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Tuskegee Modern, Or Group Rights under the Constitution

BY RICHARD A. EPSTEIN*

I. HOW QUICKLY WE FORGET

The subject of this brief Article is captured only inadequately by its title: Tuskegee Modern. For those of us who still remember Gomillion v. Lightfoot, this title should evoke a certain sense of déjà vu. Gomillion was hailed as an obvious advance for its time, for it accomplished what was thought to be morally necessary, by decisively moving the law forward into uncharted waters. Tuskegee had been laid out as a perfect square before the Alabama legislature converted the city into a "strangely irregular twenty-eight-sided figure." The purpose and effect of the legislation was to eliminate from the city's rolls all but four or five of the 400 black citizens eligible to vote in local elections. The shift in boundaries did not remove any white persons from the list of eligible voters. In the Supreme Court, the case was thought to be practically easy because it was evident to all that the sole reason for the tortured redefinition of the city's boundaries was the exclusion of black voters from the district. No other explanation was, or could have been, offered for this "essay in geometry and geography." Writing for a unanimous court, Justice Frankfurter struck down the redrawing of the boundaries under the Fifteenth Amendment.

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3 Id. at 347.
4 With due allowance for the concurrence of Justice Whittaker, see id. at 349.
5 "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.
Yet by the same token, the case was difficult as a legal matter because the Court was required to overcome the well-established proposition that, given the allocation of power under the Constitution, the drawing of local lines within a state is the business of the state and no one else. Even though the Fifteenth Amendment clearly imposes some limits on the states' power to deny or abridge the right to vote, it was far from clear before Gomillion how far those prohibitions went. To be sure, the core of the Fifteenth Amendment reached cases where black citizens were refused the right to vote while the city boundaries remained unchanged. It was not possible on anyone's reading for Tuskegee to have its cake and eat it too: to impose taxes and other obligations on black citizens to whom it overtly denied the right to vote. Indeed, if that course had been open to Tuskegee, doubtless, it would have been adopted.

Gomillion was different because Alabama and the city were prepared to pay a stiff price to keep Tuskegee securely in white hands. They were prepared to exile from the city those that might vote against the dominant powers, thus removing all threats from the local tax rolls, and from the control of the city's ordinances and administration. Indeed, one unanswered question is why the black voters exiled from the city protested if they were able to obtain a greater measure of self-determination and control by the reconfiguration of the boundaries.

The place of motive in constitutional adjudication is hardly secure. It is easy enough to hold that when the motive is corrupt, it is powerful evidence that certain acts were or were not done. That is the root of the "sham transaction" doctrine that plays so large a role in taxation. But no one doubts that the reorganization of the city boundaries went through in fact as well as on paper. It is no small step to argue that a bad motive alone is sufficient to allow a court to undo a local act that on its face meets all the prerequisites of a valid law. It requires that the Fifteenth Amendment no longer deal exclusively with matters intrinsic to the voting relationship itself, such as registration requirements, literacy tests, and grandfather clauses. Now its scope must be expanded to cover activities that are themselves not voting or incident thereto solely because of the impact they have on voting behavior and participation.

One sense of the magnitude of the shift can be captured by the line of argumentation adopted by Frankfurter in order to under-

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mine the traditional view. In the first place, he noted that Tuskegee was correct in its general claim that a state could order its internal governance as it saw fit. Cities could be created and destroyed even when the effect was to create an implicit transfer of wealth through the vagaries of the tax system. Frankfurter then relied on a line of cases that established the proposition that states could not liquidate (and then reincorporate) municipal governments in order to allow them to escape their obligations under preexisting bond contracts. These were in essence sham transaction cases and were in their own time understood as such. Frankfurter then invoked the unconstitutional conditions doctrine of *Frost & Frost Trucking Co. v. Railroad Commission,* and its familiar assertion that "it is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." But he never explained why that doctrine was applicable given its explicit rejection in *Hunter v. City of Pittsburgh* and similar cases.

