

A POST-RACIAL VOTING RIGHTS ACT

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"The future is like heaven, everyone exalts it, but no one wants to go there now." —James Baldwin

ABSTRACT

The Voting Rights Act of 1965 (VRA) was enacted "to foster our transformation to a society that is no longer fixated on race."¹ This Article critiques the prevailing election law scholarship and jurisprudence as out of step with the VRA's post-racial aspirations and offers proposals for Congress to correct course.

The United States has long been torn between civic nationalism and racial nationalism. By the mid-twentieth century, the uneasy interplay of these visions had produced a remarkable expansion of citizenship to all migrants from Europe alongside appalling discrimination against, or outright exclusion of, individuals of other ancestries. The Civil Rights Movement drew on a reinvigorated spirit of civic nationalism to expel white racial nationalism from the country's core.

The rise of black nationalism and multiculturalism represent new, albeit less destructive, forms of racial nationalism that confine individuals to subjugating racial blocs. These movements have entrenched a norm in which individuals are ascribed totalizing racial scripts to perform. The diffusion of racial scripts throughout American society is sustained by a "race-industrial complex" of interrelationships among self-interested academics, marketers, activists, and politicians.

Nevertheless, civic nationalism retains vitality. A civic nationalist politics of deliberative exchange provides a framework for minorities to challenge

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1. *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

white complacency in addressing structural racism, for whites to challenge minority policy preferences distorted by the race-industrial complex, and for the country to reach a synthesis about maximizing social welfare. Civic nationalism can help the country achieve a post-racial society by destabilizing existing racial categories and generating national solidarity around a common hybridized culture.

Voting rights law should lay the foundations for post-racial advances. The VRA currently encourages formation of majority-minority districts that reward racially polarizing candidates, handicap minorities from winning politically powerful statewide races, and reproduce race as an organizing principle of American society. The law should, instead, encourage so-called crossover districts that have the exact opposite effect. Congress should also amend the VRA to provide stronger protections against practices that have a disparate impact on minorities' access to the polls. Finally, Congress should amend the VRA's preclearance scheme so that, to begin, no jurisdictions are required to preclear voting practices. Preclearance, though, should be automatically triggered for a jurisdiction when it is found liable for diluting the influence of minority votes through redistricting or denying minorities access to the ballot.

INTRODUCTION

On March 21, 2000, Barack Obama lost a congressional primary race in Illinois's First Congressional District to incumbent Bobby Rush by a two-to-one margin.² On November 4, 2008, Obama won the U.S. presidential race by a two-to-one margin in the Electoral College vote over Republican John McCain.³ Nearly seventy million Americans cast a ballot for Obama, and he won the popular vote by over seven percentage points. Since 1860, only two Democrats, Franklin D. Roosevelt and Lyndon B. Johnson, secured larger shares of the vote than Obama.⁴

Although Obama benefited from resentment directed at the Republican Party,⁵ commentators on both sides of the aisle have been quick to credit his political acumen in producing an impressive victory.⁶ His success is all the

2. Janny Scott, *In 2000, A Streetwise Veteran Schooled a Bold Young Obama*, N.Y. TIMES, Sept. 9, 2007, at A1, available at http://www.nytimes.com/2007/09/09/us/politics/09obama.html?_r=1.

3. Larry Sabato, *Sabato's Crystal Ball*, CENTER FOR POLITICS (Dec. 17, 2008), <http://www.centerforpolitics.org/crystalball/articles/ljs2008121501/>.

4. *Id.*

5. See Nathan Persily, Stephen Ansolabehere & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1414 (2010) (noting Obama's inherent advantages because of "[t]he economic collapse, historic unpopularity of a sitting Republican president, and an enormous fundraising advantage").

6. See, e.g., David S. Broder, *A Nation Tired of Old Fights Looks Ahead with Hope*, WASH. POST, Nov. 5, 2008, at A24, available at <http://www.washingtonpost.com/wp->

more remarkable because he was the first black presidential candidate of a major political party and able to command strong support from citizens of communities of all descents.⁷ By having cross-racial appeal in a nation plagued by racial strife throughout its history, he has been called a “post-racial” president.⁸

In eight years, how did Obama go from small-time political loser to the nation’s first black president? The answer to this puzzle helps solve a much larger puzzle about the role of race in American politics and American society. A short answer to the smaller puzzle is that majority-minority districts, such as Illinois’s First Congressional District, foster political climates that are hostile to post-racial candidates such as Obama and receptive to racially polarizing candidates such as Rush. In the 2000 primary, for example, Rush rode to victory by policing destructive racial boundaries and railing on Obama as out-of-touch with the majority black community.⁹

Majority-minority districts are largely the byproduct of the VRA. The U.S. Supreme Court has found Congress’s intent in passing the VRA to be “to hasten the waning of racism in American politics”¹⁰ and “to foster our transformation to a society that is no longer fixated on race.”¹¹ Herein lies the larger puzzle. How did the VRA, crafted to reduce racism and transition to a post-racial society, come to encourage the formation of segregated districts that reward race-baiting? This article argues that policymakers, jurists, and election law scholars have all too often contemplated and formulated VRA policy without first attending to the complex workings of race in contemporary American society. This Article fills the theoretical gap, critiques the prevailing election law jurisprudence and scholarly literature as out-of-step with the post-racial aspirations of the VRA, and offers proposals for Congress to correct course.

Part I reveals a longstanding tension between two competing visions of citizenship at the country’s core—one premised on “civic nationalism” and the other on “racial nationalism.” It traces the uneasy coexistence between these

dyn/content/article/2008/11/05/AR2008110500015.html; Rachel L. Swarns, *Vaulting the Racial Divide: Obama Persuaded Americans to Follow*, N.Y. TIMES, Nov. 5, 2008, at 7.

7. See Mark Hugo Lopez & Paul Taylor, Pew Research Center, *Dissecting the 2008 Electorate: Most Diverse in U.S. History*, available at <http://pewresearch.org/assets/pdf/dissecting-2008-electorate.pdf> (last visited Jan 30, 2010); David Remnick, *The Joshua Generation: Race and the Campaign of Barack Obama*, NEW YORKER, Nov. 17, 2008, at 68 (“Obama made his biracial ancestry a metaphor for his ambition to create a broad coalition of support, to rally Americans behind a narrative of moral and political progress.”).

8. See, e.g., Rupert Cornwell, *A Day for Hope*, INDEPENDENT (LONDON), Jan. 20, 2009, at 10 (“Obama is a post-racial president, a black man who won a greater share of the white vote than John Kerry, the last Democratic candidate for the White House in 2004.”).

9. See REMNICK, *supra* note 7 (“Rush did not hesitate to mock Obama as inauthentic-and, by inference, insufficiently black. . . . Rush’s tactics were brutal, and they were effective: Obama lost the primary by thirty points.”).

10. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

11. *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

competing narratives from the Revolutionary Era through the 1930s. This time period is characterized by the gradual expansion of citizenship to all migrants from Europe, a grant of formal citizenship to black Americans in the aftermath of the Civil War but with systematic discrimination, and the continued exclusion of non-European migrants. The expansion of citizenship to all Europeans and exclusion of all others during this era is at once telling and misleading. It is telling because it demonstrates the intensity of white racial nationalism—the belief that those of African, Asian, and Latin American ancestry could have no part in a vision of America as a melting pot. It is misleading, though, because the limitation obscures the depth of the country's commitment to civic nationalism. It conceals, for example, the ability of the country to assimilate tens of millions of individuals from Southern and Eastern Europe who many had once derided as racially inferior and anathema to democracy. The country experienced a major shift in the 1940s–1960s as civic nationalism gained ascendancy and figured prominently in the Civil Rights Movement, spelling the end for white racial nationalism.

Part II describes the rise of black nationalism in the 1960s and the rise of multiculturalism in the 1970s as new forms of racial nationalism that, though less destructive than white racial nationalism, still confine individuals to subjugating racial blocs and compromise the unity of the country. The brutal struggle for black voting rights in the election of 1964 sowed the seeds for widespread black racial nationalism by the end of the decade. After a more broadly-felt loss of faith in American civic nationalism in the wake of the Vietnam War, the racial nationalism movement spread throughout the American polity as other descent communities began to take heightened pride in their provincial racial enclaves and less pride in the American nation. Part II also assesses the role of intentional white racism in preserving its lingering effects in American society. It argues that, while white racism plays a role, most discrepancies between the races can be explained by structural racism—the legacies of slavery and Jim Crow.

The diffusion of racial representations and expectations throughout American society is also sustained by a “race-industrial complex.” The race-industrial complex refers to a web of interrelationships among New Left academics, corporate marketers, racial bloc activists, and pandering politicians. Each stands to profit handily from the continued salience of the ethno-racial pentagon in American consciousness. As a result, each plays a critical role in the reproduction of race and the persistence of divisive racial nationalism.

Part III reveals that civic nationalism retains strength at the nation's core and contrasts racial nationalism's static view of politics with civic nationalism's dynamic view. Racial nationalism sees politics' purpose as the *aggregation* of groups' predefined preferences, while civic nationalism sees politics' purpose as the *transformation* of citizens' predefined preferences through deliberation. Civic nationalism provides a framework for minorities to challenge

white complacency in addressing structural racism, for whites to challenge minority policy preferences distorted by the race-industrial complex, and for the country to reach a synthesis about maximizing social welfare. To strengthen civic nationalism and achieve a post-racial society, lawmaking would *not* be colorblind because accounting for the way people operate on the fiction of race is necessary to move past the fiction. In a variety of ways, the presidential candidacy and campaign of Barack Obama embodied the principles of a vigorous civic nationalism that can generate solidarity, destabilize existing ethno-racial categories, and move toward a post-racial society.

Part IV analyzes Section 2 of the Voting Rights Act in light of the VRA's post-racial aspirations.¹² It presents the considerations for crafting districting schemes that can usher in a post-racial America by drawing on the international election law theory of "centripetalism," which uses electoral incentives to reward parties and candidates that have cross-racial appeal. Section 2 of the VRA prohibits practices that "resul[t] in a denial or abridgement of the right of any citizen of the United States to vote on account of race."¹³ Courts have construed Section 2 in a way that encourages formation of majority-minority districts. Majority-minority districts, however, intensify society's racial cleavages by rewarding candidates who appeal to racial nationalism instead of civic nationalism. Because majority-minority districts reward race-baiters and "bleach" surrounding districts from an integrated politics, they also handicap minorities from winning statewide elections.

"Crossover" districts are a viable alternative to majority-minority districts that can help move the country toward a post-racial society. Crossover districts contain a large percentage of minorities (say, 40 percent) who, together with the aid of a small percentage of reliable crossover votes from the white majority (say, 10–15 percent), are able to elect minority candidates in racially polarized areas.¹⁴ The virtues of crossover districts are that they require winning candidates to appeal to civic nationalism. They encourage citizens to build coalitions across the color line and "pull, haul, and trade to find common political ground."¹⁵ In doing so, they generate a spirit of national solidarity centered on American ideals and destabilize existing ethno-racial categories by exposing supposedly inherent racial differences as crude caricatures.

Despite these distinct advantages, the U.S. Supreme Court recently ruled that only majority-minority districts, and not crossover districts, count as dis-

12. Parts IV and V should lay to rest unsubstantiated criticisms that progressive race critiques fail to offer practical alternatives. *See, e.g.,* Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1472 (2002) (remarking that progressive race critiques offer little detail on moving past race because "the task they have assumed is an impossible one").

13. 42 U.S.C. § 1973(a) (2006).

14. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1253–55 (2009) (Souter, J., dissenting) (describing crossover districts).

15. *De Grandy*, 512 U.S. at 1020.

tricts where minority voters have the opportunity “to elect representatives of their choice” for purposes of Section 2.¹⁶ The decision incentivizes legislators to dismantle crossover districts and create majority-minority districts in order to avoid Section 2 liability. Congress should codify an approach to vote dilution that will maximize the number of crossover districts and minimize the number of majority-minority districts.

Part V addresses “vote denial,” practices that inhibit people from voting or having their votes counted, including photo identification laws, voter list purges, defective voting equipment, and felon disenfranchisement laws. These practices are troubling because they compound the problems of structural racism traced to slavery and Jim Crow. Congress should provide a comprehensive framework for evaluating such claims by codifying the same burden-shifting framework as courts apply in disparate impact employment discrimination cases.

Part VI addresses the VRA’s preclearance scheme that requires certain jurisdictions to preclear new voting practices with the federal government. This burdensome practice produces short-term compliance, but inhibits election officials in covered jurisdictions from developing antidiscrimination norms for them to vigorously enforce voting rights protections. Congress should amend the VRA such that, initially, no jurisdiction must preclear practices. Preclearance, however, should be automatically triggered for a jurisdiction when an enforceable judgment is issued against it for diluting the influence of minority votes or denying minorities access to the ballot. Judges will determine the length of the preclearance term by referencing a set of aggravating and mitigating factors. This reform trusts election officials to do their job, affirms their best intentions, and lays the groundwork for a more durable commitment to antidiscrimination norms. At the same time, officials will be aware of the ground rules, knowing that discriminatory practices could lead to liability and years of preclearance, which maintains the deterrent effect of the current preclearance scheme. In fact, the reform expands the deterrent effect from covered jurisdictions to the nation as a whole.

Part VII concludes.

I. CIVIC NATIONALISM AND RACIAL NATIONALISM: COMPETING VISIONS OF AMERICAN CITIZENSHIP AT THE COUNTRY’S CORE

When it comes to defining citizenship, Aristotle’s words still resonate: “[T]he nature of citizenship . . . is a question which is often disputed: there is no general agreement on a single definition.”¹⁷ Despite the concept’s contested meaning, most can agree that it fundamentally entails membership in a com-

16. *Bartlett*, 129 S. Ct. at 1246.

17. ARISTOTLE, *POLITICS* 93 (E. Barker ed., 1946).

munity.¹⁸ There are several dimensions to this membership, including the rights it confers, the responsibilities it demands, the values it inculcates, the identities it produces, and the solidarity it generates.¹⁹ Thus, citizenship is a web of social relationships among citizens and their changing relationship with the state.²⁰ Communities require boundaries. The ways that citizenship invokes boundaries are powerful and malleable.²¹ Citizenship can draw boundaries in a way that enriches individuals' sense of place in the world²² and empowers those previously neglected.²³ It can, however, also emphasize boundaries to cultivate communal meaning based on hate and exclusion.

Since its inception, the United States has been torn between two competing visions of citizenship—one premised on civic nationalism and the other on racial nationalism.²⁴ Civic nationalism holds that the country should be made up of individuals from a wide range of backgrounds.²⁵ The civic nationalist believes that racial and religious affiliations²⁶ are malleable and, consequently, that individuals can maintain affiliation with their heritage while retaining membership in a broader community.²⁷ Diverse individuals can be integrated as members of an American community through attainment of equal status as

18. See RUTH LISTER, *CITIZENSHIP: FEMINIST PERSPECTIVES* 3 (2d ed. 2003) (“[T]he notion of citizenship identity derives from the most basic meaning of citizenship: membership of a community.”).

19. Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 450 (2000) (“[Citizenship] has an extraordinarily broad range of uses; it is invoked to characterize modes of participation and governance, rights and duties, identities and commitments, and statuses.”).

20. LISTER, *supra* note 18, at 15 (“An understanding of citizenship in terms of membership and identity underlines that what is involved is not simply a set of legal rules governing the relationship between individuals and the state but also a set of social relationships between individuals and the state and between individual citizens. These relationships are negotiated, and therefore, fluid. Their nature and how they are understood reflects national context and culture.”).

21. Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 *B.Y.U. L. REV.* 964 (2005) (“Citizenship can be utilized as a means of exclusion or as a means of inclusion.”).

22. Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 *GEO. IMMIGR. L.J.* 1, 18 (1989) (noting that citizenship provides a “focus of political allegiance and emotional energy on a scale capable of satisfying deep human longings for solidarity, symbolic identification, and community.”).

23. DAVID MILLER, *ON NATIONALITY* 185 (1995) (noting that civic nationalism “provides the setting in which ideas of social justice can be pursued . . . and . . . helps to foster the mutual understanding and trust that makes democratic citizenship possible”).

24. GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* 4 (2001).

25. DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* 14–15; 86–88 (2006).

26. At this point, some scholars would like to insert “ethnic” affiliations as well. As will be shown, race is a social fiction. The characteristics that it encapsulates are the same as those of ethnicity and I have never read a satisfying distinction between the two categories. Rather than independently deconstruct both as fiction, I will only use the term race with the understanding that my critique applies to both.

27. *Id.* at 13–15.

rights-bearing citizens²⁸ and adoption of a shared commitment to certain political values and practices.²⁹

Racial nationalism asserts that the state should be organized around a community sharing common origins and, often, a common religion.³⁰ The racial nationalist believes that identities are primordial and static.³¹ Citizenship must be limited to individuals who possess the characteristics of the enclave community, such as a common language and place of origin, for the community to remain cohesive and suitable for self-government.³²

A. The Uneasy Coexistence of Civic Nationalist and Racial Nationalist Narratives (American Revolution – Great Depression)

“What then is the American?” the French-American immigrant J. Hector St. John de Crevecoeur asked in 1782.³³ Throughout American history, the answer has emerged from an uneasy relationship between civic nationalism and ethnic nationalism. Crevecoeur, in the Revolutionary Era, gave voice to the civic nationalist tradition, praising the “new race of man” produced from the mixture of individuals from diverse countries that had become bound together by a national allegiance to principles such as equality.³⁴ This universalizing sentiment was articulated in the country’s founding documents such as the Declaration of Independence’s proclamation that “all men are created equal.”³⁵ At the same time, a destructive racial ideology was woven into the fabric of the coun-

28. The Supreme Court has given voice to this vision of citizenship, stating for example, that “citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of Our Government.” *Knauer v. United States*, 328 U.S. 654, 658 (1946). In practice, there are a few lingering legal differences between natural-born and naturalized citizens. See SEYMORE, *supra* note 21, at 956–57 (2005).

29. MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* 6–7 (1994); Philip Gleason, *American Identity and Americanization*, in CONCEPTS OF ETHNICITY 62–63 (William Petersen, Michael Novak & Philip Gleason eds., 1982) (To become an American “a person did not have to be of any particular national, linguistic, religious, or ethnic background. All he had to do was to commit himself to the political ideology centered on the abstract ideals of liberty, equality, and republicanism. Thus the universalist ideological character of American nationality meant that it was open to anyone who willed to become an American.”).

30. One view in American history, for example, has seen the country as “a white nation, a Protestant nation, a nation in which true Americans were native-born men with Anglo-Saxon ancestors.” ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 3 (1997).

31. HOLLINGER, *supra* note 25, at 133 (“Nationality, in this view, is based on descent. The true nation is a solidarity grounded in what its adherents understand to be primordial ties, not any instrumental or accidental connections”).

32. GERSTLE, *supra* note 24, at 4.

33. J. HECTOR ST. JOHN CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 54 (1904).

34. *Id.* at 55–56.

35. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

try after the revolution.³⁶ For the country to reconcile the emerging notion that all humans possessed “inalienable rights” with the institution of slavery critical to Euro-American profiteers, leaders established a racial ideology.³⁷ The ideology ended the enslavement of whites,³⁸ imported vastly more African and Afro-West Indian slaves,³⁹ and declared that the latter groups constituted a sub-human race undeserving of the same rights as whites.⁴⁰

Between the 1820s and 1920s, roughly thirty-five million immigrants came to the United States.⁴¹ The vast migration and ability to integrate a diverse population prompted Ralph Waldo Emerson to speak of the United States as an “asylum of all nations” that derived the “energy of Irish, Germans, Swedes, Poles, and Cossacks, and all the European tribes—of the Africans, and the Polynesians,” generating a “new race” that was as “vigorous as the new Europe which came out of the smelting pot of the Dark Ages.”⁴² While America was becoming home to people from a diverse set of ancestries in the 1800s, slavery persisted. The status of blacks in America during this age is chillingly captured by Chief Justice Roger Taney’s opinion in the infamous *Scott v. Sandford*, in which he said that blacks could not be citizens and that they enjoyed “none of the rights and privileges which [the Constitution] provides for and secures to citizens of the United States.”⁴³ Even after the abolition of slavery and

36. Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 101–08 (1990).

37. *Id.* at 101–08, 114 (“Racial ideology supplied the means of explaining slavery to people whose terrain was a republic founded on radical doctrines of liberty and natural rights.”); SMITH, *supra* note 30, at 64 (1997) (“[S]lavery had to be justified, a task that prompted the colonists to elaborate . . . doctrines of racial inequality . . .”). This characterization of the emergence of slavery may strike some as curious since slavery is commonly thought of as primarily a system of race relations, “as though the chief business of slavery were the production of white supremacy rather than the production of cotton, sugar, rice and tobacco.” FIELDS, *supra* note 36, at 99. Yet, if slavery were always a racist project in segregating the races, then, as Columbia University historian Barbara Fields has said, one must answer “why Europeans seeking the ‘ultimate’ method of segregating Africans would go to the trouble and expense of transporting them across the ocean for that purpose, when they could have achieved the same end so much more simply by leaving the Africans in Africa.” *Id.*

38. *Id.* at 101–08. Contrary to popular belief, white indentured servants were often treated just as appallingly as black slaves. *Id.* at 102. (“Neither white skin nor English nationality protected [indentured] servants from the grossest forms of brutality and exploitation.”). To the extent they enjoyed some greater legal protections, this difference was a product not of their skin color, but of centuries of legal victories won by the lower classes in England. *Id.* at 103.

39. *Id.* at 104–05.

40. *Id.* at 114 (“Race explained why some people could rightly be denied what others took for granted: namely, liberty, supposedly a self-evident gift of nature’s God.”).

41. *Hearing on Congressional Immigration Reform: Becoming Americans—U.S. Immigrant Integration: Hearing Before the U.S. House of Representatives Comm. on the Judiciary Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law*, May 16, 2007 (statement of Gary Gerstle), available at <http://www.vanderbilt.edu/historydept/assets/gerstleCongressionalTestimony.pdf>.

42. HOLLINGER, *supra* note 25, at 87 (quoting Emerson).

43. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857).

ratification of the Reconstruction Amendments,⁴⁴ blacks remained systematically oppressed by Jim Crow laws.⁴⁵ Furthermore, after the Civil War, a naturalization statute from 1790 that authorized the naturalization of free whites was expanded to include those of African ancestry, but still excluded almost all migrants from Asia during the period of 1870–1952.⁴⁶ Leaders deemed the culture of individuals from these areas incompatible with democracy and even spoke of autocracy as imbedded in their genes.⁴⁷

By the turn of the twentieth century, even presidents advanced the belief that the country would be at its strongest if diverse ethnic groups were melded into an American race, while other groups were excluded. As historian Gary Gerstle has said, the “words that [Israel] Zangwill puts in David’s mouth [in Zangwill’s famed play *The Melting Pot*] could have come from [Theodore] Roosevelt’s own pen: ‘America is God’s Crucible, the great Melting-Pot where all the races of Europe are melting and reforming! . . . Germans and Frenchman, Irishmen and Englishmen, Jews and Russians—into the Crucible with you all! God is making the American.’”⁴⁸ President Roosevelt sought varied contexts

44. During Reconstruction the country made several advances against racism. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 10 (2006). “Southern blacks voted in extraordinary numbers, electing hundreds of black officeholders. Black jury service was common; streetcars generally were desegregated; and blacks finally gained access to public education. In the North as well, blacks in most states voted for the first time; restrictions on their legal testimony were removed; and blacks were admitted to public schools, which in some states were integrated.” By the 1890s, a host of factors, such as an economic hardship among Southern White farmers, halted these gains and led to renewed segregation. *Id.* at 10–14.

45. See *id.* at 8–289 (describing the impact of Jim Crow laws).

46. The statute originally restricted citizenship eligibility to “any alien, being a free white person.” Naturalization Act of 1790, ch. 3, 1 Stat. 103. In 1875, it was amended to include “aliens of African nativity and . . . persons of African descent.” 8 U.S.C. § 359 (1875), amended by 8 U.S.C. § 1422 (1952). The amended statute spurred fascinating litigation and unsettling opinions about who qualifies as a “white person” eligible for citizenship. See generally IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006). The judiciary’s failure to arrive at a workable standard for whiteness illustrates the underlying incoherence of race. For example, in 1922, the Court held that a man of Japanese ancestry with white skin was ineligible for citizenship because he was not “Caucasian,” the relevant point of inquiry to be a “white person.” *Ozawa v. United States*, 260 U.S. 178, 198 (1922). A year later, the Court contradicted itself, holding that a migrant from India was ineligible for citizenship because even though anthropologists classified him as Caucasian, the common man did not, and the latter was the relevant point of inquiry to be a “white person.” *United States v. Thind*, 261 U.S. 204, 206 (1923). See also Donald Brame, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1410 (1999) (arguing that the cases “provide extended examples of the Court’s taking note of the scientific community’s failure to arrive at a practicable system of racial classification, and turning to a reliance on the statutory meanings developed through the political process. The terms produced were popular and not scientific, indicating and naturalizing an understanding of social groups, not biological ones.”).

47. Cong. Globe, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan) (“Whether this door [of citizenship] shall now be thrown open to the Asiatic population . . . [for the Pacific Coast, this would mean] an end to republican government there, because it is very well ascertained that those people have no appreciation of that form of government; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding it or of carrying it out.”).

48. GERSTLE, *supra* note 24, at 51.

to promote civic nationalism and integrate those from diverse ancestries, most notably in wartime efforts.⁴⁹ Roosevelt's limitation on mixing to Europeans is illuminating and deceiving. It is illuminating because it demonstrates that those of African, Asian, and Latin American ancestry could have no part in his vision of an integrated America. It is deceiving, though, because the limitation obscures the depth of his faith in civic nationalism, hiding, for example, his boldness in including allegedly inferior racial groups from Southern and Eastern Europe.

A sizable majority of the twenty-four million immigrants that came to the United States between the 1880s and the 1920s descended from these regions.⁵⁰ Remarkably, they entered a society that totaled only seventy-six million people in 1900.⁵¹ Many leaders worried that the saturation of these "inferior" immigrants threatened the stability of the American state. A recurring complaint was that the new immigrants' predominantly Catholic, Christian Orthodox, and Jewish backgrounds were at odds with the Protestantism that had purportedly given "America its mission, its democracy, its high regard for individual rights, and its moral character."⁵² Registering disagreement with President Roosevelt's vision, many believed that no amount of civic nationalism could overcome these individuals' racial and cultural deficiencies. In 1924, one member of Congress quoted favorably the words of a Dr. Ward: "We cannot make a heavy horse into a trotter by keeping him in a racing stable. We cannot make a well bred dog out of mongrel by teaching him new tricks."⁵³ The "tricks" referred to learning the country's values and practices through media like the Declaration of Independence.⁵⁴ As illustrated by these unsettling characterizations of migrants from Eastern and Southern Europe, the racial nationalist strain enjoyed resurgence in the 1920s.⁵⁵ As a result, immigration from these regions was largely prohibited, and immigration rates declined precipitously.⁵⁶

Despite rampant nativism, the new class of immigrants bought into civic nationalism and engaged the political process.⁵⁷ Because, in the words of Professor Kenneth Karst, "American identity is closely bound up with participation in the American civic culture,"⁵⁸ immigrants' political engagement proved critical to their integration into American society.⁵⁹ Immigrants voted in droves

49. *Id.* at 6.

50. GERSTLE, *supra* note 41, at 2.

51. *Id.*

52. *Id.* at 2.

53. *Id.* at 3.

54. *Id.*

55. *Id.* at 3–4.

56. GERSTLE, *supra* note 24, at 104–15.

57. GERSTLE, *supra* note 41, at 3–4.

58. KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 84 (1989).

59. GERSTLE, *supra* note 41, at 3–4.

and spoke out on behalf of pro-immigrant policies. The bulk of this activity was driven by a desire of immigrants to protect the basic well-being of their communities, such as combating discrimination and raising their children in light of their own cultural practices.⁶⁰

Importantly, immigrants insisted on their own American character and appealed to American values in securing their rights. Their political involvement fueled conflict with native-born Americans in the short-term, but ultimately “worked to bind the native-born and foreign born together, and make both groups feel part of one American nation.”⁶¹ It also enabled groups once pinned as incompatible with democracy, such as Catholics and Jews, to “assert their claims on America and to assert that they had as much right to live in America, to speak on its behalf, and to access its opportunities as did long-settled populations of American Protestants.”⁶² The landslide election of pro-immigrant President Franklin D. Roosevelt in 1936 was, in many ways, the culmination of new immigrants’ efforts to influence the political process as a diverse constituency united behind his candidacy.⁶³ President Roosevelt’s inclusion of Catholics and Jews in his cabinet and successful advocacy of pro-union policies that aided immigrant workers affirmed new immigrants’ integration in the political system.⁶⁴

B. Ascendant Civic Nationalism: The Spirit of Liberty and a Dream of Equality (World War II – Civil Rights Movement)

In 1944, a brief address by a then-obscure judge, Billings Learned Hand, signaled an imminent sea change in the longstanding tension between civic nationalism and racial nationalism at the country’s core. The address also supplies an enduring framework for the civic nationalist’s definition of citizenship.

Judge Learned Hand delivered the speech entitled “The Spirit of Liberty” at an annual “I Am an American Day” ceremony in New York and led one and a half million people, most of whom were recently naturalized citizens, in a public oath of allegiance to the United States.⁶⁵ He echoed the civic nationalist refrain that citizenship is a matter not of shared origins, but of a shared courage to break with the past in search of “liberty; freedom from oppression; freedom

60. *Id.* at 4 (“Immigrants wanted to elect representatives who supported their freedom to enter the United States, to pursue a trade or occupation of their choice, and to school their children and raise their families in ways that correspond to their cultural traditions and religious beliefs. They wanted the government to end discrimination against immigrants in employment, housing, and education.”).

61. *Id.*

62. *Id.*

63. *Id.*

64. GERSTLE, *supra* note 24, at 154.

65. Learned Hand, *The Spirit of Liberty*, Address at “I Am an American Day” (May 21, 1944), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189,190 (Irving Dilliard ed., 1952).

from want, freedom to be ourselves.”⁶⁶ He also stressed that this story, common to all Americans, made them distinctive and stronger, or in his words a “picked group.”⁶⁷ The liberty that citizenship entailed, Learned Hand said, resided not in constitutions, laws, or courts, but in the hearts of citizens.⁶⁸ The citizens’ hearts should nurture a spirit of liberty that is “not too sure that it is right; . . . [that] seeks to understand the minds of other men and women; . . . [that] weighs their interests alongside its own without bias; . . . [that] remembers that not even a sparrow falls to earth unheeded.”⁶⁹ Finally, he spoke of the spirit of liberty as an abiding hope “that there may be a kingdom where the least shall be heard and considered side by side with the greatest.”⁷⁰ The kingdom that the agnostic Learned Hand spoke of was an unambiguous reference to scripture, but also an aspirational statement about the “glorious destiny” he believed was in store for America if it continued to have the conscience and courage to create it.⁷¹

The speech resonated deeply with the country, illustrating the descriptive power behind Learned Hand’s understanding of citizenship and indicating the ascendancy of civic nationalism.⁷² The spirit of liberty that Learned Hand identified as necessary for democracy to flourish comports with values advanced by contemporary scholars writing in a civic nationalist vein. For example, Professor Jeffrey Stout has said that democratic success requires a sense of citizenship defined by the universal regard for the citizenry as a whole (rather than regard for mere parochial interests),⁷³ the spirited exchange of reasoned positions on public issues,⁷⁴ a charitable reading of each other’s perspectives,⁷⁵ and hope that progress can be made.⁷⁶

As mentioned, the new immigrants of the early twentieth century, once considered anathema to democracy, embraced a civic nationalist notion of citizenship. By the 1940s, their increasingly successful integration signaled the power of civic nationalism to be what Professor David A. Hollinger calls a

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. HAND, *supra* note 65, at 190

72. Learned Hand’s speech featured prominently in publications as diverse as the *New Yorker*, the *New York Times Sunday Magazine*, *Life Magazine*, and *Reader’s Digest*. Michael Boudin, *The Master Craftsman*, 47 STAN. L. REV. 363, 368 (1995) (book review). It is credited with vaulting the judge into national fame. *Id.*

73. JEFFREY STOUT, DEMOCRACY AND TRADITION 302 (2004).

74. *Id.* at 209, 293, 293 (“The social practices that matter most directly to democracy . . . are the discursive practices of ethical deliberation and political debate. The discursive exchange essential to democracy is likely to thrive only where individuals identify to some significant extent with a community of reason-givers.”).

75. *Id.* at 298–99

76. *Id.* at 58–59.

“formidable engine of ethno-racial change.”⁷⁷ Part of this change stemmed from enemies abroad who strengthened civic nationalism and weakened racial nationalism. In World War II, the abhorrent racism of the German Nazi regime prompted many white progressives to embrace a civic nationalism that directly opposed Germany’s racial nationalism.⁷⁸ The upshot was a renewed commitment to civic equality and civil rights for previously neglected minorities.⁷⁹ In particular, the development reenergized black Americans to believe that civic nationalism could be invoked to end racial subjugation.⁸⁰ During the span of World War II, the National Association for the Advancement of Colored People (NAACP) expanded from fifty thousand to four hundred thousand.⁸¹ The unparalleled national solidarity across demographics in waging the war also aided in the further erosion of American nationhood rooted in racial particularities.⁸² Nevertheless, racial nationalism continued to manifest itself. War against Japan fueled hatred against Japanese Americans, most tragically in the form of internment.⁸³ Furthermore, though minorities willingly served in the war effort, combat life remained as segregated as peacetime civilian life.⁸⁴

After World War II, communism emerged as the country’s new enemy and the Cold War created unexpectedly favorable terrain for civil rights.⁸⁵ The United States’ efforts to win hearts and minds in Asia, Africa, and South America met with stiff resistance as the Soviet Union tarnished the United States’ reputation by circulating court cases illustrating Jim Crow justice.⁸⁶ The interest in winning the propaganda war propelled the Truman and Eisenhower administrations to intervene on behalf of civil rights in remarkable ways, includ-

77. HOLLINGER, *supra* note 25, at 208. Indeed, by the 1950s the perceived cultural differences and real economic disparities separating these European migrants from other European-Americans had all but vanished. See RICHARD ALBA, *BLURRING THE COLOR LINE*, 44–45 (2009) (describing the incorporation of these immigrants into American life after they had been the focus of intense discrimination). Some race commentators assert that the integration of Southern and Eastern Europeans is unremarkable because they were legally classified as white, so it was only a matter of time before they enjoyed all the privileges of being white in America. See *id.* at 48–50 (summarizing this view). This perspective, however, cannot explain why a racial binary (between white and colored) prevailed over a three-strata system (white, white ethnic, colored) when the sociological evidence from the early 20th Century indicated that the latter would prevail. *Id.* at 50–90 (presenting this gap in the literature and supplying an alternative theory grounded in “boundary change” to fill it).

78. GERSTLE, *supra* note 24, at 193.

79. *Id.* (“Causes that had languished on the liberal agenda—civil rights and immigration law reform, to take the most obvious examples—were now embraced.”).

80. *Id.* at 195.

81. GERSTLE, *supra* note 24, at 195.

82. *Id.* at 189.

83. *Id.* at 201–02.

84. *Id.* at 203, 213.

85. KLARMAN, *supra* note 44, at 183 (“[T]he Cold War imperative for racial change is hard to overstate and probably difficult to fully appreciate in our post-Cold War era.”).

86. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 12 (2000).

ing filing *amicus curiae* briefs on behalf of black petitioners in civil rights cases.⁸⁷ Civil rights advocates seized the moment. The NAACP, reaping the benefits of a membership surge during World War II, pursued an ambitious litigation strategy to reverse laws mandating segregation.⁸⁸ Their efforts culminated in the landmark *Brown v. Board of Education*,⁸⁹ mandating school desegregation and laying the foundation for desegregation in institutions across American life.⁹⁰ The Cold War also prompted a revolutionary change in immigration law as lawmakers removed racial limitations on naturalization.⁹¹ In particular, legislators saw the end of Asian exclusion as necessary to push Asian countries to the side of the United States and away from the Soviet Union.⁹² Nevertheless, lingering attachments to racial nationalism led to the retention of a quota system limiting the number of migrants from outside of Europe.⁹³

The Cold War created a unique opening for civil rights advocates to generate support by appealing to civic nationalism. Black Americans, led by Reverend Martin Luther King, Jr., capitalized on the opportunity.⁹⁴ To be sure, King was himself long motivated by civic nationalist ideals and believed segregation desecrated this tradition.⁹⁵ The climate enabled him to publicly escalate the civic nationalist critique of segregation and receive a warm reception from long ambivalent white audiences, while simultaneously emboldening black Americans to engage in mass resistance.⁹⁶ For instance, in a 1955 speech in Montgomery, Alabama, to the organizers of the city's bus boycott, which raised King's profile dramatically, he spoke in a civic nationalist register, asserting that: "We are here in a general sense because first and foremost we are American citizens, and we are determined to apply our citizenship to the fullness of its meaning."⁹⁷

Having founded the Southern Christian Leadership Conference (SCLC) in

87. GERSTLE, *supra* note 24, at 250.

88. *Id.*

89. 347 U.S. 483 (1954).

90. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 783 n. 24 (1979); *see also* HOLLINGER, *supra* note 25, at 98 ("Brown was an invitation not to difference-asserting pluralism but to engagement, if not intimacy, across the color line.").

91. GERSTLE, *supra* note 24, at 256–67. Immigration and Nationality Act of 1952, Pub. L. No. 42-414, ch. 2, § 311, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1422 (1994)).

92. A Republican congressman from Minnesota said at the time that "the struggle between the Free World and the Slave World will be decided in Asia, and we will lose that struggle if Asians perceive us as labeling them 'inferior and unworthy human beings.'" GERSTLE, *supra* note 24, at 258.

93. *Id.* at 260.

94. KLARMAN, *supra* note 44, at 183 ("Black leaders became adept at using the Cold War imperative for racial change.").

95. *Id.* at 273.

96. *Id.* at 276–77.

97. *Id.* at 250.

1957, King led a national movement of peaceful resistance against segregation, deploying tactics such as marches, boycotts, sit-ins at segregated lunch counters, and freedom rides on segregated buses.⁹⁸ King's vision was to transform America into a "beloved community."⁹⁹ The beloved community was one in which, according to Dr. D. Luther Ivory, "relationships were characterized by love, justice, and peace mediated through democratic and egalitarian institutions. The resolution of the nation's moral-ethical dilemma lay in its capacity to recommit itself in practice to those ideals of equality, freedom, and justice that were echoed in the foundational documents of the nation's history."¹⁰⁰ Indeed, King's vision, movement, and rhetoric were steeped in American traditions and brought Learned Hand's spirit of liberty to life. In 1961, King commended student civil rights activists for "taking our whole nation back to those great wells of democracy which were dug deep by the Founding Fathers in the formulation of the Constitution and the Declaration of Independence. In sitting down at the lunch counters, they are in reality standing up for the American dream."¹⁰¹ In 1963, civil rights activists across the country descended on Washington, D.C. to stir the nation to action.

King's "I Have a Dream" speech at the March on Washington hastened the end of racial nationalism as the country had known it.¹⁰² It also set the standard for civic nationalism's position on race, racism, and equality. Its style was deliberately more prophecy than protest. King expounded the country's vaunted ideals, explained that the oppression of blacks transgressed these ideals throughout history, and called the country to redemption. King said that the American dream that black citizens strived for could be found in the country's creed, emanating from the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal."¹⁰³ The substance of this dream is to live in a nation where children "will not be judged by the color of their skin but by the content of their character."¹⁰⁴ It is a dream of integration in which all can sing the country's hymn "My Country 'Tis of Thee," sharing pride in America's Pilgrim origins, its fallen ancestors, its natural beauty, and joining in a common goal to "let freedom ring."¹⁰⁵ King's words struck a chord. His speech was brilliant in its own right, but his civic nationalist message resonated so deeply in large part because of the active cultivation of, and popular

98. *Id.* at 270.

99. LUTHER D. IVORY, TOWARD A THEORY OF RADICAL INVOLVEMENT: THE THEOLOGICAL LEGACY OF MARTIN LUTHER KING, JR. 137 (1997).

100. *Id.*

101. *Id.* at 273-74.

102. See Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), in THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217, 219 (James M. Washington ed., 1986).

103. *Id.*

104. *Id.*

105. *Id.* at 220.

devotion to, common civic ideals during World War II and the Cold War.¹⁰⁶ King's eloquent plea within the civic nationalist framework could no longer be ignored.¹⁰⁷ Beginning with the Civil Rights Act of 1964, lawmakers engaged in a "Second Reconstruction," systematically deconstructing the legal foundations of segregation, discrimination, and disenfranchisement.¹⁰⁸

II. "THE SENTIMENT IS OLD; ONLY THE COLOR IS NEW":¹⁰⁹ BLACK POWER AND MULTICULTURALISM AS RACIAL NATIONALISM

A. *The Battle for Black Enfranchisement Births Black Nationalism*

Martin Luther King's civic nationalism was not universally embraced by black Americans.¹¹⁰ Malcolm X believed that the twenty-two million black people living in the country could only be victimized by American nationalism, not saved by it.¹¹¹ As he said a year after the March on Washington,

I'm not standing here speaking to you as an American, or a patriot, or a flag-saluter, or a flag-waver—no, not I. I'm speaking as a victim of this American system. And I see America through the eyes of the victim. I don't see any American dream. I see an American nightmare.¹¹²

Historian Gary Gerstle has said that the allusion to the American dream was a "thinly veiled attack on the patriotic politics of Martin Luther King" for a man who "delighted in skewering sacred nationalist myths and moments."¹¹³ Indeed, the March on Washington represented, in the words of Malcolm X, "nothing but a circus, with clowns and all" that was staged by Uncle Toms faithfully waiting on their white masters.¹¹⁴

To Malcolm X, white America would never listen to conciliation, but only to confrontation.¹¹⁵ His philosophy represented a branch of a larger philosophy alive at least since the nineteenth century—black nationalism.¹¹⁶ The animating sentiment of black nationalism is that white racism runs so deep that only sepa-

106. GERSTLE, *supra* note 24, at 277.

107. *Id.*; see also DANIEL FARBER, *THE AGE OF DREAMS: AMERICA IN THE 1960S* 66 (1994) (noting that "[i]t was *the* United States, the American people – not just some of them" that black Americans appealed to in order to guarantee "one standard of basic social provision, justice, and equality before the law").

108. *Id.*

109. STOUT, *supra* note 73, at 45 (quoting James Baldwin).

110. GERSTLE, *supra* note 24, at 298.

111. *Id.*

112. Malcolm X, *The Ballot or the Bullet*, in *MALCOLM X SPEAKS* 26 (George Breitman ed., 1990).

113. GERSTLE, *supra* note 24, at 298.

114. *Id.*

115. Malcolm X, *Message to the Grass Roots*, in *MALCOLM X SPEAKS*, *supra* note 112, at 9 ("Revolution is bloody, revolution is hostile, revolution knows no compromise, revolution overturns everything that gets in its way. . . . [Y]ou need a revolution.").

116. GERSTLE, *supra* note 24, at 295–96.

ration of the races holds promise for black success, with absolute partition of the races and the creation of a black nation holding the greatest promise for progress.¹¹⁷ Black nationalism can be broken down into branches based on the varied interpretations of the character this separate black nation should assume.¹¹⁸ One branch has characterized the creation of a new nation as symbolic, an imagined community bound by ethnicity and defined by distinctive cultural practices.¹¹⁹ Another branch, propagated by Malcolm X, the Nation of Islam, and the Black Panthers, has aspired to create a physically separate black nation-state in America, defined by its own borders, ruled by its own government, and protected by its own militia.¹²⁰ Yet another branch, most famously advanced by Marcus Garvey, has envisioned the establishment of a black nation in Africa that would be home to individuals of African descent around the world.¹²¹

No form of black nationalism, including Malcolm X's, commanded large numbers at the time of the March on Washington.¹²² Affiliation with the movement soon climbed, however. Despite the success of King's nonviolent approach in securing changes to American law and conscience, many activists grew disillusioned as they risked their lives for a cause they believed was advancing too slowly.¹²³ Although the legal mandates were being put in place, fierce white resistance, particularly in the South, meant that change was gradual rather than transformative.¹²⁴

Voting rights featured front and center of black disillusionment and propulsion to join the black power movement.¹²⁵ In 1961, areas such as Greenwood, Mississippi, had a county population that was 80 percent black with only a single registered black voter.¹²⁶ Attempts by those in King's movement to register voters invariably led to intimidation, harassment, and torture by police and white citizens.¹²⁷ The federal government intervened only sporadically and without the resolve to protect the average civil rights worker.¹²⁸ The disappearance of three civil rights workers in 1964, two whites from the north and one black from the south, brought significant national attention to the issue, but many blacks bemoaned the apparent necessity of white victims to raise aware-

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 298.

121. *Id.*

122. *Id.* at 296-97.

123. *Id.* at 283-86.

124. *Id.* at 281.

125. *Id.* at 282-95.

126. *Id.* at 282.

127. GARY DONALDSON, *THE MAKING OF MODERN AMERICA: THE NATION FROM 1945 TO THE PRESENT* 142-43 (2009).

128. *Id.*

ness.¹²⁹ Nevertheless, they trudged forward, risking their personal safety to enfranchise black citizens.

When the all-white Mississippi Democratic Party (MDP) opted to exclude black voters from participation in the state's primary, the civil rights activists had had enough, forming their own interracial party (the Mississippi Freedom Democratic Party, or MFDP) and demanding recognition as the representatives of Mississippi voters by the national Democratic Party at its 1964 convention in Atlantic City.¹³⁰ Black civil rights activist Fannie Lou Hamer delivered a moving speech at the convention, describing the brutality she experienced in Mississippi for merely registering black voters.¹³¹ President Lyndon Johnson was certain that full recognition of the MFDP would cause a mass defection of Southern Democrats, delivering the region to his Republican rival and ending his presidency.¹³² Through surrogates, he attempted to broker several compromises including one in which the MDP would be seated in the 1964 convention as long as they pledged to vote for Johnson but they, and any other state party, would be excluded from the 1968 convention if they disenfranchised black voters.¹³³

The MFDP was tired of compromises and declined the offer.¹³⁴ Hamer's address captured the mood of the movement. She desperately wanted to embrace American ideals, she said, but to experience violence and humiliation simply for exercising its most basic rights was unacceptable. "[I]f the Freedom Democratic Party is not seated now," she said, "I question America."¹³⁵ Without additional consultation with the MFDP, the convention ultimately accepted a modified compromise, offering the MFDP two at-large seats in which they could watch the floor proceedings but not participate.¹³⁶ The MFDP declined and continued to protest, though the rest of the convention quietly moved on. Most of the party quickly forgot about the ordeal as Johnson was formally nominated and the party won a landslide victory in the November presidential elections.¹³⁷

Black civil rights advocates would not so easily forget. As MFDP activist Cleveland Sellers wrote in his memoir, "The national Democratic party's rejection of the MFDP at the 1964 convention was to the civil rights movement what the Civil War was to American history: afterward, things would never be the same."¹³⁸ Some civil rights workers, such as MFDP leader Robert Moses, saw

129. GERSTLE, *supra* note 24, at 285.

130. *Id.* at 286.

131. *Id.* at 287–88.

132. *Id.* at 289.

133. *Id.* at 289.

134. *Id.*

135. *Id.* at 288.

136. *Id.* at 293–94.

137. *Id.* at 294.

138. *Id.* at 294 (quoting CLEVELAND SELLERS, with ROBERT TERRELL, *RIVER OF*

no hope and fled to Africa to try and find refuge.¹³⁹ For those who remained, many saw alliance with white liberals and devotion to civic nationalism as futile.¹⁴⁰ Victory, they believed, could come only from militant opposition to white control.¹⁴¹ As Gerstle wrote, "Out of the disappointment of Atlantic City, black power was born."¹⁴²

The flight was not immediate and Martin Luther King retained adequate numbers in his ranks.¹⁴³ President Johnson kept his word and continued to be a relentless advocate for civil rights. These two factors proved crucial to passage of the Voting Rights Act in 1965. John Lewis and Hosea Williams, leaders within King's movement, led a march for black enfranchisement from Selma, Alabama, to Montgomery.¹⁴⁴ The marchers made it only six blocks to the Edmund Pettus Bridge before they were met by Alabama State Troopers and their billy clubs, tear gas, and bullwhips.¹⁴⁵ The violent occasion was named "Bloody Sunday."¹⁴⁶

Soon after, President Johnson ordered his attorney general to draft "the goddamnedest toughest voting rights bill that you can devise"¹⁴⁷ and, less than a month after Bloody Sunday, introduced voting rights legislation in a moving speech entitled "We Shall Overcome."¹⁴⁸ Johnson's civic nationalist rhetoric mirrored that of King's in the March on Washington as he identified the civil rights movement as comparable to the country's other great struggles for freedom, equality, and democracy. He insisted that America was the only country founded on a shared purpose, rather than birthright, and that to deny individuals their rights because of their race, religion, or birthplace "is not only to do injustice, it is to deny Americans and to dishonor the dead who gave their lives for American freedom."¹⁴⁹

NO RETURN: THE AUTOBIOGRAPHY OF A BLACK MILITANT AND THE LIFE AND DEATH OF SNCC (1973)); *see also* JOHN LEWIS WITH MICHAEL D'ORSO, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* 291 (1998) ("As far as I'm concerned, this was the turning point of the civil rights movement. . . . We had played by the rules, done everything we were supposed to do, had played the game exactly as required, had arrived at the doorstep and found the door slammed in our face.").

139. *Id.* at 295.

140. *Id.*

141. *Id.*

142. *Id.* at 295; *see also* DONALDSON, *supra* note 127, at 144 ("The incident in Atlantic City was perhaps the most fractious event in the civil rights movement. . . . For a growing number of young blacks, the liberal hopes represented by King and the white liberal establishment were quickly being replaced by a radical dogma that was feeding on disillusionment.").

143. DONALDSON, *supra* note 127, at 144

144. *See* LEWIS, *supra* note 1378, at 331–32 (1998) (detailing the march).

145. *Id.*

146. *Id.*

147. HOWELL RAINES, *MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED* 337 (1977).

148. Lyndon B. Johnson, Special Message to the Congress: We Shall Overcome (Mar. 15, 1965) (transcript available at <http://www.historyplace.com/speeches/johnson.htm>).

149. *Id.*

Johnson commended black citizens for their commitment to the cause, but stressed that disenfranchisement was not a tragedy for the black community, but the nation as a whole. To remedy the nation's shortcomings, Johnson echoed Hamer and made clear that there could be "no delay, or no hesitation, or no compromise with our purpose" to ensure that every citizen had the most basic right, the right to vote.¹⁵⁰ Historian Doris Kearns Goodwin has said that, as Johnson spoke, "in the galleries Negroes and whites, some in the rumpled sports shirts of bus rides from the demonstrations, others in trim professional suits, wept unabashedly."¹⁵¹ Just months after Bloody Sunday and the "We Shall Overcome" speech, the sweeping Voting Rights Act was enacted. Today, the VRA is widely considered "one of the most effective instruments of social legislation in the modern era of American reform"¹⁵² and has been celebrated as "the cornerstone of the Second Reconstruction."¹⁵³

Although the civic nationalism of King and Johnson delivered comprehensive civil rights legislation and economic empowerment programs, such as Medicare and Medicaid, that assisted low-income minorities, black American civil rights advocates continued to be frustrated and disenchanted with the mainstream civil rights movement.¹⁵⁴ Although unfortunate, the feelings were understandable as, if nothing else, the product of fatigue as King's nonviolent movement continued to experience intimidation and brutality daily. The death of Malcolm X in 1965 drew extraordinary attention to black nationalism.¹⁵⁵ Historian William L. Van Deburg said that "following his death, Malcolm's influence expanded in dramatic, almost logarithmic, fashion. He came to be far more than a martyr for the militant, separatist faith. He became a Black Power paradigm—the archetype, reference point, and spiritual adviser in absentia for a

150. *Id.*

151. DORIS KEARNS, LYNDON JOHNSON AND THE AMERICAN DREAM 229 (1976); see also LEWIS, *supra* note 138, at 361 (describing the speech as a "powerfully moving moment, the culmination of a very long road . . . a high point in modern America, probably the nation's finest hour in civil rights.").

152. Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in *CONTROVERSIES IN MINORITY VOTING* 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992).

153. Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 *HOUS. L. REV.* 1, 2 (2007).

154. GERSTLE, *supra* note 24, at 299 (noting that 1966—after the bulk of President Johnson's New Society programs had been implemented—"marked the moment in which large numbers of African American civil rights workers officially broke with their civic nationalist and nonviolent pasts").

155. *Id.* It is important to note that although Malcolm X became the image of black nationalism, he was more willing to engage mainstream institutions in the years leading up to his death. He also renounced much of his previous anti-white militancy. See, e.g., Gordon Parks, *Malcolm X: The Minutes of Our Last Meeting*, in JOHN HENRIK CLARKE, ED., *MALCOLM X: THE MAN AND HIS TIMES* 120 (1969). For his part, Martin Luther King became increasingly radicalized in the years leading to his death. See JAMES H. CONE, *MARTIN AND MALCOLM AND AMERICA* 253–59 (1991).

generation of African-American activists.”¹⁵⁶ Sustained frustration with white resistance made the Manichaeian worldview of black power irresistible to many.

