

Identity and Democratic Institutions

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The most wrongheaded prediction in John Stuart Mill's anti-democratic treatise, *Considerations on Representative Government*, is that democracy is impossible in heterogeneous states. As Mill expressed his view: "Free institutions are next to impossible in a country made up of different nationalities."¹ Even in the mid-19th century, this view revealed a strange parochialism, for it required minimizing the experience of Switzerland, Canada, and the United States. But whatever the empirical foundation for Mill's prediction at the time, subsequent experience has not been kind. Amartya Sen, born in India during the British Empire, provides a fitting personal and intellectual counterpoint to Mill's elite British Liberalism. Writing at the dawn of the 21st century, Sen asserts that "[i]n the domain of political ideas perhaps the most important change to occur [in the twentieth century] has been the recognition of democracy as an acceptable form of government that can serve any nation – whether in Europe or America, or in Asia or Africa."²

We now live in what I have elsewhere called the Age of Democracy.³ In 1900, ten countries were democracies. Today, of the world's 190 countries, 119 are democracies, at least

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¹ *Considerations on Representative Government* 230 (Currin Shields ed.1958). Mill went on to add: "Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist." *Id.*

² Amartya Sen, *What's the Point of Democracy?*, *Am. Acad. Arts & Sci. Bull.*, Spring 2004, at 8.

³ Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: Constitutionalization of Democratic Politics*, 118 *HARV. L. REV.* 29 (2004).

nominally.⁴ Since 1985 alone, the number of democracies has doubled. Democracy is now widely (not universally) viewed as the aspirational form of political organization not just for breathtakingly diverse societies, as in Sen's India, but even for those emerging from profound, even violent, conflict.

The most urgent problem in the design of democratic institutions today is how best to structure such institutions in the midst of this kind of heterogeneity. In different states, the relevant differences can be religious, racial, linguistic, tribal, cultural, regional, or perhaps of other forms (as a shorthand, "ethnic differences"). This problem is central, not only to newly forming democracies over the last generation but to more established democracies, as various groups more assertively press claims for political recognition, representation, and influence. If Mill was wrong in his global rejection of the possibility for democracy amidst difference, the problem of appropriate democratic institutional design nonetheless remains challenging. We ought to understand this problem, better than we have thus far, as lying at the intersection of political philosophy and democratic institutional design on the one hand, and social-theoretic questions about the nature of individual rationality and rational choice concerning ethnic group "identities," on the other.

The argument of this paper is that academic thought and, for the most part, practical institutional design, has thus far taken too static an approach to this fundamental problem. In our first phase of confrontation with this issue, theorists and institutional designers have been overwhelmed with the problem as it appears at certain critical political moments: the moment of state formation; or the moment at which societies emerge from conflict; or the moment at which

⁴ Michael Mandelbaum, *Democracy's Good Name: The Rise and Risks of the World's Most Popular Form of*

group demands for inclusion, recognition, and power first become powerfully enough expressed to require an institutional response. These are the moments at which ethnic identities are likely to seem most fixed, most entrenched, most essential to conceptions of self, and most potentially divisive or explosive. Dominated by the urgency of these tensions at the moment of institutional formation, constitutional framers respond to the problem as then perceived. As a result, the implicit view embodied in the institutions they create takes for granted the nature of these ethnic identities and conflicts as they exist at the moment democratic institutions are forged. In contemporary contexts, the emerging democratic structures often attempt to accommodate these ethnic differences through explicit devices, which can range from guaranteed minority political representation, to minority vetoes, to consociational executive branches, to election districts set aside for particular minorities, and to other similar structures.

Overwhelmed as theory and practice are by the magnitude of ethnic conflict and difference at the moment of institutional formation, however, we neglect to recognize the extent to which ethnic differences can be fluid, capable of changing over time in response to shifting circumstances. In particular, we do not take adequate account of the extent to which the design of democratic institutions can both shape the ways ethnic identities are expressed and the extent to which these institutions, if not well designed, can entrench these identities. The specific design of democratic institutions can make it more difficult for the inherently contingent nature of these identities to be manifested. Moreover, once democratic institutions are constitutionally built along premises that assume particular ethnic identities, those institutions themselves tend to become refractory or even impermeable to change, even as shifts in social circumstances

undermine these original premises.

Thus, the very institutional structures perceived as necessary to address ethnic difference synchronically, at the moment of original democratic institutional formation, often undermine the dynamic possibilities for how these identities might shift, including to become more muted, over time. The United States Senate affords a stark example. It is now the least democratically structured representative institution among Western democracies, as measured by the one-vote, one-person principle. Thirty-six million Californians have the same representation as 515,000 residents of Wyoming (a population disparity of 66:1). When originally formed, state-based cultural and political identities were stronger than today, but the original population disparity was only 13:1.⁵ If the representative institutions of the United States were being created on a clean slate today, it is difficult to believe that a senate designed as the current one would emerge. State-based identities are thinner today, but even if such state-based differences were to continue to be taken into account to some extent, it is hard to imagine there would be consensus on accommodating these differences to the extent of a 66:1 departure from political equality. Yet the fundamental structure of the Senate is not a subject of discussion in the United States. That it would be changed today is inconceivable. Overwhelmed by the sectional differences at the moment the United States was created, the framers of the Constitution neglected to build meaningful capacity for the basic democratic institutions of the state to be modified over time as the sense of then-salient differences itself changed. Perhaps understandably, the framers of the United States' Constitution missed the essential, but complex logic of this situation: how to both

⁵ Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 85 (2004). Original disparity is calculated from the first official census data. For original population data in 1790, see generally RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES (J. Phillips 1793), available at

address existing sectional differences while designing a system that did not entrench those differences beyond their “natural” life.⁶

Even if understandable that the Constitution’s framers, unsure of the sustainability of democratic self-governance, missed this dynamic perspective on the design of democratic institutions, it is less forgivable today. Conventionally, the question of how democratic institutions should deal with ethnic difference in various societies is cast as a debate between integrationists and accommodationists.⁷ The former focus primarily on the long-term normative vision of the state; they believe that the risk of long-term entrenchment and solidification of ethnic identities is so great if political institutions are designed to accommodate group differences that such accommodations should be avoided. As a practical matter, however, integrationist approaches often founder at the moment of state formation for lack of sufficiently broad political support at this particularly risk-averse moment. Accommodationists, on the other hand, focus strongly on the immediate, short-term pressures the state faces. Viewing accommodation as a practical necessity to ensure broad social acceptance and stability of democratic institutions, accommodationists insist that realism requires acknowledgment of ethnic differences in the design of democratic institutions themselves. If anything, there is growing support today for accommodationist approaches.⁸ At the same time, if accommodationist approaches are not designed with great care, they risk precluding the rise of more integrationist politics over time.

<http://www2.census.gov/prod2/decennial/documents/1790a-02.pdf>.

⁶ For a superb account of these issues, see MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (Cambridge Univ. Press 2006).

⁷ McGarry, O’Leary & Simeon, *Integration of Accommodation? The Enduring Debate in Conflict-Regulation*, in *Constitutionalism in Divided Societies* (S. Choudry ed., Cambridge University Press, forthcoming 2008).

Now that we have another generation of experience with these issues, the task should not be understood as the need to choose between integration or accommodation writ large. To the extent accommodation is necessary or desirable at the moment of state formation, the devices and institutional structures through which accommodation is operationalized vary greatly and have dramatically different short-term and long-term consequences. The choice among specific institutional arrangements should be made in a way that builds in the greatest capacity possible for changes in the nature and intensity of ethnic differences over time. If accommodation is necessary, it should be designed, to the extent possible, not to preclude the emergence of more integrationist politics over time. Put in other terms, the task is not to choose between integration and accommodation but to design institutions that enable societies to reach different balances between the two over time.

We need a comparative and pragmatic assessment of the repertoire of institutional devices democracy possesses for addressing ethnic difference. That assessment should take a more dynamic perspective on the mutual interaction over time among ethnic identities, ethnic differences and the design of the institutions and processes through which democratic political competition is channeled. The succeeding sections develop these themes, with an effort to draw on empirical experience from recently created democracies through which we can try to reach general insights about how best to design democratic institutions to manage ethnic difference.

I. Ethnic Identity

Let me begin with the nature of ethnic group identity. The concern is how to understand the relationship between democratic institutional design and the dynamic processes of

⁸ *Id.* at 28.

ethnic-group identity formation, mobilization, and maintenance. These processes of identity formation, mobilization, and expression fuel the group conflicts to which modern democratic institutional design in divided societies seeks to respond. Without understanding this underlying dynamic, institutional designers lack a sufficiently deep grasp of the essential problem they attempt to address.

Academic work has been substantially ahead of practical political action, as well as more journalistic and popular accounts, regarding the dynamics of ethnic group conflict in modern democratic states. I want to stress four points that emerge from this work. I will present them first abstractly, then illuminate with concrete examples.