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7 *See Gomillion,* 364 U.S. at 342. In *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907), the allegation was that the absorption of the town of Allegheny into the city of Pittsburgh would increase the Allegheny citizens' tax burdens by forcing them to pay for Pittsburgh improvements when they had already funded their local improvements before incorporation. *Hunter* was treated as both a Contracts Clause and a due process decision. The Court first rejected the "novel proposition" that there was any contract between the municipal government and its own citizens. *See id.* at 177. It found the due process claim "not so devoid of merit" as to dismiss it out of hand but nonetheless dispatched it with great alacrity, noting that so far as public property is concerned, state governments have "absolute power" over municipal property held for governmental purposes. *See id.* at 177, 179.

8 *Gomillion,* 364 U.S. at 344.

9 *See,* e.g., *Shapleigh v. City of San Angelo,* 167 U.S. 646 (1897); *Port of Mobile v. Watson,* 116 U.S. 289 (1886). Frankfurter did not even mention the actual ground on which *Mobile* and *Shapleigh* were decided. Both cases involved a public variation of a liquidation/reincorporation transaction in that the new government took over the same territory as the old one, after making the effort to shed its liabilities. The cases were treated therefore as instances of "successor liability," for which there are many private law analogies. *See,* e.g., *Ray v. Alad Corp.,* 560 P.2d 3 (Cal. 1977) (acquiring company that continued manufacturing business subject to strict liability for product defects). The existence of third party creditors distinguished these cases from *Hunter.*


The need for explanation arises on any disinterested reading of the cases on which Frankfurter relies for they are manifestly unable to carry the burden that he attaches to them. Gomillion, if anything, looks more like Hunter—the case that announces the general rule—than it does like the Contract Clause cases because the persons whose rights are deprived are local citizens and not external creditors. If the Due Process Clause does not reach the reconfiguration of local governments (when it surely reached inconsistent modes of levying assessments within a single jurisdiction), then why should the Fifteenth Amendment kick in when the state was prepared to pay the price of excluding black citizens from local affairs? Frost does not carry the day for in that case only designation was at stake: the Court held that the California Railroad Commission could not regulate a private carrier by calling it a public carrier. But once the local government was prepared to pay the price and create a separate scheme of regulation for private carriers, even one identical in form and function to that applied to public carriers, the doctrine of unconstitutional conditions was at its end.

Indeed, the objections to the use of the unconstitutional conditions doctrine strike even deeper. The doctrine at its root is concerned with bargains that go astray between the state and individual citizens. Whatever the rationalization for the doctrine—I think that it is the control of monopoly power by the sovereign—everyone agrees that there must be some bargain between citizen and state in order for the doctrine to apply at all. In Frost, the question was whether the state could use its control over public highways to require Frost to waive its rights against regulation, which it enjoyed as a private carrier. But Tuskegee used pure force without negotiation.

Frankfurter, then, appealed to the unconstitutional conditions doctrine because it offered an apparent way to distinguish Hunter, which had held that the state had absolute discretion to determine the boundaries of its various municipalities. All that commends his flabby analysis is the enormity of the injustice that he tried to combat. The question is—how does one rethink the issue in order to salvage the result? Here I think that the key to the problem is that Hunter itself is wrong. In that case, the Court brushed off the due process argument and assumed that any redistribution

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13 See Epstein, supra note 10, at 47.
through the system of public funding was a political and not a constitutional matter. But if the takings argument were allowed to take hold, then the implicit shift of Pittsburgh tax burdens to Allegheny citizens would mark a taking that could be condemned under the standard disproportionate impact tests developed elsewhere in the law.\footnote{The standard citation is Armstrong v. United States, 364 U.S. 40, 49 (1960). Although located in the same volume as Gomillion, the connection between the two cases is never mentioned, let alone stressed. The familiar judicial gap between race and property exerts its influence here.}

The parallel question, then, is whether this reconfiguration of Tuskegee works a similar detriment to black citizens. It would be useful to take evidence on the point, but even in the abstract, a credible case can be made that it does; the white interests that controlled the process could not be expected to incorporate black interests in their political utility function. While members of the city, these persons enjoyed a bundle of goods and services for which they paid taxes. If the net level of benefits after the forced dissociation was negative, then there is a similar imbalance of benefits and burdens as in \textit{Hunter} itself. But the Court decided not to treat this imbalance as a matter of economic deprivation but as a sheer matter of racial hostility. It thus displaced any concern with the incidence of taxation by looking at the case solely through the lens of race and animus. It would have had an easier time if there had been a strong prohibition in place against systematic redistribution of burdens through government action.

