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INTERDISCIPLINARY APPROACH: AFTERWORD: The Role of a Bill of Rights.

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-----Footnotes-----

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SUMMARY:

... One of the happiest facts about the two hundredth anniversary of the Bill of Rights is that it occurs when, for many people in the world, the question whether to adopt a bill of rights is alive for the first time. ... If the officials can escape the language, they are more likely to follow their tendency to uphold the traditional practice, and the reform mission will fail. ... The structural conception of the Bill of Rights is the same approach generalized beyond freedom of speech. ... This argument -- my concern is not whether it is correct -- parallels the New York Times v Sullivan approach to freedom of speech; both reflect a structural conception of a provision of the Bill of Rights. ... A particular structural conception cannot be justified unless the underlying theory of the democratic process is also justified. ... The Free Exercise Clause secures a fundamental human right and should be interpreted generously. ... But to the extent that one adopts the fundamental rights conception, one cannot simply say that the Establishment Clause (or the Self-Incrimination Clause, or the Contracts Clause) is as much a part of the Constitution as the Free Exercise Clause (or the Cruel and Unusual Punishment Clause, or the Free Speech Clause) and should be interpreted as generously. ... The fundamental rights conception, unlike the structural conception, does not presuppose judicial supremacy. ... Similarly, under the fundamental rights conception not all provisions should be interpreted with the same degree of generosity. ...

TEXT:

[\*539] One of the happiest facts about the two hundredth anniversary of the Bill of Rights is that it occurs when, for many people in the world, the question whether to adopt a bill of rights is alive for the first time. What will they be adopting, if they adopt a bill of rights? In this Afterword I want to suggest an answer to that question, based on the American experience with the Bill of Rights generally and, in particular, with controversies of the kind reflected in the articles in this issue.

My suggestion is that there are three different conceptions of the Bill of Rights. Each conception sees the Bill of Rights as serving a different purpose. Each rests on certain normative and institutional premises. Each gives rise to a characteristic form of argument. None of these three conceptions, I will argue, is obviously wrong.

Many controversies that appear to concern the proper interpretation of a provision of the Bill of Rights, including many of the debates in this issue, are in fact contests between or among these different conceptions of the Bill of Rights. Disputes of this kind cannot be resolved until one conception of the Bill of Rights can be justified over another. Many confusions, illegitimate arguments, and unwarranted displays of defensiveness derive from the failure to realize that what is at stake in controversies about the Bill of Rights is often differing conceptions of the Bill of Rights.

In Sections I, II, and III of this essay, I describe the three conceptions. The first conception views the Bill of Rights as a code: a [\*540] list of relatively specific requirements and prohibitions. The second treats the Bill of Rights as a means of correcting some of the systematic failures of representative government. The third views the Bill of Rights as a charter of fundamental human rights that should not be invaded in any society. In Section IV, I will conclude by describing five fallacies that, I believe, often occur in arguments about the Bill of Rights. These fallacies result from adopting one or another conception without realizing that it is just one possible conception, and without justifying it in preference to the other conceptions.

I do not mean to suggest that everyone must adopt one or another conception. Each conception may be true to some degree. But whichever conception or combination of conceptions one adopts must be justified. One cannot simply assume that an approach derived from one or another conception is the only correct way to interpret the Bill of Rights.

I also do not mean to endorse any controversial theory of interpretation. I do, however, necessarily reject a theory of interpretation that perhaps has some adherents. That is the view that the correct interpretation of the Bill of Rights is entirely determined by the text alone, by history, by precedent, or by some similar source of authority, and that arguments about justice or social welfare can play no role in its interpretation. Of course, text and history play a role, but they do not dictate one conception and foreclose all the others. To some degree, the choice among the competing conceptions must be made in light of the considerations I discuss below.

## I. THE BILL OF RIGHTS AS A CODE

### A.

What would be most striking about the Bill of Rights to a stranger to our culture who was reading it for the first time? One plausible answer is something that played almost no role in the articles presented at this symposium: the detailed code of protections for criminal defendants. The Sixth Amendment is entirely a catalogue of such protections. The Fifth Amendment is also, except for the Just Compensation Clause. The Eighth Amendment [\*541] applies only to criminal punishments. The Fourth Amendment applies principally to criminal investigations and arrests. Since the Second and Third Amendments have little practical significance, the Seventh Amendment does not

apply to the states, and the Ninth and Tenth Amendments are often not regarded as part of the Bill of Rights, specific protections for criminal defendants are arguably the dominant feature of the Bill of Rights.

-Footnotes-

n1 For an account of why the Just Compensation Clause is included, incongruously, with a list of protections of criminal defendants, see Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 Yale L J 1131, 1181-82 (1991). The Due Process Clause of the Fifth Amendment, of course, applies to civil as well as criminal proceedings.

-End Footnotes-

A celebration of the one hundred and seventy-fifth anniversary of the Bill of Rights would have paid a great deal of attention to this aspect of the document. For three decades, culminating in the 1960s, the Supreme Court reformed state criminal procedure, principally on the authority of the specific guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments. n2 The Court used two complementary doctrinal tools in pursuing this agenda: incorporation and literalism. Incorporation, of course, is the view that the Due Process Clause of the Fourteenth Amendment applies the guarantees of the first eight amendments to the states. The most famous version of incorporation, Justice Black's, held that the Fourteenth Amendment applies each of those guarantees, but nothing more, to the states, in exactly the way that the original Bill of Rights applies to the federal government. Literalism insists that the words of the first eight amendments impose relatively clear requirements that must be followed. Justice Black reviled what he called the "natural law due process formula" under which government action could be upheld so long as it satisfied a test of "fundamental fairness" or consistency with "ordered liberty." n3

-Footnotes-

n2 Before 1960, the Court relied principally on the Due Process Clause of the Fourteenth Amendment alone. See, for example, *Chambers v Florida*, 309 US 227 (1940); and *Powell v Alabama*, 287 US 45 (1932). Beginning in 1961, the Court began to apply the specific guarantees of the Bill of Rights to the states through the Due Process Clause. See the cases cited in *Duncan v Louisiana*, 391 US 145, 148 & nn 4-12 (1968).

n3 For especially clear statements of Justice Black's position on both issues, see *Duncan*, 391 US at 162 (Black concurring); *Adamson v California*, 332 US 46, 68 (1947) (Black dissenting).

-End Footnotes-

In using the Bill of Rights in this way, the Court was following in a great tradition of law reform. The Court was using the Bill of Rights as a code -- a list of specific, relatively determinate prohibitions and requirements. The criminal law reform movement of the late eighteenth century and early nineteenth century was also a codification movement. Jeremy Bentham, perhaps the most prominent reformer in England, was outspoken in his condemnation of the common law, which he viewed as the enemy of reform. Only a code -- a catalogue of specific rules -- could bring about changes in [\*542] criminal law. Justice Black's animadversions against the "natural law due process formula" echoed

Bentham's ridicule of natural rights and the common law. n4

-Footnotes-

n4 See, for example, H.L.A. Hart, ed, Jeremy Bentham, Of Laws in General 152-95 (London, 1970).

-End Footnotes-

Both Bentham and Black understood that a code can be a reformer's ally, and an open-ended natural law or fundamental fairness approach can be a reformer's enemy. If you are trying to uproot practices that have existed for many years but that you think are corrupt or harmful, a "fundamental fairness" standard will seldom do the job. Committed reformers will agree that those practices are unfair. But a large-scale reform effort will not succeed unless it is also implemented by lower-level officials -- bureaucrats, or judges of lower courts -- who will do their jobs in good faith but who are not necessarily committed to the reform effort.

Such lower-level officials will tend to identify "fairness" with existing practices. If, however, they are responsible for enforcing a more determinate norm, they are more likely to decide that their duty requires them to uproot an established practice. It will be difficult for a person who has worked within a system in which, say, prosecutors have been allowed to comment on an accused's failure to testify at trial, to conclude that such a system is fundamentally unfair. It will be easier for such a person to conclude that the system violates the specific prohibition against compelled self-incrimination. That is not because the language deductively requires that result; of course it does not. But it is easier for a person to justify that result, to herself and others, if the specific norm rather than a more general principle is in force. And a specific norm makes it easier for a person to disclaim responsibility for the decision by blaming it on the text, or the framers, or the codifiers.

This is also true outside criminal law as well. An Eastern European official who is trying to uproot a tradition of state control over an economy and to establish a market is likely to find that specific limitations on officials' authority are more effective than general injunctions to "use price mechanisms" or "promote private ownership." Max Weber associated the rise of capitalism with codes and rule-governed bureaucracies, n5 and while this association did not invariably hold, the reason for it is clear: entrenched patterns of privilege that prevent markets from developing will yield more readily to rule-governed forms of political organization than [\*543] to a regime in which lower-level officials are controlled by less determinate norms.

-Footnotes-

n5 See Max Rheinstein, ed, Max Weber, Law in Economy and Society 350-56 (Harvard, 1954).

-End Footnotes-

One use of a bill of rights, then, is to serve as a code that facilitates reform -- a specific list of requirements or prohibitions to help break up traditional practices that are in need of change.

B.

This conception of the Bill of Rights carries with it certain presuppositions. First notice, however, one thing that it does not presuppose: Nothing in this understanding of the Bill of Rights requires any form of judicial supremacy. A code -- that is, a relatively specific catalogue of requirements and prohibitions -- can be adopted by a legislature as a tool of reform. Bentham and other codifiers urged their codes on Parliament. Far from being initiators of reform, judges were the problem: the reluctant, tradition-bound officials who needed the sharp edges of a code, rather than the more gentle prodding of an open-ended norm, if they were to effect reform.

A code can be addressed to legislatures, too. International human rights treaties are an example. A treaty requiring nations to protect a specific catalogue of human rights is easier to enforce than a general rule requiring respect for humanity. Violations of specific rights can be identified and condemned with greater ease and greater effect, and without the need to argue over whether the practice violates an open-ended norm. The Supreme Court's use of the Bill of Rights to reform American criminal procedure was just a particular instance of a code-driven reform effort led by a court. The connection between the use of the code and the role of the Court was contingent.

This conception of a bill of rights does presuppose some state of affairs that needs reform badly enough to justify the costs inflicted by a code. A code, like any set of rules, is a crude device. It will be over- and under-inclusive. Some practices that will be found to violate, for example, the Double Jeopardy Clause or the Self-Incrimination Clause, might be practices that, everything considered, should be maintained. Conversely, some unjust practices might not violate any specific provision of the Bill of Rights; ideally they should be invalidated, but under the "code" conception of the Bill of Rights they will survive.

It makes no sense to incur these costs of over- and under-inclusiveness unless there is a potential gain. If, for example, there are entrenched practices that will yield to strict rules but not to more open-ended norms, the price might be justified.

[\*544] C.

This conception of the Bill of Rights has two characteristic modes of argument, which I will call formalism and exclusivity. By formalism I mean three things: a heavy reliance on the precise language of the text; a pretense that the text resolves more issues than it actually does; and an effort to shift responsibility for a decision away from the actual decisionmaker and to some other party, such as the Framers. Justice Black's opinions are famous for displaying these traits. By exclusivity I mean the insistence that the catalogue of rights is exhaustive; that no other rights besides those enumerated in the code exist. This, of course, was one of Justice Black's central themes.

Formalism and exclusivity are necessary to this conception because otherwise the Bill of Rights would not serve the functions of a code: it would not provide the clarity needed for reform. A code forces officials to judge a traditional practice, which they might be inclined to uphold, in light of relatively specific language. If the officials can escape the language, they are more likely to follow their tendency to uphold the traditional practice, and the

reform mission will fail.

They can escape the language by deemphasizing its importance, for example by saying that the specific guarantees of the Bill of Rights inform but do not determine the proper interpretation of the Fourteenth Amendment. Or they might escape the language by capitalizing on its indeterminacy, for example by saying that the words of the Self-Incrimination Clause do not, by virtue of their meaning alone, preclude the government from commenting on a defendant's failure to testify.

One might ask why, if the words of a constitutional provision do not actually require that a traditional practice be overthrown, judges who are disposed to accept the practice will feel that the words compel them to overthrow it. The answer, I believe, is that formalism is an attractive creed to people who have the power to make decisions. Formalism makes difficult decisions easier, in at least two ways. First, a formalist decisionmaker generally doesn't have to think as hard; she only has to work with the words of the authoritative text, instead of with complex and (obviously) inconclusive arguments about policy or fairness. Second, a formalist decisionmaker can more readily assign responsibility for the decision elsewhere. Because formalism is so attractive, a legislature, supreme court, or chief executive who promulgates a code and sets about creating a formalist legal culture can expect to have some [\*545] success in inducing officials to act like formalists, even when that means that they will take part in uprooting a practice that they themselves do not consider unfair.

Exclusivity -- we enforce the Bill of Rights; nothing less, but nothing more -- functions in a more indirect way, by enhancing the credibility of the reformers. It allows them to appear restrained and principled. Like formalism, it helps assign responsibility elsewhere. Justice Black's position is again the paradigm. He criticized the Court for overreaching when, as in *Griswold v Connecticut*,<sup>n6</sup> it enforced rights not clearly specified in the Bill of Rights. This allowed him to convey the message that he was willing to be bound by the same restraints he imposed on the states and on the other branches of the federal government. Self-denial of this form gives credibility to the claim that the reformers' efforts are not simply their own acts of will.

-----Footnotes-----

n6 381 US 479 (1965).

-----End Footnotes-----

D.

The problems with the formalistic conception of the Bill of Rights are well known. The language, even of the most specific provisions, is not determinate; the words alone resolve few controversial cases. There are notorious problems in relying on the Framers' intentions as a way of making the language more determinate. n7 The argument for exclusivity is dubious, in light of, among other things: the Ninth Amendment; the indeterminacy of many of the specific guarantees in the Bill of Rights (a wide range of invasions of personal autonomy, for example, can plausibly be characterized as unreasonable seizures of the person); and the fact that the only language that literally applies to the states is the open-ended terms of Section 1 of the Fourteenth Amendment.