When civil rights leader James Meredith was shot and wounded in 1966, the three dominant organizations of the civil rights movement, the SCLC, Student Nonviolent Coordinating Committee (SNCC), and the Congress of Racial Equality (CORE), marched from Memphis, Tennessee, to Jackson, Mississippi. It would be the last time that leaders of the three organizations marched together.¹⁵⁷ During the march, a confrontational young leader recently elected to head SNCC, Stokely Carmichael, erupted and declared that “the only way we gonna stop them white men from whuppin’ us is to take over.”¹⁵⁸ We been saying freedom for six years and we’ve got nothin’. What we gonna start saying now is black power!”¹⁵⁹ Later that year, SNCC voted to expel all white members from the organization and, soon after, CORE did the same.¹⁶⁰ In Oakland, California, Huey Newton and Bobby Seale formed the militant Black Panther Party, wielding weapons to protect its streets and confronting white police at every opportunity.¹⁶¹ Just three years later, the party commanded thirty chapters nationwide.¹⁶²

As Malcolm X had predicted, when racial tensions escalated in the north, blacks in the northern ghettos burned the cities that denied them rights.¹⁶³ Cities across the country were engulfed in riots, looting, and destruction.¹⁶⁴ The ensuing images of inner cities as wastelands propelled many civil rights activists to draw parallels to colonies ruled by European imperialists.¹⁶⁵ Activists began to identify with America’s enemy of the age, Vietnam, as a fellow victim of imperialist rule.¹⁶⁶ “They discarded the civic nationalist pantheon, featuring Lincoln, the Pilgrims, Washington, and others who had fired the imagination of Martin Luther King, Jr.,” wrote Gerstle, “and constructed a new one from the figures of Mao Zedong, Ho Chi Minh, Che Guevara, the Mau Mau of Kenya, and like-minded Third World leaders who had led armed struggles against imperial or capitalist tyrants.”¹⁶⁷ The narrative of liberation from white oppressors migrated throughout American institutions as universities began to feature black studies programs and segregated dormitories; as school administrations and teachers’ unions lost control to black community organizers; as white boss-

156. GERSTLE, *supra* note 24, at 299.

157. *Id.* at 299–300.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 300–01.

164. *Id.* at 301.

165. *Id.*

166. *Id.*

167. *Id.* at 301–02.

es and white unions lost campaigns to black nationalist unions; and as audiences at sporting events saw black athletes bow their heads and raise clenched fists to show solidarity with black power over the American nation during the national anthem.¹⁶⁸

Black nationalism also transformed black culture and identity. Afros, braids, and shaved heads replaced the white-mimicking “conk” hairstyle.¹⁶⁹ Anglo-Saxon names changed to African and Islamic ones.¹⁷⁰ Inner city black youth emulated the clothing style, language, and attitude of the street hustler who openly flouted white American law and values.¹⁷¹ “Soul” came to describe an ascendant genre of black music, traditional black food in the south, and black culture as a whole.¹⁷²

B. Multiculturalism and the Ethno-Racial Pentagon as Racial Nationalism

So today, before the glaring inequities, unfulfilled promises, and rich possibilities of democracy, we hear heady evocations of European, African, and Asian backgrounds accompanied by chants claiming the inviolability of ancestral blood. Today, blood magic and blood thinking . . . are rampant among us The proponents of ethnicity—ill concealing an underlying anxiety, and given a bizarre bebopish stridency by the obviously American vernacular inspiration of the costumes and rituals ragged out to dramatize their claims to ethnic (and genetic) insularity—have helped give our streets and campuses a rowdy, All Fool’s Day, carnival atmosphere. In many ways, then, the call for a new social order based upon the glorification of ancestral blood and ethnic background acts as a call to cultural and aesthetic chaos. —*Ralph Ellison*¹⁷³

Ralph Ellison’s critique of swelling racial pride in 1978 is caustic, but correct. Black nationalism arose as an understandable, though regrettable, response to particular historical circumstances. After a broader loss of faith in American civic nationalism in the wake of the Vietnam War, the movement spread throughout the American polity as other descent communities began to take heightened pride in their provincial racial enclaves and less pride in the American nation. More problematic than mere increase in racial pride, multiculturalism entrenched a social norm in which individuals are ascribed a racial identity at birth and socialized to accept an identity “script” that structures their beliefs, tastes, and actions. These scripts coalesce principally around five racial communities, comprising a historically distinctive and culturally curious “ethno-racial pentagon” of “African Americans,” “Caucasians,” “Latino Americans,”

168. *Id.* at 303–04.

169. *Id.* at 306.

170. *Id.* at 306.

171. *Id.* at 302.

172. *Id.* at 308.

173. Ralph Ellison, *The Little Man at Chehaw Station*, available at <http://empiretheory.fortunecity.net/Chehaw.pdf> (last visited Mar. 22, 2011).

“Asian Americans,” and “Native Americans.” A vast business, academic, and activist industry (the “race-industrial complex”) has emerged that profit from the entrenchment of the ethno-racial pentagon, creating powerful incentives for Balkanization.

This trend of replacing pride in American culture with racial pride became known as “multiculturalism” and constituted a new form of racial nationalism.¹⁷⁴ Racial nationalism asserts that the state should be organized around a particular community, typically racial or religious in character.¹⁷⁵ While prevailing forms of black nationalism in the 1960s did have an element demanding a separate black state, most contemporary forms of racial pride no longer have such revolutionary aspirations. Contemporary advocates of multiculturalism advance a softer form of racial nationalism, dictating that one’s descent is destiny, that the most important community one belongs to is the racial community one was born into.¹⁷⁶ It remains racially nationalist by ascribing a fixed cultural identity to individuals at birth and socializing them to accept an identity script that structures their beliefs, tastes, and actions.¹⁷⁷ Baldwin once characterized the Nation of Islam as racial nationalist, stating that “the sentiment is old; only the color is new.”¹⁷⁸ His words largely ring true for multiculturalism as well.¹⁷⁹

This sentiment has prompted the country to develop a curious system of classification for descent communities that historian David Hollinger calls the “ethno-racial” pentagon.¹⁸⁰ The system ascribes Americans an identity script according to a five-part demographic structure consisting of: “African Americans,” “European Americans,” “Hispanic Americans,” “Asian Americans,” and “Native Americans.”¹⁸¹ Professor Hollinger pointed out that the pentagon is color-coded (black, white, brown, yellow, red), reflecting its origins in old, racist materials of the nineteenth century and “the most gross and invidious popu-

174. GERSTLE, *supra* note 24, at 312, 327–42.

175. See *supra* notes 30–32 and accompanying text (defining racial nationalism).

176. David A. Hollinger, *Obama, the Instability of Color Lines, and the Promise of a Postethnic Future*, 31 CALLALOO 1033, 1033–34 (2008).

177. See Kwame Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, in K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 30, 97 (1996) (“The large collective identities that call for recognition come with notions of how a proper person of that kind behaves: it is not that there is *one* way that blacks should behave, but that there are proper black modes of behavior. These notions provide loose norms or models, which play a role in shaping the life plans of those who make these collective identities central to their individual identities. . . . Collective identities, in short, provide what we might call scripts.”).

178. STOUT, *supra* note 73, at 45 (quoting James Baldwin).

179. See RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 3 (2008) (noting that multiculturalists’ celebration of racial difference “employs precisely the same description of group difference that the bigots employ”).

180. HOLLINGER, *supra* note 25, at 23.

181. See *id.* at 2350 (defining the ethno-racial pentagon).

lar images of what makes human beings different from one another.”¹⁸² Contemporary Americans are trained to believe, as almost any application requiring personal information would indicate, that the pentagon captures all of the origins of Americans and that each individual can be classified within the structure.¹⁸³ The task is actually like, in Professor Anthony Appiah’s evocative metaphor, classifying books in a library on the basis of their size and shape.¹⁸⁴ That is, a person’s genetic composition correlates with the pentagon’s five sides at the same miniscule level that a book’s essence correlates with its size and shape.¹⁸⁵

In reality, then, the structure does not *reflect* coherent categories in which Americans can fall based on their origins, but itself *produces* the categories and *privileges* ascription into these racial categories over affiliation with other descent identities, affiliation with mixed descent identities, or exclusive affiliation with non-descent identities (e.g., merely “American” or “Catholic”).¹⁸⁶ These characteristics are troubling. First, the five sides of the pentagon are not a reflection of primordial racial identity (which is itself a fiction¹⁸⁷) or an accurate depiction of the way American society is organized, but a way of producing racial blocs. Crude categories such as “Asian American” cannot capture the stunningly varied origins of individuals within the bloc who otherwise share little or nothing in common. Consider the few cultural commonalities likely shared among individuals hailing from Vietnam, Bangladesh, and Japan. In addition, the five sides appear not to be proportional in population size, power, or wealth, also calling into question any objective cultural purpose of classification into

182. *Id.* at 32.

183. *Id.* at 23.

184. KWAME ANTHONY APPIAH, IN MY FATHER’S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 38 (1992).

185. As Merlin Chowkwanyun has said, if you “go somewhere else on the planet or step back a century . . . you’ll likely encounter a different racial schema all together.” Merlin Chowkwanyun, *Why Genes Don’t Determine Race: Race Against History*, NEW REPUBLIC (June 11, 2007, 12:00 AM), <http://www.tnr.com/article/race-against-history>. Consider the study of racial classification of a Senate commission at the turn of the 20th Century. *Id.* The commission’s *Dictionary of Races or Peoples* distilled scholarly discussion of race as follows: “Some writers have reduced the number of such basic races to 3, while others have proposed, 15, 29, or even 63.” *Id.* The Commission opted for five in a structure that no American would find familiar today. *Id.* A century from now our descendants will most likely find our ethno-racial pentagon just as foreign.

186. HOLLINGER, *supra* note 25, at 119, 191.

187. See APPIAH, *supra* note 177, at 72–74 (demonstrating that race is a social construction); FIELDS, *supra* note 36, at 101 (“Race is not an element of human biology (like breathing oxygen or reproducing sexually); nor is it even an idea (like the speed of light or the value of π) that can be plausibly imagined to live an eternal life of its own. Race is not an idea but an ideology. It came into existence at a discernible historical moment for rationally understandable historical reasons and is subject to change for similar reasons.”); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) (“Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization.”).

five groups along these lines.¹⁸⁸ The reason these five blocs became entrenched has more to do with the politics of building a formidable political unit to challenge mainstream identity and claim entitlements.¹⁸⁹ Thus, while no Vietnamese, Bangladeshi, or Japanese constituency could viably compete for society's resources, an Asian bloc could, even if the category possesses little coherence.

Second, the pentagon significantly limits identities that individuals may wish to assume.¹⁹⁰ It makes it difficult for individuals to identify with particular communities, rather than one of the five racial blocs.¹⁹¹ Those who want to affiliate with Colombian, Persian, or Irish cultural traditions see their particular identities rendered obsolete in the eyes of American society as they are subsumed by larger racial blocs.¹⁹² The pentagon is also inconsistent with the multiracial character of many modern nation-states. Consider that an Indo-Trinidadian immigrant is classified as "Asian American" even if her ancestors migrated generations prior from India to Trinidad & Tobago, she has never traveled to India, and she strongly identifies with the mixed cultural traditions of Trinidad & Tobago.¹⁹³ Even more problematic, society would treat her as if she were raised in a minority population that is wealthy and comparatively powerful, while an Afro-Trinidadian would be treated as if she were raised in a community that is long-oppressed, even though Afro-Trinidadians have long held the reins of power in Trinidad.¹⁹⁴ Thus, for this Indo-Trinidadian female migrant, the pentagon encourages individuals to ascribe her an identity that in no appreciable way resembles how she sees herself.¹⁹⁵ A similar difficulty arises for those who wish to identify with a mixed racial background—they are usually assigned to one group or another, rather than allowed to express themselves as multiracial.¹⁹⁶

The pentagon also robs individuals of choosing the level of intensity at which they want to identify with any racial community. Individuals are assigned a totalizing identity script to perform based on their ascribed bloc. An immigrant from Ecuador may shed ties to an Ecuadorian identity rather easily,

188. HOLLINGER, *supra* note 25, at 24.

189. *Id.* at 36.

190. *Id.* at 28.

191. *Id.*

192. *Id.*

193. See Aisha Khan, *Mixing Matters: Callaloo Nation Revisited*, 30 CALLALOO 51 (2007) (describing the Indo-Trinidadian presence in Trinidad and the country's mixed cultural traditions).

194. *Id.*

195. The example may strike some as obscure, potentially signifying the limited scope of the critique. Such an assessment would be inaccurate. The modern world is filled with multiracial countries such as Trinidad & Tobago. Consider that the Indian Diaspora alone totals more than 20 million people spread across dozens of countries. See YEVGENY N. KUZNETSOV, *DIASPORA NETWORKS AND THE INTERNATIONAL MIGRATION OF SKILLS: HOW COUNTRIES CAN DRAW ON THEIR TALENT ABROAD* 71 (2006).

196. HOLLINGER, *supra* note 25, at 102.

but will still be considered Hispanic and expected to take on the beliefs, tastes, and actions that society expects from Hispanics.¹⁹⁷ Non-conformists are punished through verbal jabs, usually by members of their ascribed racial bloc. In the context of black Americans, Professor Kimberly Jane Norwood has called this phenomenon “Blackthink.”¹⁹⁸ Black people who refuse to follow script are derided as “Oreos” and the other minority blocs are similarly criticized as types of food (Asian “bananas,” Latino “coconuts,” Native-American “apples”) because of an alleged rejection of their skin color and acceptance of a white identity.¹⁹⁹ This phenomenon, thus, frowns on individuals who would rather identify as simply “American” as many immigrants throughout American history have, usually assisting in their integration.²⁰⁰

Perhaps the most destructive aspect of the pentagon is that it causes individuals to internalize stereotypes rather than carve out a positive identity for themselves. Professors Richard T. Ford and Charles Taylor supplied insight on this point with their analysis of *Chambers v. Omaha Girls Club*.²⁰¹ In that case, a charitable club that serves an overwhelmingly black population dismissed Crystal Chambers, a young black woman, after she became pregnant because it violated the club’s “negative role model” rule.²⁰² Chambers unsuccessfully claimed that the club’s policy violated Title VII because it had a disparate impact on black women “due to their significantly higher fertility rates.”²⁰³ Professor Regina Austin attacked the decision because, under her account, Chambers’ single motherhood constituted a black cultural practice and the product of autonomous choice that the white mainstream failed to tolerate.²⁰⁴ Professor Taylor offered a more plausible interpretation rooted in the policing of racial scripts.

I’m afraid there is another account of *Chambers* in which a young Cham-

197. *Id.* at 28.

198. Kimberly Jade Norwood, *The Virulence of Blackthink and How Its Threat of Ostracism Threatens Those Not Deemed Black Enough*, 93 KY. L.J. 143, 147 (2005) (“[Blackthink] presumes that all Blacks are unquestionably liberal, pro-affirmative action, pro-choice, pro-gay rights, pro-welfare, and most definitely anti-Republican. Some segments of our society not only harbor this presumption but go a step further: they will devalue and marginalize those who fail to comply Autonomy and difference are stifled; acquiescence is embraced and rewarded.”).

199. RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 39 (2005); see also APPIAH, *supra* note 177, at 99 (“If I had to choose between Uncle Tom and Black Power, I would, of course choose the latter. But I would like not to have to choose. I would like other options.”).

200. HOLLINGER, *supra* note 25, at 192.

201. FORD, *supra* note 199, at 79 (citing *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 705 (8th Cir. 1987)).

202. *Id.*

203. *Id.*

204. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 539–46 (“Implicit in the *Chambers* decision, however, is an assumption that the actual cultural practices and articulated moral positions of the black females who know the struggles of early and single motherhood firsthand are both misguided and destructive.”).

bers plays the victim of racism, not by *failing* to conform to what the “racist mainstream” wants of her, but by her absolute complicity with a racist stereotype. Coerced by the imperative to “stay true” to a distorted image of her cultural roots, influenced by the subtle and overt racism of the mainstream media and pressured by those members of her community who had internalized the stereotypes of the racist society of which they are a part (and perhaps those who cynically used the language of solidarity to have their way with her), Chambers looked at a caricature and mistook it for a mirror. In so doing she remade herself to conform to the caricature, her “free choices” verbatim lines in a long-running tragedy.²⁰⁵

The act of mistaking a caricature for a mirror is an all-too-common by-product of the entrenchment of the pentagon and the micro-regulation of racial identity.²⁰⁶ Individuals are raised in an environment polluted with distorted racial expectations and are then relentlessly nudged to live up to them.²⁰⁷ Their doing so is less an act of unfettered choice and more one of unconscious submission.

C. *The Role of White Racism*

It is important to situate white racism within my model. Many scholars assert that race persists exclusively because of white racism. Professor Ian Haney-Lopez’s essay *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama* provides a convenient example.²⁰⁸ Professor Haney-Lopez argues that “racial categories arise and persist in conjunction with efforts to exploit and exclude.”²⁰⁹ He posits that wide disparities among the races, particularly in rates of incarceration, are traceable to Jim Crow and have resisted remediation because of a backlash to the civil rights movement that manifests itself in a coded racial politics that targets criminals and welfare queens.²¹⁰ This backlash, he argues, emanates from significant portions of the white electorate who “have sought to defend their privileged access to market, state, and cultural resources.”²¹¹

There is no doubt that racial disparities remain severe. Black Americans disproportionately reside in segregated and decrepit neighborhoods and learn in

205. FORD, *supra* note 199, at 79.

206. See Reginald Leamon Robinson, “Expert Knowledge:” *Introductory Comments on Race Consciousness*, 20 B.C. THIRD WORLD L.J., 145, 160–63 (2000) (detailing the destructive consequences that follow from embracing racial authenticity).

207. See APPIAH, *supra* note 177, at 99 (“The politics of recognition requires that one’s skin color . . . should be politically acknowledged in ways that make it hard for those who want to treat their skin as personal dimensions of the self. And ‘personal’ doesn’t mean ‘secret’ but ‘not too tightly scripted,’ ‘not too constrained by the demands and expectations of others.’”).

208. Ian Haney-Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

209. *Id.* at 1027.

210. *Id.* at 1038.

