions; people simply do not choose where to live based on congressional or state legislative district boundaries. By contrast, people quite often do choose where to live based on more permanent jurisdictional lines, such as municipal or school district boundaries. If the balkanization critique's proponents really want to combat segregation as it actually operates in Americans' everyday lives, they would be better advised to spend their time reconsidering *Milliken v Bradley* and other legal doctrines that countenance racial isolation, rather than repealing Section 2. Instead, Justices Scalia and Thomas (joined by Chief Justice William Rehnquist) dissented last term in *Board of Education of Kiryas Joel Village School District v Grumet,* arguing that New York State should be permitted deliberately to carve out an entirely Hasidic school district to enable the Hasidic community to control the provision of public special education for its children.

But while the Voting Rights Act cannot do very much to desegregate American neighborhoods, it has made considerable progress in integrating national, state, and local legislative bodies. Since the Act's passage, the number of African-Americans elected to Congress has increased from nine to thirty-eight, and the number of African-Americans elected to state legislatures has more than quadrupled. Almost all of this progress can be attributed to the conscious creation of majority-nonwhite districts. The overwhelming majority of African-American congressmen and women were elected from majority-nonwhite districts; all

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58 See Guinier, *Tyranny* at 129 (cited in note 40).
60 114 S Ct 2481, 2505-16 (1994).
61 Only Justice Anthony Kennedy's concurrence picked up on this tension. See *Bd. of Educ. of Kiryas Joel Village School Dist. v Grumet,* 114 S Ct at 2504 (Kennedy concurring in the judgment) (condemning New York's actions as "explicit religious gerrymandering" that violates a "fundamental limitation . . . that government may not use religion as a criterion to draw political or electoral lines"). See also Christopher L. Eisgruber, *Political Unity and the Powers of Government,* 41 UCLA L Rev 1297, 1321-26 (1994).
62 Perhaps if the residents of Representative Mel Watt's congressional district in North Carolina could recast themselves as Falashas, rather than African-Americans, Justices Scalia and Thomas would be more sympathetic to their aspirations for self-governance.
64 Handley & Grofman, *The Impact of the Voting Rights Act on Minority Representa-
of the African-American representatives from the South were.\textsuperscript{64} Fewer than 2 percent of African-American state legislators in the South were elected from majority-white jurisdictions, and that percentage has not changed since the early 1970s.\textsuperscript{65} Similarly, a substantial majority of Hispanic-American legislators are elected from majority-nonwhite districts. Without the Voting Rights Act and race-conscious districting, then, the complexion of the American legislative branches would be decidedly lighter, and in the Deep South would be virtually all white. The Act's aspiration for racially fair election schemes recognizes an intractable fact, at least in the foreseeable future, about American life: race matters. The Act's current solution is to accept, where it exists, the existence of residential segregation and political polarization, and to seek to integrate the one forum that an election-law regulation can integrate—elected bodies—in large part by exploiting the existence of segregated residential patterns.

Nor, to my mind, is the critique more persuasive as a matter of normative political theory. The integration of legislative bodies, to which much of current voting-rights doctrine is directed, makes a key contribution to the robust functioning of the American political process. This Article is not the place to offer a comprehensive justification of the Voting Rights Act and political integration—I am still in the process of developing one—but let me sketch the outlines of such a theory.\textsuperscript{66} Broadly speaking, perspectives on the American political process fall into two major categories. For pluralists, politics is the art of aggregating individual preferences to reach collective outcomes; elected officials are expected to reflect and translate into government policy the prepolitical wishes of the constituents who elected them. By contrast, for civic republicans, politics marks an opportunity to create communal, public-regarding preferences, and representatives deliberate and select among policies using their independent judgment about what best serves the jurisdiction as a whole.\textsuperscript{67}

\textsuperscript{64} Id at 343.
\textsuperscript{65} Id at 336, 345.
\textsuperscript{66} In a recent article, Lani Guinier also has advanced a theory of group representation and the Voting Right Act. See Guinier, [\textit{E\textquoteright}racing Democracy, 108 Harv L Rev at 109 (cited in note 46).