Whatever one may think of \textit{Gomillion}, the case did usher in a new era whose importance has only increased in the intervening thirty plus years. Because the economic and property arguments carried no weight, the case was argued and interpreted as a race case involving bad motives, and most relevant to the issues here, as a case involving group rights: if all persons shut out of the city had been white, then no one would have thought any constitutional claim was presented, no matter what the increase or decrease of the relative fortunes of the two groups. The key element in the case was that of racial animus—a special class of takings. It was not merely people hurting people. It was whites hurting blacks, hurting them because of the differences in color, and the separation of people with two different colors.
II. A Color-blind Interlude

In the years after Gomillion, the constitutional dimension in this area of litigation has retreated because of the strong and powerful intervention of the Voting Rights Act of 1965, which reduced the pressure on the Court to decide matters under the Fifteenth Amendment alone. The original version of Section 2 of the Act read as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

On its face, the statute is as color-blind as the Fifteenth Amendment on which it rests, for both extend their protection to "any citizen." In addition, the Supreme Court in its initial construction of this provision treated the Voting Rights Act as an "intent" statute and held that any disproportionate impact of a voting practice was not actionable unless and until it was shown that it was adopted with some form of discriminatory intent. There is little need to belabor the obvious connection between the intent requirement under the Voting Rights Act and the parallel debate about disparate impact under Title VII, which came out quite the opposite way in Griggs v. Duke Power Co. The number of cases in which the effect in some sense is disproportionate, but for which some neutral justification might be proffered, is very large. The 1982 amendments to the Voting Rights Act saw the crafting of a political compromise whereby a "results" test was introduced to expand the scope of liability, limited only by a caveat that an-

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20 As amended, the Act provides:
Sec. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) as provided in
nounced, "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 21

The parallels between the Voting Rights Act and Title VII are quite extraordinary. The basic provision of the Voting Rights Act, Section 2(a), even after 1982, contains only a color-blind injunction, which appears to grant protection of equal status to all persons. Such is the obvious import of the words "of the right of any citizen of the United States." But Section 2(b) makes it clear that its commitment to universality is, so to speak, only skin deep because it refers to a "protected class" of persons whose interests are entitled to special protection under the Act, just as the colorblind language of Title VII has with time come to be construed as offering protection largely, if not exclusively, to certain protected classes. Similarly, the resort to effects standards under the Voting Rights Act is parallel to the shift accomplished through judicial means in Griggs. Finally, the caveat against proportionate representation is akin to the obvious prohibition against quotas that most people seem to agree belongs in the employment area. 22

This new development is not without its ironies, not the least of which is that it leads to the very practices that were regarded as self-evidently wrong in Gomillion. The modern cases under the Voting Rights Act have as their central objective the maximization of participation by certain protected groups in the political process. They welcome the use of race-conscious criteria for setting the boundary requirements for districts or other requirements for eli-

subsection (b) of this section.

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.


21 Id.

gibility in elections. The strange twenty-eight-sided figure is back in style with a vengeance, and it reveals the same urge for politics to bring about innovations in geometry. The strategies that are introduced in the new cases are no different in means from those that were the subject of such self-evident scorn in *Gomillion*. But the melody has become sweeter because the tune is played by other musicians, having other, and more correct, ends. The idea of group rights that was implicit in *Gomillion* has become explicit in the modern materials: the motive of the drafter has become not the source of condemnation, but the source of justification for what is done.