-----Footnotes-----

n7 See, for example, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *BU L Rev* 204 (1980); Ronald Dworkin, *The Forum of Principle*, 56 *NYU L Rev* 469, 476-500 (1981).

-----End Footnotes-----

Perhaps the more difficult task is not to explain why the code conception need not be accepted as the only correct view, but rather to explain how anyone could ever accept it as the correct view. Perhaps the formalistic view of the Bill of Rights as a code should simply be rejected outright as obviously wrong and disingenuous. But I would like to describe, without endorsing, an argument that in some circumstances it would be defensible to adopt this conception of the Bill of Rights.

[\*546] Suppose you were a Supreme Court Justice at a time when, you believed, many states' criminal justice systems were badly in need of reform. On their face the states' procedural rules were reasonable, even enlightened. For example, they permitted criminal defendants to be compelled to testify, but only before a judge, in open court, with counsel present; they permitted trials before a judge in some complex cases, even when the defendant requested a jury; in the interests of "nonadversary" justice, they provided for appointment of counsel only when there was a special need; and they permitted some witnesses to give evidence without cross-examination. But you were convinced that these reasonable-sounding procedures masked abuses -- in particular the frequent conviction of innocent defendants and racial discrimination -- that were widespread but hard to prove in any specific case.

Although the particulars are different, this is arguably the situation that the Supreme Court faced between 1930 and 1970. In effect, Justice Black's response was: We do not wish either to condemn or to praise these procedures. That is not our role. Our role is to enforce the Constitution. But the words of the Bill of Rights simply prohibit each of these practices. We therefore cannot allow them to continue.

By contrast, a completely candid Court might say the following. Whether these procedures violate the specific provisions of the Constitution is by no means an open-and-shut question. One could interpret the Sixth Amendment right to counsel not to require the appointment of counsel in any case, but only to ensure that the defendant may have counsel that she herself retains. (Indeed, that was probably the Framers' understanding.) It would be more of a stretch, but one could interpret the self-incrimination and jury trial rights to apply only in cases of potential abuse. The Confrontation Clause might be interpreted to allow a trial court to dispense with cross-examination in favor of some other reasonably effective way of testing a witness's credibility. In any event, the only provisions that literally apply to the states are those of the Fourteenth Amendment, and on their face, the state procedures do not violate "due process of law," if that is interpreted to require only fundamental fairness. Nonetheless, the candid Court would say, we believe that these practices have led to serious abuses, and our interpretation of the Bill of Rights is informed by that belief. We accordingly hold that they are unconstitutional.

To the extent the Court's rhetoric matters, there is not much doubt which of these approaches is more likely to succeed. The first approach, Justice Black's, appeals to a widespread allegiance [\*547] to the language of the Bill of Rights; it assigns a fully plausible, even obvious, meaning to its terms; and it does not appear to be passing moral judgment on the states. The second approach accuses state officials of reprehensible conduct, does not rely on specific language, and explicitly invokes the Court's conception of fairness. If you believed that the states' procedures needed reform, there is not much doubt which strategy is better calculated to achieve your aims.

Even if the formalist approach would be more effective, however, it might still be unacceptably disingenuous. n8 Ordinarily one would want to say that deceptive and manipulative rhetoric is justified only in the most extreme circumstances. n9 But in defense of the formalist approach, one might say that a judicial opinion is, and is understood to be, a public document, issued in part to accomplish certain effects. It is not expected to be a completely candid account of the judges' actual reasons for their decision.

- - - - -Footnotes- - - - -

n8 I refer to the formalist approach, rather than to Justice Black, because it is not clear that Justice Black intended to use his rhetoric in a manipulative way. That may have been a side effect of a formalist orientation that Justice Black adopted for other reasons.

n9 See Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* 76-103 (Oxford, 1986), for a similar account and criticism of the use of formalist rhetoric in interpreting the First Amendment. Bollinger suggests that defenders of free speech, including judges, speak as if the dictates and foundations of the First Amendment were much clearer than they actually are; and that they do so because they fear that any admission of uncertainty will encourage the ever-present forces of mass intolerance. Bollinger comments on the "elitism" of this approach to the First Amendment. *Id.* at 101.

- - - - -End Footnotes- - - - -

For example, a court might set aside an agency action because it is convinced that the agency was influenced by improper political considerations, without saying so explicitly. It might set aside a state referendum because it believed the voters acted out of racial prejudice, without explicitly saying that. The most important decision of this century, *Brown v Board of Education*, n10 is, notoriously, not fully candid in this sense. A fully candid opinion would have said (as the most compelling subsequent defense of the decision said n11) that segregation as practiced in the South in 1954 was an odious system of racial oppression that could not possibly be squared with the constitutional requirement of equal protection. But it is difficult to fault the Court for not writing such an opinion. For similar reasons, it is difficult to fault the Court for not spelling out all of the reasons it became convinced that state criminal justice systems needed to be reformed.

- - - - -Footnotes- - - - -

n10 347 US 483 (1954).

n11 Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L J 421, 428 (1960).

- - - - -End Footnotes- - - - -

[\*548] There is, however, a difference between not fully spelling out all of one's reasons for reaching a conclusion and stating supposed reasons that are not true -- such as (in most cases), "the Framers decided this question for us," or "the text requires this result." The defense of the use of the Bill of Rights as a code is that it accomplished important objectives that otherwise might not have been achieved. The problem with this conception of the Bill of Rights is that it raises the question of the extent to which manipulatively false rhetoric is permissible in public life. That is a difficult question; it is possible that this approach oversteps the line.

II. THE BILL OF RIGHTS AS A STRUCTURAL CORRECTIVE

A second conception of the Bill of Rights treats it as a way of correcting certain structural deficiencies in representative government. This conception differs sharply from the view that treats the Bill of Rights as a code. It does not necessarily rely on specific language; it has different presuppositions and modes of argument; and, unlike the code approach, it does imply a form of judicial supremacy.

A.

The central idea of this conception is that representative government does some things badly, or at least cannot be trusted to do them well. The purpose of the Bill of Rights is to make up for these deficiencies of representative government.

The most conspicuous example of this conception is a well-known understanding of the Free Speech Clause of the First Amendment: that the purpose of this guarantee is to ensure the proper functioning of representative government. n12 Left to their own devices, officials will tend to suppress speech that is critical of them, thus preventing democratic accountability. The principal purpose of the guarantee of free speech is to keep the channels of communication open so that representative government can continue to operate. This understanding of freedom of speech is probably the most widely accepted view of the First Amendment today. It is, for example, the view that underlies New York Times v Sullivan, n13 [\*549] arguably the most important free speech decision of the last thirty years.

- - - - -Footnotes- - - - -

n12 The best-known example of this approach is Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (Harper, 1948). See also Cass R. Sunstein, Free Speech Now, 59 U Chi L Rev 255, 300-14 (1992).

n13 376 US 254 (1964).

- - - - -End Footnotes- - - - -

In an important sense, however, this understanding does not see the First Amendment as establishing a right to free speech at all. This reflects the

defining characteristic of the structural conception of the Bill of Rights. The structural approach does not regard the First Amendment as establishing rights in the sense that this approach is concerned with the condition of the system of expression as a whole, not the fate of any identifiable individual. So long as the system is working properly -- so long as channels for criticizing government officials remain open -- the fate of any particular individual is immaterial. Under the structural conception, individuals' legal rights are entirely instrumental: the only justification for allowing an individual to assert First Amendment "rights" is that there is no other satisfactory way of maintaining the system-wide quantity and quality of expression that we want.

In other words, in principle the structural view of the First Amendment would allow any individual's speech to be suppressed so long as the system of free expression as a whole was functioning properly. If, for example, the President's decision to veto a civil rights bill had been thoroughly criticized in literally thousands of well-publicized statements, there would be no harm in suppressing the speech of a single individual with a small audience, all of whom had heard the same arguments many times before. That particular speech would be surplusage because it would not provide any benefit to the system of democratic accountability. The leading proponent of this view made the point explicitly: "What is essential is not that everyone shall speak, but that everything worth saying shall be said." n14

- - - - -Footnotes- - - - -

n14 Meiklejohn, Free Speech and Its Relation to Self-Government at 25 (cited in note 12).

- - - - -End Footnotes- - - - -

In practice, of course, there are dispositive institutional reasons not to allow a free speech claim to be defeated on this basis. Courts cannot be trusted to decide when the system as a whole is functioning well or when the speech in question is truly redundant. My point is not that, under the structural approach, we ought to allow the suppression of speech in these circumstances. It is only a point about the nature of the justification that this approach offers for protecting speech.

This view of freedom of speech contrasts with what I believe is the universal understanding of freedom of religion. Religious freedom [\*550] is not instrumental in the way that, under the structural approach, free speech is. Punishing a person because of her religious beliefs is unacceptable in principle, not because of institutional concerns, but because it infringes on an individual right no matter what the condition of the "system" (whatever the relevant system is). There are many non-structural justifications for free speech, of course. But the structural argument -- that free speech is necessary to keep democracy functioning as it should -- places freedom of speech on a different foundation from freedom of religion.

The structural conception of the Bill of Rights is the same approach generalized beyond freedom of speech. According to this conception, the Bill of Rights does not provide a code that will spur reform, nor does it protect (other than instrumentally) individual rights. Instead, it protects against certain systematic weaknesses of representative government. This idea is associated with the Carolene Products footnote, which envisions more active judicial

review both of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and of "statutes directed at particular . . . minorities [because] prejudice against discrete and insular minorities may . . . tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect them." n15

-Footnotes-

n15 United States v Carolene Products Co., 304 US 144, 153 n 4 (1938). For a leading statement of this generalized approach, see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard, 1980).

-End Footnotes-

In addition to the Free Speech Clause (and of course the Equal Protection Clause), many Bill of Rights' protections for criminal defendants can be understood in this way. The Cruel and Unusual Punishment Clause n16 protects convicted offenders, a small and politically powerless group, against a vengeful society. The jury trial right n17 ensures, among other things, a form of popular sovereignty over decisions that, because of their particularity, the legislature cannot control. The Fourth Amendment's Warrant Clause and ban on unreasonable searches and seizures help control decisions by low-level officials that are not visible enough for elected bodies to control. n18

-Footnotes-

n16 US Const, Amend VIII.

n17 US Const, Amend VI.

n18 See Ely, Democracy and Distrust 96-99, 172-73 (cited in note 15).

-End Footnotes-

Today perhaps the most significant structural interpretation of the Bill of Rights involves the Just Compensation Clause. Structural arguments, generally associated with public choice theory, are [\*551] increasingly offered as reasons for courts to expand the Just Compensation Clause, and there are signs that those arguments are becoming increasingly influential.

The public choice structural argument is, roughly, that when a representative body regulates or redistributes property, it systematically tends to benefit well-organized interest groups at the expense of more diffuse groups, to the detriment of society as a whole. If the Just Compensation Clause were applied to a wider range of government actions than it now covers, the government would be precluded from adopting some or all redistributive measures and would be forced to internalize the costs of regulatory actions. This, it is said, would reduce the distorting effects of interest group power. n19 This argument -- my concern is not whether it is correct -- parallels the New York Times v Sullivan approach to freedom of speech; both reflect a structural conception of a provision of the Bill of Rights.

-Footnotes-

n19 Richard A. Epstein, Property, Speech, and the Politics of Distrust, 59 U Chi L Rev 41 (1992), is an example of the argument for interpreting the Just Compensation Clause in this way. The public choice argument about the defects of representative government is summarized in Einer Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L J 31, 35-43 (1991), which, however, questions whether that argument, even if correct, justifies an expanded judicial role.

- - - - -End Footnotes- - - - -

The structural view is not the only possible understanding of the Just Compensation Clause. One might see it as protecting individual rights non-instrumentally. That is, quite apart from any arguments about the propensities of representative government, it is an unacceptable invasion of my liberty for the government to seize my car or my house without compensation. This understanding of the Just Compensation Clause belongs to the third conception. It does not justify as sweeping an interpretation of the Clause as the structural view; it does not preclude regulatory and redistributive actions wholesale. Rather, it just forbids actions of a particularly intrusive kind, those likely to inflict serious psychic or material injury. Arguably the Just Compensation Clause is already interpreted to prohibit this kind of government action.

The structural argument, by contrast, would expand the Just Compensation Clause to reach government actions that cannot plausibly be described as affronting human rights in the same way as a seizure of one's personal possessions. (Not every structural understanding of the Just Compensation Clause would call for such an expansion, but the influential public choice structural argument now being made in many circles does.) For example, much of what [\*552] is offensive about the classic seizure of an individual's property is the surprise and sense of insecurity it engenders. But regulation routinely occurs in volatile business settings in which it does not have these effects. If a person is fully prepared to see the market cause the value of her investment to fluctuate by thirty percent, government regulation reducing its value by, say, one percent, is unwelcome but cannot be compared, in the effect it has on the individual, to the uncompensated seizure of an individual's possessions. The argument against such regulation is structural: given the propensities of representative government (the argument goes) there is an unacceptable risk that the regulation will diminish overall well-being. It is not an argument based on the effects the regulation has on identifiable individuals.

B.

The structural conception of the Bill of Rights has its own presuppositions. They operate whether the structural conception is applied to a particular provision, or to no provision in particular -- a legitimate thing to do, under this conception, as I will argue below.

The most significant presupposition is judicial supremacy. Unlike the other conceptions, the structural conception of the Bill of Rights necessarily presumes that courts will be the primary enforcers. The whole point of a bill of rights, according to this conception, is to withdraw issues from the legislature. Recall that this was not true of the formalistic conception of the Bill of Rights as a code, and as I will argue shortly, it is not true of the

third conception, which treats the Bill of Rights as a charter of fundamental individual liberties. Under each of those conceptions, it would make sense to have a bill of rights without the institution of judicial review. A bill of rights might be addressed solely to a sovereign legislature: the English Magna Carta, Petition of Right, and Bill of Rights were all addressed to the sovereign King or Queen in Parliament; some colonies and states had constitutions without judicial review; and international declarations of human rights are addressed to sovereign governments and not generally enforced by courts. But under the structural conception, the purpose of a bill of rights is to authorize courts to correct the legislature's failings. It would, according to this conception, be otiose to have a bill of rights without judicial review. The connection between judicial review and a bill of rights, so natural to Americans, is a necessary connection only for the structural conception.