211. *Id.* at 1041.

segregated and underfunded schools.²¹² In the criminal justice arena, one in every eleven black Americans is in prison, on parole, or on probation, though the same is true for only one in every forty-five whites.²¹³ The statistical disparities compel many to point the finger at overt racism. For Professor Haney-Lopez, the racist policies arise from a desire of whites to retain control over the state's resources. Yet, such accounts offer no explanation for another statistical discrepancy. Black immigrants from the Caribbean and Africa are among the most successful immigrant groups in the United States.²¹⁴ These migrants have the highest level of educational attainment among any immigrant group and are overrepresented by several hundred percent among black student populations at elite universities.²¹⁵ If enduring racism is the cause of black-white inequality, then how can these immigrants, who often have darker skin and more exotic-sounding names than their native black American counterparts, achieve sweeping success?²¹⁶ Overt racism approaches have yet to offer a satisfying answer.²¹⁷

Only the approach of institutional racism can reconcile the black-white divide with the success of black migrants from Africa and the Caribbean immigrants. Under this view, slavery and Jim Crow established a totalizing system of oppression and segregation, the effects of which linger on for the descendants of the original victims.²¹⁸ The segregated urban planning of earlier generations, that confined black Americans to ghettos with inferior institutions, is still present.²¹⁹ These ghettos set in motion a crippling cycle of poverty for its

212. FORD, *supra* note 179, at 54–59.

213. HANEY-LOPEZ, *supra* note 208, at 1028.

214. See Douglas S. Massey, Margarita Mooney, Kimberly C. Torres, & Camille Z. Charles, *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 246–49 (2006) (detailing the success of black immigrants).

215. *Id.*

216. See HOLLINGER, *supra* note 25, at 224 (“Yet even the most dark-skinned of immigrants from the Caribbean, Africa, and South Asia often do better in general throughout the United States than do lighter-skinned ‘African Americans’ whose opportunities to overcome the legacies of slavery and Jim Crow have been diminished by economic segregation.”).

217. See Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 983–92 (2010) (reciting statistical disparities among the races without resolving this paradox). Professors Barnes, Chemerinsky, and Jones rely on the racism of fringe elements in American society, such as the Birther movement, to show that rampant racism plagues America. *Id.* at 980. Yet, their thin evidence seems to make the exact opposite point. Consider that in 1924, it was within the bounds of mainstream conservative thought to advocate the expulsion of all black Americans to New Guinea and the Belgian Congo. See David A. Hollinger, *Authority, Solidarity, and the Political Economy of Identity: The Case of the United States*, 29 DIACRITICS 126 (1999). That overt racism today is confined to fringe movements and roundly condemned reveals the remarkable progress America has already made and can continue to make. *Id.* (detailing America's racial progress and post-racial possibilities).

218. See HOLLINGER, *supra* note 176, at 1033–34 (advancing the view that the “force keeping so many black Americans down is operative not so much in the eye of the empowered white beholder as in that legacy of slavery and Jim Crow, in the form of diminished socioeconomic capacity to take advantage of educational and employment opportunities.”).

219. See ROBERT D. BULLARD ET AL., RESIDENTIAL APARTHEID: THE AMERICAN

inhabitants,²²⁰ explaining much of the existing black-white disparities.²²¹ To be sure, white racism remains. Its most dangerous effects, however, are dampened by a regime of rights and remedies across American life that protect minorities from racial discrimination. There are holes and citizens of all backgrounds should be compelled to address them²²² but, as the success of African immigrants illustrates, the system generally works and opportunities for upward mobility abound.²²³ Many native black Americans are unable to take advantage of these opportunities not because of persisting overt racism, but because they have internalized the hopelessness that surrounds them in ghettos created by generations past.²²⁴

There are diverse actors culpable for the country's willingness to support policies that perpetuate preexisting racial cleavages and its refusal to enact policies that address the legacy of institutional racism. The punitive criminal justice regime that Professor Haney-Lopez points to, for example, likely did result in part from shameless politicians appealing to a racialized law-and-order vote. But black community leaders bear responsibility as well, because during the same time period they called for heightened police presence in ghettos and for stiff penalties against black criminals with the good intention of promoting black progress. Minority leaders are also at fault more generally for their decision to make the antidiscrimination movement about the appreciation of cultural difference rather than the elimination of structural disparities.

D. The Race-Industrial Complex

Perhaps even more than lingering white racism, the diffusion of racial representations and expectations throughout American society is sustained by what I term America's "race-industrial complex." The race-industrial complex refers to the intricate web of relationships among New Left academics, corporate

LEGACY (1994); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

220. Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 279 (2006) ("Residential segregation is a form of super-segregation, creating and perpetuating racial, social, and economic disparities so significant that it creates a spiraling 'feedback loop' of intergenerational inequality.").

221. Sheryll Cashin, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 96 (2004) (classifying poor blacks as "hypersegregated," defined as a "deep wall of isolation and concentrated poverty. Poor black people are highly segregated from all other groups, and their levels of segregation remained essentially the same in the last third of the twentieth century.").

222. Incidentally, my prior published work is directed at this task. See Jason Rathod, *Not Peace, but a Sword: Navy v. Egan and the Case Against Judicial Abdication in Foreign Affairs*, 59 DUKE L.J. 595-635 (presenting a path to independent judicial review of racial discrimination claims arising from the security clearance process).

223. See HOLLINGER, *supra* note 176, at 1034 ("But skin color does not tell the whole story. If it did, the immigrant/non-immigrant distinction within the black population would not have shown itself to have such striking consequences.").

224. *Id.*

marketers, racial bloc activists, and pandering politicians. Each stands to profit handily from the continued salience of the ethno-racial pentagon in American consciousness and the All Fool's Day glorification of ancestral blood that Ralph Ellison observed in the 1970s. As a result, each is instrumental in the reproduction of race.

For transnational corporations, the ethno-racial pentagon fuels a multi-billion dollar industry. Magazines, television programs, radio shows, clothes, food, hair products, medicine, and dozens of other products all come racially tailored.²²⁵ The goods are so readily consumed, in the words of Richard Ford, because they "offer an easy solidarity, a V.I.P. pass to belonging . . . [,] companionship, distinction, a sense of purpose, a link to history."²²⁶ The beauty in the prefabricated identities for corporations is that the tie to the blood magic of the underlying five categories is so malleable that the products can retain the power of the primordial and endlessly shift in substance. Without anyone thinking twice of it, a consumer's prefabricated black identity one year of Hammer pants and Malcolm X hats becomes baggy jeans and do-rags the next. Consumerist culture undeniably extends beyond racial identity,²²⁷ but its pervasiveness in this context seems particularly troubling because it entrenches racial scripts, encouraging individuals like Crystal Chambers to internalize racial caricatures as personal identities.²²⁸ The wholesale commodification of racial identity also exaggerates differences among communities, sending a pernicious message that "[t]he status distinctions that divide society . . . are defined . . . by real and profound differences in lifestyle, morality, temperament, norms and aesthetic sensibility."²²⁹ As a result, interracial cooperation and mixing, as well as attempts at establishing a common culture, are misperceived as futile.

It is a grave irony that a community that popularized abrasive critiques of capitalism and fought racial segregation now capitalizes on the commodification of racial identity and constitutes a pillar of a race-industrial complex. The phrase "New Left" refers to a class of youthful activists who fought racial segregation in the 1960s affiliated with minority racial power movements in the wake of the Vietnam War, and then stridently advanced multiculturalism, particularly in the realm of higher education, from the 1970s onward.²³⁰ The New

225. FORD, *supra* note 199, at 38–39; STOUT, *supra* note 73, at 47 ("The 'All Fool's Day, carnival atmosphere' is still here, and growing more chaotic, but now you can purchase its emblematic accoutrements from the local mall and subscribe to representations of diversity from your local cable provider. It is in the interest of the business elite to transform all forms of diasporic consciousness, functionally speaking, into obsession with life-style enclaves by commodifying the symbolic means of identification.").

226. FORD, *supra* note 199, at 39.

227. STOUT, *supra* note 73, at 47.

228. See *supra* notes 201–205 and accompanying text (describing the case implicating Chambers).

229. FORD, *supra* note 199, at 41.

230. FORD, *supra* note 179, at 267; GERSTLE, *supra* note 24, at 316–18, 327–29 (characterizing the New Left).

Left is fully institutionalized, having long ago ended its protests in Berkeley's People's Park to post articles on Berkeley Electronic Press.²³¹ Its adherents have every incentive to ossify racial categories as it cements their legacy and lines their pockets.

Admittedly, this group's efforts to challenge conformist impulses in mainstream culture and expand the range of voices attended to in academia were laudable. Unfortunately, though, as Professor Ford puts it, "the best 'multicultural thought' traveled less well than the excesses of the worst."²³² Among the latter can be included standpoint epistemology and ethnic theme houses.²³³ The common thread is erecting boundaries to solidify provincial communities and insulate them from meaningful exchange with each other and the mainstream. The interests of the business elite dovetail nicely with the initiatives of the New Left. The business elite train adolescent minds to form "authentic" identities by donning the mass-produced apparel of racial difference. Once college-aged, the New Left supplies them with an ideology dictating that they have not just a choice to flaunt a prefabricated identity of racial difference, but a right to do so in a bloc of similarly colored classmates.²³⁴ The implicit business-academic partnership produces students with a strong sense of self, a cause to fight for, and a connection to the primordial. Unfortunately, it does so by prompting the internalization of racial stereotypes and depriving the country of the benefits of an amalgamated culture and a unified citizenry.

Racial bloc activists also figure prominently in the race-industrial complex. They are those who avowedly represent the interests of one of the four minority sides of the pentagon and profit from policing the racial miscues of others or capitalizing on diversity discourse.²³⁵ Al Sharpton²³⁶ and Louis Farrakhan²³⁷ come to mind, who seem to litter the public square with racial demagoguery and sow seeds of distrust among communities.²³⁸ They are masters of "playing the race card."²³⁹ When people play the race card, they reflexively presume that racism is the root cause of an incident or that racism is the animat-

231. FORD, *supra* note 179, at 267.

232. *Id.* at 272.

233. *Id.* at 272-74.

234. *See id.* at 267-70 (describing the campus politics of the New Left).

235. *See id.* at 92 ("As racial politics increasingly focuses on trivial slights, innocent slips of the tongue, and even well-intentioned if controversial decisions, the most severe injustices—such as the isolation of a largely black underclass in hopeless ghettos or even more hopeless prisons—receive comparatively little attention because we can't find a bigot to paste to the dartboard.").

236. *See, e.g., id.* at 269 (describing Al Sharpton's vocal opposition to efforts to integrate Cornell University's racial communities).

237. *See, e.g., id.* at 6 (quoting Farrakhan as publicly threatening white communities with violence).

238. *See id.* at 30 ("[A]ntiracism now attracts yahoos and opportunists.").

239. *See id. passim* (detailing the phenomenon of playing the race card and how it harms interracial conciliation).

ing force behind others' intentions, while failing to examine plausible alternatives. Prime examples would be rapper Kanye West's comment in the aftermath of a shoddy Hurricane Katrina relief effort that "President Bush doesn't care about black people" or the eagerness of some leaders to condemn Duke University lacrosse players as rapists before the balance of the evidence had come in.²⁴⁰ By playing the race card, racial bloc activists are usually guaranteed media coverage and can, themselves, cash in on the country's obsession with race.

Many of those who play the race card go a step further, exploiting a concept called the "catharsis of race"²⁴¹ by engaging in rhetoric of racial excess.²⁴² Such rhetoric mirrors that of the Nation of Islam and Malcolm X in the 1960s. For many who are outraged by real injustices, rhetoric of excess supplies a convenient release with the "obviousness of the villains, the clarity of the passions invoked, the *fantasy* of imagined vengeance."²⁴³ Professor Cornel West has observed that many black people are drawn to Louis Farrakhan not because of his widely reported scapegoating of Jews, but because he is the personification of boldness.²⁴⁴ Professor Stout appropriately adds that, while scapegoating is not the main attraction, it nevertheless feeds into the boldness effect "[b]y increasing the audience's sense of danger, an effect . . . achieve[d] through mythic amplification and personification of the forces of evil."²⁴⁵ The audience's draw to scapegoating, then, is that its self-image is "vicariously enlarged and empowered" vis-à-vis the speaker's association of the world's injustices with demonic enemies.²⁴⁶ These phenomena are destructive for advancing civil rights, principally because those otherwise amenable to the cause are repulsed by the intimation (race card) or the insistence (racial excess) that they are racists.²⁴⁷

Those who raise money and lobby for diversity entitlements on behalf of

240. *Id.* at 46. Although I only include the examples of minority bloc activists because they are the topic of this section, it is important to note that white citizens can just as easily play the race card and foment racial divisions. For example, conservative blogger Andrew Breitbart falls into this category as evidenced by his posting of a video of Department of Agriculture official Shirley Sherrod that was selectively edited to misconstrue her comments as racist. See Sheryl Gay Stolberg, Shaila Dewan and Brian Stelter, *For Fired Agriculture Official, Flurry of Apologies and Job Offer*, N.Y. TIMES (July 22, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9E02E2D81331F931A15754C0A9669D8B63>. Likewise, conservative commentators like Rush Limbaugh, who have decried a tanning tax as "reverse racism," are guilty of reflexively presuming that racism is the root cause of an incident, while failing to examine more plausible explanations. See N.C. Aizenman, *'Tan Tax' Discussions Include Allegations of Reverse Racism*, WASH. POST (July 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070804488.html>.

241. STOUT, *supra* note 73, at 53.

242. *Id.* at 54.

243. *Id.* at 53.

244. *Id.* (quoting Professor West).

245. *Id.*

246. *Id.*

247. See FORD, *supra* note 179, at 339 (warning that false charges of racism may transform sympathetic audiences into indifferent cynics).

large institutions are also culpable for sustaining America's racial divisions.²⁴⁸ They entrench the fiction that the American population is subdivided into a coherent pentagon along racial lines. It bears distinguishing these activists from those who are in the trenches raising awareness, building coalitions, and pressuring lawmakers to confront the country's legacy of institutional racism and correct longstanding structural inequalities. The former perpetuate a racialized discourse by making hay of poor racial manners or exaggerating differences among communities. The latter appropriately call attention to policies propelling the plight of a black underclass who languish in ghettos and prisons, at least partly because of the legacy of slavery. To be sure, the lines blur and because strategists are often not ideologues, even those only concerned with eradicating institutional racism may appeal to the more fashionable diversity rationale. Yet, the demarcation remains important because, as the saying goes, the road to hell is paved with good intentions.²⁴⁹

Pandering politicians round out the race-industrial complex.²⁵⁰ Living in perpetual fear of electoral defeat, they seek endless ways to maximize funds for the next election and expand their voter base. Even high-minded politicians calibrate their rhetoric and policy positions to the shifting winds of public opinion, rationalizing that the gravest compromises are still an improvement from what their opponent would accomplish. The race-industrial complex provides a reliable bank of money, votes, and manpower. Consequently, many politicians are compelled to support race-based entitlements and extol the benefits of primordialist-oriented diversity. They are likely to exploit the corporate commodification of racial identity by waging racially-tailored campaigns in minority magazines and on minority radio. For most politicians, the arrangement is great.²⁵¹

248. See FIELDS, *supra* note 36, at 117–18 (“Those who create and re-create race today are not just . . . people who join the Klan They are the academic ‘liberals’ and ‘progressives’ in whose version of race the neutral shibboleths difference and diversity replace words like slavery, injustice, oppression and exploitation, diverting attention from the anything-but-neutral history these words denote. They are also the Supreme Court and spokesmen for affirmative action, unable to promote or even define justice except by enhancing the authority and prestige of race.”).

249. See APPIAH, *supra* note 177, at 104 (“Racial identities can be the basis of resistance to racism; but even as we struggle against racism—and though we have made great progress, we have further still to go—let us not let our racial identities subject us to new tyrannies.”).

250. See FORD, *supra* note 179, at 30 (“‘It’s a Black Thing; you wouldn’t understand’ is as insipid and dangerous a slogan as ‘My country right or wrong.’ Just as hack politicians wrap themselves in the flag, they now also seek cover in the mantle of racial justice.”).

251. Political beneficiaries of the race-industrial complex include members of the Congressional Black Caucus. At one time, the Caucus represented an admirable and powerful force in Washington D.C. by, for example, leading the movement to divest from apartheid South Africa. Yet, there are remarkably few recent accomplishments that can be attributed to the caucus’s efforts. In fact, it has allied with corporate interests that have, among other things, successfully lobbied members to vote against the regulation of predatory industries such as rent-to-own stores. Eric Lipton & Eric Lichtblau, *In Black Caucus, A Fundraising Powerhouse*, N.Y. TIMES, Feb. 13, 2010, at A1, available at <http://www.nytimes.com/2010/02/14/us/politics/14cbc.html?pagewanted=all>. Many caucus mem-

They generate support by performing a script of good racial manners and providing token support to multicultural policies, such as diversity-based affirmative action, in minority outlets. The difficult policy decisions that could have a real impact on mitigating institutional racism—on issues like criminal sentencing for drug offenses—are postponed indefinitely.

III. CIVIC NATIONALISM AND POST-RACIAL AMERICA

Yet while this latest farcical phase in the drama of American social hierarchy unfolds, the irrepressible movement of American culture toward integration of its most diverse elements continues, confounding the circumlocutions of its staunchest opponents. -Ralph Ellison²⁵²

A. *The Transformative Politics of Civic Nationalism and the Post-Racial Ideal*

In spite of the racial nationalist forces coalescing to reproduce race and magnify communal differences, the narrative of civic nationalism remains at the country's core.²⁵³

A strengthened civic nationalist tradition can help the country achieve a post-racial society. Racial nationalism has a static view of politics, treating it as a barometer of society's preferences and the state as a source of entitlements. By contrast, civic nationalism has a dynamic view of politics. It operates from the view that races are socially constructed and have malleable preferences, that the object of politics is to deliberate over public issues by appealing to the national interest, and that vigorous deliberation among citizens can remedy existing inequities through the transformation of preexisting preferences and subsequent enactment of remedial policies. The civic nationalist approach supplies a framework for the country to tackle the legacy of slavery and Jim Crow, as well as rigorously police lingering overt racism. It simultaneously can transition the country to a post-racial society because it would entail a public culture generative of national solidarity and fueled by the melding of disparate traditions. Antidiscrimination law would be crafted with an eye toward these ends. To strengthen civic nationalism and achieve a post-racial society, lawmaking would *not* be colorblind because accounting for the way people operate on the fiction of race is necessary to move past the fiction. The presidential campaign of Barack Obama embodied the principles of a vigorous civic nationalism that can generate solidarity, destabilize ethno-racial categories, fuse varied cultural

bers benefit from campaigns heavy on identity politics because it deflects attention away from their legislative shortcomings and willingness to cave to corporate greed.