As I indicated, I thought that *Gomillion* was a difficult case whose result could be defended by looking more closely at the allocative and distributional consequences that were wrought by the decision made in Tuskegee. It is also evident that the inquiry is helped along in a material way because the boundaries were redrawn by a group that benefitted from them so that there was no pretense of even-handed neutrality, which might offer partial cover from the ravages of judicial review. In the end, I think that this modern concern with group rights under the voting laws is a mistake. The part of *Gomillion* that should be preserved is that which is designed to keep racial motives out of the public decision making system, not that which is designed to ensure that voting systems benefit blacks or indeed any other racial or ethnic group. My title, "Tuskegee Modern," has been chosen to emphasize the point that developments during the past ten years have been misguided. The ends here do not justify the chosen means. The past discrimination by members of one group against another should not become the justification for a repetition of the same error in the opposite direction. The errors will never cancel out, the accounts will never balance, and the seeds of conflict will be sown yet again for the next generation. Resting an entire system on the exclusive concern with protected classes is to take a myopic view of social conflict and aspirations. The color-blind standard in

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23 As one might expect, colorblindness in the public sphere is on the outs as well. See, e.g., Neil Gotanda, *A Critique of “Our Colorblind Constitution,”* 44 Stan. L. Rev. 1 (1991). The article begins with a quotation from Justice John Marshall Harlan's heroic dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), but then deprecates the notions that Harlan had defended apparently without any recognition of the social evils that a faithful adherence to the color-blind standard could have avoided. See id. at 2. Gotanda's discussion of *Plessy*, see id. at 38-40, is brief and uninformative, shedding no light on the passions of the case.
public affairs, whatever its weakness, does have an appeal to universality that the alternative notion of the protected class so desperately lacks.

The argument in support of this claim contains two parts. First, I shall argue that all voluntary associations should be protected under the Constitution. Second, I shall argue that it is a mistake to give groups any special status in constitutional law. The dimensions of this error are illustrated vividly by the Voting Rights Act, where all groups are not alike. We should take no comfort in the fact that the "right" people now wield the pencil. The key objective should be to eliminate the twenty-eight-sided figure, not to ensure that the right people draw it. To speak only of the districting problem, the proper response is to have no one draw the boundary lines with political purposes in mind by remitting that process to an invisible technocrat that has no interest, one way or the other, in the outcome of the process.

III. How Groups Fit into Constitutional Theory

A. Voluntary Groups

The initial part of the inquiry asks, how do groups fit into constitutional theory at all? The point is of obvious concern because the unit of rights that is found in the critical clauses of the Constitution is typically the individual. Thus, the protections found in both the Bill of Rights and the Reconstruction Amendments, for example, are all keyed to the person, or to the nature of the liberty that is protected. There is no mention of group rights as such being accorded special status under the Constitution. How then do these arise?

One method is consistent with the basic structure of our system of constitutional guaranties of rights. Individuals may decide to come together through voluntary association and thus form groups. Thus, the right to the free exercise of religion protected by the First Amendment may well be vested in single individuals, but the exercise of that right typically involves the intense cooperative effort that is the hallmark of ordinary religious activities. Similarly,
First Amendment cases like *NAACP v. Alabama*\(^{27}\) are best understood not as a special gloss on First Amendment theory, but as an observation that freedom of association is part of all forms of individual freedom, as applicable in the area of the First Amendment as anywhere else. It is a fitting irony that persons that are so suspicious of freedom of contract in general can speak of it in laudatory terms when the freedom in question is one they like.\(^{28}\) I also regard the protection of these associations as an inescapable by-product of the protection of private property, which at least in cases of land and chattels includes the right to the exclusive use and disposition of property to whomever the owner sees fit. Groups have to meet somewhere, and if a private owner cannot exclude members from his group, then he cannot exclude them from his property either, as the cases under the National Labor Relations Act show.\(^{29}\) The protection flows from all the specific constitutional guaranties that should be read together to form a consistent vision of human freedom.

The emphasis upon the role of liberty in dealing with freedom of association makes it clear that the ends for which groups are organized, and the criteria they choose for selection, are of no concern whatsoever to the state. These individuals only wish to share with each other the rights that they otherwise enjoy singly. They do not claim through association any right to impose additional burdens or duties on those persons that, for whatever reason, are not invited to join their ranks.\(^{30}\) Because any individual can, given the ordinary rules of civil capacity,\(^{31}\) join whatever groups are open to him or her, there is no centralized state agency that determines what groups should be formed or who should form or join them. These voluntary organizations thus act as a buffer between the individual and the state, and because their principles and programs are at cross-purposes, there is another built-in protection against the dominant power of state officials, surely the

\(^{27}\) 357 U.S. 449 (1957) (compelling disclosure of NAACP membership lists might interfere with freedom of association).


greatest fear to which any constitution is directed. The operative rule therefore should be simple: if anyone wants to form these groups, the Constitution protects the endeavor. The rights of the individuals that compose the group, no more and no less, are transferred to the group itself. The process is therefore simply additive. If speech, property, and religion are rights that are protected in the individual group members, then they are protected in the groups themselves.