[\*553] The other crucial presupposition is a relatively complete theory of how a well-functioning legislative process would work. You cannot draw any conclusions about how much speech is needed to protect representative government unless you know what representative government consists of and how it should function. Even more obviously, you cannot say which groups need judicial protection because they lack sufficient power, and which "interest groups" have too much power, unless you have a theory about how the legislative process should operate.

This point is significant because the underlying theory is often left implicit. The Carolene Products formulation "discrete and insular minorities," for example, begs many questions about which groups need special protection in a democratic system. Many theories about "rent seeking" in the political process seem simply to assume, without justification, that the only legitimate function of the political process is to correct market failures. A particular structural conception cannot be justified unless the underlying theory of the democratic process is also justified.

C.

The principal mode of argument under the structural conception is one of comparative institutional competence. A court should invalidate a statute if that statute is within a class of measures that are likely to be the product of some legislative dysfunction, and if the courts are likely to correct the legislative error. In every case, under this conception, that is the primary issue.

Under the structural conception the words of the document are incidental, and formalist arguments should play no role. This is perhaps not obvious, because many advocates of the structural conception also invoke the words of the document. The Carolene Products footnote, for example, suggested that active judicial review would be appropriate, not only where the political process might not function well, but also "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." n20

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n20 Carolene Products, 304 US at 153 n 4.

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The structural conception, however -- taken by itself, not in combination with another conception -- does not justify this kind of resort to the specific language of the document. It calls for active judicial review of those issues, but only those issues, that the legislative process will systematically handle badly, and the judicial [\*554] process will systematically handle better. As I suggested earlier, a plausible claim can be made that many of the provisions of the Bill of Rights concern such issues. The Framers of the Constitution and the Bill of Rights may even have had such systemic dysfunctions in mind. But the justification for judicial intervention remains the structural argument, not the text. If the text is to be cited as authoritative in itself, some other justification will be needed. n21

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n21 See Charles L. Black, Jr., Structure and Relationship in Constitutional Law 11-12 (Ox Bow Press, 1985).

-End Footnotes-

Of course, as I said at the outset, it might be possible to hold a view that combined structural and formalist elements. One might say, for example, that the text is authoritative but that where it is ambiguous it should be interpreted according to structural arguments. n22 One would then have to justify the use of those two conceptions in combination. The view that the text is binding might be justified by arguments about authority or precedent. But structural arguments alone -- that is, arguments about institutional competence -- do not by themselves justify the reliance on text.

-Footnotes-

n22 Ely, Democracy and Distrust (cited in note 15), takes this approach at least to a degree.

-End Footnotes-

III. THE BILL OF RIGHTS AS A CHARTER OF FUNDAMENTAL HUMAN RIGHTS

A.

The third conception of the Bill of Rights is probably closest to the popular image. It treats the Bill of Rights as a charter of fundamental human rights -- those rights that an individual should have against the state in any society.

In one sense this conception is the easiest to justify. Everyone agrees in the abstract that there are human rights that no society should abridge. And there is nearly universal agreement on many of those rights: religious toleration, a general right to dissent, freedom from arbitrary punishment, and freedom from slavery and oppressive racial or ethnic discrimination. Every society should have, somewhere, a conception of these rights -- either written down in a bill of rights, or informally understood in the culture. It is natural to view the Bill of Rights as our society's recognition of these basic human rights.

[\*555] This conception of the Bill of Rights has some overt advocates. n23 But the list of its advocates does not begin to convey how central this conception is in history and in current practice. A claim that a government practice is morally wrong is always a powerful argument in a controversy over any provision of the Bill of Rights. If you persuade a judge that a certain practice would be condemned if, for example, another country engaged in it, you are well on your way to convincing the judge to interpret some provision of the Constitution to forbid that practice.

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n23 See, for example, Ronald Dworkin, Unenumerated Rights: Whether and How Roe Should Be Overruled, 59 U Chi L Rev 381 (1992); Michael Perry, The Constitution, the Courts, and Human Rights (Oxford, 1982).

-End Footnotes-

In controversies about the Bill of Rights -- for example, a case, not controlled by precedent, involving the First Amendment, the Fourth Amendment, or the Due Process Clause -- the principal dispute often concerns not the text or the history of the particular provision (both of which are often indeterminate or otherwise unhelpful) but whether the challenged government action is, all things considered, a morally unacceptable way to treat individuals. The litigants will use moral terms like "fair," "reasonable," or "justified on balance," and the judges will think in (or react in) those same terms. Does this form of government involvement with religion endanger religious liberty in a way that seems unfair to some group? Does permitting this restriction on speech open the door to government abuse of political opponents? Does this police investigative practice interfere with citizens' legitimate interests in privacy and security? Is this a fair way to adjudicate this class of disputes, given the various interest at stake? Is this form of punishment barbarous? All of these questions reflect a conception of the Bill of Rights under which its purpose is to protect fundamental human rights.

Like the structural conception, this view of the Bill of Rights fits uneasily with its language. Many of the rights explicitly guaranteed by the Bill of Rights are fundamental in the sense that no civilized society would deny them. But some rights that virtually everyone would agree are fundamental in this sense are not explicitly enumerated in the Bill of Rights. Freedom from chattel slavery and from oppressive racial discrimination had to await the Thirteenth and Fourteenth Amendments. The right to bodily integrity, even in the barest sense of a right not to be beaten up by the police, is not obviously guaranteed by language anywhere in the Bill [\*556] of Rights. n24 In my view, a greater right to bodily integrity, of the kind anti-abortion laws violate, is also fundamental and is not obviously described in the text of the Bill of Rights either. (The abortion question is truly difficult, but only because the interest in fetal life is at stake.) A right to privacy in the sense of keeping certain private information from the government is in the same category. n25 We would not regard a society as just (or maybe as even a society) if it provided no protection against private violence; but that right, according to the Supreme Court, is not in the Constitution at all. n26 There are many other possibilities. And, of course, there is the problem that the text of the Bill of Rights itself applies only to the federal government, not the states.

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n24 Three provisions of the Bill of Rights arguably protect this right: the Fourth Amendment's prohibition against unreasonable searches and seizures "of persons, houses, papers, and effects"; the Due Process Clause of the Fifth Amendment; and the Cruel and Unusual Punishment Clause of the Eighth Amendment.

The Fourth Amendment, however, seems to refer simply to detention, not to battery. That is the ordinary meaning of "seizure," and the parallelism suggests that the Amendment applies only to actions of a kind that could also be taken against houses, papers, and effects -- none of which can be subject to a battery. The most obvious meaning of "liberty" in the Due Process Clause is again freedom from physical restraint, especially since that Clause contemplates that "liberty" can be taken away if due process is provided, and no process justifies police brutality. The narrow definition currently given to "punishment" in the Cruel and Unusual Punishment Clause, see, for example, *Bell v Wolfish*, 441 US 520, 537-39 (1979), would exclude many acts of police brutality.

Of course, any of these provisions can be interpreted to prohibit police brutality without stretching their language beyond recognition. But if that is the test -- whether the language would be stretched beyond recognition -- then there are few rights that anyone would advocate that cannot be fit within some provision of the Bill of Rights.

n25 Everyone would agree, I believe, that no reasonably just society would permit the government unlimited to monitor its citizens' private conversations. In *Katz v United States*, 389 US 347 (1967), the Court found this right in the Fourth Amendment. But as Justice Black's dissent showed, this outcome is not by any means obvious from the language of that Amendment. See *id.* at 364-74 (Black dissenting). See also *Whalen v Roe*, 429 US 589 (1977); and *Roberts v United States Jaycees*, 468 US 609 (1984).

n26 *DeShaney v Winnebago County Department of Social Services*, 489 US 189 (1989).

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Finally, not all of the rights enumerated in the Bill of Rights are fundamental in the sense that no civilized society would deny them. The states may dispense with grand jury indictments and civil juries, and that is not a violation of fundamental human rights. There are just societies in the world that do not observe the privilege against self-incrimination or some of the aspects of an adversary criminal justice system prescribed in the Sixth Amendment. There are also just and tolerant societies with established churches.

It might be argued that conditions peculiar to our society make, say, established churches and nonadversary criminal procedures [\*557] unacceptable here, even if they might be benign elsewhere. But even if this argument is accepted, the fundamental rights conception of the Bill of Rights has powerful implications: it suggests that certain provisions are to be interpreted less generously than other.

It seems entirely plausible, for example, that religious establishments in this country (unlike, I suppose, the current Church of England) would seriously violate religious freedom. Even so, under this conception of the Bill of Rights, the Establishment Clause need not be interpreted with the same sympathy and scope as the Free Exercise Clause. The Free Exercise Clause secures a fundamental human right and should be interpreted generously. In contrast, the Establishment Clause (according to this view) should be interpreted narrowly, to forbid only those forms of government recognition of religion that really do endanger religious liberty. There might be structural justifications for giving a more sweeping reading to the Establishment Clause. For example, the Court at one time suggested that the special danger posed by religiously divisive political controversies was a reason for restricting the power of the government to aid religion. n27 And there might be formalist justifications as well, for example if one thought (again plausibly) that there are common forms of government aid to religion that in fact violate religious liberty but are not widely perceived that way. n28 But to the extent that one adopts the fundamental rights conception, one cannot simply say that the Establishment Clause (or the Self-Incrimination Clause, or the Contracts Clause) is as much a part of the Constitution as the Free Exercise Clause (or the Cruel and Unusual Punishment Clause, or the Free Speech Clause) and should be interpreted as generously.

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n27 This was the notion of "political entanglement." See Michael W. McConnell, Religious Freedom at a Crossroads, 59 U Chi L Rev 115 (1992), for criticism of this notion.

n28 See, for example, Mary E. Becker, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U Chi L Rev 453 (1992).

-End Footnotes-

B.

The fundamental rights conception, unlike the structural conception, does not presuppose judicial supremacy. Even a society without judicial review could profitably adopt a bill of rights: it would be used in political controversies as a means of persuading the legislature. As I said before, there are many examples of human rights charters adopted without a system of judicial review, ranging from the English Magna Carta, Petition of Right, and Bill [\*558] of Rights, to the constitutions of some colonies and states, to international declarations of human rights today.

The fundamental rights conception does have one important, and superficially controversial, presupposition: it presupposes some form of moral objectivity. That is, it presupposes that in a wide range of cases, there are right and wrong answers to moral questions. Otherwise it would not be possible to say that certain rights are fundamental, and that all societies should protect them.

The presupposition of moral objectivity is important not so much because it is doubtful as because many lawyers reflexively resist it. In fact, the opposite position -- that two contradictory moral judgments might each be right -- is difficult to make sense of, much less to justify. Some form of moral objectivism is almost surely correct. But the notion that judges who rely on moral arguments are "imposing their own values" is a familiar one. This

notion does reflect a legitimate concern about institutional competence. That is the real concern with the fundamental rights conception, not the very dubious view that there is in principle no right or wrong in moral matters.

If it is to be implemented, the fundamental rights conception of the Bill of Rights must defend certain presuppositions about institutional competence. For example, even if moral judgments are, in principle right or wrong, it does not follow that judges are more likely to get them right if they make up their own minds than if they defer to a popularly elected body.

In fact, the questions of institutional competence raised by this conception are very difficult. There are serious problems with leaving the difficult moral questions raised by a bill of rights to any of the institutions that might possibly decide them. Courts can be arbitrary and willful, and have various kinds of class biases; legislatures are subject to popular passion, prejudice, and misjudgment, as well as the dysfunctions identified by public choice theory; and individuals are self-interested and sometimes irrational. n29 Undoubtedly different institutions are best suited to determine the scope of different rights, but in any event some difficult judgments about institutional competence must be made before the human rights conception can be implemented.

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n29 Two examples of positions that leave difficult moral judgments about fundamental rights to individuals are the "pro-choice" position in abortion and the view that private charity should be responsible for all redistributions of wealth.

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[\*559] C.

The characteristic modes of argument of the fundamental rights conception follow from these presuppositions. The principal argument will be, at bottom, about whether a particular government practice is morally right or wrong. Interestingly, the rhetoric usually avoids explicit moral language; it never uses the term "moral" and often shies away from words like "unjust." Instead the rhetoric uses the terms of the Constitution -- freedom of religion, freedom of speech, and so on -- or, if necessary, technical-sounding terms like "unreasonable burden" and similar "balancing" language.

It might be objected that of course the courts and advocates use the terms of the Constitution; that is what they are supposed to be interpreting. But according to the fundamental rights conception, the correct way to interpret the terms of the Constitution is to recognize that it protects fundamental human rights. This conception is supported by existing practices: as I suggested earlier, in practice, in a wide range of difficult constitutional cases, it is generally accepted that the best legal argument is often an argument about fairness or decency -- that is, a moral argument. In fact, the reluctance to use overtly moral language reflects the reflexive subjectivism I criticized, as well as a legitimate concern -- related to the formalist conception -- that a decision justified in terms of the text will be more readily accepted than one justified in explicitly moral language.

The other mode of argument under the fundamental rights conception ought to be institutional competence. Sometimes the institutional questions are settled by precedent or some comparable source, just as questions about the content of rights can be settled by such sources. In most systems there is no point in arguing about whether the courts or the legislature should decide whether a particular measure abridges religious freedom; that question was settled long ago, by deliberate act or, more likely, by culture. But often questions about institutional competence will be central -- for example, in deciding the extent to which the courts will oversee police practices; or the way courts will attempt to control government actions that are impermissibly motivated; or the appropriateness of so-called "affirmative" rights to government aid (such as subsistence, or the right to be free from private violence). Even under the fundamental rights conception, it is a non sequitur to say that because it is morally wrong for the government to act in a certain way, the courts should prohibit it from doing so.