Under either view, racial integration of governing bodies plays a critical role. In a pluralist world, racial diversity may be correlated with diversity in interests; in contemporary America, race is often highly correlated with a variety of such interests, ranging from residence to religious affiliation to socioeconomic status. Thus, a governing body which has no members who represent the distinctive blend of interests for which “race” serves as a shorthand is likely to shortchange those interests.\(^6\) If the legislature includes members who represent the distinctive set of interests held by an African-American community, however, then those interests will be subject to the process of pluralist bargaining and logrolling.\(^6\) On some issues, representatives from the African-American community will be able to build winning coalitions because the representatives of other communities share the same interests; for example, the representative from a poor African-American community and the representative from a depressed agricultural area might unite behind a surplus distribution program that buys food which would otherwise depress the prices farmers receive and provides it below cost to families who could otherwise not afford it.\(^7\) On other issues, a representative from an African-American community may be able to trade her vote on an issue that is not of great concern to her constituency in return for the support of another representative on an issue as to which his constituents are relatively indifferent; pork-barrel local public works are a prime example of this phenomenon. Such pluralist bargaining is more likely to be effective on the legislative level than on the grassroots level,\(^7\) and thus legislative integration may be critical to including African-Americans within the pluralist process.

As one moves away from pure pluralism towards a more republican understanding, additional benefits emerge. Legislatures offer an institutional setting that provides opportunities for

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\(^6\) Thus, for example, in a pluralist world, if there is no representative from the African-American side of town, African-American neighborhoods will receive inferior public services. See, for example, *Rogers v Lodge*, 458 US 613, 622-26 (1982). Similarly, the legislature will be unlikely to enact vigorous antidiscrimination ordinances to protect African-Americans from societal discrimination.

\(^6\) These representatives need not themselves be African-American; the question is how faithfully they champion the interests of African-American constituents.


deliberation through debates, amendment processes, and hearings. These may also create greater understanding and acceptance of the minority's interests and a greater willingness to compromise. Even the most public-regarding legislator, however, is a product of her own background; the presence of diverse representatives can provide exposure to perspectives of which she might otherwise be unaware. In this sense, legislative bodies are like juries: just as ensuring a fair cross-section on juries contributes to the search for truth because it increases the likelihood that wisdom acquired from diverse experiences will be available during the deliberative process, so too ensuring diversity on governing bodies will increase the likelihood that wisdom acquired from both diverse experiences and interaction with diverse constituencies will be available for legislative decision making. Moreover, integration enhances the legitimacy of that deliberative process by allaying fears that the distinctive perspective of minority groups has been ignored. Finally, to the extent the governing body creates, as well as reflects, citizen preferences, the presence of a diverse and integrated legislature may provide a model for popular respect for diversity. What the Voting Rights Act recognizes is that we have not yet entirely reached that point: to the extent that racial-bloc voting prevents minority voters from electing candidates who fairly represent their points of view, the political process is likely to exacerbate the political, and ultimately the physical and social, isolation of the minority community.

At the opposite end of the spectrum from Justice Thomas's attack on the Act's conscious integrationism, a different strand of criticism of voting-rights doctrine focuses on a problem of "fit" between group representation and territorial districting. Proponents of this critique, unlike Justice Thomas, are committed to integrating the American governance process. Their criticism of race-conscious districting is more practical; they point to the difficulties of carving up territory in multiethnic areas. The paradigmatic vote-dilution case of the first thirty years of Voting Rights Act enforcement involved a biracial jurisdiction. In

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72 See also Sunstein, 97 Yale L J at 1586 (suggesting that race, gender, and other social classifications may play a role similar to the role played by geographic diversity in the republicanism of the Framers)(cited in note 67).
75 See Rodolfo O. de la Garza and Louis DeSipio, Save the Baby, Change the
In these situations, there was a numerical racial majority and a numerical racial minority; the central goal of the Act was to permit the minority to elect some fair proportion of the governing body. Today, though, much of the voting-rights action takes place in multiethnic urban settings in which three or more groups are competing.\textsuperscript{76}

Dade County, Florida, provides a wonderful example of the new voting-rights context. Dade County has seen a series of three-way battles for legislative seats among African-Americans, non-Hispanic whites (including a Jewish community with distinctive interests), and Hispanic-Americans (largely Republican Cuban-Americans, with a distinct and primarily Democratic subgroup of Mexican-Americans).\textsuperscript{77} The Supreme Court confronted this issue in \textit{Johnson v De Grandy},\textsuperscript{78} a challenge to Florida's post-1990 state legislative reapportionment. The district court found that the state could have drawn either an additional majority Hispanic-American or an additional majority African-American state senatorial district, but not both, and thus it declined to require either.\textsuperscript{79} Ultimately, the Supreme Court upheld the political process's allocation of seats among the groups as essentially fair, but the process was clearly far from ideal. To the extent that territorial districts require the creation of a series of individual-district-winning groups and -losing groups, such districting may highlight intergroup tensions.