This attitude is of course at sharp variance with modern law. Collective bargaining statutes, for example, create unions that were not formed by voluntary means. And the costs of that decision are large. With voluntary groups, all members can be bound by group decisions in accordance with decision rules that were announced and accepted at the time the individual joined the union. But that source of legitimacy is denied when membership in the group is determined by majority rule. It is therefore no surprise that the Justices of the Supreme Court are wholly unable to agree about what activities a group can undertake with the funds of members that were forced to join the group against their will in the first place. Eliminate the initial use of coercion in the formation of the group, and the problem disappears. The group can draft provisions that state who will be bound and when, and decide what mix of voice and exit to allow for the expression of dissenting views.

There is thus a mortal tension between the enforcement of antidiscrimination principles for private voluntary associations and the principle of group autonomy I have just defined. It is quite clear that the Supreme Court does not believe that the principle of freedom of association can trump or limit the operation of antidiscrimination law. Indeed, it has on numerous occasions taken the undefended position that the elimination of private discrimination is a "compelling state interest," which justifies limitations on the freedom of association, however grounded in the Constitution. But the proposition is seriously infirm. I regard the

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32 See, e.g., Lehnert v. Ferris Faculty Ass'n, ___ U.S. ___, 111 S. Ct. 1950, 1959 (1991) (The Court was sharply divided over the ways that a union could spend compelled contributions from its members. The Court held that the funds could be used for funding national "nonpolitical" job information services, but not for political lobbying activities—this is perhaps the best that could be expected under the circumstances.).

33 See, e.g., Roberts v. United States Jaycees, 468 U.S. 609, 622-29 (1984). The decision stressed the importance of "intimate associations," but the operative principle should extend to all voluntary associations as well.
unconstitutionality of these antidiscrimination statutes as applied to any private voluntary organization as too obvious to require extended argument. In the effort to create ostensible diversity within groups, the state runs the far greater risk of creating excessive concentration of powers in itself. Now there is far less diversity between groups and a far smaller range of choices for all persons, regardless of race, creed, sex, or color.

The situation is more dangerous, for it is quite clear that no antidiscrimination law will remain neutral in practice, no matter how it is drafted on its face. The history of Title VII, and the manifest tension between section 2(a) and section 2(b) of the Voting Rights Act, offer dramatic proof that the antidiscrimination principle is applied in practice in one direction and in one direction only. Owing to the constellation of political pressures, it is hard to see how the outcome could be otherwise. For the interest group that has to choose between fidelity to neutral principles and the advancement of political causes, the choice is easy: the second wins out. Such groups do not regard color-blind standards as ends in themselves, but as short term strategies on the road to greater political power and control.

It is just that tendency for political power to expand and for legal principle to erode that should make us wary of modern appeals to special interest, just as we remain alert to the dangers of Jim Crow. The safety and freedom of some groups can never be secure, unless the safety and freedom of all groups are secure. Freedom is indivisible for friend and foe alike. We have learned that lesson the hard way under the First Amendment, where selective forms of content restriction are deservedly greeted with the highest levels of judicial scrutiny. No system of government can

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34 For a relatively brief statement of my views, see Epstein, supra note 22, ch. 6. The point has been noticed by others whose views are, it is safe to say, radically different from my own. For example, Mark Kelman, in Concepts of Discrimination in "General Ability" Job Testing, 104 Harv. L. Rev. 1158, 1170 n. 34 (1991), agrees that the conclusion follows from my premises, but (in ignorance of Forbidden Grounds, supra note 22, at 141-43) thought that I chose to avoid the point for tactical reasons. I regard the conclusion that Title VII is flatly unconstitutional as one of the strengths of my theory.