[\*560] IV. CONCLUSION: FIVE FALLACIES IN INTERPRETING THE BILL OF RIGHTS

I have suggested that there is no single, obviously correct conception of the role of a bill of rights. Instead, our history and current controversies reflect three competing conceptions, each with different presuppositions and modes of argument, and of course with different implications for how the Bill of Rights should be interpreted.

As I said at the outset, one need not choose one of these conceptions; they can be coherently combined in various ways. What is important is not to invoke arguments without justifying the conception from which those arguments are derived. As a conclusion, I will suggest five common fallacies that, I believe, result from this error: using arguments from a conception that has not yet been justified.

A. Where Is It in the Text?

Many of those who make this argument think that the lack of explicit textual support is an unanswerable criticism. Some of those against whom it is made think it is not a criticism at all, because the text is (for various reasons) indeterminate. Others resort to the view that the text is only one among many factors to consider, a view that gives the impression of being irresolute and unsatisfactory. n30

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n30 It might also be said that in any debate about the interpretation of the Bill of Rights, what is "in the text" is precisely the point in dispute. In a sense, that is correct: any argument about the Bill of Rights is a claim about how the text of the Bill of Rights should be interpreted. The argument I refer to here is the claim that rights not explicitly guaranteed in the text should not be recognized. If the notion that some guarantees are "explicit" is meaningless (I do not believe that it is), see Dworkin, 59 U Chi L Rev at 381 (cited in note 23) then this argument is all the more fallacious.

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In fact, this argument can be a legitimate one only if some antecedent conception is justified. For example, this argument would be sound if the

formalist conception -- that the Bill of Rights is a code -- were shown to be the only correct conception. If you can demonstrate that the Bill of Rights (or any comparable charter) should, at this time and place, be used only as a code, then you are entitled to demand a textual source for any right. One might arrive at the same place through a structural argument, for example by showing that allowing judges to go beyond the explicit text creates too much of a danger that they will abuse their power. But that will be a difficult argument to make; it will require empirical and [\*561] normative premises and a way of addressing the obvious indeterminacy of the Bill of Rights.

The most prominent example of this argument today, of course, is the one made against Roe v Wade. n31 From one angle this argument is very puzzling, because it is not that difficult to come up with a plausible textual source for the right involved in Roe. More important, the issue of the moral status of fetal life is much more serious, presents a much more difficult question for the proponents of Roe to answer, and better reflects what the opponents of Roe are (I suspect) really concerned about. The reason much of the debate over abortion has been about the existence vel non of the right, I believe, is because the formalist view took such a strong hold during the Warren Court period. A structural or fundamental rights view would present the abortion issue in a much more useful way.

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n31 410 US 113 (1973).

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B. All Constitutional Provisions Are Equal

Justice Frankfurter and others made this argument in response to Justice Black's view, essentially adopted by the Court, that First Amendment rights occupy a "preferred position" that justifies more active judicial review (compared to property rights, for example). The argument is made today by what may be an emerging movement in favor of reviving constitutional protections for property. (It is not obvious how to measure which rights receive "more" protection; but for present purposes I assume that it can be done.) Why is it, proponents of this view ask, that the Just Compensation Clause (or the Contracts Clause) is interpreted so grudgingly, while the Free Speech Clause is interpreted so generously?

Ironically, in view of its use against Justice Black, the argument that all constitutional provisions are equal derives from the formalist view of the Bill of Rights as a code. For example, if you are trying to reform entrenched aspects of state criminal justice systems, you do not want to say that the Confrontation Clause can be interpreted flexibly to accommodate the interest in protecting victims of child abuse from cross-examination, but the Self-Incrimination Clause cannot be interpreted flexibly to accommodate the interest in obtaining confessions.

But unless you have sufficient reasons for using the Bill of Rights as a code, or can justify some other conception of the Bill of [\*562] Rights that dictates that all provisions are "equal" in some sense, this argument is a non sequitur. Under the structural view, there is no reason to treat all provisions alike. Some provisions identify areas where the courts are superior to

legislatures; others do not. Similarly, under the fundamental rights conception not all provisions should be interpreted with the same degree of generosity. As I have argued, some provisions of the Bill of Rights protect rights that are fundamental in any society; others do not. The notion that all constitutional provisions are equal sounds very appealing but is actually quite difficult to justify.

C. The Judicial Nirvana Fallacy

This is the view that either ignores institutional competence arguments or uses them selectively, in a way that overstates the capacity of courts. It takes two forms. The first adopts the fundamental rights conception without recognizing its institutional presuppositions. You cannot justify active judicial enforcement of the Bill of Rights just by showing that there are moral rights and wrongs and that provisions of the Bill of Rights can plausibly be interpreted to constitutionalize various moral judgments. One must also explain why it is better on balance for the courts to make the necessary judgments.

The other form of the fallacy identifies defects in the legislative process as a basis for more active judicial review. The problem here is a one-sided application of the structural conception, which requires a comparative judgment of institutional competence. Even if legislatures do certain things badly, there is no guarantee that courts will do them better. Any argument for more active judicial review -- for example, the public choice-based argument for more vigorous judicial enforcement of property rights -- must address the competence of courts as well as legislatures. n32

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n32 See Elhauge, 101 Yale L J 31 (cited in note 19).

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D. The Fallacy of Misappropriated Moral Force

This fallacy takes advantage of the fact that many provisions of the Bill of Rights secure fundamental human rights to support an argument that is actually based on a different conception. It is the opposite of guilt by association: a provision of the Bill of Rights is treated as protecting a valuable right because other provisions, or other applications of that provision, protect valuable rights. There are several possible examples.

[\*563] Consider, first, one common treatment of the Self-Incrimination Clause, which celebrates it as a foundation of liberty. It may be desirable, all things considered, to forbid compelled self-incrimination. But there are just societies, and decent systems of criminal justice, in which defendants are required to give testimony (under, of course, carefully controlled conditions).

Many of those who celebrate the Self-Incrimination Clause do so not because it is a fundamental human right but because they want to enforce it for other reasons. For example, the Warren Court's decision in *Miranda v Arizona* n33 can be seen as using the Self-Incrimination Clause in a formalistic, code-like way, to try to control abusive practices in police interrogation. Historically custodial interrogation had been analyzed under the Due Process Clause. That approach focused attention on the abusiveness of the interrogation and, to

some degree, on the likelihood that the interrogation could have produced a false confession. Miranda shifted the focus to whether the suspect had been "compelled . . . to be a witness against himself," an approach that produces a different emphasis. The text did not compel this treatment of custodial interrogation, but the Miranda Court evidently believed that it was needed to combat unacceptable police practices. n34 It helps, in using the Clause in this way, to take advantage of the fact that other provisions of the Bill of Rights -- and for that matter, certain applications of the Self-Incrimination Clause -- do protect against violations of human rights. But doing so gives the Clause an aura of moral significance that it does not fully deserve.

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n33 384 US 436 (1966).

n34 For a discussion of these points, see Stephen J. Schulhofer, Reconsidering Miranda, 54 U Chi L Rev 435 (1987).

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Another example of an argument that misappropriates moral force involves the Just Compensation Clause. Some protection for private property is surely a fundamental human right: a government with unlimited power to take property from its citizens would be tyrannical. As I outlined earlier, however, some arguments for protecting property rights, based on public choice theories, would go far beyond the level needed to secure fundamental human rights. Those structural arguments invoke the Just Compensation Clause and the idea of property rights as a bulwark against tyranny, thus trying to take advantage of the moral force of those notions. In fact, however, the expanded public choice conception of property rights must be justified in structural terms. It is an illegitimate appropriation of moral force for the public choice [\*564] conception of property rights to take advantage of the morally powerful connotations of the idea that every decent state guarantees some right of property.

E. Unreflective Moral Subjectivism

I addressed this fallacy in discussing the fundamental rights conception of the Bill of Rights. This fallacy consists of denying the authority of courts ever to consider moral issues, instead of discussing whether courts are institutionally competent to do so. The fallacy is reflected in the common claim that when courts invoke the fundamental rights conception -- when they go "beyond the plain language," or, in some versions, when they go beyond structural justifications for judicial review -- they are necessarily just "imposing their own values."

The fallacy lies in assuming that it is impossible to reason about moral judgments and to arrive at answers that are right or wrong. As I said earlier, moral subjectivism is in fact difficult to defend. Indeed, few of those who make the "judges' own values" argument are really moral subjectivists. They would not say, for example, that it is meaningless to make moral arguments to legislators or administrators, or that when parents or teachers or public figures purport to make moral arguments to children they are just "imposing their own values" instead of making claims that we can decide are right or wrong by reasoning about them.

The "judges' own values" argument does reflect a real concern, but one that raises complex and difficult issues. Plausibly stated, the argument can take one or more of four forms: (1) judges are more likely to decide a certain category of moral issues wrongly than legislatures are; (2) whether or not judges are more likely to make the wrong decision, the decisions will be wrong in a worse way (for example, the judges' errors will reflect some form of class bias, while legislatures' errors will be more randomly distributed); (3) although judges' decisions may be right, they will have adverse effects because society has not exercised its own capacities to decide; n35 or (4) even if judges' decisions are more likely to be right, democratic decisionmaking has intrinsic moral value that outweighs the risk of error. Each of these claims is plausible; each is surely right sometimes; but each must be justified. The simple, [\*565] rhetorically effective invocation of the danger of the "judge's own values" is not an adequate way to deal with these issues.

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n35 For example, the decision may be less likely to take hold than one arrived at through democratic means, or the society's capacities to decide certain kinds of issues may atrophy because it relies too much on judges to decide them.

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The Bill of Rights is a powerful symbol in our society, and the idea of a bill of rights is an increasingly powerful symbol in the world. But symbols, of course, do not interpret themselves, and the Bill of Rights will not be anything in particular until we decide what to make of it. In our history, and in current controversies, the Bill of Rights has been at least three different things. We should not underestimate the difficulty of deciding what we want it to be in the future.

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SYMPOSIUM: Making Sense of English Law Enforcement in the Eighteenth Century: A Response

George Fisher

SUMMARY:

... David Friedman's title makes an arresting promise: He will undertake to make sense of English law enforcement in the eighteenth century. ... True, Beattie concludes that some of the decline in indictments reflects a real decline in violence, but he attributes that decline not to the efficiency of the system of private prosecution, which after all had existed for many centuries, but to a "developing civility, expressed perhaps in a more highly developed politeness of manner and a concern not to offend or to take offense, and an enlarged sensitivity toward some forms of cruelty and pain." ... In any event, to syllogize increasing expenditure from increasing wealth obscures the truly interesting question about the rise of the prison: Why, at the end of the eighteenth century, did penal authorities in England choose a new and highly articulated prison regimen as the punishment of first resort for minor crime? Friedman is right that sufficient resources are a necessary condition to this choice, but can having the money explain the choice? Historical theorists trying to explain the rise of the English prison seize on religious movements, intellectual trends, industrial developments, social struggles, historical accidents, and the influence of motivated individuals, all of which help to explain dissatisfaction with transportation and expanding ambitions for imprisonment. ...

TEXT:

David Friedman's title makes an arresting promise: He will undertake to make sense of English law enforcement in the eighteenth century. At first one guesses he means merely to organize the tangled mass of procedures and punishments. Slowly one suspects he means to do more. He means to show that the institutions of eighteenth-century criminal justice were sensible. The task would be plausible if, by sensible, Friedman meant that the institutions of law enforcement advanced one of the system's articulated goals in an articulable way or that authorities defended existing institutions by reference to those goals. But Friedman means more. He means that the institutions of punishment in eighteenth-century England were a cost-effective means of fighting crime in a world of rational economic actors. His often ingenious paper belongs alongside other volumes that promise to uncover economic rationality beneath a skein of unreason: Making Sense of Sex; Making Sense of War; Making Sense of the Eighteenth Century.

Putting aside my admiration for the boldness of the undertaking and for Friedman's success in synthesizing so much material so neatly, I argue here that his major arguments lack support in the historical record. As theory--or "conjecture" as he often calls them--his ideas could be valuable tools for

analysis, but only to highlight the divergence between theory and reality and thereby to spur deeper investigation. My argument tracks Friedman's two major points. Section I addresses his claim that the system of private prosecution was "reasonably successful" because it exploited the economic interests of crime victims. n1 I consider the lack of evidence of "success," the lack of evidence of an economic motive, and the lack of evidence that any such motive can explain the system as it stood. Section II looks at Friedman's discussion of the forms of punishment. Here he makes fewer broad claims, the most identifiable (and vulnerable) being that imprisonment gained favor at the end of the century because only then could the country afford it. Based on evidence that prisons became more popular as they became more expensive, I argue that cost does little to explain their earlier unpopularity and that the nation's latecentury affluence does little to explain the form the new prisons took or the ideology of their builders. I. The "Logic" of Private Enforcement

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n1 David D. Friedman, Making Sense of English Law Enforcement in the Eighteenth Century, 2 U Chi L Sch Roundtable 477, 485 (1995).

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Friedman does not question our modern judgment that a system of public prosecution ensures broader, more uniform law enforcement than a system that relies on the initiative of individual crime victims to bring a case to trial. But if Britain's protracted resistance to public prosecution had political or social motives, or if the system of private prosecution had deep historical roots tracing to outdated systemic incapacities, these do not interest Friedman. Private prosecution made sense, he says, because it worked. It worked because the practice of "compounding" crimes--terminating prosecution in exchange for payment by defendant to crime victim--gave the victim an incentive to prosecute. n2 Friedman does not claim that this system worked better than a system of public prosecution--although superior efficiency would seem important to any economic argument. Nor does he claim that authorities embraced or defended private prosecution because they perceived it to work--although contemporary rationale would seem important to any historical argument. Instead Friedman argues that private prosecution made sense simply because it worked, by which he means that it suppressed a lot of crime.

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n2 I am leaving aside Friedman's argument that the large network of prosecutor associations helped to make the system of private prosecution effective against crime. See Friedman, 2 U Chi L Sch Roundtable at 486-88 (cited in note 1). His brief treatment of the subject presents no evidence that the associations increased prosecutions or deterrence, and at least one historian cited by Friedman has concluded they had little such effect. See P. J. R. King, Prosecution Associations and Their Impact in Eighteenth Century Essex, in Douglas Hay and Francis Snyder, eds, Policing and Prosecution in Britain 1750-1850 17172, 189-92 (Clarendon, 1989). In any event, these associations grew up largely in the last third of the eighteenth century and so cannot much explain why the age-old system of private prosecution "worked." See David Philips, Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England 1760-1860, in Hay and Snyder, eds, Policing and Prosecution at 113, 122, 161-63.