First, ethnic identities are less a matter of fixed, profound, fundamental psychological and affective attachment than fluid and contingent possibilities that become mobilized by specific circumstances. Indeed, in many contexts, citizens do not have a single ethnic identity but several different, potential ethnic identities that can become mobilized. In such contexts, the question is not one of ethnic difference, but which of several potential ethnic differences actually become salient. To be sure, background cultural and historical circumstances determine and limit the range of potential ethnic identities that might become mobilized. Moreover, once certain identities have become powerfully mobilized, they can become substantially more hardened and less fluid in the short term. At the moment of most acute group conflict, such as the aftermath of a civil war, the relevant dimensions of group difference are likely to seem most enduring and refractory.

Nonetheless, ethnic identity has been the subject of a great deal of academic work in recent years, both theoretical and empirical, which consistently reveals a dynamic process behind

the formation, maintenance, and diminishment of these identities.⁹ Identities that policymakers take as given have instead been constructed through specific circumstances and processes. In the years since democratization in India, for example, the level of Hindu-Muslim conflict, according to one major study, “has varied so much over time and across locations that an alleged general propensity to ethnic hatred cannot explain much.”¹⁰ As a great deal of work documenting similar facts in various societies suggests, these identities are more fluid than often assumed. This fact can be particularly difficult for Americans to recognize, because the most incendiary group difference in American history – the racial one – appears particularly primordial and enduring. Yet even this “difference” is more fluid and less deterministic, historically, than most Americans recognize, as I will illustrate in a moment.

Second, the most powerful and effective incentives for mobilizing identities along one dimension or another are generated by the competition over political power. Such power is an exceptionally effective vehicle for distributing material resources, whether in the form of patronage, rents, licenses, subsidies, general policies with beneficial distributional effects, or other state-created benefits. Formal political power is also an essential vehicle for distributing the expressive resources Charles Taylor famously denominated “the politics of recognition.”¹¹

⁹ The analysis in the following pages draws centrally on works such as Rogers Brubaker, *ETHNICITY WITHOUT GROUPS* (Harvard Univ. Press 2004); DAVID D. LAITIN, *IDENTITY IN FORMATION: THE RUSSIAN-SPEAKING POPULATIONS IN THE NEAR ABROAD* (Cornell Univ. Press 1998); David D. Laitin, *Marginality: A Microperspective*, 7 *RATIONALITY & SOC’Y* 31 (1995). See also Shaheen Mozaffar et. al., *Electoral Institutions, Ethnopolitical Cleavages, and Party Systems in Africa’s Emerging Democracies*, 97 *AM. POLI. SCI. REV.* 379, 379 (2003) (noting “the accumulated findings of over three decades of comparative research on ethnopolitics” attests that “ethnopolitical groups and associated ethnopolitical cleavages are not primordially fixed but constructed in the courts of social, economic, and political interactions . . .”).

¹⁰ JACK L. SNYDER, *FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT* 289 (W.W. Norton & Co. 2000). This work views “inherent” ethnic conflict to be less significant than the ways in which “the political context has varied in ways that sometimes fan the flames of ethnic rivalries and other times dampen them.” *Id.* at 290.

¹¹ CHARLES TAYLOR, *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* (Princeton Univ. Press 1992).

Particularly for ethnic groups that perceive themselves to have been previously exploited or excluded from participation under prior regimes, this kind of formal recognition through explicit representation in the institutions of governance can be a fundamental demand.¹²

The third point is a more specific application of the second. There are numerous ways the institutional structures and processes of democratic political competition can be organized, all of them consistent with “democratic theory” – with, that is, general principles of democracy. But the particular way in which the structures for democratic competition are designed generates distinct incentives for mobilizing coalitions and identities in one way rather than another. Hence, one of the most powerful forces for constructing and shaping ethnic difference is the structure through which political competition is channeled in a democratic state. That is, democratic institutions cannot be viewed only as responses to pre-existing ethnic differences. They must be designed with an awareness of the extent to which, and the ways in which, they also construct the very ethnic differences at issue.

Fourth, the design of political institutions can dominate culture in accounting for a society’s ethnic differences. This is an intentionally tendentious statement, given that proving dominant causal relationships is no easy task for phenomena as complexly caused as ethnic identity formation and mobilization. I offer it partly based on my own direct study of the American experience, but also because, by putting the point in such strong terms, I aim to call attention to how much more powerful the design of political competition is in the shaping of ethnic identities than often realized. To be sure, background conditions (themselves the outcome

¹² Note the following observation regarding democratic politics in India: “But it is no accident that arguably all the potent mobilizations that independent India has seen, in some respects, involve an appeal to self-respect. Most of our politics has been a politics of recognition.” PRATAP BHANU MEHTA, *THE BURDEN OF DEMOCRACY* 49 (Penguin Press 2003).

of previous modes of “politics” in earlier regimes, including non-democratic ones) influence the latent identities capable of being mobilized through democratic politics. But formal politics, particularly in democracies, creates one of the most shared and visible public spaces and platforms. Nowhere are more resources devoted to the mobilization of coalitions and group affiliations than in the pursuit of political power. As political elites and entrepreneurs mobilize various identities, including ethnic identities, in efforts to forge winning coalitions, these efforts radiate into other arenas, including the cultural and social spheres.¹³ The structure of political competition both creates incentives to mobilize identities along certain lines rather than others and provides a focal point for the coordination of citizens’ strategic choices about how they self-identify. As the political domain mobilizes certain identities and more firmly entrenches them, these identities become more culturally powerful as well. That outbreaks of ethnic violence coincide with the electoral cycle in countries like India, for example, is no accident; political competition in India is a principle vehicle for politicizing latent cultural and ethnic cleavages.¹⁴ Over time, the role of political institutions in shaping these identities can fade into

¹³ A detailed insider’s account of these issues in South Africa makes this point regarding ethnic differences there. See HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION* 113 (Cambridge Univ. Press 2000) (“Claims of cultural diversity and difference have come to reflect a complex interaction between real cultural and ethnic identities on the one hand and the claims of political leaders on the other. These leaders’ assertions of cultural and ethnic particularities are intertwined with their own attempts either to preserve existing power or to seek future political advantage.”). For a similar view about the rise of ethnic parties in Latin America starting in the 1990s, which attributes this rise not to ethnic differences per se, but to changes in legal and other factors that affected the organization of political party competition, see DONNA LEE VAN COOT, *FROM MOVEMENTS TO PARTIES IN LATIN AMERICA: THE EVOLUTION OF ETHNIC POLITICS* 8 (Cambridge Univ. Press 2005) (“I argue that political institutions and configurations of power within a party system help to determine the likelihood that ethnic parties will form and become successful.”). See also Kanchan Chandra, *WHY ETHNIC PARTIES SUCCEED: PATRONAGE AND ETHNIC HEAD COUNTS IN INDIA* 290–294 (Cambridge Univ. Press 2004) (providing an instrumental theory of ethnic voting in “patronage democracies” and observing capacity of political elites successfully to choose whether to mobilize identities around religion, caste, or regional bases).

¹⁴ For this point about India, see Jack Snyder, *supra* note 10, at 294. As the resource for this finding, Snyder draws on DENNIS AUSTIN, *DEMOCRACY AND VIOLENCE IN INDIA AND SRI LANKA* (Council on Foreign Rel. Press 1995).

the background and be forgotten. The identities come to be seen as matters of deep attachment and essential cultural difference.

Let me offer a few concrete studies that inform these four general points. One of the best comes from a superb study of ethnic politics in Africa by Daniel Posner, where the country of Zambia, in particular, provides an ideal social-scientific experiment in the relationship between the design of political institutions and the nature of ethnic identity.¹⁵ With respect to ethnic identities, Zambia has four broad, regionally clustered linguistic groups and seventy-two tribal groupings, more locally concentrated. With respect to the institutional design of political competition, Zambia has alternated, since independence, between a multi-party and a one-party system: multi-party from 1964 –1972; one-party from 1973 –1991; and then multi-party again since 1991. The ethnic differences that became politically and hence culturally most salient—linguistic or tribal differences—were profoundly shaped by which of these institutional systems for political competition was in place.

During the eras of multi-party democratic politics, control of the executive was part of the competitive political process, which also involved competition for representation in the parliament. The effective focus for elections was the national level, because the presidency was the most powerful office. Party labels down the line ensured that parliamentary candidates were representatives of national coalitions; that is, the effect of competition over the presidency was to ensure that parliamentary elections were also nationalized through party identification. With an electoral design that encouraged the building of nationwide coalitions to gain effective power, political campaigns, candidates, and coalitions became organized around Zambia's linguistic differences. Both the large size of the four groups and their regional distribution created rational

¹⁵ See generally DANIEL POSNER, *INSTITUTIONS AND ETHNIC POLITICS IN AFRICA* (Cambridge Univ. Press 2005). 11

incentives for candidates and parties to calculate that mobilizing potential supporters along linguistic lines would enable effective winning coalitions. On the other hand, the more locally-based tribal differences were not politically mobilized and did not find meaningful expression in these nationally-oriented election campaigns.