\textsuperscript{76} Moreover, these settings, unlike the South of the 1960s and 1970s, often involve vigorous party competition in local elections, further complicating the picture. For a general discussion of this point, see Susan A. MacManus, \textit{The Appropriateness of Biracial Approaches to Measuring Representation in a Multicultural World}, 28 PS 42 (Mar 1995).


\textsuperscript{78} 114 S Ct at 2647.

The real problem with decennial territorial districting, this latter group of critics contend, is that it imposes an antidemocratic "top-down" approach to the process of pluralist politics, as the state picks which groups will control individual districts and which of voters' myriad characteristics will be used to create districts. Contemporary districting, for example, may decide that a voter's most salient group affiliation is her race, and place her in a district with other African-American voters, or that it is party enrollment, and place her in a district with other Democrats. The individual voter has no choice as to which characteristic will be used and, once the district lines are drawn, is essentially stuck with the assignment for the next decade. To the extent that voters want to band together on the basis of characteristics not correlated with residence—for example, gender or position on a particular issue such as reproductive rights or foreign policy—geographic districting may preclude their effective affiliation. Districting picks one, two, or perhaps three salient characteristics (residence always, political party affiliation usually, and race occasionally) and tells voters that those are the only groups that really matter to the political process. The process may indeed be "balkanizing" but not in the sense of dividing people into warring camps; it is balkanizing in the sense that it creates tiny political subunits in places where otherwise voters with common interests would unite across geographic lines.

Essentially, both criticisms recognize that requiring a territorial basis for group political power can be divisive and may result in an ostensibly integrated legislative body that is nonetheless deeply racially polarized or unrepresentative. The emergence of these concerns is linked in part, of course, to a general sense of increasing racial and ethnic tension within the United States—illustrated by the Los Angeles riots, the Nation of Islam, and white-male backlash. But this tension is hardly unique to the United States: Quebeçois separatism in Canada, the emergence of geographically based political parties within Italy, anti-immigrant sentiment in a variety of Western European nations, and ethnic and tribal violence around the world attest to a more general disintegration, in an almost literal sense, of the ideal of the multilingual, multiracial, or multiethnic nation-state. The prospect of "balkanization" or the United States's replacement of South Africa as the home of "apartheid" is especially depressing. Just as the problem of the color line was the central domestic
question of the twentieth century, the problem of the color and nationalities lines may turn out to be the central problem of the twenty-first century.

III. THE VOTING RIGHTS ACT, INTEGRATION, AND DISINTEGRATION

The critics of current voting-rights doctrine have latched onto an issue of real concern: how can an increasingly multiracial American society keep the civic and political peace? In a limited sense, Justice Thomas is right: the Voting Rights Act has become "a device for regulating, rationing, and apportioning political power among racial and ethnic groups." But any multiethnic nation in which political cleavages often break along racial lines must have some such device. One might think from all their invocations of "balkanization" that the critics might have noticed that two generations of communist suppression of ethnic and religious tension in Yugoslavia did little to ensure stability, tolerance, or integration. Simply abandoning the conscious enterprise of allocating power among competing groups would be untenable.

Critics, particularly those who share Justice Thomas's radical bent, seem to ignore the fact that race-conscious districting is the product of the Voting Rights Act rather than purely judicial doctrine. The current policy is the product of a national political consensus, embodied in the 1982 Amendments to the Voting Rights Act and in the Department of Justice's expansive use of its preclearance authority. Rather than an attempt to relinquish to the political process control over these intensely political questions, the balkanization critique marks a judicial attempt to undo the existing political resolution and to revisit, in the name of an outmoded purely majoritarian political order, a set of