35 The warning of Herbert Wechsler in Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959), remains relevant. He was surely correct in stressing the importance of voluntary organization, but incorrect in assuming that segregated schools in the Old South were segregated along voluntary lines. See id. at 34.

36 On which, see my account in Epstein, supra note 22, ch. 5.

claim the allegiance of all its citizens if it extends its protections to only those that are fortunate enough to fall within a protected class. For all the concerns about caste, and about subordinate status that might be created by unequal social conditions, there is almost no awareness of the far greater dangers that a social order runs of building formal and explicit classifications into the fabric of the law.

Nor is there anything to fear from a rule that allows organizations to select their own members. It is said that persons will be excluded from organizations that they wish to join, and of course that will happen. But here the transaction costs between the organization and the applicant are low, and if the expanded organization is for mutual gain, then admission can and will be speedily arranged: another implication of the Coase theorem.\(^3\) Because it is not, one has to assume that there are losses to the group members that are smaller than the gains that the would-be applicant is prepared to pay. The failure of the contract to form should not be regarded as a lamentable outgrowth of an unfortunate situation. It should be regarded as information as to the intensity and weight of preferences. The state should leave well enough alone.

There is an additional reason to protect freedom of association for private groups. The number of private organizations that will form can easily be reduced by the insistent pressures that they take in members whom they wish to exclude. Yet, the greater protection for individual freedom lies in the richness of the private alternatives and not in the coercive power of the state. If women and blacks are excluded from some groups, they will surely be admitted and welcomed into others: the impulses in favor of affirmative action are not solely the response to government pressure, but are a complex admixture of private desire and public coercion. In a regime of freedom of choice, those that engage in exclusion (or for that matter in affirmative action) will have to pay a price, and if they can pay it then they should be allowed to continue as before, even if their influence is diminished.

History will not be forgotten on matters of race and sex if the law allows all persons to form whatever voluntary organizations they see fit. The positions of blacks, of women, of many ethnic and racial groups are different from the position of the prototypical white male. But those differences do not justify any difference in

the legal treatment of special groups. Instead, they powerfully explain why the patterns of group organization and group membership will not be symmetrical across race, sex, and class. The system of freedom of association is able to accommodate those differences. If some women believe that all-female organizations are necessary for networking, for bonding, and for advancement, we should expect a large number of all-female organizations, and a correspondingly smaller number of all-male ones. The same is true of race and ethnic lines. I see no more reason for the law to discourage the formation of these organizations, from which I will be routinely excluded, than I see for affording them a distinctive and preferred legal status.

All too often we hear today that women and minorities should never be excluded from any organization that they wish to join for reasons of sex or race, but should have the power to exclude others from the organizations that they wish to form. The risks of this special pleading are serious. The appetite for preferences can never be satisfied, so what is advertised as a short term palliative against some past discrimination becomes embedded as a long term structural feature in the political culture. The language of subordination, of victimization, of hierarchy becomes a tool for a new authoritarianism that is no better, nor less dangerous, than the older versions that it replaces. The dangers of unconstrained self-interest should always be kept at the fore, and these are best controlled by public systems of formal equality that keep any and all interest groups from appealing to their own special needs in order to commandeer the legal and moral power of the state.

Nor can any institution prosper if its membership is determined by forces from without. The internal dynamics of institutions are sufficiently fragile that forced interactions change the nature of the organization in which membership is sought. And for what gain? There are many ways for persons to make contact with other people, even if excluded from some groups. Most people join more than one club or group precisely because they do not wish their membership in one organization to cut them off from those persons that cannot join that group. Seen from its systematic viewpoint, the network of groups that do exist should provide access between people that want to do business with each other. The ebb and flow of social pressures should be quite sufficient to limit any abuses of power that otherwise exist. To repeat, if there are differential cases to be made for some exclusive groups (blacks or women, for
example), there is no reason to afford them preferred constitutional status. If the gains are there, then in a system that protects freedom of association there will be a larger number of groups that cater to women and black members. Open systems are fully capable of registering these historical circumstances.