The shift to one-party elections involved nothing more than a single change in the Constitution. According to Posner's detailed study, there was no difference in political freedom or in any other dimension associated with this formal, discrete legal change that mandated a one-party system. But in the era of one-party elections, effective political competition between candidates—which did occur—took place at the local, not national, level. Under this structure, the president was chosen by the central committee of the ruling party; voters then had the option only of voting for or against this candidate in the general election. As a result, there was no need for parties and leaders to compete for voting support with respect to the presidency. There was, however, substantial competition within individual constituencies for seats in the parliament. Indeed, on average more than four candidates ran for each seat during the era in which the law permitted only one-party competition (ironically, this contrasted with only slightly more than two candidates running per district, on average, when the law permitted multi-party competition). These individual election districts tended to be homogenous by language, but heterogeneous by tribe; 80 per cent of them were rural. With the meaningful electoral arena shifting to these local districts, away from the national level, political competition responded to the rational incentive structure generated and became organized around tribal differences, not language ones.

Posner's careful and detailed study qualitatively and quantitatively documents specifically the ways in which politics became organized around linguistic differences during

multi-party competition but tribal differences during one-party campaigning. Most remarkable is not just that the election structure shaped the relevant ethnic differences mobilized, but that these changes took place so rapidly —evidence for the force with which political incentives, at least in some contexts, can encourage mobilization of one or another ethnic identity. I will highlight only a few of the specific differences Posner chronicles.

First, candidates themselves treated the importance of their identities, tribal and linguistic, differently under the two systems. In the one-party system, with competition locally based, candidates self-selected to match their tribal identity to that of the district in which they ran. By contrast, in multi-party competition, with competition dominated by the incentive structure created by the national electoral focus, candidates were quite willing to run outside their own tribal constituencies. Thus, in a particularly telling finding, 83 per cent of the candidates who shifted districts between the two systems moved from outside their tribal district to inside their tribal district when the election system shifted from multi-party to one-party.¹⁶ Second, politicians made different kinds of ethnic appeals under the two systems: tribal appeals under one-party competition, linguistic appeals under multi-party competition. Third, in multi-party competition (but only then), political elites sought to build civic associations that united multiple tribes, often along provincial or linguistic lines. Finally, voters tended to vote for candidates from their own tribes in one-party elections but for parties whose leaders were from the voters' same language group in multi-party elections.

So is Zambia divided by tribal differences or by linguistic ones? The answer depends, to a considerable extent, on the institutional structures of political competition. Note that the

¹⁶ *Id.* at 208.

mechanism at work is that voters do use some form of ethnicity as a proxy for gauging the extent to which those seeking power through elections will protect or enhance the voter's interests. Ethnicity serves as a credible commitment device for promises, explicit or implicit, that candidates and parties make with regard to both material and expressive resources. Indeed, the less information voters have and the more risk averse they are —factors likely to be at their height in the initial stages of democratic transition and early elections —the more likely voters are to use ethnicity as a proxy in these ways. Nonetheless, even with this strong, general sense of ethnic affiliation, the design of democratic institutions and processes conditions which ethnic identities are mobilized in the public sphere.

This striking example from Africa is more extensively documented than most but is hardly aberrational. In India, for example, during the 1920s and 1930s, voting was limited to those able to meet high property-holding requirements; as a result, political competition was organized around issues that divided the property-holding upper-caste elites. In contrast, when the franchise was broadly expanded in the 1950s, the prior political parties shifted to appeals based on Hindu-Muslim identity differences.¹⁷ Similarly, in then Zaire (now the Democratic Republic of Congo), the first competitive elections were confined to seven major cities; in those elections, the dominant cleavages were tribal ones. Three years later, when national elections began for national and provincial representative institutions, political elites began “defining region rather than [tribe] as the political building block” and essential ethnic cleavage.¹⁸ Again, what makes these changes all the more notable is how quickly they emerged when the structure

¹⁷ See STEVEN I. WILKINSON, *VOTES AND VIOLENCE: ELECTORAL COMPETITION AND ETHNIC RIOTS IN INDIA* (Cambridge Univ. Press 2004).

¹⁸ CRAWFORD YOUNG & THOMAS TURNER, *THE RISE AND DECLINE OF THE ZAIRIAN STATE* 150 (Univ. Wisconsin

of political competition changed. On the one hand, this might seem obvious: shift the way the electorate is constituted and the dynamics of political competition—including the nature and extent of the group conflicts that will be mobilized—will change. On the other hand, we do not appreciate this insight deeply enough when it comes to ethnic identities, which are often viewed as less fluid or responsive to the incentives created by the design of political competition than is frequently the case.

A particularly powerful example is offered by the American experience with race. A common misconception is that the black-white racial divide in the American South had an essentially fixed, rigid structure from the end of the Civil War (1865), or the end of Reconstruction (1876), until the civil-rights revolution of the 1960s. This divide is thought to be the quintessential example of a deep, primordial identity attachment that fueled a relatively deterministic, stable ideology of white supremacy, segregation, and related state-sanctioned racial practices throughout the long era after the formal end of slavery. But the historical experience with racial differences in the American context is more complex, as my own research and that of others on this issue demonstrates.¹⁹ Even with respect to a group difference thought to be so deeply entrenched, the structure of elections profoundly altered the extent to which racial identities were mobilized and expressed. For more than a generation in the late 19th century, roughly 1867–1890, blacks were legally entitled to vote in the American South. Despite

Press 1985).

¹⁹ See Richard H. Pildes, *Keeping Legal History Meaningful*, 19 CONST. COMMENT. 645 (2002); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000) [hereinafter Pildes, *Democracy*]. The leading work which chronicles the differences in Southern politics before and after black men were disfranchised is MORGAN J. KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE, RESTRICTION, AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* (Yale Univ. Press 1974). The fluidity of racial politics in the American South before the 1890s is the theme of Comer Vann Woodward's classic work, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed., Oxford Univ. Press 1974) (1955).

how strongly held racial identities might have been in some sense, the extent to which those identities found public expression depended on the incentives that the structures of political competition generated. In the era in which black men were legally entitled to vote, the nature of political coalition formation – and the resulting effect on officeholding and public policy —was dramatically influenced, in ways most Americans today surely do not realize. In North Carolina, for example, a fusion coalition of Republicans and Populists, with black and white political support, controlled the state legislature from 1894–1898.²⁰ Numerous black officials were elected to local offices such as justice of the peace, alderman, county commissioner, register of deeds, city attorney and the like. To be sure, interracial coalitions like this, which existed in other parts of the South as well, did not mean that whites and blacks lived in some kind of romanticized racial harmony. The incentives created by the pursuit of political power, however, had a powerful effect on the kind of coalitions that got mobilized, and the payoffs those coalitions had to make to their constituent members —an effect powerful enough to overcome even “ethnic differences” seemingly as deep rooted as that of race in the 19th century American South.

This era of interracial political coalitions ended only when Southern Redeemers managed intentionally to change the institutional structure for elections and hence when the political incentives for electoral competition were altered. Starting in the 1890s, southern state legislatures enacted a series of changes designed to remove most blacks and many poor whites from political participation: literacy tests, poll taxes, grandfather clauses, felon disfranchisement

²⁰ Pildes, *Democracy*, *supra* note 19, at 313–315.

provisions, increased registration barriers, and the like.²¹ But it is a mistake to understand these changes as an expression only of – or even primarily of -- a *cultural* ideology of racial supremacy. They were an intentional effort to change the dynamics of partisan political competition —an effort that was wholly successful. The white factions who propelled these changes sought to ensure their own *political* dominance by destroying the conditions that fueled the kind of coalitions that had challenged their authority, including the kind of interracial coalitions that had controlled state politics in a place like North Carolina. The highly visible cultural expressions of white racial supremacy, such as segregation, did not become legally enacted until black voters had been removed through these legal changes from political participation. Another specific example: when Congress in 1867 first enfranchised black residents in the District of Columbia, the political parties paraded “for the first time in living memory” *without* banners “in regard to niggers, miscegenation and similar matters.”²² Changes in the structure of political competition enabled or diminished the full flowering of the most powerful public symbols of racial hierarchy.

The American experience with race is particularly telling because once the late 19th century changes in elections in the South were put into place, they remained largely intact until the Voting Rights Act of 1965.²³ As a result, the effects of political structures on the culture of race relations faded into the background. Instead, the cultural expressions of racial difference, such as segregation, remained highly visible and publicly displayed on a day-to-day basis. The

²¹ See KOUSSER, *supra* note 19.

²² ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 272 (Harper & Row 1988).

²³ The Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973, 1973bb-1 (2000)) (U.S.).

history of black-white political cooperation from 1867–1890 was largely forgotten.²⁴ Policies and practices of racial conflict and subordination came to be seen as natural expressions of essential, enduring racial differences. Comparative perspective is also illuminating on the extent to which racial differences are, instead, shaped by the structure of democratic political competition. Like the United States, Cuba was one of the last countries in the world to retain a system of racialized slavery; indeed, Cuba abolished slavery even later than did the United States.²⁵ Yet despite emerging from a culture of racialized slavery, post-independence Cuba did not, as did the American South, create an election structure that disfranchised blacks.²⁶ As a result, blacks were more fully appealed to in politics (and hence in culture) and integrated into the structures of political competition and governance. To be sure, race relations in Cuba had their own complexity in the years after independence. But Cuba did not have a comparable history of a strong system of state-sanctioned racial hierarchy and subordination to that of the American South, once the electoral rules in the South had changed to exclude black political participation. To the extent one mistakenly believes cultural attitudes toward race are likely to be rigid and deterministic in societies emerging from longstanding systems of racialized slavery, comparative perspective, detailed appreciation for the fluidity of American history, and recognition of the way structures of political competition shape cultural attitudes undermine any simplistic notion of essential cultural differences—even with respect to the ethnic divide thought to be most rigid

²⁴ This is the theme of Vann Woodward's *THE STRANGE CAREER OF JIM CROW*, *supra* note 19.

²⁵ For the process by which this happened, see REBECCA J. SCOTT, *SLAVE EMANCIPATION IN CUBA: THE TRANSITION TO FREE LABOR, 1860–1899* (Princeton Univ. Press 1985).

²⁶ For a superb study of these issues, see ALEJANDRO DE LA FUENTE, *A NATION FOR ALL: RACE, INEQUALITY, AND POLITICS IN TWENTIETH-CENTURY CUBA* (Univ. N.C. Press 2000). For a more focused study during the immediate post-slavery period, see ADA FERRER, *INSURGENT CUBA: RACE, NATION, AND REVOLUTION, 1868–1898* (Univ. N.C. Press 1999). For a comparative perspective on the role of black political participation in Cuba and the United States following the end of slavery, see REBECCA J. SCOTT, *DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER*

and difficult to change in American political history.

At the outset, I observed that academic work was ahead of practical politics with regard to the fluidity and contingency of ethnic differences and identities. Scholarship, however, has been less attentive to how much the structures of political competition, as opposed to a more vaguely attributed “cultural construction of identity,” is a driving force in mobilizing and encouraging these identity formations. Academic culture in the humanities over the last generation has seen a diminished interest in formal politics, with a greater focus on issues of culture.²⁷ This is a mistake, if we are to understand ethnic identity formation and mobilization properly. It is also a mistake if we are to think soundly about the design of democratic institutions in the midst of ethnic conflicts.

II. Democratic Institutions

I now turn from analysis of ethnic identity formation to democratic institutional design. At the outset, it is helpful to be precise about the nature of this design problem in societies potentially divided deeply along lines of ethnic difference.

The structural problem is that potentially vulnerable minority groups need credible institutional design commitments that they will not be exploited in an overly majoritarian democratic system. This need is particularly acute for societies emerging out of conflict and forming democratic regimes for the first time. Lawyers tend to think of bill of rights and constitutional courts as the primary institutional solution to this need, but these are relatively

SLAVERY.(Harvard Univ. Press 2005).

²⁷ As Rogers Brubaker, a leading scholar on these issues, puts this point: “Much social analysis today is informed by what might be called an *overethnicized* conception of history, politics, and social interaction. The ethnic categories deployed by political and cultural entrepreneurs are often uncritically adopted by social analysts.” Brubaker, *supra* note 10, at 151–152.

weak institutional solutions. Judicial review operates at best as an *ex post* check or negative veto on the exercise of political power. It can offer, perhaps, a defensive shield. But judicial review rarely is capable of ensuring fair distributional allocation of goods. Judicial review also does not respond fully to the expressive demands for recognition often central to ethnic minorities and hence to the legitimacy and stability of democratic institutions across ethnic groups.

Minority groups today typically recognize these limitations on bill of rights-style protections and demand greater *ex ante* forms of security and recognition devices. They also seek to have credible institutional commitments built directly into the structures of political governance, within either or both the legislative and executive branches. At the same time, the risk is that locking in these commitments through the design of political institutions hazards the two consequences noted earlier: the creation of even greater incentives to mobilize politics around these identities and thus to increase their broader cultural salience, and the freezing of institutional structures into a mold that reflects the circumstances at the moment of democratic formation. This process of institutional solidification makes it difficult for these institutions to be adapted down the road as ethnic identifications change. Paradoxically, it is precisely when democratic institutions are most successful at stabilizing and compromising among conflicting groups that this problem becomes most acute. The more that experience under democratic institutions convinces potentially vulnerable minorities that majorities will not exploit these minorities, the more support there will be for integrationist institutions. The structure of democratic institutions however, tends to be self-perpetuating; ideological, as well as more self-interestedly political, interests crystallize around existing institutional structures. In particular, those who hold political power have a strong stake in preserving the structures and

modes of competition through which they have attained that power.²⁸

Given an ethnically divided society that is forming or reforming its democratic institutions, in which practical political constraints preclude the integrationist approach, the question is *which* strategies, devices, and institutional structures are the best means for accommodating ethnic conflict? In particular, we want to frame this question in dynamic, not static, terms. My aim is to identify techniques of accommodation that nonetheless leave the democratic system with the greatest capacity to respond to shifting conceptions of ethnic identity as that system develops.

I highlight five of these approaches here, given constraints of space. I have chosen these particular ones partly because some are more novel and partly because there is some concrete experience with each:

1. Multi-stage democratic processes: One strategy is to design the democratic regime so that it comes into full being only in multiple stages. The moment of state formation, that is, expressly entails a commitment to a sequencing of stages in the structure of a state's democratic institutions.

In the initial stage, the institutional structures of democracy might, in this sequencing, be accommodationist. They might, for example, have strong consociational features. As noted earlier, at the moment of state formation, the need to ensure inclusive structures of representation is often at its height, as is the risk aversion of minorities. But the constitutional design in these sequenced systems commits to treating this initial stage as transitional. At a later stage, itself

²⁸ One of the consistent findings in political science is how little change there tends to be in the basic structure of electoral systems once established. *See* HANDBOOK OF ELECTORAL SYSTEM CHOICE 57 (Josef Colomer ed., Palgrave MacMillan 2004). Uncertainty about the effects of change appears to play a major role. *Id.* at 6.

built into the original constitutional structure, the structures of democracy expressly become more integrationist. Rather than choosing once and for all between accommodation and integration in dealing with ethnic difference, a constitutional system designed in this way negotiates between the two alternatives: accommodationist at the outset, but integrationist as the evolutionary steady state of the democratic system.

South Africa provides a model of this particular technique, as it does more generally for a managed, multi-stage transition to democracy. As work by Richard Simeon and Christina Murray documents, there were strongly conflicting views among leading players as to whether a democratic South Africa should adopt a power-sharing or a Westminster-style majoritarian system of democratic institutions.²⁹ Instead of choosing one option or the other at the outset, the compromise underlying the 1993 Interim Constitution required that a power-sharing, consociational structure of accommodation be established for the first five years. The first elected government was designed to be a government of national unity. Any party winning 20 per cent of the seats in the National Assembly was entitled to appoint a Deputy President; any party with more than 5 per cent was entitled to cabinet representation. Thus, former National Party President F.W. De Klerk became Deputy President and Mangosuthu Buthelezi, head of the Inkatha Freedom Party, became part of the cabinet (one of nine minor party politicians to do so). As Simeon and Murray note, this was “pure Lijphart”: a consociational structure designed to ensure stability and buy-in from the major ethnic and party groups in South Africa by ensuring recognition of these groups within formal political governance structures.³⁰ Acceptance by the

²⁹ Simeon & Murray, *Recognition without Empowerment: Minorities in a Democratic South Africa*, in *Constitutionalism in Divided Societies* (S. Choudry ed., Cambridge University Press, forthcoming 2008).

³⁰ *Id.* at 27.

leaders of the African National Congress of this interim, consociational executive branch, along with the National Party's acceptance of the right to an elected representative parliament, were "the key elements of agreement in South Africa's democratic transition."³¹

This was consociationalism structured, however, to be limited in time. The Interim Constitution contained a five-year "sunset clause." After that time, the democratically elected national parliament was given the power to write a new constitution, which could keep or reject this power sharing, consociational structure. In practice, South Africa's parliament did abandon the initial power-sharing arrangement and move to a Westminster style, majoritarian system after this initial five-year period. Thus, an accommodationist structure enabled the evolution to a more integrationist one. As Simeon and Murray conclude, majority rule has won out over a power-sharing model of South Africa democracy. To date, the South African system is considered relatively successful in the primary task of generating stable democratic institutions in a post-conflict society filled with a variety of potential ethnic conflicts.