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81 Holder v Hall, 114 S Ct 2581, 2592 (1994)(Thomas concurring in the judgment).
82 See Pamela S. Karlan, Undoing the Right Thing: Single-Member Offices and the Voting Rights Act, 77 Va L Rev 1, 13-14 (1991)("Unlike a court faced with a constitutional challenge to a voting procedure, a court faced with a [S]ection 2 challenge is not asked to substitute its judgment for that of an elected body. Rather, it is called on only to substitute the views of the national political culture, as expressed by the majority in Congress who supported the 1982 amendments, for the views of a local . . . political majority." (emphasis in original)(internal quotation marks omitted))(cited in note 54).
questions answered for three decades by Congress and the Executive in favor of integrated elected bodies. Ostensibly in the name of equal protection, the current judicial approach threatens to deny the Fourteenth Amendment's intended beneficiaries their ability to engage in the same sort of pluralist electoral politics that every other bloc of voters enjoys. The courts' overheated rhetoric about apartheid and bizarreness, their comparisons of the legislative intent behind creating majority African-American districts to the mens rea of murderers, and their pious invocations of Martin Luther King, pose a far greater threat to balkanize us than do the districts themselves.

The real tragedy of the courts' international comparisons is that they are so superficial. Had the courts really considered international experiences with regulating, rationing, and apportioning political power among diverse groups, they might have noticed the wide range of alternatives to single-member, territorially defined electoral districts. Many of these alternative voting systems might be able to dampen separatist forces by opening up politics to more fluid and diverse groups. There are many ways of encouraging individuals to build biracial coalitions and to think of themselves as members of overlapping groups, and the voting-rights system should be modified to take account of these possibilities.

majority's decision by referendum to deviate from one person, one vote).

84 See text accompanying notes 41-42.

85 See Hays v Louisiana, 839 F Supp 1188, 1195 (W D La 1993) ("In a brief aside, we draw on the familiar crime of homicide as a didactic analogy in understanding the legislature's motive in drawing a majority African-American congressional district), vacated and remanded, 114 S Ct 2731 (1994).

86 See Vera v Richards, 861 F Supp 1304, 1310 (S D Tex 1994).

87 See also Richard Rose, A Model Democracy?, in Richard Rose, ed, Lessons from America: An Exploration 131 (Halsted Press, 1974) ("With confidence born of continental isolation, Americans have come to assume that their institutions . . . are the prototype for democratic systems). In Democracies, Arend Lijphart explores the wide varieties of democratic forms. Arend Lijphart, Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries (Yale University Press, 1984) (cited in note 43). Of particular salience to my argument, Lijphart describes the structures used in "plural societies—societies that are sharply divided along religious, ideological, linguistic, cultural, ethnic, or racial lines," id at 22, such as Belgium, Israel, the Netherlands, and Switzerland, id at 63, as alternatives to the purely majoritarian "Westminster" model used in Great Britain and, with the modification of judicial review and separation of executive and legislative powers, in the United States. Id at 22-23. Many of these societies used consensus forms, which provide some level of minority representation and proportionality. Lijphart, Democracies at 22-23 (cited in note 43).
In an earlier work, I discussed two of these systems, both with long American pedigrees—cumulative and limited voting. Both of these systems avoid governments, assigning voters to particular districts on the basis of residence, race, or any other factor. Instead, individual voters decide with whom to affiliate in electing a candidate, and they can change their affiliation from election to election, or even from office to office. Using these systems, for example, a voter might decide in electing a representative to the school board to join with other working parents throughout the city to support candidates committed to providing after-school activities, while deciding to support a neighborhood-based candidate for city council and a member of her ethnic or racial group for the state legislature.

My earlier work, and that of most other recent commentators on cumulative or limited voting, has focused on county and municipal offices, but a cumulative or limited system might be particularly appropriate for congressional elections. In many states with sizeable congressional delegations, one-person, one-vote and partisan concerns result in the creation of congressional districts whose boundaries do not correspond to any preexisting social, economic, or political realities. Territory exercises at most a constraining influence on the degree of gerrymandering. Moreover, many voters already are better represented by legislators elected from districts other than their own because those representatives better reflect the voters' policy preferences or even provide them with better constituent services.