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Friedman stakes this claim on J. M. Beattie's report of sharply declining homicide indictments in Surrey and Sussex between 1660 and 1800. FN 3 This evidence cannot bear Friedman's freight. To begin with, the system of private prosecution dates to the very earliest history of England's system of criminal prosecution. n4 If it worked, then why was the homicide rate so high in 1660? Second, Beattie has reported merely indictment rates, not crime rates. The latter, in an age without organized police, are beyond ascertainment. Friedman leaves out Beattie's very interesting discussion of the factors that might have depressed the prosecution rate but not the crime rate. n5 True, Beattie concludes that some of the decline in indictments reflects a real decline in violence, but he attributes that decline not to the efficiency of the system of private prosecution, which after all had existed for many centuries, but to a "developing civility, expressed perhaps in a more highly developed politeness of manner and a concern not to offend or to take offense, and an enlarged sensitivity toward some forms of cruelty and pain." n6 Third, Friedman's theory that the promise of a financial settlement impelled crime victims to press charges would seem to work worst in homicide cases. A system that officially sanctioned such settlements only in misdemeanor cases n7 would tolerate them least in homicide cases. Fourth, there is no evidence of a sustained or substantial fall in property crime during the eighteenth century. Beattie's figures show that the rate of robbery indictments in Surrey fell only about 20 percent between the late seventeenth and the late eighteenth centuries, while the rate of robbery indictments in Sussex increased about 50 percent. n8

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n4 See Roger D. Groot, *The Early-Thirteenth-Century Criminal Jury*, in J. S. Cockburn and Thomas A. Green, eds, *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* 3, 4 (Princeton, 1988).

n5 J. M. Beattie, *Crime and the Courts in England 1600-1800* 108-11 (Princeton, 1986).

n6 *Id* at 112.

n7 See Friedman, 2 U Chi L Sch Roundtable at 488 (cited in note 1).

n8 Beattie, *Crime and the Courts* at 162 (cited in note 5).

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I do not mean to suggest that the system of private prosecution did not work. A great many cases were prosecuted and brought to trial, and a great many defendants were punished. To the extent that the system did work, however, Friedman fails to show that it worked because of the economic motive promised by settlement in lieu of trial. He concedes Peter King's finding that fewer than 15 percent of prosecutors who brought charges failed to press them forward to trial. n9 He admits Beattie's conclusion that the "vast majority" of cases went forward. n10 He then speculates that prosecutors were bought off before charges were brought. n11 Perhaps so, but we cannot know how often. "There is inevitably not a great deal of evidence" about such deals in court records. n12

-Footnotes-

n9 Friedman, 2 U Chi L Sch Roundtable at 490 (cited in note 1).

n10 Id at 490 n 97.

n11 Id at 490 & n 32.

n12 Beattie, Crime and the Courts at 40 n 12 (cited in note 5).

-End Footnotes-

In the absence of direct evidence, how plausible is Friedman's speculation that financial settlements were common enough to inspire prosecutors to take action? In misdemeanor assault cases, the practice was perhaps common enough. Compounding misdemeanors was legal and was perhaps encouraged by the magistrates who presided over the local courts of quarter sessions. n13 Moreover, defendants in assault cases often might have had the means to make amends. Blackstone acknowledged (and condemned) a post-trial method of settling misdemeanor assault cases, which he said was "too frequently commenced, rather for private lucre than for the great ends of public justice." n14 Theft was a different matter. Because all theft was felony theft, compounding was illegal. Thieves were in any event more likely to be destitute, unable to make the slightest payment to the victim. But if Friedman's theory promises to work only with regard to assault cases, then it has little promise. The law enforcement system was far more concerned with theft than with minor crimes of violence. n15

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n13 See id at 39. Authorities felt that minor violence caused mainly private injury. See id at 76, 124. See also Peter King, The Transformation of Attitudes to Interpersonal Violence in the English Courts in the Eighteenth and Early Nineteenth Centuries 8 (draft on file with author) (noting that between 1748 and 1752, more than three-quarters of those accused of assault at Essex Quarter Sessions pleaded guilty and concluding that victim and accused "no doubt . . . in most cases" had reached a settlement).

n14 William Blackstone, 4 Commentaries \*356-57. Blackstone argued that forgiving assaults did not serve public justice:

For, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others.

Id (quoting Beccaria).

n15 Patrick Colquhoun complained that when "a personal assault is committed of the most cruel, aggravated, and violent nature, the offender is seldom punished in any other manner than by a fine and imprisonment, but if a delinquent steals from his neighbour secretly more than the value of

twelvepence, the law dooms him to death." Patrick Colquhoun, A Treatise on the Police of the Metropolis 265-66 (H. Fry, 2d ed 1796).

My studies at the Manchester Quarter Sessions show that between 1774 and 1797, assault accounted for at most 13 percent of all convictions, whereas theft accounted for at least 70 percent. See Lancashire County Record Office, Preston, Quarter Sessions Order Books 143-66 (1774-97). Of course, these are convictions; compounded cases would not appear in these figures. Still, the percentages are so lopsided as to suggest a preoccupation with theft. The associations for prosecution that became so prominent toward the end of the century, see Friedman, 2 U Chi L Sch Roundtable at 486-88 (cited in note 1), concerned themselves mainly with thefts. See Philips, Good Men to Associate at 145 (cited in note 2); King, Prosecution Associations at 171, 173-74 (cited in note 2).

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Contemporary commentary on the law enforcement system offers no help for Friedman's thesis that the promise of compounding cases made the system of private prosecution work. Commentators mentioned the practice only rarely and then unfavorably. In 1751, London magistrate and novelist Henry Fielding set out six causes of the "Remissness of Prosecutors," who he said are often:

1. Fearful, and to be intimidated by the Threats of the Gang; or,
2. Delicate, and cannot appear in a public Court; or,
3. Indolent, and will not give themselves the Trouble of a Prosecution; or,
4. Avaricious, and will not undergo the Expence of it; nay perhaps find their Account in compounding the Matter; or,
5. Tender-hearted, and cannot take away the Life of a Man; or,

Lastly, Necessitous, and cannot really afford the Cost, however small, together with the Loss of Time which attends it. n16

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n16 Henry Fielding, An Enquiry into the Causes of the Late Increase of Robbers 81 (G. Faulkner, 1751).

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Far from proposing that "Necessitous" crime victims launch a prosecution and then settle it for cash, Fielding scolded the "Avaricious" who did just that and lumped them in with all the other "remiss" prosecutors. One gets little sense that compounding cases was a common practice and even less that authorities perceived it to be helpful in suppressing crime. Lancashire magistrate Thomas Butterworth Bayley blamed the underenforcement of laws on crime victims' "selfish Indolence," yet he made no appeal to their selfishness by reminding them of the potential to settle cases for a gain. n17 And Bayley's complaint about victims' "tenderness," n18 like Fielding's about their tender-heartedness and Blackstone's about their "compassion," n19 displayed concern that crime

victims sometimes shielded criminals from the law's severity.FN 20 These observers would be amazed at Friedman's image of crime victims as economic animals who wielded the threat of execution to leverage settlement from the defendant. n21

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n17 Manchester Mercury (Aug 9, 1785).

n18 Id.

n19 Blackstone, 4 Commentaries \*18 (cited in note 14).

n21 Friedman, 2 U Chi L Sch Roundtable at 490 (cited in note 1).

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In fact, contemporaries portrayed a criminal justice system hampered by its reliance on the private initiative of crime victims, who were put off by the sometimes extravagant costs of prosecution, turned off by the potential bloodletting, and scared off by the personal risk. Fielding thought it "a Miracle of Public Spirit if [the crime victim] doth not rather choose to conceal the Felony." n22 By appealing to the public spirit of crime victims, he and other public leaders hoped to persuade victims to go forward against their perceived self-interest. The futility of the task in many cases no doubt moved Lancashire magistrate Samuel Clowes to endorse "prosecuting Felons at the public Expençe" as one of "the most effectual Means of suppressing Villainy." n23 That the system worked at all, indeed that it survived largely intact until 1879, is a paradox worthy of research. n24 The story of the system's ultimate dismantling reflects the complexity of affections for any hoary social institution, however inadequate to its task. n25 In any event, contemporaries certainly thought that the system of private prosecution did not work. Friedman's valiant revisionism notwithstanding, there is little evidence that the system of private prosecution worked well, even less that it worked because of the potential to settle cases for cash, and still less that contemporaries preserved it because they perceived it to work. II. Punishment and Punishment Cost

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n22 Fielding, An Enquiry at 110 (cited in note 16).

n23 Letter from Samuel Clowes to Lord Liverpool (Dec 5, 1791) (258 Liverpool Papers, Duchy of Lancaster Papers 1790-94, British Museum Add MS 38447, f 148).

n24 One reason the system of private prosecution survived may have been the success of early efforts to alter it in practice without doing so in law. In late-eighteenth-century Manchester, an attorney who served as clerk to seven justices of the local bench conducted as many as 80 percent of the prosecutions before the bench. He seems to have served as de facto public prosecutor. See George Fisher, The Birth of the Prison Retold, 104 Yale L J 1235, 1250-52 (1995). By the mid-nineteenth century justices' clerks often served as semi-official public prosecutors. See Douglas Hay and Francis Snyder, Using the Criminal Law, 1750-1850: Policing, Private Prosecution, and the State, in Hay and Snyder, eds, Policing and Prosecution at 3, 42-45 (cited in note 2).

n25 See Philip B. Kurland and D. W. M. Waters, Public Prosecutions in England, 1854-79: An Essay in English Legislative History, 1959 Duke L J 493.

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The reason Friedman likes private prosecution so much becomes clearer when he turns his attention to comparing various forms of punishment. A costlessly collected fine or damage payment--of the sort paid to buy off a private prosecutor--has an inefficiency of zero. "What one person loses another gets." n26 Execution, in contrast, has an inefficiency of about one. "The criminal loses his life and nobody gets one." n27 And imprisonment (on today's model) has an inefficiency far greater than one. "The criminal loses his liberty, nobody gets it, and the state must pay for the prison."FN 28 Friedman surmises that the great cost of imprisonment suppressed its use early in the eighteenth century and that the nation turned increasingly to prisons as the industrial boom of the latter half of the century generated the necessary funds.

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n26 Friedman, 2 U Chi L Sch Roundtable at 494 (cited in note 1).

n27 Id.

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It is hard to grasp why rational economic actors (as I understand Friedman supposes us to be) would have embraced wholesale what is perhaps the most inefficient form of punishment. Perhaps prisons produce goods that need to be factored into the equation, like the incapacitation of the criminal or the deterrence of others. n29 More startling to me as a non-economist is why our adoption of this inefficient form of punishment should have been delayed only by our inability to pay for it. Why should a suddenly prosperous late-eighteenth-century English society have decided to squander its newfound wealth on, among all things, a highly inefficient form of criminal punishment?

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n29 Elsewhere Friedman makes clear that he is ignoring the benefit of incapacitation and says that he considers deterrence "separately." David D. Friedman, Should the Characteristics of Victims and Criminals Count?: Payne v. Tennessee and Two Views of Efficient Punishment, 34 BC L Rev 731, 734 n 11, 735 n 13 (1993). In a letter to the author, Friedman argues that imprisonment was embraced because it promised to deter minor crime:

Imprisonment is an expensive punishment relative to transportation or execution. Its great advantage is that the quantity can be varied much more easily; in particular, it is more suitable for lower (but still substantial) punishments.

Lower but substantial punishments are useful because judges, juries, and victims will not (perhaps also should not) impose very severe punishments on first offenders, youths, etc. Their failure to do so reduces deterrence. So we can get more deterrence by making extensive use of imprisonment for the sorts

of offenders that will go free if we only have available transportation and execution.

This additional deterrence comes at a cost. That cost was too high to pay early in the century. But the 18th century was a period of substantial economic growth. By the end of the century, England, and in particular the English government, was rich enough to be willing to buy a 'higher quality' deterrent system--one with imprisonment as well as transportation and execution.

As I argue below, it is not at all clear that prisons were too expensive earlier in the century. I have argued elsewhere that the rise of prisons during the last quarter of the century reflected the rise of a corrective penology. See Fisher, 104 Yale L J at 1271-77 (cited in note 24). There is little evidence that could support Friedman's view that prisons grew up in response to a deterrent impulse long frustrated by financial constraints.

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Before I examine the consequences of Friedman's argument, let me point out that he is again arguing in an evidentiary void. What evidence is there that imprisonment was more expensive than transportation, the form of punishment it most directly replaced? n30 We must be careful not to project backward onto eighteenth-century prisons the costs of today's heavily staffed, restlessly litigated fortresses. Here historians could really use the help of someone like Friedman, yet he merely churns back the few useful cost figures historians have managed to produce. Toward the beginning of the century, the government paid three pounds for each transported convict; the fee soon rose to five pounds. n31 Friedman reasons that English imprisonment may have cost the same as French imprisonment--about four pounds per year. n32 As the term of transportation for minor crimes was seven years, Friedman concludes that "imprisonment cost substantially more than the English state was willing to pay." n33

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n30 Imprisonment grew up at the end of the eighteenth century primarily as an alternative to transportation for the punishment of minor crimes, not as an alternative to execution for the punishment of great crimes. See Fisher, 104 Yale L J at 1264-67, 1293, 1312-13 (cited in note 24).

n31 See A. Roger Ekirch, Bound for America: The Transportation of British Convicts to the Colonies 1718-1775 70-71 (Clarendon, 1987).

n32 Friedman, 2 U Chi L Sch Roundtable at 497 (cited in note 1).

n33 Id.