The current Iraqi constitution, for what it's worth, makes use of a similar device.³² By the time of this constitution's creation, the intensity of ethnic divides precluded the non-Shiite minorities from accepting a majoritarian governance structure (though the Shia-Sunni-Kurd divide now seems intractable, experts assert that these identities have hardened substantially since the war due to two primary factors: the early decision of the Coalition Provisional Authority to allocate political power based on ethnicity, combined with the security vacuum that has caused individuals to seek security among co-ethnics). But as in South Africa, the current

³¹ See KLUG, *supra* note 13, at 105.

³² McGarry & O'Leary, *Iraq's Constitution of 2005: Liberal consociation as political prescription*, (S. Choudry ed., Cambridge University Press, forthcoming 2008).

Iraqi constitution creates a staged transition process, in which the first stage is consociational, with a sunset clause, while the permanent stage is to be more majoritarian.³³ Thus, the current central executive authority is in the hands of a Council of Ministers headed by a prime minister. But the prime minister cannot be appointed until the election of a Presidential Council. During the four-year transitional period, this is a three-person body that charges the leader of the largest party in the legislature with forming the Council of Ministers, which the legislature must then approve in a majority vote. The Presidential Council is elected by a two-thirds majority in the legislature.³⁴ The Constitution does not set seats aside on the Presidential Council on the basis of religion or ethnicity, but the two-thirds vote requirement is designed to encourage coalition building. The current Presidential Council consists of a Kurdish president, a Sunni vice-president, and a Shi'a Arab vice-president. After the four-year transition, the Presidential Council is (in theory) to be replaced by a single-person presidency, which can be established by a majority vote of the legislature. Thus, the vision behind this structure is consociational power sharing in the first phase, with a built-in shift to a more majoritarian, more integrationist political system. In their work on Iraq, John McGarry and Brendan O'Leary call this and other features of the Iraqi constitution a form of "liberal consociationalism." Consistent with the perspective I am urging, this is an emerging form of constitutional design that recognizes practical needs to accommodate ethnic differences at the moment of state formation, but that attempts to devise structures that do not lock those differences into place indefinitely.

Of course, the question is why ethnic minority political elites would agree at the outset to a staged sequence in which the ultimate end state is majoritarian democracy, if they are not

³³ See IRAQ CONST.

willing to accept such a system at the outset. Perhaps they believe the accommodationist phase will give their constituents enough time to judge whether they can trust a more majoritarian system; if not, perhaps they will seek to escape, including through violence, the terms of the original deal. Perhaps, in some contexts, the alternative of a delayed transition to a full majoritarian system might be better than the alternative options (indeed, De Klerk sought to have the power sharing provisions of the interim constitution inserted as one of the “core” constitutional principles that would be binding for the drafting of the permanent constitution, but he failed in this effort).³⁵ More generally, we know little about the time horizons on which political elites function.

There are many ways in which temporal sequencing instruments might be used, with the initial democratic stage tacking to the side of greater inclusiveness and broader formal representation of ethnic differences, while later stages seek to diminish the intensity of these differences in the political arena. For example, proportional representation (PR) systems can be designed with low thresholds at the outset, to address the risk averseness of small minority groups and parties. But instead of taking a static approach, which might lock a 1 per cent threshold into place in the constitution indefinitely, the constitution can specify raising that threshold by specific amounts over time. Again, the contexts in which potentially vulnerable minorities might accept such a two-stage process are hard to specify in general terms.

Alternatively, in some systems, electoral thresholds are initially set at a high level, to minimize fragmentation, but could be designed in the original constitution to ratchet down in a pre-set way

³⁴ IRAQ CONST. art. 138.

³⁵ James Hamill, *A Disguised Surrender? South Africa's Negotiated Settlement and the Politics of Conflict Resolution*, 14 *DIPLOMACY & STATECRAFT* 1, 9 (2003). Hamill suggests three specific contextual factors account for De Klerk's willingness to accept a delayed transition to majoritarian government: lack of international support for minority-protecting provisions to benefit whites in the South African context; the ability of the ANC to destabilize South Africa if its demands were not met; and a young generation of NP politicians who viewed the transition to majoritarianism as inevitable. *Id.* at 16-19.

over time. Institutional designers and political negotiators should at least be aware of these kinds of options, ones that build greater dynamic flexibility into constitutional systems.

2. *Novel voting systems*: The conventional choice among voting systems is between proportional representation (PR) and districted elections with plurality or majority elections (single-member districting, or SMD). In ethnically divided societies, both systems pose particular risks. The effect of SMD elections will depend heavily on the geographic distribution of the relevant ethnic groups. One risk occurs when an ethnic minority is relatively dispersed, with the consequence that it represents a minority in *all* districts. In SMD elections, that minority will be outvoted in all of these districts, if voting is heavily polarized along ethnic lines. A second risk is that SMD elections require the creation of individual election districts, which will have to be revised regularly to keep up with population changes. This introduces the risk of gerrymandering, depending on the institutional actors given the power to draw the lines. In Malaysia, for example, many election districts were originally designed to be balanced between Malay and Chinese parties. But by 1974, these boundaries had been so heavily gerrymandered by the Malay majority that a vast number of districts were Malay majority, while the Chinese were overwhelmingly packed into a few districts in which most of their votes were therefore wasted.³⁶

Even under the best of circumstances, with a non-partisan, independent body assigned this power, the way district lines are mapped will entail a continuous (because districts must be redrawn to keep up with population shifts) and direct confrontation of ethnically-charged issues. Line drawing can affect the distribution of political power; those in charge must decide whether,

³⁶ Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, in *DESIGNING DEMOCRATIC INSTITUTIONS* 253, 265

for example, to create two districts in which a particular ethnic group constitutes 30 per cent in each district—in which case, with polarized voting, those groups will always fail to elect candidates of their choice—or one district in which that group constitutes a 60% majority. Each confrontation with issues of this sort can be divisive and further polarizing. South Africa reportedly chose to avoid using SMDs, for example, because that would force decisions to be made, and remade, about the racial composition of districts—a process that political leaders believed would be explosive.³⁷

PR systems can avoid some of these problems through nationwide elections. PR systems can ensure formal representation of less-than-majority groups. For this reason, ethnic minorities in divided societies often favor PR. If political parties have a strong ethnic cast, the society's ethnic differences will be fully represented in a parliament that “mirrors” those differences. If no party manages a majority, coalitions will have to be made across ethnic lines for government to function. One standard objection to PR in ethnically divided societies is that it assumes political leaders will have the incentive to exercise “statesmanship” and construct coalitions across ethnic divides. But as a leading critic points out, experience suggests reasons to question that assumption.³⁸ Leaders are not necessarily less ethnically divisive than their supporters. Even if leaders are inclined to be, they can face a high price from competitors prepared to punish them. In ethnically bipolar states, where conflicts are often the most intense, PR will give one party complete dominance. Put in other terms, “[c]oalitions that are created after elections merely to

(Ian Shapiro & Stephen Macedo eds., N.Y.U. Press 2000).

³⁷ This is based on private communications from an ANC leader in the negotiation process over constitutional design in South Africa.

³⁸ See Donald L. Horowitz, *Constitutional Design: Proposals Versus Process*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* 15, 20–22 (Andrew Reynolds ed., Oxford Univ. Press 2002).

form a government of 50 percent plus one of the seats in parliament may prove to be fragile when divisive ethnic issues arise.”³⁹

There is one further inherent limitation of PR as a solution to ethnic conflict, however, that is particularly deep, even if insufficiently appreciated. PR is a top-down solution to ethnic conflict. Indeed, it might exacerbate these conflicts among the mass of voters, even as it seeks to give incentives to political elites to overcome these conflicts. PR encourages the formation of smaller, more ideologically coherent parties—including ethnically-based parties—because any party gets representation in proportion to its votes as long as it surmounts the election threshold (rarely higher than 5 per cent). PR encourages coalitions and compromises to form after the election, among political leaders, not before, among voters. PR generates no incentive for voters in ethnically-divided societies to vote outside their natural affinity groups; it does not require voters to take into account the different views and preferences of voters outside the former’s natural group. PR seeks to represent faithfully in the parliament the differences that exist among groups in society; it does not seek to overcome those differences at the level of individual citizens.