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90 Such a system could not be implemented absent a change in the statute that currently requires the election of congressional representatives from single-member districts. See 2 USC § 2c (1988). See also Laurence F. Schmeckebier, Congressional Apportionment (The Brookings Institution, 1941)(tracing the history of regulations of congressional districting).
91 For some particularly salient examples having very little to do with racial politics, see, for example, Karcher v Daggett, 462 US 725, 761-62 (1983)(Stevens concurring); Badham v Eu, 694 F Supp 664, 669-71 (N D Cal 1988)(three-judge court), aff'd, 488 US 1024 (1989). The architect of California's post-1980 reapportionment, the plan litigated in Badham, described it as his "contribution to modern art." Larry Liebert, Burton-Style Remapping May be a Thing of the Past, SF Chron A19 (Jan 9, 1992).
92 For an extremely interesting discussion of the functions played by territoriality, see Richard Briffault, Race and Representation After Miller v Johnson, 1995 U Chi Legal F 23, 39-45.
93 See Jeffers v Clinton, 730 F Supp 196, 214 (E D Ark 1989)(three-judge court)(white
For example, rather than the North Carolina Piedmont or the Atlanta metropolitan region being parcellled out among three separate districts, voters might be better off being put in one "superdistrict." In a "strictly limited" system of one voter, one vote, a three-member superdistrict would enable any group of voters who constituted more than 25 percent of the electorate to choose a representative. In a cumulative-voting system, each voter would receive three votes, to cast as she wished—all three for one candidate she supported intensely or one or two votes for each of a "slate" of candidates. Here, too, sizeable groups of voters could elect candidates of their choice even if they did not constitute a majority of the entire electorate and even if they were scattered throughout the jurisdiction. Fewer voters would be "filler people," it is likely that more voters would actually vote for a winning representative.

To the extent that voters desire to have descriptive representation in Congress, any sufficiently numerous group could achieve its goal by bloc voting. But to the extent voters prefer to align themselves along dimensions other than race or ethnicity, that choice would also be available to them. Either way, one would expect legislatures to be racially integrated: in the former case, bloc voting by African-Americans or Hispanic-Americans would enable them to capture a number of seats related to their proportion of the electorate; in the latter case, if there is no ra-
cial bloc voting and members of different racial groups are distributed evenly or randomly across policy preferences, then in a multiracial jurisdiction one would expect some legislators to be nonwhite.88

But alternatives to territorial districting could do more than simply promote integration—both within the legislature and in the creation of biracial or multiracial political coalitions. They could also promote disintegration, that is, the dissolution of a monolithic white majority that all too often "votes sufficiently as a bloc [so as] to enable it . . . usually to defeat the minority's preferred candidate."89

The historical experience with the white primary in the one-party South shows that deep ideological and philosophical divisions often exist within white communities. One aim of the voting-rights system should be to exploit those divisions to encourage a politics which is more fluid and characterized by shifting coalitions. By allowing voters to form winning coalitions with like-minded citizens regardless of residence, alternative systems encourage the development of individual candidate-, interest-, and issue-oriented alliances. The more fluid the groups, the more likely individual white blocs will find it to their advantage to build biracial coalitions. Even if most white voters continue to be unwilling to support nonwhite candidates, some white voters will, and since biracial coalitions in an alternative system can attract their white supporters from anywhere, rather than being forced to find all their members in particular neighborhoods, they are more likely to succeed. Moreover, because these alternative systems do not create "safe seats" and "filler people," as the once-in-a-decade reapportionment battles do, they do not create semipermanent winners and losers along racial lines. To the extent that what the Shaw v Reno majority really objected to was the appearance of race consciousness,100 alternative systems also provide a measure of "proportionality" in the sense that they assure that a "color-blind hypothesis" could, if true, actually be realized in the Institutional World of biracial and multiracial political invoked by Gingles.101

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89 Thornburg v Gingles, 478 US 30, 51 (1986)(requiring white-bloc voting as the third Gingles factor).

100 See Shaw v Reno, 113 S Ct 2816, 2827 (1993)(noting that reapportionment is "one area in which appearances do matter" (emphasis added)). But see Miller v Johnson, 115 S Ct 2475, 2486 (1995)(holding that a bizarre appearance is not essential to a wrongful
ative systems allow us to preserve equal electoral opportunity while avoiding that appearance. These systems are entirely neutral among groups and simply give voters who affiliate along racial or ethnic lines the equal opportunity "to participate in the political process and to elect representatives of their choice" guaranteed by Section 2.\footnote{42 USC § 1973(b)(1988).}