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That might be true if prison terms, when they took hold, replaced transportation terms year for year. But they did not. Records from the Manchester Quarter Sessions show that during the last quarter of the

eighteenth century, imprisonment largely displaced transportation as the punishment for petty larceny, the crime that consumed the great bulk of criminal business in that court. The statutory term of transportation for petty larceny was seven years. Yet the average prison term for that same crime appears never to have reached ten months. n34 True, the cost of a new prison commissioned by the Manchester magistrates and completed in 1790 exceeded [Sterling]13,000, n35 but the magistrates could well have continued to use their old prison, built hundreds of years earlier and recently renovated for a relatively modest Sterling1,671. n36

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n34 See Fisher, 104 Yale L J at 1265 (cited in note 24).

n35 See id at 1260 & n 124.

n36 See Margaret DeLacy, Prison Reform in Lancashire, 1700-1850 74-75 (Stanford, 1986).

-End Footnotes-

These figures highlight one question it seems no cost-based argument can answer: Why did penal authorities in late-eighteenth-century England build such expensive prisons? n37 The prevailing prisons of the early and middle parts of the century had but few rooms in which prisoners indiscriminately mixed. These prisons were not inherently secure, but shackling the prisoners in heavy irons kept them in one place. Staffing was minimal, and the jailer's privilege to collect fees from the prisoners in exchange for improved accommodations and to operate a "tap," or prison pub, meant that salaries could be small. Even food burdened the rate-payer little. In Manchester, prisoners begged for donations by lowering collection bags through the bars. The prison reform of the last quarter of the century wrecked these economic virtues of early prisons. The Manchester bench closed the tap in 1777 and banned fee-taking from the prisoners--and was thereafter forced to raise the jailer's salary from Sterling25 to Sterling80. n38 Parliament soon closed prison taps nationwide, having earlier placed limits on the collection of fees. n39 The many new prisons built in this era provided separate cells for each inmate, separate courts for the several classes of prisoners, workshops, chapels, and infirmaries. n40

-Footnotes-

n37 During the 1780s and 1790s a "good reformed prison" cost between Sterling151 and Sterling283 per cell-place. Reforming counties spent at least a quarter of their revenues on prison mortgages and administration. See Robin Evans, The Fabrication of Virtue: English Prison Architecture, 1750-1840 194 (Cambridge, 1982).

n38 See DeLacy, Prison Reform at 78, 106-07 (cited in note 36); John Howard, The State of the Prisons in England and Wales 435 (Warrington, Eyres, 3d ed 1784).

n39 See 22 Geo 3, ch 64, section 8 (1782) (banning taps in houses of correction); 24 Geo 3, ch 54, section 22 (1784) (banning taps in county jails); 14 Geo 3, ch 20 (1774) (placing some limitations on collecting fees from prisoners).

n40 See Evans, *The Fabrication of Virtue* (cited in note 37) (reprinting plans of prisons built in this era).

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Despite their seeming extravagance, some forty-five of these prisons were built between 1775 and 1795. n41 In Gloucestershire, Sir George Onesiphorus Paul persuaded county authorities to build five prisons on the latest model all at once. n42 Although there was occasional scattered grumbling about the cost of these state-of-the-art prisons, n43 the prevailing mood was that cost was no object. n44 Witness Bayley's announcement of plans to build a new prison in Manchester: "The necessary Expences which will attend the Completion of this good work of mercy and justice, will, I am confident, be cheerfully borne by an enlightened and generous Public, when they are rationally led to expect . . . 'That solitary Imprisonment, well regulated Labour, and religious Instruction, may be Means, under Providence, of deterring others from the Commission of Crimes, of reforming Individuals, and inuring them to Habits of Industry.'" n45 Of course, by protesting so much, Bayley betrayed his concern that the less enlightened would not pay their increased rates so cheerfully. That may explain his unspoken appeal to cost efficiency: It costs more because it saves more.

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n41 See *id* at 94.

n42 See *id* at 139. Gloucestershire's new jail, which incorporated a penitentiary and house of correction, cost almost Sterling26,000. Four additional houses of correction cost between Sterling3300 and Sterling6200 each. See J. R. S. Whiting, *Prison Reform in Gloucestershire 1776-1820* 15, 17, 114, 139, 145, 160 (Phillimore, 1975).

n43 See Evans, *Fabrication of Virtue* at 133-34 (cited in note 37); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* 98, 234 n 65 (Pantheon, 1978).

n44 In 1788, Dorset authorities decided that their new prison, built just five years earlier at a cost of Sterling4000, was not reformed enough and quickly built a Sterling16,000 prison in its place. See Evans, *Fabrication of Virtue* at 132 (cited in note 37).

n45 *Manchester Mercury* (Aug 9, 1785) (emphasis in original).

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Perhaps Friedman is right that the government could not have afforded such elaborate imprisonment in the earlier years of the century, but he provides no evidence on the point. The question is more complicated than it seems, as these new prisons were built not by the central government but by many separate local and county authorities whose resources are not so easy to measure. n46 In any event, to syllogize increasing expenditure from increasing wealth obscures the truly interesting question about the rise of the prison: Why, at the end of the eighteenth century, did penal authorities in England choose a new and highly articulated prison regimen as the punishment of first resort for minor crime? Friedman is right that sufficient resources are a necessary condition to this choice, but can having the money explain the choice? Historical theorists

trying to explain the rise of the English prison seize on religious movements, intellectual trends, industrial developments, social struggles, historical accidents, and the influence of motivated individuals, all of which help to explain dissatisfaction with transportation and expanding ambitions for imprisonment. Yet except for the occasional footnoted reference, n47 Friedman leaves non-cost-based forces for others to explore. III. Conclusion

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n46 Parliament's involvement generally extended only to authorizing county authorities to raise funds. Between 1785 and 1788, six counties obtained acts for the rebuilding and the reorganizing of their prisons. See Sidney Webb and Beatrice Webb, English Prisons under Local Government 40 (Longmans, Green, 1922); 25 Geo 3, ch 10 (1785) (Gloucestershire); 26 Geo 3, ch 24 (1786) (Shropshire); 26 Geo 3, ch 55 (1786) (Middlesex); 27 Geo 3, ch 58 (1787) (Sussex); 27 Geo 3, ch 60 (1787) (Staffordshire); 28 Geo 3, ch 82 (1788) (Cheshire).

n47 Friedman, 2 U Chi L Sch Roundtable at 484 n 67 (cited in note 1).

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Friedman is surely right that a society will employ only those procedures and punishments it can afford, that the execution of any particular procedure or punishment will respond to cost constraints, and that the effectiveness of any procedure or punishment will depend to some degree on how well it exploits the self-interest of both criminal and law enforcer. Legal historians of this era have not proceeded in ignorance of these principles. That so many studies nonetheless have yielded so many widely varying accounts of the forces at work shows how unlikely it is that measuring costs can do much more than set the outer bounds of analysis. Friedman has helped us to see more clearly the cost constraints within which the law enforcers of the eighteenth century acted. We must still work to understand the choices they made within those constraints.

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George Fisher is an assistant clinical professor of law at Boston College. He would like to thank Avi Soifer, Elena Kagan, and David Friedman for their help and comments.

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Article: Our Separatism? Voting Rights as an American Nationalities Policy

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-Footnotes-

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-End Footnotes-

SUMMARY:

... My argument in this Article is that the voting-rights system is a key element in the American response. ... 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. ... The electorate of North Carolina's Twelfth Congressional District--the district described in Shaw--is only 53.5 percent African-American; the districts condemned in Louisiana, Georgia, and Texas had roughly similar racial compositions. ... 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. ... 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. ...

TEXT:  
[\*83]

One of the salient characteristics of contemporary global politics is the disintegration of empires and multiethnic nationstates 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

[\*84] 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, votingrights 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 absoluteequipopulousity requirement.

I. The Lexical Seeds of the Separatism Critique: VotingRights Doctrine

The Voting Rights Act of 1965 ("Act") n1 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 n2 --the Act protects certain classes of voters against dilution of their group voting strength. n3 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? n4

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n1 42 USC sections 1973-1973aa-6 (1988 & Supp 1994).

n2 See 42 USC section 1973aa (banning literacy tests nationwide); 42 USC section 1973aa-1a (requiring bilingual voting materials); 42 USC section 1973aa-6 (requiring assistance for blind, disabled, or illiterate persons).

n3 See 42 USC sections 1973, 1973c.

n4 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).

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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 [\*85] 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. n5 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. n6

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n5 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 F2d 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, 27 F3d 563 (4th Cir 1994) (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 1988) (three-judge court), aff'd, 488 US 1024 (1989).

n6 *Bandemer*, 478 US at 131-32 (plurality opinion). See also *id* at 152-53 (O'Connor concurring in the judgment).

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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. n7 But this protection extends to only two classes. First, the Act protects groups defined in terms of race, usually, but not always, African-Americans. n8 Thus, the Act [\*86] is itself explicitly race conscious, n9 and demands that courts consider the racial fairness of challenged districts.

-Footnotes-

n7 42 USC section 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).

n8 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).

n9 See 42 USC section 1973(b) (providing that "the 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).

-End Footnotes-

Second, the Act protects "members of a language minority group" n10 . . . sometimes. The Act specifically defines "language minorities" to include only "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." n11 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 ownlanguage election materials. n12 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. n13 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. n14 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. n15

-Footnotes-

n10 42 USC section 1973b(f) (2).

n11 42 USC section 19731(c)(3).

n12 42 USC section 1973b(f)(2).

n13 42 USC section 1973(b).

n14 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 section 19731(c)(3).

n15 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).

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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 [\*87] decision to create majority Inupiaq rather than majority Yupiq districts raise a claim under Section 2? n16 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. n17 By contrast, if the covered groups are treated as opaque, the Act may mask real intragroup conflict.

- - - - -Footnotes- - - - -

n16 See *Arizonans for Fair Representation v Symington*, 828 F Supp 684, 690 (D Ariz 1992) (three-judge court) (discussing conflict between Navajo and Hopi tribes in Arizona that resulted in their placement in separate congressional districts), *aff'd*, 113 S Ct 1573 (1993); *Guy v Hickel*, No. A-92-494 CIV (JWS) (D Alaska, 1994) (rejecting a Section 2 claim by Yupiq Eskimos because Eskimos as a whole are fairly represented within the Alaskan legislature). See also Samuel Issacharoff, *Race and Redistricting*, 2 *Reconstruction* 118, 124 (1994) (referring to the tensions competing Latino communities may experience if they are combined in the same congressional district, as was done with Chicanos and Puerto Ricans in Chicago); Frank J. Macchiarola and Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?*, 14 *Cardozo L Rev* 1175, 1211 (1993) (discussing councilmanic redistricting in New York and the conflict between Dominicans and Puerto Ricans in upper Manhattan and between American-born and Caribbean-born African-Americans in Brooklyn).

n17 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).

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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 n18 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 singlemember districts. n19 The second and third elements revolve [\*88] around political discreteness: the group must show that it is politically cohesive, and it must show that members of the (usually white) majority vote sufficiently as a bloc so as to defeat the minority's candidates of choice. n20 Gingles's emphasis on geographic segregation (a point I criticized in an earlier work n21 ) 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 difference 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 litigation--the insistence on political polarization may affect the larger political environment.

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n18 478 US at 30.

n19 Id at 50.

n20 Id at 51.

n21 See Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv CR-CL L Rev 173 (1989).

- - - - -End Footnotes- - - - -

The preferred remedy in Section 2 cases exploits the existence of geographic isolation to combat political exclusion. Absent an agreement to adopt a modified at-large remedy, n22 courts generally order defendant jurisdictions to create single-member districts, some of which are majority nonwhite, to remedy Section 2 violations. n23 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. n24 Complying with one person, one vote and satisfying the political realities of partisanship and incumbent protection may make the resulting districts look quite ungainly. n25 Even a minority group [\*89] 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 n26 --can seek relief through relatively race-neutral remedial districting only if they live in large ghettos 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. n27

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n22 For a discussion of these remedies at greater length see notes 87-101 and accompanying text.

n23 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).

n24 See *Johnson v De Grandy*, 114 S Ct 2647, 2658-59 (1994) (discussing proportionality among districts and fair representation).

n25 Many of these districts are no more ungainly than some of the grotesque political gerrymanders permitted under the current constitutional standard. For example, the court in *Vera v Richards*, 861 F Supp 1304 (S D Tex 1994), prob jur noted, 115 S Ct 2639 (1995), sustained Texas's Sixth Congressional District, which is majority white, against a constitutional attack. Using two different measures of compactness, that district is quite similar to three majority-nonwhite Texas districts that the Vera court struck down as violating the Equal Protection Clause in light of *Shaw v Reno*, 113 S Ct 2816 (1993). See also Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich L Rev 483, 565 (1993) (containing a table measuring the

compactness scores of various congressional districts). Regardless of their relative regularity, however, many of the newly drawn congressional districts look odd compared to the perhaps-never-actually-used "ideal" in most Americans' minds--something rather like the shape of Colorado or Kansas.

Moreover, the ungainliness may itself be an illustration of the relative weight of minority interests in the overall apportionment process. If minority groups' concerns are subordinated to the majority's partisan considerations, one should expect that minority districts will look especially odd since they must make do in part with voters who are "leftovers" whom no incumbent insists on having.

n26 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").

n27 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).

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[\*90]

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 n28 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. n29 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.

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n28 Section 5 of the Voting Rights Act of 1965, 42 USC section 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).

n29 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 AfricanAmerican 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).

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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, n30 but it recognized a new cause of action for what might be described as wrongful districting. In Shaw v Reno, n31 the Court seemed to limit wrongful districting claims to plans involving districts that were facially "irregular" or "bizarre," but in Miller v Johnson, n32 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 [\*91] in or without a particular district." n33 As I have explained elsewhere, the cases betoken a jurisprudence that is both incoherent and doctrinally unstable; n34 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. n35

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n30 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).

n31 113 S Ct at 2820, 2825, and 2826.

n32 115 S Ct at 2488.

n33 Id.

n34 Pamela S. Karlan, Still Hazy After All These Years: Voting Rights in the Post-Shaw Era (forthcoming in Cumb L Rev).

n35 Shaw, 113 S Ct at 2830.