A third option other than SMDs or PR is greater use of what are called vote-pooling systems or preferential voting systems. These can take different forms and go under various names (alternative voting (AV), single-transferable voting (STV), instant runoff voting, and supplemental voting). The core concept is that the voting system itself encourages voters to spread their votes among more than one candidate. As a rough illustration, the system starts with voters ranking candidates in order of preference, rather than voting for just one candidate. The

³⁹ Donald L. Horowitz, *Electoral Systems: A Primer for Decision Makers*, 14 J. DEMOCRACY 115, 119 (2003).

first choices of voters are then tabulated. If no candidate gets enough votes to be elected, the last place candidate is eliminated, and the votes of all the voters who voted for that last place candidate are now transferred to those voters' second choice candidate. This process continues until one candidate emerges with an outright majority (at least 50 per cent plus one vote).

The logic behind these systems is that both candidates and voters are given incentives to campaign and vote beyond their natural affinity groups. For candidates, instead of appealing only to their natural base, candidates know they can benefit from being the second or third or even later choice of other groups of voters. Thus, these systems encourage candidates to appeal across ethnic lines. The system can also encourage parties to form and announce pre-election coalitions, so that their supporters get clear cues about which candidates and parties to rank second, third, and so forth. Similarly, for voters the vote that actually counts might not be their first choice, but their second or later. Voters are thus encouraged to think more broadly than for a single, favorite candidate. There is an *ex ante* effect that might moderate ethnic divides among voters. In theory, these vote-pooling systems thus encourage a bottom-up and top-down mode of political action that encourages surmounting ethnic differences at the same time such voting systems recognize the reality of current ethnic divides. These systems also are inherently responsive to changes in ethnic identity over time; voters can choose in each election what their strongest voting identities ought to be.

In the recent constitutional redesigns for South Africa, Bosnia, and Fiji, proponents urged adoption of AV. Fiji was the first country to adopt AV for nationwide legislative elections for the intended purpose of minimizing ethnic conflict (AV has long been used in Australia and has

been used off and on in Papua-New Guinea).⁴⁰ Since independence, Fiji has had ongoing tension between the 52 per cent indigenous Fijian and 44 per cent Indian communities. Following a military coup in the late 1980s, an agreement on a new constitution was created in 1997.

Donald Horowitz, a leading AV proponent, directly influenced this constitution and has claimed the election results in the years since as at least a mixed success.⁴¹ In the first election after this system went into effect, two multi-ethnic coalitions emerged; both made arrangements for sharing seats and exchanging preference votes; for the first time, a prime minister from the smaller, Indian community was chosen; and Indian-led coalition parties won seats even in districts with only 20–30 per cent registered Indian voters.⁴²

Unfortunately, matters are not so simple regarding this important first experiment. The elected coalition quickly fell apart. A year later, this government was overthrown in a coup. More specifically, a careful study of how voters and parties used the AV system suggests that it had not worked as assumed; in fact, “far more preference votes were transferred *from* moderate parties *to* the more radical parties than vice versa.”⁴³ The reason is that the moderating effects of AV will emerge only if voters rank candidates (or parties, to the extent voting is based on party affiliation) from more to less ethnically extreme. The assumption that voters will do so is critical to the ethnic moderating justification for AV. In many contexts, that assumption, which is *prima facie* plausible in societies polarized along ethnic lines, will no doubt be warranted. But that

⁴⁰ Jon Fraenkel & Bernard Grofman, *Does the Alternative Vote Foster Moderation in Ethnically Divided Societies? The Case of Fiji*, 39 COMP. POL. STUD. 623, 631 (2006).

⁴¹ It should be noted that the circumstances in which AV can be effective in encouraging vote pooling require ethnic heterogeneity in the relevant electoral constituencies and multiple political parties. These circumstances did exist in Fiji.

⁴² *Id.* at 633–634.

⁴³ *Id.* at 647.

political preferences will have this structure cannot be taken for granted. In Fiji, for reasons perhaps having to do with a feature of the AV system created, the second choice of voters was not the more moderate party of their ethnic group, but a party chosen for purely tactical reasons.⁴⁴ This particular instance does not indict the theory of AV, nor undermine the case for vote-pooling structures of this type. But the Fiji experiment is a cautionary tale that institutional designers must have knowledge of the local context in projecting how any system is likely to work.⁴⁵

Vote-pooling structures do remain promising as means of ensuring minority representation and influence in divided societies, while building in flexibility to minimize the risk that the system will entrench ethnic identities needlessly or be unable to adapt should ethnic differences diminish. In the United States, there has been a good deal of success at the local government level with cumulative voting systems, which are systems closely related to AV.⁴⁶ In addition, there are other electoral structures that draw on ideas similar to those that underlie vote pooling. Nigeria's distributional requirements for election of its President, in a presidential

⁴⁴ Fiji's system allowed voters to rank order candidates "above" or "below" the line on the ballot. Below the line, voters simply rank ordered candidates. But the (moderate) parties that designed the system feared that Fijian would only give preferences to Fijian candidates, and Indian voters to Indian candidates. Thus, political parties were required pre-election to file preference lists ranking all candidates in each district. Voters were given the option of just voting for a single candidate, which was called voting "above" the line. If they did so, they would automatically be assigned the preference rankings below their express first choice based on the list the party they had voted for had filed. 92 per cent of voters voted above the line. Thus, the vote transfer was not the product of individual voter choice, but of the coalitions the parties had selected in advance. The parties formed these coalitions based not on policy, including policy on ethnic issues, but on purely tactical bases —whatever coalition was most likely to defeat the incumbent officeholders. Thus, as soon as they won office, the coalition, lacking any policy coherence, fragmented. *See id.* at 632, 635 & n.13.

⁴⁵ Horowitz has responded to Fraenkel and Grofman, asserting that the Fiji evidence still supports the claim that AV generally increases moderation. See Donald L. Horowitz, *The Alternative Vote and Interethnic Moderation: A Reply to Fraenkel and Grofman*, 121 PUB. CHOICE 507 (2004) and Donald L. Horowitz, *Strategy Takes a Holiday: Fraenkel and Grofman on the Alternative Vote*, 39 COMP. POL. STUD. 652 (2006).

⁴⁶ *See, e.g.*, Richard H. Pildes & Kristin A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEG. F. 241.

system of government, can be viewed as an example. Nigeria has long been divided by three major, geographically concentrated groups.⁴⁷ After civil war in the late 1960s, Nigeria moved to a presidential system, for the purpose of promoting nation building and political integration through a unified executive. But to promote cross-ethnic political competition, the constitution required that the president obtain both a majority of national votes and 25 per cent of the vote in at least two-thirds of all the states. This vote-pooling structure for the presidency has required major parties to court and award office to minority politicians.⁴⁸

This distributional requirement for the presidency is similar to America's much criticized electoral college for presidential elections. If the electoral college is considered antiquated in the United States, that is partly because the previous state and sectional divisions that once seemed so divisive now no longer seem as meaningful. The electoral college, that is, may be a victim of its own success (as well as the success of other factors that have diminished the power of earlier state and sectional based identities). In Nigeria, it is easy to understand why regionally based distributional requirements would continue to be means of accommodating ethnic divides while minimizing the entrenchment of ethnic identities. As my discussion of federalism will note, geographically based structures of dealing with ethnic conflict can be particularly adaptable because they leave open the possibility that mobility will erode the meaningfulness of these differences over time. Structures like the American electoral college can recognize the need to take account of certain powerful dimensions of difference without entrenching those differences in the way formal consociational structures do. The problem with America's electoral college is

⁴⁷ John Boye Ejobowah, *Integrationist and Accommodationist Measures in Nigeria's Constitutional Engineering: Successes and Failures*, in *Constitutionalism in Divided Societies* (S. Choudry ed., Cambridge University Press, forthcoming 2008).

not that it lacked a plausible, integrative justification when first created. It is that the Constitution failed to create an effective mechanism by which the electoral college could be modified or abolished over time if state-based identities became, as they have, less divisive and meaningful than they were originally. As I noted at the outset, the electoral college is a prime example of how institutions designed to deal with “ethnic differences” can endure long beyond the point at which the differences that originally motivated them have diminished. That is why institutional design thinkers must be attentive to this risk at the outset and search for devices and structures that retain as much flexibility as possible, *given* the need at the moment of state formation to accommodate ethnic differences, to some extent, in the design of political institutions.

3. *Integrationist political spheres and accommodationist cultural spheres:* Minority groups often seek recognition of their cultural distinctiveness, as well as some assurance of control over the institutions of control reproduction, such as schools, and recognition of their right to use their own language in various contexts, including, perhaps, in interacting with the government. Cultural and recognition interests of these sorts often underlie demands for power-sharing arrangements in the design of political institutions. Ethnic groups fear that their cultural interests will be overridden unless the state’s institutions are built to reflect “their” communities. This fear can generate undifferentiated general demands for accommodationist institutions and policies across the board.