Additionally, nonterritorial districts might unite groups that are separated under the current regime. Particularly to the extent that congressional elections are becoming increasingly "nationalized"—that is, reflective of individuals' views about national policy rather than local pork—groups of voters who share viewpoints but not neighborhoods could unite around their common visions rather than being constrained by artificial geographic boundaries. From either a pluralist or a republican perspective, this more fully representative system could offer advantages. For example, nonterritorial districting might be more perfectly pluralist because it would enable a greater number of groups to obtain direct representation of their interests. Moreover, both by dampening the incentive for purely pork-barrel politics and by increasing the electoral attractiveness of coalition building and the variety of voices within the legislative debate, such alternative systems might improve the quality of legislative outcomes.\footnote{See Karlan, 24 CR-CL L Rev at 182 (cited in note 21)("To tie representation to small geographic areas within a jurisdiction can impair the development of representatives concerned with the welfare of the entire community. For republicans, this insight counsels almost categorically against election from small districts precisely because of the tendency for representatives then to identify solely with the small subset that elected them.").}

Or perhaps, rather than abandoning territorial congressional districting altogether, we ought to consider relaxing somewhat the constitutional constraint of equipopulousity. Since Karcher v Daggett,\footnote{462 US at 725.} that requirement has been applied with fanatical precision to congressional districts. There is no de minimis deviation; every departure from absolute mathematical population equality among districts, no matter how small and statistically insignificant, must be justified.\footnote{See Anne Arundel County Republican Central Committee v State Administrative Bd., 781 F Supp 394 (D Md 1991)(three-judge court)(requiring Maryland to justify average deviations of 2.75 people among districts containing over 500,000 people each).}
One person, one vote was always justified, at least in part, as an attempt to assure fair representation of group interests, as well as to assure equality among individual voters.105 Certainly, such a concern with group representation motivated the standard delineated in *Daggett.*106 But computer technology has stripped one person, one vote of a significant part of its constraining force.107 What strict adherence to one person, one vote does do is limit the number of possible solutions to the intensely political question of how to accommodate competing group interests in the reapportionment process. Two reasons why congressional districts used to have more pleasing appearances were the technical impossibility of slicing the lines more finely (since the data necessary for political or race-conscious districting were not available at block level) and the ability to satisfy other interests while also complying with a more forgiving equipopulosity requirement.108

In state and local apportionments, judicial scrutiny does not kick in unless the total-population deviation exceeds 10 percent.109 Perhaps if states were given similar latitude with regard to congressional districts, they would be able to satisfy some of their other interests—compliance with the Voting Rights Act, representation of distinctive groups more generally, incumbent protection, and partisan or bipartisan gerrymandering—without being forced to draw quite such irregularly shaped districts. Especially given the increasingly group-driven character of the apportionment process, and the differences in rates of voter eligibility and turnout that result in far larger deviations in actual voting strength than 10 percent,110 a fetishistic adherence to a fictional absolute population equality may cause more problems than it cures. One person, one vote already requires geographic

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108 For example, the Supreme Court upheld a post-1970 congressional plan in Missouri which had deviations essentially the same as the deviations struck down in *Daggett.* See *Preisler v Secretary of State,* 341 F Supp 1158, 1162 (W D Mo 1972), aff'd, 407 US 901 (1972).
110 See *Garza v County of Los Angeles,* 918 F2d 763, 773-76 (9th Cir 1990)(noting that among county supervisory districts whose total population deviation was less than 0.68 percent, there was roughly a 40 percent total deviation as to citizens of voting age).
districts that are somewhat untethered from any underlying geographically defined interests; \({}^{111}\) slightly loosening the mathematical constraint might make it more likely that congressional districts would reflect some reality on the ground.

CONCLUSION

A quarter century ago, the Kerner Commission warned that “Our nation is moving towards two societies, one black, one white—separate and unequal.”\(^{112}\) To blame the Voting Rights Act for that continuing separation is “like saying that it is the doctor’s thermometer which causes high fever.”\(^{113}\) And to attempt to dismantle the Act and purge American legislatures of many of their African-American members is a cure worse than the disease. As Justice Oliver Wendell Holmes, Jr. long ago explained, “A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.”\(^{114}\) We have to face the fact that some form of racial politics and thus some need for race-conscious representation devices is here to stay, at least for the foreseeable future. The only real question is how to achieve fairness in the present while struggling for justice in the future.

\(^{111}\) See Briffault, 1995 U Chi Legal F at 43-44 (cited in note 92).

\(^{112}\) Report of the National Advisory Commission on Civil Disorders 1 (Bantam Books, 1968).


\(^{114}\) Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv L Rev 457, 477 (1897).