252. Ellison, *supra* note 173.

253. See JEDEDIAH PURDY, A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM 75 (2009) (describing Americans' sustained appetite for "connection, membership, and righteousness" and our "persistent desire for a sense of national community and the common good.").

traditions, and move toward a post-racial society.

It is important to highlight the persisting influence of civic nationalism and its melting pot tradition. Anyone from anywhere in the world, regardless of his or her color, creed, or circumstance, can become American simply by professing belief in American ideals.²⁵⁴ While it is true that an individual from South Korea can gain citizenship in countries such as France, Great Britain, Israel, Austria, or Japan, she will find it incredibly difficult to engage their societies on the same level as she could in the United States, because their public cultures and social histories are dramatically more mono-ethnic.²⁵⁵ Varied immigrants continue to view "America as a land of milk and honey compared with their old homelands" and have "embraced their new country with the enthusiasm of converts and followed the path of upward mobility."²⁵⁶ Examined in the broadest strokes, this powerful and pervasive ideal has helped create a comparatively open-minded and integrated polity. One survey of national attitudes credits Americans' "embrace of the melting pot" for its open-minded outlook toward racial minorities and immigrants as compared to their European counterparts.²⁵⁷ Along the same lines, Professor Hollinger has called the United States the most successful nationalist project in modern history because, in part, it is a "formidable engine of ethnoracial change" that "displays a degree of structural assimilation not to be found even in such other diverse societies as India, Switzerland, and Belgium, to say nothing of more homogeneous societies like Germany, Japan, the Netherlands, Austria, and Poland."²⁵⁸

As throughout American history, however, civic nationalism exists in tension with racial nationalism. A strengthened civic nationalism could roll back the advances of the new racial nationalism and put the country on track to become a post-racial society. The old racial nationalism's politics were rooted in separatism and animated by the belief that membership in a political community must be limited to individuals who possess the characteristics of the enclave community for it to remain cohesive.²⁵⁹ The new racial nationalism has a similarly static view of race and politics, though it is pluralist not separatist. That is, it operates from the view that there are static races with set preferences, that the object of politics is to aggregate individual and group preferences, and that the status quo fails to properly account for the preferences of minorities.²⁶⁰

254. See *supra* note 29 and accompanying text (describing the universalist aspect of American citizenship).

255. HOLLINGER, *supra* note 25, at 87.

256. Steven G. Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law, 86 B.U. L. REV. 1335, 1394 (2006).

257. ANDREW KOHUT & BRUCE STOKES, AMERICA AGAINST THE WORLD: HOW WE ARE DIFFERENT AND WHY WE ARE DISLIKED (2006).

258. HOLLINGER, *supra* note 25, at 87.

259. See *supra* notes 30–32 and accompanying text (characterizing racial nationalism).

260. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539,

By contrast, civic nationalism has a dynamic view of politics that draws on the political theory of civic republicanism.²⁶¹ That is, it operates from the view that races are socially constructed and have malleable preferences, that the object of politics is to deliberate over public issues by appealing to the national interest, and that deliberation can remedy existing inequities through the transformation of preexisting preferences and subsequent enactment of remedial policies.²⁶² The first point, concerning the social construction of race, has been addressed.²⁶³

The second—that public discourse should emphasize improving the country as a whole rather than fortifying enclaves—serves as a point of departure for an invigorated civic nationalism.²⁶⁴ Citizens must see the country as a cohesive national community—that is, as a whole and “in it together”²⁶⁵ in addressing common challenges.²⁶⁶ The point of departure may strike some as banal, but its obvious advantages have been clouded by various forces subordinating the national interest to parochial interests. For example, the new racial nationalism has erected barriers for reasoned exchange among diverse communities by assigning rigid scripts to individuals based on where they purportedly fall along the ethno-racial pentagon.

1542–47 (1988) (describing the characteristics of the pluralist approach to politics).

261. See *id.* at 1547–58 (describing the characteristics of the civic republican approach to politics); see also Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313, 327 (1997) (“At the heart of the deliberative conception of democracy is the view that collective decision-making is to proceed deliberatively - by citizens advancing proposals and defending them with considerations that others, who are themselves free and equal, can acknowledge as reasons.”). Civic Republicanism has enjoyed resurgence largely due to the spirited articulation of democracy and the public square by German philosopher Jürgen Habermas. See generally JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., 1989).

262. *Id.*; see also HOLLINGER, *supra* note 25, at 49 (“[A] ‘politics which seeks to eliminate the processes which give rise’ to racism may turn out to look very different from a ‘politics which merely seeks to give full play to differentiated identities once these have arisen.’”).

263. See *supra* note 187.

264. STOUT, *supra* note 73, at 53 (“[A]t the national level it must be the people as a whole, attending to the concerns and well-being of the people as a whole. The phrase ‘as a whole’ here is . . . meant simply to rule out implicit definition of the people in terms of a constituency. In the present context, this means at a minimum the avoidance of implicitly ethnic or racial specifications of who the people really are. Yet an implicitly racist usurpation of the concept of the people is only one obstacle to the creation of a democratic politics. Another is an inability or unwillingness—on the part of diasporic communities, workers, the poor, and others who would benefit most directly from democratic social change—to identify with any group larger than their own faction.”).

265. HOLLINGER, *supra* note 25, at 15 (“I defend the notion of a national culture as an adhesive enabling diverse Americans to see themselves as sufficiently ‘in it together’ to act on problems that are genuinely common.”).

266. See Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 68 (Seyla Benhabib ed., 1996) (“Legitimacy in complex democratic societies must be thought to result from the free and unconstrained public deliberation of all about matters of common concern.”).

Corporate interests with financial stakes in control of the exchange of information have reinforced the problem.²⁶⁷ While a generation ago Americans received news from a pool of common sources, today many choose from talk radio, cable channels, and blogs tailored to particular enclaves.²⁶⁸ Increasingly, citizens have opted to retreat into smaller communities in which policy preferences are largely predetermined and even the way of talking about policy is provincially shared. The most disconcerting aspects of this trend are the way that enclaves caricature other enclaves and relentlessly attack media outlets that appeal to the country as a whole. These tactics help the enclave media's bottom line, but erode trust in once venerable common institutions, as well as trust among citizens.²⁶⁹ Once trust is lost, there is a threat of a vicious cycle ensuing, since the enclaves are inclined to screen information that could restore it.²⁷⁰

Thus, there are obvious challenges to establishing the common welfare, over provincial interest, as the baseline for deliberation. These challenges are surmountable. They can be overcome by affirmations of the country's shared sources of inspiration. Judge Learned Hand made a name for himself in an era of nativism by reminding Americans that they have a common story of breaking with the past in search of "liberty; freedom from oppression; freedom from want; freedom to be ourselves" that makes them a "picked group." Martin Luther King, Jr. subverted the foundations of deep-seated white racial nationalism by sharing pride in the country's Pilgrim origins, its fallen ancestors, its natural beauty, and, most importantly, by calling on the country to honor its founding creed that all are created equal. A civic nationalism that affirms shared American ideals can foster an attachment to the national community necessary for productive public deliberation and radical social change.

The third point about civic nationalism's view of politics is that deliberation can remedy existing inequities through the transformation of preexisting preferences and subsequent enactment of remedial policies. Racial nationalism treats politics as a barometer of society's preferences and the state as a source of entitlements. That is, the state aggregates the parochial preferences of individuals and groups and distributes its resources accordingly. Civic nationalism takes the view that politics should not aggregate existing preferences, but transform them through reasoned deliberation.²⁷¹ Prior to external engagement, individual and group preferences may be objectionable to many people or may be distorted²⁷² through legacies of discrimination and the race-industrial complex. If the state aggregates these preferences, the resulting policies will aggravate

267. STOUT, *supra* note 73, at 114.

268. *Id.*

269. *Id.*

270. *Id.*

271. See Sunstein, *supra* note 260, at 1545 ("[Politics'] function is to select values, to implement 'preferences about preferences,' or to provide opportunities for preference formation rather than simply to implement existing desires.").

272. *Id.* at 1543–44.

fractures in the body politic, perpetuate underlying inequities, and propel the internalization of stereotypes.²⁷³ When citizens harbor objectionable and distorted preferences, it is imperative for fellow citizens to challenge their assumptions and for society as a whole to reach a new synthesis about optimizing social welfare. This discursive exchange should comport with the values enshrined in Judge Learned Hand's "spirit of liberty." As he said, citizens should nurture a spirit of liberty that is "not too sure that it is right; . . . [that] seeks to understand the minds of other men and women; . . . [that] weighs their interests alongside its own without bias; . . . [that] remembers that not even a sparrow falls to earth unheeded." Substantive discursive exchange premised on open mindedness, a willingness to interpret others' positions charitably, and an ethos of compassion would be a remarkable improvement over contemporary discourse.²⁷⁴

Many race commentators allege that the failure to support initiatives to address structural racism can be blamed squarely on white racism. The pluralist politics of the new racial nationalism, however, enjoys perhaps a larger share of the blame because it has prevented or eroded white majority support for such initiatives. As stated, pluralist politics is premised on the idea that public policy is the byproduct not of deliberation, but of the aggregation of existing preferences and, concomitantly, self-interested deal-making.²⁷⁵ Politicians gain the backing of prominent minority leaders by voicing material support for entitlement spending, token support for diversity-based affirmative action, and minding one's racial manners.

A major problem with the pluralist framework is that it encourages the white majority to see minorities as an interest group like the oil industry or gun companies, wielding concentrated influence to manipulate policymaking through backroom deals.²⁷⁶ The resulting suspicion makes many in the white majority unwilling to lend their support to remedial initiatives.²⁷⁷ A useful analogy is to the passage of the Patient Protection and Affordable Care Act.

273. See *id.* at 1544 ("[B]ecause [pluralist politics] disregards the sources and effects of bad preferences, such a system will produce unacceptable results.").

274. See David B. Wilkins, *Introduction: The Context of Race*, in K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 3 (1998). ("Not only are we as a nation destined to fail to solve the problem of the color-line in this century, but we are in danger of losing our ability to even talk about the subject intelligently.").

275. See SUNSTEIN, *supra* note 260, at 1544–45 (criticizing the pluralist emphasis on self-interested deal-making).

276. Incidentally, pluralists draw a troubling analogy between minority leaders and these interest groups when defending majority-minority districting. See Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 300–01 (1997).

277. See Adeno Addis, *Constitutionalizing Deliberative Democracy in Multilingual Societies*, 25 BERKELEY J. INT'L L. 117, 125 (2007) ("[A] process that views and treats citizens as mere vessels of interests and democracy as a process of aggregating those interests will not be able to build the necessary interconnectedness and trust among citizens to build a community that will sustain the polity over a long period of time.").

While comprehensive health care reform enjoyed large public support through much of the process, it dropped steadily in the wake of the “Cornhusker kickback”—a deal granted to Democratic Senator Ben Nelson for his state of Nebraska in exchange for his vote.²⁷⁸ The deal eroded public support for comprehensive health care because it became seen as the product of self-interested deals, rather than the product of reasoned deliberation in the national interest.²⁷⁹ Contemporary racial politics compels a similar disdainful reaction among the white majority. It is no surprise, then, that this politics has failed to liberate the country from the legacy of slavery and Jim Crow, leaving far too many black Americans to languish in ghettos and prisons.²⁸⁰

A transformative politics rooted in reasoned deliberation can succeed where the politics of new racial nationalism has failed.²⁸¹ This politics of civic nationalism would tear down barriers of exchange among diverse communities and encourage citizens to openly challenge each other’s existing preferences. The emphasis on deliberation could eliminate the cycle of suspicion that contemporary racial politics, with its emphasis on private deal-making, generates. A civic nationalist politics of deliberative exchange also provides a framework for minorities to challenge white complacency in addressing structural racism, for whites to challenge minority policy preferences distorted by the ethno-racial pentagon and the race-industrial complex, and for the country as a whole to reach a new synthesis about maximizing social welfare.

In addition to addressing structural racism, heightened identification with the civic nation could help achieve a post-racial society by destabilizing primordial conceptions of race premised on the ascription of identities corresponding to the ethno-racial pentagon, and cultivating conceptions in which affiliation with provincial communities, descent-oriented and otherwise, is voluntary. In a post-racial America, identity would be understood as constituted through individual performance, not inherent to one’s being. Individuals would no longer be instructed that the most important aspect of themselves is their as-

278. See David Catron, *Who Killed Obamacare?*, AM. SPECTATOR (Feb. 5, 2010) (“When the sordid character of those closed-door negotiations became generally known, the deficit of trust skyrocketed. . . . The administration was, for example, intimately involved in the negotiations that led to Ben Nelson’s infamous ‘Cornhusker Kickback.’”).

279. *Id.*

280. In spite of this reality, some critical race theorists rail against “post-racialism” for not offering concrete solutions, but themselves can only to cling to the failed racial politics of pluralism. See, e.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1647–48 (2009) (“[T]he emphasis needs to be on organizing those who have been historically left out of the equation, especially ‘women, ethno-racial and religious understrata, sexual and age-based understrata, and indigenous people.’ Only by empowering the various understrata may the existing undemocratic structures be weakened.”).

281. See ADDIS, *supra* note 277, at 126 (“A process requiring collective decisions to be made through a deliberative process where citizens give reasoned and morally justifiable arguments for their claims, choices and proposals is more likely to give such minorities the opportunity to influence the majority through the process of participation.”).

cribed race.²⁸² In fact, they would choose what groups, if any, to affiliate with, rather than have any ascribed based on appearances. Individuals could devote as much or as little energy to descent-oriented communities as they choose. Professor Hollinger has called this a principle of affiliation by revocable consent.²⁸³ In a post-racial America, the micro-regulation of racial identity would end, individual imaginativeness would begin, and a richly textured understanding of descent-oriented identity would prevail.

A post-racial society, in which racial identity is seen as dynamic and voluntary rather than static and ascribed, opens up new possibilities for a mixed popular culture that generates social solidarity. The longstanding image of America as a melting pot would gain renewed vitality. Currently, the ethno-racial pentagon frowns on many forms of cultural mixing as “cultural imperialism” or, more charitably, improper “cultural appropriation.” These concepts are severely under-theorized, but academics advocating multiculturalism generally assert that it is inappropriate for a minority culture to have its elements drawn on by national culture or outsider racial cultures unless they embrace the “full set of social practices and institutions, encompassing all aspects of social life.”²⁸⁴ This insistence on whole-cloth preservation of racial bloc cultures is misguided because cultures are living traditions, socially constructed and ever-changing.²⁸⁵ As Professor Ford said, the process of selective exchange and recombination of minority cultural practices to create new cultural practices could just as easily be characterized favorably as “cultural syncretism.”²⁸⁶ In a post-racial America, cultural syncretism would be encouraged since it creates new and valuable traditions, as well as breeds social solidarity.²⁸⁷ “[The] fluid and varied process of cultural melding,” Professor Ford wrote, “can generate the common cultural norms, practices, events, artifacts and customs that bind

282. HOLLINGER, *supra* note 176, at 1033–34.

283. HOLLINGER, *supra* note 25, at 188 (“This principle urges that we, as a society, encourage rather than discourage individuals to make up their own minds about just how much energy they put into their communities of descent.”).

284. WILL KYMLICKA, *FINDING OUR WAY: RETHINKING ETHNOCULTURAL RELATIONS IN CANADA* 31 (1998).

285. Kwame Anthony Appiah, *The Case for Contamination*, N.Y. TIMES MAG., Jan. 1, 2006, at 30, available at <http://www.nytimes.com/2006/01/01/magazine/01cosmopolitan.html> (“[T]rying to find some primordially authentic culture can be like peeling an onion. The textiles most people think of as traditional West African cloths are known as Java prints; they arrived in the 19th century with the Javanese batiks sold, and often milled, by the Dutch. . . . Societies without change aren’t authentic; they’re just dead.”).

286. FORD, *supra* note 199, at 158.

287. See Katharine Bartlett, *Making Good on Good Intentions*, 95 VA. L. REV. 1893, 1954 (2009) (“Cognitively, intergroup contact decategorizes group boundaries, so that group members view themselves . . . as . . . part of one larger group—and less as members of separate, competing groups. Motivationally, forming a ‘common group identity’ triggers the same positive attitudes that characterize in-group bias, therefore leading people to see each other more generously.”).

potentially disparate groups together into an institution or a society.”²⁸⁸

B. Putting the Post-Racial Ideal into Practice

Antidiscrimination law should be crafted with the goals of post-racialism in mind. Progress toward the post-racial ideal requires what Dean Robert Post has called “a sociological account” of antidiscrimination law, in which rigorous attention is paid to the ways that the law acts as a social practice capable of fortifying or transforming preexisting social practices such as race.²⁸⁹ To ensure that race’s salience is undermined, lawmaking must *not* be colorblind, because accounting for the way people operate on the fiction of race is necessary to move past the fiction. Professor Appiah supplies a useful analogy to witchcraft to explain why. “Understanding how people think about race remains important . . . even though there aren’t any races,” he writes. “To use an analogy . . . we may need to understand talk of ‘witchcraft’ to understand how people . . . act in a culture that has a concept of witchcraft, whether or not we think there are, in fact, witches.”²⁹⁰

Suppose a society possesses popular categories of witches; for example, early modern Europe had two dominant classes: the social witch (who curses a neighbor following a conflict) and the sorcerer witch (professional healers and midwives whose use of “magic” could harm others). Suppose these two categories, in popular imagination, had distinct features: social witches have warts and sorcerer witches have wrinkles. Further suppose that the government, believing that witchcraft is all a fiction, desires to usher in a post-witchcraft society in which discrimination on the basis of witchcraft ends and the underlying categories themselves disappear. Lawmakers could not achieve their desired ends by ignoring the patterns of witch status ascription correlated to individuals’ skin and the nature of discrimination based on such ascription. Their incantations of “Our Constitution is Skin-Blind” and public worship of individual merit would constitute a sorcery of its own if they believed that such discourse could dissolve the underlying categories. Similarly, in real-world America, the blood magic of race cannot be willed away by the incantation of pretty platitudes.

In many ways, Barack Obama’s presidential campaign embodied the essence of a successful post-racial politics. First, Obama, just like Dr. King, drew on the country’s shared sources of inspiration to breakdown citizens’ racial and ideological blinders and open their minds to his message of national solidarity.