One strategy for addressing these conflicts that does not entrench ethnic identities into the processes of democratic political competition, with all the attendant consequences, is for the constitutional system to differentiate the political and cultural spheres. The constitution can guarantee specific cultural rights, both negative and positive ones, in a way that accommodates

⁴⁸*Id.* at 13.

these particular concerns. But doing so need not require the same structures of accommodation in the design of the processes of electoral competition and representation itself; instead, the formal political institutions of the state can rest on a more integrationist foundation. Indeed, the very fact that constitutional negotiators are willing to recognize ethnic group cultural claims in spheres like education might make it easier to find agreement to design electoral processes and political institutions in this more integrationist manner.

The advantage of this kind of differentiation is that the powerful incentives provided by the structures of political competition will encourage less ethnicized politics, even as the cultural sphere does recognize distinct cultural claims. Systems designed in this way retain greater capacity to adapt to changing ethnic self-identifications, since the sphere of formal democratic politics is not built on the basis of those ethnic identities most salient at state formation. To the extent constitutional designers believe a constitution must be accommodationist or integrationist across the board, they miss the opportunity for more subtle differentiations of this sort.

Again, the South African constitution provides an example. As noted above, that constitution ensured the possibility, after an interim period, that political institutions would not be structured along ethnic lines. The structure of electoral democracy, in the long-term, was integrationist. At the same time, the constitution has some of the strongest provisions in any constitution for recognizing language and cultural rights of minority groups. These are not the conventional negative rights of liberal constitutionalism. For example, in a critical provision the constitution protects the right “to receive education in the official language or language of [one’s] choice.”⁴⁹ It requires the state to take “positive measures to elevate the status and enhance the

⁴⁹ S. AFR. CONST. 1996 § 29(2).

use” of eleven officially identified languages.⁵⁰ The constitution also establishes a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities.⁵¹ Yet though these provisions reflect a high degree of ethnic accommodation in the cultural sphere, none of it spills over into the way the constitution constructs the political sphere.

Professors Simeon and Murray call the overall constitutional system one of “recognition without empowerment.” This characterization is incisive. Where political circumstances make it a feasible strategy, this differentiation of the political and cultural spheres —rather than an all-or-nothing approach to accommodation —offers another set of tools for democratic institutional designers to enable more flexibility even as they negotiate amongst ethnically divided groups.

4. *Courts as Unwinders of Ethnic Political Bargains:* As I noted above, once the framework for democratic elections is designed in ways that create incentives for a more ethnically-oriented form of political competition, it becomes difficult to change that framework down the road, even if the initial conditions that motivated and justified it have changed. This reality is a subset of the larger “iron law” of electoral rules, which is that such rules, once in place, are highly resistant to change. Not only do vested personal and political interests arise around such rules, but to change those rules citizens must appeal to the very political actors who owe their political fortunes to the rules at issue. What is missing are intermediate institutions staffed by actors who stand at some remove from existing electoral laws and who could be trusted with the power to determine when circumstances have changed in ways that justify modifying electoral laws originally created to deal with earlier, different circumstances.

⁵⁰ *Id.* § 6.

⁵¹ *Id.* § 185–186.

To describe such a power is to suggest how disquieting it is. Nonetheless, there is one institution that can be viewed as playing such a role, at times, in at least some systems. That institution is the courts. The problem is the way the passage of time undermines the social premises that originally underwrote a system's electoral laws.⁵² Political institutions generally have a difficult time dealing with the problem of obsolete laws, a problem exacerbated in the context of the laws of democratic competition by the self-interested personal and partisan considerations noted earlier.

I can provide a few accounts of judicial systems that might be seen to be exercising this kind of “updating” power.⁵³ In the American context, the Voting Rights Act was designed to deal with the problem of racially discriminatory voting laws.⁵⁴ First enacted in 1965, then significantly amended in 1982, the Act had been left largely unchanged since then by Congress (until recent 2006 amendments which I will discuss). Coming out of an era of near complete black exclusion from political participation in the South, the need to ensure black political participation and representation was, at these earlier legislative moments, undoubtedly compelling. There was a substantial, well-justified concern that white voters would not vote for black candidates; thus, in majority-white electorates, black candidates could not be elected, even if the rules for casting a ballot were not discriminatory.

A legislative means of ensuring more black representation that emerged was the creation

⁵² The problem of electoral laws becoming outdated, yet remaining unchanged, is a subset of the larger problem of the difficulty established democracies have in general in modernizing statutory law. For the argument that courts in general have a proper role to play in using interpretation to “update” older statutes, see Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987).

⁵³ I have written about these examples at greater length elsewhere. See Pildes, *supra* note 6, at 83–101.

⁵⁴ The Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973, 1973bb-1 (2000)) (U.S.).

of “safe” minority election districts —districts designed intentionally to concentrate minority voters into the majority, so that they can control election outcomes. This constituted a mild element of consociationalism in the American context: the intentional creation of safe, majority-black election districts (with the concomitant effect of making other districts more white). This technique was effective in its immediate aim; it led to the election of many more minority officeholders.⁵⁵

But by the 2000s, nearly 25 years after the United States Congress had last revisited the issue, a variety of issues had arisen about whether various circumstances had changed enough to undermine the need for continuation, without any modification, of these racially-defined election districts —structures that had always been justified as a “second best” approach, one made necessary by the practical difficulty of more directly breaking down racial differences enough so that white voters would vote for black candidates. Despite the time that had passed since the policy had been adopted, and the intervening changes, Congress evinced no inclination to revisit these issues. That is not surprising, given that the issues are divisive and all sitting members of the House had been elected under this system.

Faced with the absence of any legislative attention to these policies, the Supreme Court in a series of decisions in the 1990s and 2000s cut back on the scope of the consociationalism embedded in these policies.⁵⁶ Employing the Constitution’s Equal Protection clause, the Supreme Court acknowledged the legality of some degree of accommodationist policy in the design of American democratic institutions; the Court endorsed the use of race to design election

⁵⁵ For the relevant data, see Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995).

⁵⁶ See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Holder v. Hall*, 512 U.S. 74 (1994); *Shaw v. Reno*, 509 U.S. 630 (1993). See generally Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*,

districts when polarized voting precluded minorities from being elected. At the same time, however, the Court imposed constitutional limits on the extent to which election districts could be designed for this purpose. Thus, constitutional boundaries were imposed on the extent of permissible accommodation. Even more interestingly, the Court began to reinterpret the earlier legislation in a way that read more flexibility into it; where earlier decisions had treated the obligation to draw “safe” minority-controlled election districts as a fairly unyielding one, recent decisions permitted these districts to be unwound a bit in the service of recognizing or fostering a greater capacity today for interethnic politics. These decisions could be viewed as reflecting a judicial recognition that the conditions that warranted more “accommodationist” policies when the United States was emerging from an era of racial exclusion ought to be modified 40 years after the law was first passed and 25 years since Congress last revisited it.

A similar view might be thought to animate a decision of the constitutional court that the Dayton Peace Agreement created for the two entities forged out of the breakup of the former Yugoslavia, the Republika Srpska (where most Serbs live) and the Federation of Bosnia-Herzegovina (where most Croats and Bosniaks live).⁵⁷ The original agreement appeared to leave the legal power to define their respective “constituent peoples” to each of these entities, which had done so in ethnically exclusive ways. Nonetheless, the court rejected this strong form of consociationalism and held that even though these entities were created to accommodate profound ethnic differences, they did not have the power to constitute themselves in ethnically exclusive terms.⁵⁸ This judicial decision is even more striking than the American ones, for not

forthcoming __OHIO ST. L.J.__ (2007).

⁵⁷ The Dayton Peace Accords on Bosnia (1995), *available at* <http://www.state.gov/www/regions/eur/bosnia/bosagree.html>.

⁵⁸ Constitutional Ct of Bosn. & Herz., Request for Evaluation of the Constitutionality of Certain Provisions of the

only were the ethnic issues involved more explosive, but far less time had passed between the original political deal that recognized a need for ethnic accommodation and the court's willingness to unwind at least one element of that deal.

To be sure, there are serious normative and pragmatic concerns with courts playing the role of institutional agents for transitioning away, even modestly, from ethnic accommodation in the design of democratic institutions. Normatively, the legitimacy of courts partially undoing political agreements reflected in legislation is problematic, although perhaps less so the longer the interval between the original agreement and the court's action. Pragmatically, to the extent judicial interventions of these sorts rest, in part, on the view that circumstances have changed enough to justify moves toward a more integrationist political sphere, they require exquisitely charged judgments. Should a court be wrong about the extent of change, its decision could fuel ethnic conflicts.