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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 n36 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. n37 Third, representatives elected from racially identifiable districts may ignore the viewpoint of voters who are not members of the district majority. n38 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; n39 the "conservative" version claims that representatives elected from overwhelmingly African-American districts are outside the political mainstream, even of their districts. n40 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.

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n36 Id at 2827. See also *Anderson v Martin*, 375 US 399, 402 (1964) (striking down a Louisiana law that put candidates' race on the ballot because it might signal to voters the government's desire that they take race into account).

n37 See Samuel Issacharoff, *Race and Redistricting*, 2 *Reconstruction* 118, 122-23 (1994) (cited in note 16).

n38 See *Shaw*, 113 S Ct at 2827.

n39 See, for example, Juan Williams, *Blacked Out in the Newt Congress*, *Wash Post C1* (Nov 20, 1994); Charles Lane, *Ghetto Chic: New York's Redistricting Mess*, *New Republic* 14 (Aug 12, 1991); Carol Matlack, *Questioning Minority-Aid Software*, 22 *Natl J* 1540, 1540 (1990); Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 242-44 (Harvard University Press, 1987) (cited in note 7).

In the "Who Lost China?" category, commentators have argued that the creation of majority-nonwhite districts is responsible for the Democrats' loss of the House. See Steven A. Holmes, *Did Racial Redistricting Undermine Democrats?*, *NY Times* 1-32 (Nov 13, 1994). Notably, these commentators do not mention that Republicans picked up roughly 53 percent of the House seats with slightly over 50 percent of the total vote cast in House races. See Marjorie Connelly, *Portrait of the Electorate: Who Voted for Whom in the House*, *NY Times* 1-24 (Nov 13, 1994). Nor, of course, do they confront the normative implications of a theory that treats African- and Hispanic-American voters as if they are "Hamburger Helper" to be used to extend the political power of white Democrats who may or may not be responsive to their nonwhite constituents.

n40 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 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 "the moderating influences genuine diversity offers"). See also Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 60 (Free Press, 1994) ("Where 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).

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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" n41 and "balkanization." n42 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. n43 [\*93] 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.

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n41 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.

n42 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.

n43 South Africa chose an election system characterized by proportional representation and power sharing, deliberately rejecting an American-style, first-past-the-post wholly districted system precisely because it would not fairly reflect the voting strength and preferences of the white minority. See, for example, Andrew Reynolds and Arend Lijphart, *Ethnic Power Sharing: South Africa's Model*, *Christ Sci Mon* 19 (Sept 14, 1994); Andrew Reynolds, *A Fair Voting System for South Africa: All Sides Reject Winner-Take-All for First All-Race Elections*, in *Voting and Democracy Report: 1993* 15, 15-16 (Center for Voting and Democracy, 1993). For a more extensive discussion of democratic systems that try to account for ethnic and linguistic divisions among the population, see Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, 1984).

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Two terms ago, in *Holder v Hall*, n44 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 divides 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." n45 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. n46 In Justice Thomas's democracy, voters who are part of the minority are supposed to lose: "if 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." n47 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. n48

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n44 114 S Ct at 2591-2602 (Thomas concurring in the judgment).

n45 *Id* at 2598 (internal quotation marks omitted). See also, for example, *id* at 2592 ("We have collaborated in what may aptly be termed the racial 'balkanization' of the Nation.").

n46 *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, *Erasing Democracy: The Voting Rights Cases*, 108 *Harv L Rev* 109, 120-26 (1994).

n47 *Hall*, 114 S Ct at 2596 (Thomas concurring in the judgment).

n48 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 African-American person as county commissioner, and that the federal judge who tried the case himself stated that he "wouldn't run if he were black," *id* at 2584 (opinion of the Court), simply did not trouble Justice Thomas.

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[\*94]

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. n49 He simply rejects the proposition that elections are "a device for regulating, rationing, and apportioning political power among racial and ethnic groups" n50 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 Reynolds v Sims, n51 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.

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n49 See id at 2597-98 (Thomas concurring in the judgment).

n50 Id at 2592.

n51 377 US 533, 554-55, 561-62, 565-66 (1964).

-End Footnotes-

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 Shaw--is only 53.5 percent African-American; n52 the districts condemned in Louisiana, Georgia, and Texas had roughly similar racial compositions. n53 These districts, what [\*95] 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. n54

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n52 Shaw, 113 S Ct at 2820; Shaw v Hunt, 861 F Supp 408, 472 (E D NC 1994) (threejudge 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. Shaw, 113 S Ct at 2820; Shaw, 861 F Supp at 472. In the November 1992 elections, both the First and Twelfth Districts elected African-American representatives. See Barone & Ujifusa, Almanac at 946, 970 (cited in note 29).

n53 The Georgia Eleventh District, struck down in Johnson, 115 S Ct at 2475, has a 60 percent African-American voting age population. See Barone & Ujifusa, Almanac at 357 (cited in note 30). The redrawn Louisiana Fourth District, struck down in Hays v Louisiana, 862 F Supp 119 (W D La 1994) (three-judge court), rev'd on other grounds, 115 S Ct 2431 (1995), has a roughly 55 percent African-American electorate. See Hays, 862 F Supp at 122. And the Texas Eighteenth, Twenty-Ninth, and Thirtieth Districts, struck down in Vera, 861 F Supp at 1319-25, 1337-41, are 49 percent African-American and 13 percent Hispanic-American; 10 percent African-American and 54 percent Hispanic-American; and 47 percent African-American and 15 percent Hispanic-American, respectively. See Barone & Ujifusa, Almanac at 1251, 1276, 1278 (cited in note 29).

n54 See Pamela S. Karlan, Undoing the Right Thing: Single-Member Offices and the Voting Rights Act, 77 Va L Rev 1, 43-45 (1991).

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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. n55 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. n56 At least to the extent that incumbency tends to increase the number of white voters who vote for African-American candidates, n57 some evidence exists that creating nonwhite districts diminishes the level of white-bloc voting and racial polarization.

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n55 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.

n56 See Conference, The Supreme Court, Racial Politics, and the Right To Vote: Shaw v. Reno and the Future of the Voting Rights Act, 44 Am U L Rev 1, 60-62 (1994).

n57 See James E. Conyers and Walter L. Wallace, Black Elected Officials: A Study of Black Americans Holding Governmental Office 116, 147 (Russell Sage Foundation, 1976); Lani Guinier, Keeping the Faith: Black Voters in the Post-Reagan Era, 24 Harv CR-CL L Rev 393, 425 n 138 (1989); Federal Document Clearinghouse Congressional Testimony (May 11, 1994)(testimony of Allan J. Lichtman on the Voting Rights Act before the House Judiciary Committee).

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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 [\*96] 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. n58 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 n59 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, n60 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. n61

-Footnotes-

n58 See Guinier, Tyranny at 129 (cited in note 40).

n59 418 US 717 (1974).

n60 114 S Ct 2481, 2505-16 (1994).

n61 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).

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.

-End Footnotes-

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. n62 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; n63 all

[\*97] of the African-American representatives from the South were. n64 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. n65 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.

-Footnotes-

n62 See Lisa Handley and Bernard Grofman, The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations, in Chandler Davidson and Bernard Grofman, eds, Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990 335, 336, 345 (Princeton University Press, 1994); Joint Center for Political and Economic Studies, Black Elected Officials: A National Roster: 1991 xix (Joint Center for Political and Economic Studies Press, 20th ed 1992).

n63 Handley & Grofman, The Impact of the Voting Rights Act on Minority Representation, in Davidson & Grofman, eds, Quiet Revolution in the South at 336-37 (cited in note 62).

n64 Id at 343.

n65 Id at 336, 345.

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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. n66 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. n67

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n66 In a recent article, Lani Guinier also has advanced a theory of group representation and the Voting Right Act. See Guinier, Eracing Democracy, 108 Harv L Rev at 109 (cited in note 46).

n67 See, generally, Michael A. Fitts, The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U Pa L Rev 1567 (1988); Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L J 1539 (1988).

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[\*98]

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. n68 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. n69 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. n70 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, n71 and thus legislative integration may be critical to including African-Americans within the pluralist process.

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n68 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.

n69 These representatives need not themselves be African-American; the question is how faithfully they champion the interests of African-American constituents.

n70 See Edward Walsh, *After Putting GOP in Power, Farmers May Reap Less in Subsidies*, Wash Post A4 (Mar 13, 1995).

n71 See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv CR-CL L Rev 173, 216-18 (1989) (cited in note 21).

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As one moves away from pure pluralism towards a more republican understanding, additional benefits emerge. Legislatures offer an institutional setting that provides opportunities for [\*99] 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. n72 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, n73 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. n74 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.

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n72 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).

n73 See Taylor v Louisiana, 419 US 522, 526-31 (1975); Jury Selection and Service Act of 1968, 28 USC section 1861 (1988); Guinier, The Tyranny of the Majority at 107 (cited in note 40).

n74 See Karlan, 24 Harv CR-CL L Rev at 218-19 (cited in note 21).

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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. n75 In [\*100] 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. n76

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n75 See Rodolfo O. de la Garza and Louis DeSipio, Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage, 71 Tex L Rev 1479, 1480-81 (1993).

n76 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, The Appropriateness of Biracial Approaches to Measuring Representation in a Multicultural World, 28 PS 42 (Mar 1995).

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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). n77 The Supreme Court confronted this issue in Johnson v De Grandy, n78 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. n79 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.

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n77 See, for example, De Grandy, 114 S Ct at 2647 (state legislative seats); Meeks v Metropolitan Dade County, 908 F2d 1540 (11th Cir 1990) (county government), cert denied, 499 US 907 (1991); Barry Bearak, Miami Split in Ethnic Rivalry in Race for Pepper's Congressional Seat, LA Times 1-21 (Aug 26, 1989) (congressional districts); Adela Gooch, Ethnic Divisions Dominate Florida's House Race, Wash Post A3 (Aug 27, 1989) (congressional districts). In the debate over post-1990 census state legislative districts, one African-American state legislator asserted, in explaining why an additional majority African-American district rather than an additional Cuban-American one should be created, that "if the basis of an extra minority seat is the Voting Rights Act, then we ought to look and see who it was standing on the Edmund Pettus Bridge in Selma getting trampled." Samuel Issacharoff, Race and Redistricting, 2 Reconstruction 118, 123 (1994) (cited in note 16).

n78 114 S Ct at 2647.

n79 See De Grandy v Wetherell, 815 F Supp 1550, 1578-80 (N D Fla 1992), aff'd in part and rev'd in part as Johnson v De Grandy, 114 S Ct at 2647.

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[\*101]

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: Quebecois separatism in Canada, the emergence of geographically based political parties within Italy, antiimmigrant 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

[\*102] question of the twentieth century, n80 the problem of the color and nationalities lines may turn out to be the central problem of the twenty-first century.

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n80 See W.E.B. DuBois, *The Souls of Black Folk* xi (Signet, 1969) (originally published in 1903).

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### 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." n81 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.

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n81 Holder v Hall, 114 S Ct 2581, 2592 (1994) (Thomas concurring in the judgment).

-End Footnotes-

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. n82 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, n83 a set of

[\*103] 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, n84 their comparisons of the legislative intent behind creating majority African-American districts to the mens rea of murderers, n85 and their pious invocations of Martin Luther King, n86 pose a far greater threat to balkanize us than do the districts themselves.

-Footnotes-

n82 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 Section 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).

n83 A nationwide political majority rejected this political order in enacting and amending the Voting Rights Act. See Karlan, 77 Va L Rev at 9-11 (describing the nonmajoritarian character of the Voting Rights Act) (cited in note 54). Compare Lucas v Forty-Fourth General Assembly of Colorado, 377 US 713, 734-37 (1964) (rejecting the majority's decision by referendum to deviate from one person, one vote).

n84 See text accompanying notes 41-42.

n85 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).

n86 See Vera v Richards, 861 F Supp 1304, 1310 (S D Tex 1994).

-End Footnotes-

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. n87 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.

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n87 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).

-End Footnotes-

[\*104]

In an earlier work, I discussed two of these systems, both with long American pedigrees--cumulative and limited voting. n88 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 neighborhoodbased candidate for city council and a member of her ethnic or racial group for the state legislature. n89

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n88 See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation* 24 Harv CR-CL L Rev 173, 223-36 (1989) (cited in note 21).

n89 See Pamela S. Karlan, Democracy and Dis-Appointment, 93 Mich L Rev 1273, 1282-83 (1995).

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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. n90 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. n91 Territory exercises at most a constraining influence on the degree of gerrymandering. n92 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. n93

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n90 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 section 2c (1988). See also Laurence F. Schmeckebier, Congressional Apportionment (The Brookings Institution, 1941) (tracing the history of regulations of congressional districting).

n91 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).

n92 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.

n93 See Jeffers v Clinton, 730 F Supp 196, 214 (E D Ark 1989) (three-judge court) (white state legislators in Arkansas who represented large numbers of African-American constituents often told their African-American constituents to seek assistance from African-American state legislators instead), aff'd, 498 US 1019 (1991); Lani Guinier, The Tyranny of the Majority 37 (Free Press, 1994) (noting that Harlem Congressman Adam Clayton Powell, rather than the congressman elected from their district, was viewed as the "representative" of African-Americans living in North Carolina) (cited in note 40).

Campaign contributions offer another pointed example of this phenomenon. For example, over 80 percent of all contributions over \$ 200 to Oliver North's and Senator Charles Robb's senatorial campaigns in 1994 came from outside Virginia. See Harper's Index, Harper's 13 (Oct 1994).

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[\*105]

For example, rather than the North Carolina Piedmont or the Atlanta metropolitan region being parcelled 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. n94 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. n95 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"; n96 it is likely that more voters would actually vote for a winning representative.