288. FORD, *supra* note 199, at 152.

289. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 31 (2000). Admittedly, I am more optimistic than Dean Post that a sociological account of antidiscrimination law can help advance the country toward a post-racial society. See *id.* at 17 (“It would be astonishing . . . if American antidiscrimination law could transcend these categories, if it could operate in a way that rendered them truly irrelevant.”).

290. APPIAH, *supra* note 177, at 38.

He steeped his speeches in the mythology of American civic nationalism by weaving in allusions to the founding fathers, revered leaders like Abraham Lincoln, foundational documents like the Declaration of Independence, and historic wars like World War II.²⁹¹

Second, Obama rejected the divisions of the ethno-racial pentagon and appealed to the country as a whole. In his Democratic National Convention speech in 2004, he said plainly, "There's not a black America and white America and Latino America and Asian America; there's the United States of America."²⁹² He affirmed this message in his groundbreaking speech on race in Philadelphia in the spring of 2008, stressing that the country's challenges were "neither black or white or Latino or Asian, but rather problems that confront us all."²⁹³ Along the same lines, Obama eschewed the condescending racial politics of lining up support among minority leaders in hopes that they shepherd their flocks to the polls.²⁹⁴ In fact, during the Democratic primary, many black members of the political establishment resented Obama's unwillingness to court their support and opted to endorse his opponent, Hillary Clinton.²⁹⁵ These same leaders also feared that Obama would move too far from the script of a black politician, representing a challenge to the old guard that "black politics might now be disappearing into American politics in the same way that the Irish and Italian machines long ago joined the political mainstream."²⁹⁶

Third, Obama anchored his campaign in the deliberative politics of civic nationalism to begin a conversation that can move the country beyond its racial past. "[R]ace is an issue that I believe this nation cannot afford to ignore right now," he said in his Philadelphia race speech. "And if we walk away now, if we simply retreat into our respective corners, we will never be able to come to-

291. The late philosopher Richard Rorty is instructive on the importance of such rhetoric. See Richard Rorty, *The Unpatriotic Academy*, N.Y. TIMES, Feb. 13, 1994, at 15, available at <http://www.nytimes.com/1994/02/13/opinion/the-unpatriotic-academy.html?pagewanted=1> ("An unpatriotic Left has never achieved anything. A left that refuses to take pride in its country will have no impact on that country's politics and will eventually become an object of contempt.").

292. Barack Obama, Keynote Address at the Democratic National Convention (July 27, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A19751-2004Jul27.html>.

293. Barack Obama, A More Perfect Union (March 18, 2008), available at <http://www.nytimes.com/2008/03/18/us/politics/18text-obama.html>.

294. See William Jelani Cobb, *As He Rises, the Old Guard Scowls*, WASH. POST, Jan. 13, 2008, at B01 ("Obama has been running without much support from many of the most recognizable black figures in the political landscape.").

295. See Ta-Nehisi Coates, *The Issue is Black and White*, TALKING POINTS MEMO (March 31, 2008, 12:11 PM), http://tpmcafe.talkingpointsmemo.com/2008/03/31/the_issue_is_black_and_white/ ("[T]he Clinton machine took an approach to race that can be described as clumsy. . . . I'm talking about the entire approach of basically going into states like South Carolina and securing big endorsements from preachers and the civil rights crowd, and then assuming that would deliver votes. . . . Obama was able to basically bypass the gatekeepers and go right to the barbershops and beauty salons.").

296. Matt Bai, *Post-Race*, N.Y. TIMES, Aug. 10, 2008, at MM, available at <http://www.nytimes.com/2008/08/10/magazine/10politics-t.html?pagewanted=2>.

gether and solve challenges like health care, or education, or the need to find good jobs for every American.”²⁹⁷ In the speech, he gave voice to both black anger and white resentment, while challenging citizens of all backgrounds to engage each other and work through their anxieties.²⁹⁸ For black citizens, he affirmed that persisting disparities are traceable to slavery and Jim Crow, recognized the resulting anger as real but counterproductive, and challenged them to embrace self-responsibility and engage their fellow citizens.²⁹⁹ For white citizens, he affirmed that many of them have been locked out of economic mobility, recognized the resulting resentment as real but counterproductive, and challenged them to take the continuing legacy of white racism seriously and engage their fellow citizens.³⁰⁰

It is telling that Obama’s candor rubbed some leaders in the race-industrial complex the wrong way. Professor Ford has said that in contemporary politics “whenever someone is ‘offended’—especially about an issue of race or gender—the conversation stops and the offending parties must repudiate their statement.”³⁰¹ The problem is that sometimes “offending people is productive: Honest dialogue about difficult and often personal issues will necessarily involve some bruised feelings.”³⁰² At one point in the campaign an open microphone caught civil rights icon and 1988 presidential candidate Rev. Jesse Jackson expressing a desire to castrate Obama for “talking down to black people.”³⁰³ Jackson’s resentment stemmed from comments Obama made on Father’s Day³⁰⁴ about the need for black fathers to act responsibly in their family life. Jackson’s strong visceral reaction spoke to the anxiety in some corners that Obama had broken an unwritten rule that black leaders not publicly air the community’s dirty laundry. To Obama’s credit, he never relented from tearing down barriers to conversation on sensitive topics that are necessary for the country to progress.

Finally, Obama’s very identity challenged the structure of the ethno-racial pentagon. In order to arrive at a vision of a post-racial America, people must be confronted with racial identities that depart from script. In addition to subverting scripts that white and black populations have come to ascribe black presi-

297. Obama, *supra* note 293.

298. DAVID REMNICK, *THE BRIDGE: THE LIFE AND RISE OF BARACK OBAMA* 524 (2010) (“Obama indicated to all sides that he heard them, that he ‘got it.’ He spoke as a kind of racial Everyman.”).

299. Obama, *supra* note 293.

300. *Id.*

301. Richard Thompson Ford, *Obama Took the Risk to Confront Race Relations in America*, S.F. CHRON., March 26, 2008, at B9, available at http://articles.sfgate.com/2008-03-26/opinion/17167286_1_racial-justice-race-relations-wright-s-anger.

302. *Id.*

303. Bai, *supra* note 296.

304. President Barack Obama, Father’s Day Remarks at the Apostolic Church of God in Chicago (June 15, 2008), available at <http://www.nytimes.com/2008/06/15/us/politics/15text-obama.html>.

dential candidates, Obama posed a challenge on a more fundamental level. He cast serious doubt on the idea that people can fit into neat categories amenable to script ascription. Commentator Andrew Sullivan has captured this sentiment well:

To be black and white, to have belonged to a nonreligious home and a Christian church, to have attended a majority-Muslim school in Indonesia and a black church in urban Chicago, to be more than one thing and sometimes not fully anything—this is an increasingly common experience for Americans, including many racial minorities. Obama expresses such a conflicted but resilient identity before he even utters a word. And this complexity, with its internal tensions, contradictions, and moods, may increasingly be the main thing all Americans have in common.³⁰⁵

Indeed, it is impossible to overstate the significance of Obama embracing his mixed identity on the national stage and then commanding strong support from Americans of all racial backgrounds. As Professor Hollinger has written, “Obama’s destabilization of color lines will be hard to forget. Identity politics in the United States will never be the same again.”³⁰⁶

IV. POST-RACIAL REDISTRICTING AND VOTE DILUTION CLAIMS

A. *The VRA’s Aspirations, the Post-Racial Ideal, and the International Analogy*

The VRA proscribes discriminatory voting practices that, historically, led to the systematic disenfranchisement of black voters, particularly in southern states. It is widely considered to be “one of the most effective instruments of social legislation in the modern era of American reform”³⁰⁷ and has been celebrated as “the cornerstone of the Second Reconstruction.”³⁰⁸ The U.S. Supreme Court has found Congress’s ultimate intent in passing the VRA to be “to hasten the waning of racism in American politics”³⁰⁹ and “to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race.”³¹⁰

A post-racial Voting Rights Act would compel redistricting schemes that maximize citizen identification with the civic nation over racial nations and encourage reasoned deliberation that breaks down objectionable and distorted citizen preferences concerning race. One need not fashion a redistricting ideal out

305. Andrew Sullivan, *Goodbye to All That*, ATLANTIC MONTHLY, Dec. 2007, at 40, available at <http://www.theatlantic.com/magazine/archive/2007/12/goodbye-to-all-that-why-obama-matters/6445/>.

306. HOLLINGER, *supra* note 176, at 1037.

307. GRAHAM, *supra* note 152, at 177.

308. KARLAN, *supra* note 153, at 1–2.

309. *Johnson v. De Grandy*, 512 U.S. 997, 1020.

310. *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

of whole cloth. The experiences of other multiracial countries are instructive about how varied methods may intensify or mitigate racial cleavages. American election law scholars have been keenly aware of this reality, but have drawn almost exclusively from a single school of thought known as “consociationalism” when theorizing about voting rights.³¹¹ In multiracial democracies, consociationalism mandates the inclusion of all racial groups in government.³¹² The guiding principles of consociationalism are proportional inclusion (accomplished through government by grand coalitions and elections conducted by a proportional electoral system), mutual group vetoes on major issues, and group cultural autonomy.³¹³ American election law scholars have particularly admired consociationalism’s guarantee of proportional representation and have sought ways to import the concept to the United States.³¹⁴ There is compelling evidence, however, that consociationalism entrenches racial enclaves and fosters gridlock among lawmakers.³¹⁵ I would add that its assumptions conflict with civic nationalism in that consociationalism, like racial nationalism, sees politics as the mere aggregation of preexisting preferences and the state as a source of entitlements.

An alternative school of thought, completely overlooked by the existing election law literature, is known as centripetalism.³¹⁶ Centripetalism’s point of departure is challenging the wisdom of consociationalism’s combination of: (1)

311. See, e.g., Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 92 n.43 (1995) (describing consociationalism in the South African Constitution).

312. AREND LJPHART, *DEMOCRACY IN PLURAL SOCIETIES* 25–52 (1977).

313. *Id.*

314. See, e.g., Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1134–53 (1991). A few number of scholars have gone so far as to recommend adoption of a minority veto. See, e.g., IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 184 (1990); Guinier, *supra*, at 1145–54.

315. Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213, 1219–23 (2008) (enumerating consociationalism’s flaws); see also Michael Kang, *Voting As Veto*, 108 MICH. L. REV. 1221, 1267 (2010) (expressing support for consociationalism while recognizing the threat of group differences solidifying).

316. Horowitz, *supra* note 315, at 1216–19 (describing centripetalism’s central tenets); Benjamin Reilly, *Electoral Systems for Divided Societies*, 13 J. DEMOCRACY 156, 156–58 (2002) (contrasting consociationalism with centripetalism). An unrestricted Lexis-Nexis search of American law reviews and journals with the terms “centripetalism” and “Voting Rights Act” yields no results. Professor Lani Guinier’s proposal to institute cumulative voting can be considered a variant of consociationalism because it would lead to proportional representation and would create incentives that discourage cross-racial voting. See Richard Briffault, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, 95 COLUM. L. REV. 418, 435–441 (1995) (evaluating Professor Guinier’s proposal). Professor Richard Briffault has advocated implementation of the Single Transferrable Vote (STV), which would have centripetalist tendencies. *Id.* at 440–41 (describing how STV could encourage cross-racial alliances). STV, however, has proven less effective than other mechanisms explicitly advocated by centripetalists described below and would require a disruptive shift to multimember districting. See Donald Horowitz, *Where Have All the Parties Gone? Fraenkel and Grofman on the Alternative Vote - Yet Again*, 133 PUBLIC CHOICE, Oct. 2007, at 13, 18–19 (describing problems in the incentive structure of STV).

the inclusion, through proportional representation, of the most extremist elements of racial groups (2) in governments that are ruled by consensus.³¹⁷ The arrangement gives undue power to racial extremists, allowing them to either hold out and extract explosive concessions on racially sensitive issues or cause the dissolution of governments.³¹⁸ Centripetalism earned its moniker because it encourages movement toward the middle of the ideological spectrum, strengthening the hand of racial moderates over racial extremists.³¹⁹ Rather than operate on a set of racial guarantees, it uses electoral incentives to reward those parties and candidates that have cross-racial appeal.³²⁰ In particular, centripetalists promote institutions that require the electoral success of racial groups to be dependent on supporters outside of the group, asserting that this arrangement produces conciliatory behavior.³²¹ Centripetalists point to concrete examples such as India, where anti-Muslim violence is substantially less frequent and severe in states in which the ruling party is dependent on Muslim electoral support, than in those where the support of Muslim voters is unnecessary.³²²

A frequently deployed weapon in centripetalists' electoral arsenal is the alternative vote system, also known as the instant-runoff vote (IRV).³²³ To illustrate how IRV functions, consider the experience of Papua New Guinea, a country with a dizzying array of tribes who have frequently warred with one another.³²⁴ Under IRV, the country was carved into tribally heterogeneous single-member districts in which winning candidates needed to gain an absolute majority of votes.³²⁵ If no candidate did, then the system eliminated the candidate with the lowest number of first-preference votes and redistributed those ballots to the remaining candidates based on the lower preferences marked.³²⁶ The process ended once a majority winner emerged.³²⁷ IRV promoted cooperation across tribal lines by encouraging candidates with limited support from their own tribe to moderate their platform and actively campaign for the second-preference votes of competing tribes.³²⁸ When drafters replaced IRV with a first-past-the-post (FPP) system in 1975, the candidates presciently saw cross-tribal appeals as futile and

317. HOROWITZ, *supra* note 315, at 1219–22.

318. *Id.*

319. *Id.* at 1217–19.

320. *Id.*

321. *Id.*

322. *Id.* at 1225.

323. See REILLY, *supra* note 316, at 156–57 (describing the alternative vote).

324. *Id.* at 163 (“Papua New Guinea is a country of exceptional ethnic fragmentation, with some 840 languages spoken by several thousand competitive ethnic ‘micropolities,’ reflecting enormous ethnic, cultural, and regional divisions. Indeed, more languages are spoken by Papua New Guinea’s 5.1 million people than in all of Africa.”).

325. *Id.* at 163–65.

326. *Id.*

327. *Id.*

328. *Id.* at 164 (noting that IRV “appeared to encourage a degree of vote-pooling, cooperation, and accommodation among the country’s many small tribal groups, rather than . . . violent competition”).

retreated to rallying their bases.³²⁹ Over time, tribal extremists came to power by winning small pluralities comprised exclusively of their tribe, group boundaries grew clearer, and tribal violence swelled.³³⁰ Recently, Papua New Guinea restored IRV to mitigate tribal fractionalization and promote intertribal conciliation.³³¹

Centripetalism supplies important lessons for the project of crafting a post-racial VRA. It counsels against systems that allow racial extremists to come to power, such as proportional representation or single-member districts where one racial bloc dominates. It suggests that retention of the single member district system, coupled with redistricting schemes that require dependence on the votes of other racial groups to secure victory, can advance interracial conciliation. More radical proposals would call for the implementation of IRV, though there are existing alternatives that can achieve much the same effect and cause less disruption, as the following sections illustrate.

B. Background on Redistricting Under the VRA

In the original VRA, the most sweeping provision was Section 5 (discussed in Part IV), establishing wide-ranging federal oversight of elections administration in “covered jurisdictions” or jurisdictions with a prior pattern of discriminatory voting practices. These covered jurisdictions may not implement a change related to voting without obtaining prior approval or “preclearance” from the Department of Justice. Congress has amended and extended the VRA several times. Following the VRA amendments in 1982, Section 2 came to rival Section 5 as the most influential provision. Under Section 2, practices that “result[t] in a denial or abridgement of the right of any citizen of the United States to vote on account of race” are prohibited.³³² Plaintiffs have a cause of action if they can show that “based on the totality of the circumstances,” the members of a racial minority “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”³³³ The U.S. Supreme Court has construed Section 2 to ban schemes that lead to “vote dilution” or the practice of dispersing politically cohesive minority voters across voting districts so as to diminish their electoral strength.³³⁴

The Court’s decision in *Thornburg v. Gingles* lays out the three preconditions plaintiffs must meet in order to proceed with such a claim.³³⁵ A minority

329. *Id.* at 165.

330. *Id.*; see also HOROWITZ, *supra* note 315, at 1224–25 (“When AV was dropped in Papua New Guinea . . . candidates won on small pluralities, consisting of their kinsmen alone, and violent intergroup conflict increased greatly.”).

331. REILLY, *supra* note 316, at 165.

332. 42 U.S.C. § 1973(a) (2006).

333. 42 U.S.C. § 1973(b).

334. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

335. *Id.*

group must show that it is: (1) sufficiently large and geographically compact to constitute a majority in a single-member district, (2) politically cohesive, and (3) usually unable to elect its preferred candidate because the white majority votes sufficiently as a bloc.³³⁶ In areas where voters cast ballots along racial lines, vote dilution is typically accomplished by gerrymandering district lines in order to “crack” or “pack” minority communities.³³⁷ The former generally refers to the practice of drawing lines to divide a minority group that constitutes a majority in a single-member district into districts where it comprises less than a majority in each. The latter generally refers to the practice of collapsing minority communities that represent a majority of the population in two districts into a single district. In both instances, minority communities are able to elect fewer representatives of their choosing.³³⁸

Following litigation in the wake of the 1982 amendment, majority-minority districts became the surest way for states to comply with Sections 2 and 5.³³⁹ The districts, consequently, became popular across the country.³⁴⁰ The results were impressive in the sense that minorities were elected to higher office in large numbers.³⁴¹ Indeed, more black Americans were elected to the House of Representatives in the 1990s than at any point since Reconstruction.³⁴²

C. Majority-Minority Districts Entrench Racial Nationalism

The significant increase in minority representation was heralded by many as a triumphant development for racial progress.³⁴³ Critics have pointed out, however, that descriptive representation is not the same as substantive representation and raised concern that minority elected representatives have been no better at representing the interests of minority constituents than white representatives.³⁴⁴ Over the years, majority-minority districts became increasingly out of favor with judges and scholars for this and many other reasons.³⁴⁵

In the last few years, however, a counter-trend has emerged. For instance,

336. *Id.*

337. See Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CALIF. L. REV. 1589, 1600–02 (2004) (discussing the phenomena of cracking and packing).