At the same time, there is at least one less obvious potential advantage of judicial action. When political institutions address issues at the intersection of ethnic conflict and the design of democratic institutions, it might well be that placing these issues in the political arena tends to be more divisive and polarizing than when courts take similar steps. Judicial processes are often less rhetorically charged and court decisions have less visibility. In addition, while the losing side might blame the judges, that can be less inflammatory than blaming "the people." The main justification for judicial unwinding of the sort described here must be in similarly pragmatic terms, namely, the absence of other institutions likely to take responsibility for this role. My aim here is not to defend the legitimacy of courts doing so, but to point out that courts in several

Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina, Case U 05-98, Partial Decision pt. 3, ¶ 61 (July 1, 2000), <http://www.ccbh.ba/?lang=en&page=decisions/byyear/2000>. See generally Anna Morawiec Mansfield, Note, *Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 103 Colum. L. Rev. 2052 (2003).

systems can be understood to have taken on precisely such a role.

5. *Federalism and territorially-based devolution*: Federalism or territorial devolution can take many forms, but it is increasingly becoming among the most important structural and constitutional mechanisms for dealing with ethnically-divided societies. Writing in 1984, Daniel J. Elazar observed that the “federalist revolution is one of the hidden revolutions of our times, despite the fact that few have paid attention to it.”⁵⁹ What was true then has become only more so since. Federalism increasingly serves as a proxy for enabling minorities to experience some degree of autonomy, security, and recognition. Indeed, while federalism historically arose when prior, autonomous units decided to join together, federalism in recent years has also been used to disaggregate previously centralized regimes—a novel use suggesting the modern appeal of the federal approach. Comparative experience with federalism can hardly be summarized here. For reasons of space, I limit myself to four brief points.

First, from the perspective of the dynamic approach advocated here, federalism is particularly attractive as compared to more overtly consociational features often used in divided societies. This can be so whether or not the federal units as initially constituted are homogenous or more intermixed with respect to the country’s salient ethnic dimensions. As a form of power sharing or power dividing, federalism has the virtue of not formally designing state institutions on the basis of ethnic identities as such—unlike consociational arrangements, such as that in Lebanon’s National Pact from 1943 to the civil war of the mid-1970s, which required that the president be a Maronite, the prime minister a Sunni, the speaker of the House a Shiite, the

⁵⁹ Daniel J. Elazar, *The Role of Federalism in Political Integration*, in *FEDERALISM AND POLITICAL INTEGRATION* 13, 28 (Daniel J. Elazar ed., Univ. Press Am. 1984).

vice-president a Greek Orthodox, and so on.⁶⁰

Most importantly, not only is federalism only a proxy for ethnic group identity, it is a particularly malleable proxy. Federalism can ensure vulnerable minorities some degree of autonomy and protection at the outset of state formation. Yet if ethnic identities as a source of conflict diminish over time, individuals will move between units (as long as free movement is guaranteed) in a way that makes territory and identity correspond less and less directly. Movement and changing demographics provide a built-in mechanism that keeps a democratic system more open and responsive to the possibility of diminished ethnic conflict over time. As a leading modern theorist of federalism, Carl J. Friedrich noted, “[t]he study of social structure in relation to federalism has, therefore, helped us to understand better the dynamic nature of federal orders, to look upon a federal system as subject to continual change, rather than a static design fixed forever in an immutable distribution of factors.”⁶¹ Indeed, there are nations originally designed as formally federal in structure that are considered “non-federal” today because, despite these federal structures, the relevant political actors (political leaders, parties, interest groups, voters and the like) view politics overwhelmingly in national terms; Austria, Germany, and the United States are the three countries typically classified as formal federations with non-federal societies.⁶² It is true that federal systems will entrench geographically-based distinctions long after they have become less meaningful than initially, as has been true in the United States. But that is better than entrenching ethnic identities themselves, which are likely to be far more divisive.

⁶⁰ See the Ta'if Accord, 1989, art. II(6) (Leb.).

⁶¹ CARL J. FRIEDRICH, *TRENDS OF FEDERALISM IN THEORY AND PRACTICE* 54 (Praeger 1968).

⁶² See, e.g., Jan Erk, *Austria: A Federation without Federalism*, 34 *PUBLIUS* 1, 2 (2004).

Second, to the extent actual political power is devolved from the center to the federal units, there can be at least two particular benefits with respect to defusing potential ethnic conflicts. One is that pressure is taken off competition over the control of institutions and policies at the national level. Federalism can be a form of gag rule, in which competing parties agree not to contest certain divisive issues at the national level. By removing those issues from the national level, the stability and acceptance of national institutions can be enhanced. To the extent divisive issues are resolved through competition at the unit level instead, those resolutions are more segmented and confined. In addition, enhanced competition in units differently constituted than the national political arena can have other benefits, as noted in a moment.

Third, there is a longstanding debate about whether, from various perspectives, it is better in different contexts that the units in a federal structure be ethnically homogenous or intermixed. As a practical matter, the options are often sharply constrained, including by whether the relevant ethnic groups are geographically concentrated or not. But leaving those constraints to the side, it is important to recognize that federalism can contribute to democratic legitimacy and stability in divided societies regardless whether the units are ethnically homogenous or not. If the units are homogenous, competition for power at that level often will bring out conflicts *within* the particular ethnic group along lines other than ethnicity (or the dimension of ethnicity that divides the society more generally). This can help diminish the more profound and potentially more explosive conflicts at the center. As Horowitz puts it, where ethnic groups are geographically concentrated, devolution can diminish ethnic conflict not because it provides group autonomy, but because once power is devolved, the very idea of “the group” can become

more difficult to maintain.⁶³ Homogenous units differently constituted than the nationwide ethnic configuration also can provide opportunities for distributional goods, such as jobs, that minorities might fear will not be available in a unitary state. Heterogeneous units, of course, can generate incentives for interethnic coalitions and accommodations that may not exist at the center.

To be sure, federal structures that address ethnic conflicts can take various forms. The extent to which mobility over time, in particular, is a realistic prospect can vary with the social foundation of the federal units as well as the nature of their formal powers. Federalism can be based on linguistic divisions, for example, as in Canada, Belgium, and India. To the extent the linguistic basis is merely *de facto* and not further entrenched in additional policies of the federal units, systems of this sort might retain meaningful capacity for movement between the units, particularly for the second generation. But if the federal units have the additional power to try to lock-in a dominant language through *de jure* requirements —by insisting that education be only in the dominant language or through other “official language” policies — the effective capacity of residents to move between units might be expected to be diminished. We do not have enough comparative data on actual mobility within different federal systems to know how effective mobility varies among differently structured federal regimes.

Fourth and finally, American scholars frequently underappreciate the contribution federalism can make to managing ethnic conflict. Federalism’s tainted history in the United States, linked to slavery and racial segregation, makes it difficult to recognize the extent to which federalism has been an essential institutional means elsewhere for bringing about political

⁶³ DONALD H. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 627 (Univ. Cal. Press 1985).

integration, stability, and accommodation between diverse groups. Modern federal systems, however, are more likely to ensure that national institutions, including courts, are given the power to ensure that fundamental rights are protected at all levels. There are no general acontextual rules for how best to structure federal arrangements in all contexts —how many units to create, with what powers, composed in what ways —and careful examination of which forms have worked best in which contexts cannot be undertaken here. But federalism offers particularly promising opportunities for institutionalizing the dynamic approach urged here to designing democratic institutions in ways that accommodate, without needlessly entrenching, ethnic divides.

III. A Dynamic Perspective

Designing democratic institutions to address ethnic conflicts has become the most pressing problem in modern constitutional design. Several reasons account for this fact. In the third wave of democracy that has emerged since 1989, democracy has been viewed as the appropriate institutional solution even for societies previously wracked by violent, internal group conflicts. With forced population relocation no longer widely considered legitimate, the aspiration has been to deploy democratic institutions to stabilize heterogeneous societies, including post-conflict ones. In addition, the Cold War fueled a state-strengthening dynamic, with the United States and the Soviet Union building up centralized authorities, particularly through military aid. With the end of the Cold War and the softening of central authority, latent ethnic differences are more easily mobilized and given expression. Even more established democracies have seen the rise of ethnic identities and political claims, whether in the United Kingdom, Spain, Latin America, or, with increased demands for group recognition of

African-Americans, Hispanics, and others, in the United States.

Thus far, much academic analysis and practical institutional design has taken too static an approach to these issues. Ethnic identities can be fluid, with the incentives that the structure of political competition creates providing a particularly powerful force for mobilizing those identities along one dimension or another. There is (or can be, in many contexts) a dynamic relationship between the design of democratic institutions and the ethnic identities expressed. To the extent democratic institutions being designed today must accommodate ethnic differences for practical reasons, institutional designers must avoid thinking only in terms of the structure of those differences at the moment of institutional formation. The aim should be to accommodate those differences, while building in as much flexibility as possible to enable democratic institutions to be responsive to changes in ethnic identifications over time.