B. Constitutionally Protected Groups

The present approach toward groups under the Constitution has quite a different focus. It insists that some system of public justification can sort out those groups that should be favored from those that should not. There is a collective determination of which groups are preferred and which are not: The Black Law Student Association is acceptable; the Hispanic, Christian, or Jewish Law Student Association is acceptable; The White Law Student Association or the Men’s Law Student Association is not. Yet, the special imprimatur of the state carries with it an extra benefit that should be afforded to no group under the theories I developed above.

The voting rights situation is illustrative of the basic problem. When Congress provides that districts must be organized to maximize the influence of any group in the political process,\(^\text{39}\) it necessarily gives chips to some persons and takes them away from others. If I am able to organize districts in a fashion that maximizes the number of blacks in Congress, then I have decided to minimize the number of whites that will hold Congressional office. Externalities abound in ways that they do not with consensual organizations, which today are under constant legislative attack. The number of legislative seats is constant, so that a decision to give more to some, necessarily implies a decision to give fewer to others.

In addition, the constant manipulation of districts changes the identity of which whites and which blacks will gain office. A district that is mixed black and white will tend to be represented by a Congressman whose attitudes and tastes are close to those of the median voter within the group. Switch the composition of the group, and the identity of the median voter will shift as well. The effects will be exerted across all districts, and the net effect will be to create (in addition to safe black districts) districts represented by safe conservative Republicans as well. At the Congressional level, for example, there will be a greater dispersion of sentiments

\(^{39}\) See, e.g., THERNSTROM, supra note 16, at 192-231 (discussing effects of such enactments).
across the political spectrum, which will make political disagree-
ment more evident and political compromise harder to reach. The
effect of influencing the levels of participation by rigging the
districts is far different from that of increasing levels of partici-
patation by making sure that the polls are open and that the election
officials are fair and respectful of all persons.

There is, moreover, an alternative to the current disarray. We
should learn how dangerous it is to trust any group to decide how
the boundaries should be drawn and why. Here is a case in which
the evil is discretion, no matter who has the power to exercise it.
The response to that problem is to make sure that the pencil that
draws the line is in the hands of one that does not care about the
outcome. The twenty-eight-sided monster can be eliminated by a
simple computer program that starts in one corner of the state.
Standard techniques of district compactness and simplicity of
boundary lines can then avoid the gamesmanship routinely invoked
when electoral commissions draw boundaries, whether or not under
the Voting Rights Act. In some cases, some groups will win, and
in other cases other groups will win. If the process takes place in
a blind fashion across the country and across time, the law of large
numbers should help to “even out” the fortuitous inequalities that
emerge in any individual case. The political wrangling can be
reduced; the special pleadings, the constant drumbeat of discrimi-
nation and victimization can be dulled if not silenced; and the
business of government can go on with less fanfare and hubbub
than before.

The principle of colorblindness, in my view, has no role to play
in the affairs of any private organization, which can be as diverse
or not as it chooses. But colorblindness has a critical role to play
in the public sector, where it serves as a counterweight to coercive
monopoly power that no private firm can exert. The effort to peek
underneath justice’s blindfold lends to our process of political
election and representation all the dignity and solemnity found in
a children’s game of pin-the-tail-on-the-donkey. Why the current
system of explicit race preferences under the Voting Rights Act is
not violative of the color-blind language of the Fifteenth Amend-
ment is quite beyond me. That amendment is universal in its
phrasing and was designed to call a halt to the destructive processes
of favoritism that called forth its introduction. It was not designed
to allow the victims (or their descendants) to get even with the
wrongdoers (or their descendants). The great principle of all the
Reconstruction Amendments was to get race out of politics. It is
a pity that the politics of group rights under the Constitution has again placed race at the political center stage, where the high stakes up for grabs promise only continued litigation and strife.

In my judgment, our nation has adopted the wrong collective response to the ever greater diversity of its population. When the people that compose our nation differ widely in attitudes, backgrounds, affiliations, and identities, it is idle to assume that they will be able to iron out their differences by discussion and debate. Instead it is critical to recognize that, where these differences are irreconcilable, we should try to remove the stress on our collective political institutions by taking as much power from the hands of government as is humanly possible. The problems of determining proper electoral districts are difficult enough in the best of circumstances. The task is hardly made any easier by increasing the stakes of political action, and through it the stakes in choosing our elected officials.