-Footnotes-

n94 The "threshold of exclusion" refers to the size a group must be to elect its preferred candidate under a worst-case scenario in which all other voters vote strategically against the relevant group. See Karlan, 24 Harv CR-CL L Rev at 222 (cited in note 21). In a strictly limited system, the threshold is  $v/(v + n)$ , where  $v$  is the number of votes each voter is permitted to cast and  $n$  is the number of seats to be filled. Id at 224.

n95 Slates could be created either collectively--for example, environmentally conscious groups might propose a "green" slate--or could reflect entirely individual choice, much as individual diners construct their own menus from a buffet. See Guinier, *The Tyranny of the Majority* at 15 (cited in note 40); Richard L. Engstrom, Delbert A. Taebel, and Richard L. Cole, *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J L & Pol 469, 476-95 (1989).

n96 See note 37 and accompanying text.

-End Footnotes-

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; n97 in the latter case, if there is no racial-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. n98

-Footnotes-

n97 See *Johnson v De Grandy*, 114 S Ct 2647, 2658 n 11 (1994) (distinguishing between this concept of proportionality and the idea of "proportional representation" disclaimed by the proviso in Section 2).

n98 For predictions regarding the number of African-American representatives who would be elected from majority-white jurisdictions if a "color-blind

hypothesis" were true, see Lisa Handley and Bernard Grofman, The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations, in Chandler Davidson and Bernard Grofman, eds, Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990 336, 337-38, tables 11.1, 11.3, 11.4, (Princeton University Press, 1994) (cited in note 62).

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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." n99 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, n100 alternative [\*107] 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. n101

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n99 Thornburg v Gingles, 478 US 30, 51 (1986) (requiring white-bloc voting as the third Gingles factor).

n100 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 districting claim).

n101 42 USC section 1973(b) (1988).

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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. n102

-Footnotes-

n102 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.")

-End Footnotes-

Or perhaps, rather than abandoning territorial congressional districting altogether, we ought to consider relaxing somewhat the constitutional constraint of equipopulosity. Since Karcher v Daggett, n103 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. n104

-Footnotes-

n103 462 US at 725.

n104 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).

-End Footnotes-

[\*108]

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. n105 Certainly, such a concern with group representation motivated the standard delineated in Daggett. n106 But computer technology has stripped one person, one vote of a significant part of its constraining force. n107 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 equipopulousity requirement. n108

-Footnotes-

n105 See Pamela S. Karlan, The Rights to Vote: Some Pessimism About Formalism, 71 Tex L Rev 1705, 1717-18 (1993)(cited in note 4).

n106 Daggett, 462 US at 744-61 (Stevens concurring). See also Samuel Issacharoff, Judging Politics: The Elusive Quest for Judicial Review of Political Fairness, 71 Tex L Rev 1643, 1656 (1993).

n107 See Issacharoff, 71 Tex L Rev at 1645-46, 1696-98 (cited in note 106).

n108 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).

-End Footnotes-

In state and local apportionments, judicial scrutiny does not kick in unless the total-population deviation exceeds 10 percent. n109 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, n110 a fetishistic adherence to a fictional absolute population equality may cause more problems than it cures. One person, one vote already requires geographic [\*109] districts that are somewhat untethered from any underlying geographically defined interests; n111 slightly loosening the mathematical constraint might make it more likely that congressional districts would reflect some reality on the ground.

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n109 See Voinovich v Quilter, 113 S Ct 1149, 1159 (1993); Brown v Thomson, 462 US 835, 842-43 (1983).

n110 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).

n111 See Briffault, 1995 U Chi Legal F at 43-44 (cited in note 92).

-End Footnotes-

Conclusion

A quarter century ago, the Kerner Commission warned that "Our nation is moving towards two societies, one black, one white --separate and unequal." n112 To blame the Voting Rights Act for that continuing separation is "like saying that it is the doctor's thermometer which causes high fever." n113 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." n114 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.

- - - - -Footnotes- - - - -

n112 Report of the National Advisory Commission on Civil Disorders 1 (Bantam Books, 1968).

n113 Voting Rights Act Extension, S Rep No 97-417, 97th Cong, 2d Sess 28, 34 (1982)(cited in note 7).

n114 Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv L Rev 457, 477 (1897).

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Half-Truths of the First Amendment

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-Footnotes-

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-End Footnotes-

SUMMARY:

... Much of the law of free speech is based on half-truths. ... (2) The most serious threat to the system of free expression consists of government regulation of speech on the basis of content. ... On this view, the ban on advertising for cigarettes, gambling, and alcohol consumption invades the autonomy of those who would listen to such speech. ... In certain narrow circumstances, the presumption is overcome because (a) there is at most a small risk of illegitimate motivation, (b) low value or unprotected speech is at issue, (c) the skewing effect on the system of free expression is minimal, and (d) the government is able to make a powerful showing of harm. ... My point is only that current law does not embody a flat ban on viewpoint discrimination. ... The restriction of the speech of political dissidents is said to have a modern analogue in the regulation of false and misleading commercial speech. ... In these circumstances, some major threats to a well-functioning system of free expression, defined in Madisonian terms, come not from content-based regulation, but from free markets in speech. ... The First Amendment question is not whether there is a subsidy or a penalty. ...

TEXT:  
[\*25]

Much of the law of free speech is based on half-truths. These are principles or understandings that have a good deal to offer, that have fully plausible origins in history and principle, and that have mostly salutary consequences. But they also have significant blind spots. The blind spots distort important issues and in the end disserve the system of free expression.

In this essay, I deal with the four most important of these half-truths. (1) The First Amendment prohibits all viewpoint discrimination. (2) The most serious threat to the system of free expression consists of government regulation of speech on the basis of content. (3) Government may "subsidize" speech on whatever terms it chooses. (4) Content-based restrictions on speech are always

worse than content-neutral restrictions on speech. Taken together, these half-truths explain a surprisingly large amount of free speech law. All in all, they may do more good than harm. But they also obscure inquiry and at times lead to inadequate outcomes.

The four half-truths are closely related, and it will probably be beneficial to understand their many interactions. Above all, I suggest that the doctrinal distinctions embodied in the half-truths are taking on an unfortunate life of their own; it is as if the doctrines are operating for their own sake. In some ways, the distinctions are threatening to lose touch with the animating goals of a system of free expression, prominently including the creation of favorable conditions for democratic government. Indeed, it sometimes seems as if free speech doctrine is out of touch with the question of whether the free speech principle is animated by identifiable goals at all. My effort to challenge the half-truths is spurred above all by a belief that whatever else it is about, the First Amendment is at least partly designed to create a well-functioning deliberative democracy. When free speech doctrine disservices democratic goals, something is seriously amiss. [\*26]

I. HALF-TRUTH NUMBER ONE: THE FIRST AMENDMENT PROHIBITS VIEWPOINT DISCRIMINATION

It is commonly said that government may not regulate speech on the basis of the speaker's viewpoint. n1 Indeed, viewpoint discrimination may be the defining example of a violation of the freespeech guarantee. Thus, for example, government may not prohibit Republicans from speaking on subways, even though government may be able to prohibit advertising on subways altogether, or even regulate the content of speech on subways if it does so in a viewpoint-neutral way.

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n1 See, for example, American Booksellers Association v Hudnut, 771 F2d 323, 332 (7th Cir 1985); R.A.V. v City of St. Paul, 112 S Ct 2538 (1992); Geoffrey R. Stone, Antipornography Legislation as Viewpoint Discrimination, 9 Harv J L & Pub Pol 461 (1986).

-End Footnotes-

If the First Amendment embodies a per se prohibition on viewpoint discrimination, then government's first obligation is to be neutral among different points of view. This principle recently received prominent vindication in R.A.V. v City of St. Paul, n2 in which the Supreme Court invalidated a "hate-speech" ordinance in significant part because it embodied viewpoint discrimination. n3 The prohibition on viewpoint discrimination has also played a central role in the key modern case on pornography regulation. n4

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n2 112 S Ct at 2538.

n3 Id at 2547-48. This part of the holding is discussed in Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 S Ct Rev 29; Cass R. Sunstein, Democracy and the Problem of Free Speech (Free Press, 1993).

n4 Hudnut, 771 F2d at 332.

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As a description of current free speech law, the first half-truth has considerable merit. Upon first examination, there are very few counterexamples, and we can find a good deal of affirmative support for the prohibition on viewpoint discrimination. Whatever its descriptive force, the prohibition on viewpoint discrimination is not difficult to explain in principle. It can be defended by reference to two central constitutional concerns: the removal of impermissible reasons for government action; and the ban on skewing effects on the system of free expression.

The notion that the First Amendment bans skewing effects on public deliberation seems reasonably straightforward, but the prohibition on impermissible reasons is perhaps less clear. It should be connected with the requirement that judges be neutral. n5 A judge in a civil case may not have a personal stake in the outcome, even [\*27] . if that stake would not affect his ruling. This ban on judicial bias operates regardless of whether it affects the outcome. So too, the First Amendment is best understood to mean that government, in its regulatory capacity, may not censor speech on the basis of its own institutional interests.

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n5 This analogy is suggested in David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum L Rev 334, 369 (1991).

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How might these ideas justify the ban on viewpoint discrimination? Imagine that a law forbids criticism of the current administration. Here the reasons for government action are most suspicious, for this sort of distortion of debate provides a good reason for distrusting public officials. The free speech clause declares offlimits certain reasons for censorship, and the ban on viewpoint discrimination seems admirably well-suited to ferreting out those reasons. n6

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n6 See Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189, 227-33 (1983).

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Quite apart from the issue of impermissible reasons, viewpoint discrimination is likely to impose harmful skewing effects on the system of free expression. The notion that the First Amendment bans skewing effects on public deliberation is connected with the idea that government may not distort the deliberative process by erasing one side of a debate. Above all, government may not distort the deliberative process by insulating itself from criticism. The very freedom of the democratic process depends on forbidding that form of self-insulation.

Thus far I have spoken of government censoring speech about itself, and this is indeed the most disturbing form of viewpoint discrimination. But even if

viewpoint discrimination does not have this distinctive feature, there may still be cause for concern. Imagine that government says that speech in favor of the antitrust laws is permitted, but that the opposite message is forbidden; or that state law prevents people from criticizing affirmative action programs; or that a city concludes the pro-life point of view cannot be expressed. In these cases, too, the governmental motivation may be out of bounds and, even more fundamentally, the skewing effects on the system of free expression may not be tolerable.

From both precedent and principle, it is tempting to conclude that viewpoint discrimination is always or almost always prohibited. Indeed, the Supreme Court sometimes acts as if that is the case, and this view may be coming to represent current free speech orthodoxy. n7 But there are many counterexamples, and these greatly complicate matters. [\*28]

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n7 See R.A.V., 112 S Ct at 2545-48.

-End Footnotes-

For example, there is a good deal of viewpoint discrimination in the area of commercial speech. Government can forbid advertising that promotes casino gambling, n8 even if it does not simultaneously forbid advertising that is opposed to casino gambling. This prohibition is unquestionably viewpoint-based. Moreover, government can and does forbid advertising in favor of cigarette smoking on television, n9 although government does not forbid television advertising that is opposed to cigarette smoking. On the contrary, there is a good deal of such advertising. Precisely the same is true for advertising relating to alcohol consumption. In commercial speech, then, there is a good deal of viewpoint discrimination. n10

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n8 Posadas de Puerto Rico Associates v Tourism Co. of Puerto Rico, 478 US 328, 344 (1986).

n9 See Public Health Smoking Act of 1969, 15 USC 1335 (1988) (prohibiting television and radio advertising of cigarettes and cigars after January 1, 1971).

n10 It would be possible to say that there is no such discrimination, because there is not quite a category called "advertising against" smoking, or gambling, or alcohol consumption. On this view, messages that oppose these activities are not really "advertising against," and hence there is no discrimination on the basis of point of view. This claim might be supported by the fact that ideological messages arguing for smoking in general are not banned. Perhaps government must be viewpoint-neutral with respect to messages, as it is, and perhaps the ban on advertising does not run afoul of the prohibition. I think that this response is mostly semantic; it redefines categories to claim that there is no discrimination when in fact government is suppressing one side of the debate.

-End Footnotes-

As another example, consider the area of labor law, where courts have held that government may ban employers from speaking unfavorably about the effects of unionization during the period before a union election if the unfavorable statements might be interpreted as a threat against workers. n11 Regulation of such speech is plausibly viewpoint discriminatory, because government does not proscribe employer speech favorable to unionization.

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n11 See NLRB v Gissel Packing Co., 395 US 575, 618-19 (1969).

-End Footnotes-

As a final example, consider the securities laws that regulate proxy statements. Restrictions on viewpoint can be found here, too, as certain forms of favorable statements about a company's prospects are banned, while unfavorable views are permitted and perhaps even encouraged.

Almost no one thinks that there is a constitutional problem with these various kinds of contemporary viewpoint discrimination. The restrictions are based on such obvious harms that the notion that the restriction is "viewpoint based" does not even have time to register. For example, casino gambling, cigarette smoking, and drinking all pose obvious risks to both self and others. Government controls on advertising for these activities are a means of [\*29] controlling these risks. It is not entirely implausible to think that a liberal society should regulate or indeed ban some of these activities, n12 though this is extremely controversial, and our government has generally not chosen to do so. If government has the power to ban the activity, but has decided instead to permit it, perhaps it can permit it on the condition that advertising about it be banned. This was the Supreme Court's reasoning in the casino gambling case. n13

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n12 See Robert E. Goodin, No Smoking: The Ethical Issues (University of Chicago Press, 1987).

n13 Posadas, 478 US at 345-46. The Court said that when the Constitution protects the subject of advertising restrictions, the state cannot prohibit such advertising. Id at 345. In the case at hand, however, the Court noted that the Constitution does not prohibit the Puerto Rican legislature from banning casino gambling by the residents of Puerto Rico. " The greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." Id at 345-46.

-End Footnotes-

One could respond that this reasoning is wrong because it permits a distinctively objectionable form of paternalism. Some people think that the First Amendment is undergirded by a principle of listener autonomy, one that forbids government to ban speech because listeners might be persuaded by it. n14 On this view, the ban on advertising for cigarettes, gambling, and alcohol consumption invades the autonomy of those who would listen to such speech. If we were serious about the principle of listener autonomy, perhaps we would rarely allow government to stop people from hearing messages. This is a reasonable