338. *Id.*

339. See *id.* at 1603–04 (describing the emergence of majority-minority districts).

340. *Id.*

341. *Id.*

342. *Id.*

343. BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 135–37 (1992).

344. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 56 (1994).

345. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1117–20 (2005) (describing the trend away from majority-minority districts). The emergence of crossover districts, another main reason for the shift away from majority-minority districts, will be discussed in Section D of this Part.

Professor Michael Kang in his 2008 *Yale Law Journal* article, *Race and Democratic Contestation*, set forth a detailed case for majority-minority districts.³⁴⁶ The piece earned the praise of the veritable dean of election law scholarship, Professor Heather Gerken.³⁴⁷ Professor Gerken presented a more modest endorsement of majority-minority districts in an earlier article. This Section will deconstruct these authors' principal arguments and demonstrate why majority-minority districts intensify racial polarization by strengthening the hand of racial extremists.

Professor Kang argues that racial polarization compels citizens to subordinate policy disagreements in the interest of maintaining racial cohesion.³⁴⁸ For example, when a black citizen is confronted with the choice of voting for a white candidate who does represent her interests and a black candidate who does not, that voter will cast a ballot for the latter out of sheer racial solidarity and without any basis in policy. Majority-minority districts, however, "liberate [citizens] to think politically beyond race by acknowledging and controlling for race."³⁴⁹ Thus, the same black voter in such a district would likely have to choose between two or more black candidates in the primary and would be compelled to compare their respective policy platforms when casting a ballot. "Once a majority-minority district obviates the need to cohere against racially polarized opposition," writes Professor Kang, "minority citizens can consider more nuanced differences among them than would have otherwise been advisable."³⁵⁰

Professor Kang's argument that majority-minority districts "liberate" minorities is reminiscent of arguments by minority students at Cornell University in the 1990s demanding separate housing. The conservative student newspaper, *The Cornell Review*, retorted, "Racial minorities on campus should demand not only their own houses, but their own dining halls, their own public restrooms, their own water fountains!"³⁵¹ Segregated districts liberate minorities to focus on policy over race as much as segregated water fountains might liberate minorities to focus on water quality over race. Rather than liberate people from thinking about race, segregation makes people obsessed with race and reproduces race as an organizing principle of society.³⁵²

346. Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008).

347. Heather K. Gerken, *The Supreme Court 2006 Term Comment, Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007) (referring to Professor Kang's article as "the most important piece on race and redistricting in the last few years").

348. Kang, *supra* note 346, at 781.

349. *Id.*

350. *Id.*

351. FORD, *supra* note 199, at 268. Professor Kang's article is symptomatic of a broader ill plaguing legal scholarship on race that eschews the benefits of integration. ADAMS, *supra* note 220, at 264 ("Integration no longer captivates the progressive imagination; it no longer moves those concerned with eliminating racial inequality.").

352. See FORD, *supra* note 199, at 36-41 (describing his "repressive hypothesis"

Recall the central insight of centripetalism.³⁵³ Based on elections in racially divided countries, it observes that redistricting schemes that require cross-racial support for victory advance interracial conciliation. Those districts in which crossover support from another racial group is not required, however, typically reward race-baiters who resort to fanning the flames of racial extremism.³⁵⁴ Majority-minority districts in the United States are no different.³⁵⁵ They intensify society's racial cleavages by rewarding candidates who appeal to racial nationalism instead of civic nationalism. Campaigns degenerate into battles of who is the blacker candidate or the browner candidate as measured by racial scripts written by the race-industrial complex.³⁵⁶ In the end, racially polarizing candidates are rewarded, conciliatory post-racial candidates are punished, and racial nationalism becomes further entrenched in American society.

It is telling that Professor Kang (and his allies in the academy such as Professor Gerken³⁵⁷) cite no real world examples of a richer democratic discussion following the creation of a majority-minority district. Recent electoral history in majority-minority districts is replete, however, with examples of a racially-polarizing candidate appealing to racial scripts to defeat a post-racial candidate with novel, conciliatory policy ideas. Two races readily come to mind: the 2002 Newark mayoral race between Sharpe James and Cory Booker and a 2000 Alabama congressional race between Earl Hilliard and Artur Davis.

The 2002 Newark mayoral race pitted four-term incumbent Sharpe James against a thirty-two-year-old city councilman, Cory Booker.³⁵⁸ At the time,

about the production of race).

353. Incidentally, Professor Kang does cite to the intellectual father of centripetalism, Professor Donald Horowitz. Kang, however, cites to Horowitz, who has dedicated much of his professional career to debunking the mythical benefits of consociationalism, in support of consociationalism. See KANG, *supra* note 346, at 779 n.163 (referencing Professor Horowitz for the proposition that several countries in Asia and Africa have deep-seated racial divisions that purportedly "require" consociational arrangements).

354. See Reilly, *supra* note 316, at 155 ("As is well-known, politicians in such 'divided societies' often have strong incentives to 'play the ethnic card' at election time, using communal appeals to mobilize voters. 'Outbidding'—increasingly extreme rhetoric and demands—can offer rewards greater than those of moderation.").

355. ABIGAIL THERNSTROM, VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 161 ("Candidates are not pushed to the center Instead, black candidates, who face competition only from other blacks, have every incentive to run as the most racially committed – the most 'authentically' black.").

356. Perhaps more troubling than those paradigms that overlook the possibility for races to play out this way are those that demand minority officials show their cultural authenticity. See, e.g., Guinier, *supra* note 314, at 1103 (expressing a preference for candidates that are "community-based," "culturally-rooted," and "politically, psychologically, and culturally black.").

357. The closest Professor Gerken comes to defending the real-world implications of majority-minority districts is a conclusory suggestion that even if crossover districts proved to be most consistent with the purposes of Section 2, we should "nonetheless insist on majority-minority districts capable of electing someone like Cynthia McKinney to Congress." See Gerken, *supra* note 345, at 1177. To which I respond, "Why?" A thorough critique of Professor Gerken's thought is presented later in this section.

358. John H. Fund, *Newark, Zimbabwe?*, WALL ST. J., May 8, 2002, at A18.

Newark had a population of roughly two hundred seventy-five thousand with blacks comprising 52 percent, Latinos 30 percent, and whites 14 percent.³⁵⁹ Both James and Booker are black, but have very different personal backgrounds. James came from a working class family and became a school teacher after graduating college.³⁶⁰ He earned the respect of his community most notably after wresting control of Newark's "War on Poverty" organization from white leadership in the 1960s and soliciting an on-air apology from talk show host Phil Donahue after he made disparaging comments about Newark.³⁶¹ As mayor, James had a mediocre record at best. A strong case could be made that he used the office for personal advancement since he more than tripled his own salary and purchased a Rolls-Royce and vacation property on the Jersey shore following his election.³⁶²

Booker grew up in the wealthy suburbs of Bergen County, New Jersey, and attended Stanford University before becoming a Rhodes Scholar.³⁶³ After graduating from Yale Law School, he moved to Newark in 1996 to work as a lawyer for the Low-Income Tenants Coalition.³⁶⁴ In 1998, he became the youngest councilman in the city's history and, then, lived up to a campaign promise by moving into a housing project.³⁶⁵ He also garnered national attention in 2000 when he went on a ten-day hunger strike to protest the city police force's unwillingness to regulate rampant drug dealing in housing projects.³⁶⁶ While James essentially walked in lockstep with traditional democratic positions, Booker was known for taking more independent positions, including support for faith-based initiatives and school vouchers.³⁶⁷

Based on the demographics of the city, the political positions of the candidates, and the challenges confronting Newark, one would have suspected—especially under a paradigm such as Kang's—that the election would feature vigorous democratic engagement with substantive policy questions. The election did not turn out that way. When Booker announced he was entering the race, he reportedly received a phone call from James. "I am going to out-nigger you in the community," James said.³⁶⁸ James would later call him a "faggot

359. Jeffrey Kraus, *Generational Conflict in Urban Politics: The 2002 Newark Mayoral Election*, 2 THE FORUM no. 3, at 2 (2004), available at <http://www.bepress.com/forum/vol2/iss3/art7/>.

360. *Id.* at 4.

361. *Id.*

362. Nate Schweber, *For Sharpe James, Harsh and Loyal Words*, N.Y. TIMES, Aug. 3, 2008, at 2.

363. Tom Moran, *Booker's Challenge*, NEWARK STAR-LEDGER, April 7, 2002, at 1.

364. *Id.*

365. *Id.*

366. Lanny J. Davis, *Newark Mayor Cory Booker's Purple Leadership*, WASH. TIMES, Mar. 30, 2009, at A04.

367. *Id.*

368. Jake Tapper, *Keeping the New Black Candidates Down*, SALON (June 18, 2002, 14:23 ET), <http://dir.salon.com/story/politics/feature/2002/06/18/davis/index.html>.

white boy” who was not “authentically black.”³⁶⁹ The James campaign also stoked the flames of a whisper campaign that “slimed Booker for being gay, Jewish and white, and for accepting money from the KKK.”³⁷⁰ An article on James’s campaign website added that Booker was “comfortable in the company of people whose political ancestors hosed down and blew up black children in Birmingham.”³⁷¹ These accusations represented more than an interesting side-show and, arguably, constituted the centerpiece of James’s campaign. Indeed, after James’s slogan “Let’s Continue the Progress” failed to resonate, he hired a political consulting firm that changed it to “The Real Deal,” which dovetailed nicely with the rhetoric attacking Booker’s commitment to the black community.³⁷² At the end of the campaign, voters chose James over Booker by a 53 to 46 percent margin.³⁷³

One other election is especially notable for the way that a long-time black incumbent harnessed destructive racial scripts to defeat an insurgent post-racial candidate. A 2000 Alabama House race featured incumbent and local civil rights icon Earl Hilliard against a young Harvard Law School graduate and civil rights lawyer, Artur Davis.³⁷⁴ Like James, Hilliard’s record contained several signs of corruption, including unpaid taxes, diversion of county money to suspect organizations, and diversion of campaign money for personal use.³⁷⁵ Also like the James-Booker race, the incumbent’s campaign quickly degenerated into a series of accusations attacking the challenger’s black authenticity. “The only thing he’s done for black people is put them in jail,” Hilliard said in a crude mischaracterization of Davis’s legal career, which included work for the U.S. Attorney’s office.³⁷⁶ Furthermore, fliers were circulated that accused Davis of being controlled by outside interests, namely the Jewish community. As a testament to the spirit of the campaign, one flier was entitled “Davis and the Jews: No Good for the Black Belt.”³⁷⁷ Davis ended up losing the 2000 race but did, notably, win a rematch two years later in a campaign that assumed much the same tenor.

The important lesson to draw from contests such as James-Booker and Hilliard-Davis is that majority-minority districts do not liberate voters from engaging in racial politics as Professor Kang asserts. Instead, they create environments obsessed with race in which polarizing candidates win by engaging in

369. *Id.*

370. Ronald D. Brown, Note, *The Politics of “Mo’ Money, Mo’ Money” and the Strange Dialectic of Hip Hop*, 5 VAND. J. ENT. L. & PRAC. 61 (2003)

371. Fund, *supra* note 358.

372. Kraus, *supra* note 359, at 5.

373. *Id.*

374. David M. Halbfinger, *Generational Battle Turns Nasty in Alabama Primary*, N.Y. TIMES, June 3, 2002, at A1.

375. *Id.*

376. *Id.*

377. *Id.*

rhetoric of excess³⁷⁸ and policing racial scripts.

Much of this analysis applies just as forcefully against Professor Gerken's more modest endorsement of majority-minority districts in an earlier article.³⁷⁹ In it, she set forth a comprehensive framing device for understanding an alternative system of diversity known as "second-order diversity."³⁸⁰ First-order diversity refers to diversity in the way most understand it: a desire to have all institutions roughly reflect the composition of the population at-large.³⁸¹ Second-order diversity refers to diversity among institutions, rather than within them, which may well mean that some institutions look nothing like the population at-large, though on an aggregate level, they still serve the underlying goals of diversity.³⁸² For Professor Gerken, majority-minority districts are a quintessential example of second-order diversity and its benefits.³⁸³ First-order diversity would call for statewide districting schemes where each district contains minority populations roughly proportional to their state or regional population.³⁸⁴ Second-order diversity, however, would recommend that at least some districts amass a majority of minorities, so that minorities could more readily get elected and thereby diversify legislative bodies.³⁸⁵ Under a paradigm of first-order diversity, minorities may only exert influence over the decision-making process but not get elected, while under a paradigm of second-order diversity they could get elected and enjoy "the power to decide, a power usually enjoyed solely by members of the majority."³⁸⁶ This "turning of the tables,"³⁸⁷ provides minorities with a higher degree of symbolic dignity,³⁸⁸ the benefits of agenda-setting that accompany membership in elected bodies,³⁸⁹ and motivation to invest more in the political process.³⁹⁰

While second-order diversity constitutes a thought-provoking defense of majority-minority districts, it ultimately fails on its own terms. Consider that geographically-based legislative representation is frequently a launching pad for more powerful statewide representation in positions such as attorney general, governor, or senator.³⁹¹ Because majority-minority districts reward race-

378. See also *supra* text accompanying note 242.

379. See GERKEN, *supra* note 345, at 1117–21 (2005) (applying her theory of second-order diversity to defend majority-minority districts). Professor Gerken's defense of majority-minority districts continues to figure prominently in her scholarship. See, e.g., Heather Gerken, *What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 10–14 (2010).

380. GERKEN, *supra* note 345, at 1101–06.

381. *Id.* at 1102.

382. *Id.* at 1102–03.

383. *Id.* at 1188–89.

384. *Id.* at 1120–21.

385. *Id.* at 1176.

386. *Id.* at 1126.

387. *Id.* at 1142.

388. *Id.* at 1144.

389. *Id.* at 1134–35.

390. *Id.* at 1134–36.

391. Nate Silver, *Why There Are No Black Senators*, FIFTYEIGHT (Jan. 1,

baiting candidates and punish post-racial candidates, they elect candidates who lack the cross-racial appeal to win statewide races. Again, the career of Rep. Artur Davis provides insight on this point. Rep. Davis, one of the few post-racial candidates to win in a majority-minority district, declared in 2009 his intent to run for governor of Alabama the following year. To make himself competitive in the general election, Rep. Davis eschewed tailoring his message to minority audiences and also staked out positions on issues that were more consistent with the conservative politics of the state than the politics of his district. These stances provoked some to police racial scripts and question Rep. Davis's fidelity to the black community. For example, after Rep. Davis voted against the Patient Protection and Affordable Care Act, Joe Reed, the long-time black political boss in Alabama, condemned Davis, stating: "You cannot curse Bubba and Cooter, Big Man and June Bug in the daytime and beg them at night. Davis is not going to be able to hoodwink the voters of Alabama."³⁹² Joe Reed's politics ultimately won the day as he helped drain significant black support from Rep. Davis who lost in the Democratic primary. Davis's loss sends a clear warning to candidates in majority-minority districts to dutifully perform their ascribed racial script, thereby ruining their chances of a successful statewide run.

Segregation reinforces race as an organizing principle of society not only for minority citizens, but white citizens as well.³⁹³ When minorities are packed into a few districts, the composition of the surrounding districts necessarily becomes "bleached."³⁹⁴ The politics follow suit as white citizens are deprived of the opportunity to deliberate and politic with minority voters. As a result, white citizens will come to associate minority representation with minority constituents and "minority interests."³⁹⁵ The notion of minority representation of their interests will ring foreign when a minority candidate runs for statewide office lobbying for their votes.³⁹⁶ The upshot of having a few race-baiting officials from majority-minority districts and a less sympathetic white population base

2009, 10:41 AM), <http://www.fivethirtyeight.com/2009/01/why-are-there-no-black-senators.html>.

392. Ben Smith, *Race and Politics in Alabama*, POLITICO (Dec. 7, 2009, 11:54 AM), http://www.politico.com/blogs/bensmith/1209/Race_and_politics_in_Alabama.html (quoting Joe Reed).

393. Cf. ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 124–25 (1987) (quoting Professor David Horowitz in noting that majority-minority districts "encourage[] local white politicians to say to the minority communities: You have your own representatives. Don't come to us with your problems; speak to them").

394. CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS* 205–25 (1995). For a reply to the bleaching critique, see Karlan, *supra* note 276, at 300–02. Professor Karlan's reply does not encompass the critique concerning minority representation in more powerful institutions that I offer here. Moreover, it neglects the possibility that the policy preferences of minority and white citizens could be distorted and would benefit from critical engagement.

395. SWAIN, *supra* note 394, at 202–25.

396. See THERNSTROM, *supra* note 393, at 187–88 ("[M]inority access to the political process can also be enhanced by placing minority voters in largely white constituencies. That way, the minorities will have a political foothold in more than one district.").

statewide is that minorities will have a slim chance of winning statewide races.³⁹⁷ It is probably more than coincidence, then, that there are twenty-five black members of the U.S. House of Representatives from majority-minority districts, but there are no elected black U.S. senators.³⁹⁸ The benefits that Professor Gerken attributes to minorities winning elections from majority-minority districts are negated by the resulting homogenization across a set of more powerful political institutions. To borrow her parlance, majority-minority districts are not first-order diverse, and they lead to elective bodies that are not second-order diverse.

The label of “segregated” for majority-minority districts is apt. Throughout this critique I have frequently referred to them as such. This discourse echoes that of conservative justices who have invoked the language of “segregation,”³⁹⁹ “balkanization,”⁴⁰⁰ and “apartheid”⁴⁰¹ to characterize these districts. In the most vivid imagery, Justice Clarence Thomas declared that majority-minority districting “systematically divides the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of political apartheid.”⁴⁰² These characterizations have earned the ire of more progressive scholars.⁴⁰³ They point out that districts comprised of a majority of minority citizens with a substantial white population hardly bear resemblance to the invoked imagery from the segregated South, Balkanized Yugoslavia, and apartheid South Africa.⁴⁰⁴ This observation may be true as a descriptive matter, but I remain sympathetic to the segregation critique. Black power movements in the 1960s lacked the coercive power of the state and the widespread support that white racial nationalism long enjoyed in this country, but Ralph Ellison and James Baldwin were correct to say that the spirit of racism remained comparable.⁴⁰⁵ “The sentiment is old; only the color is new” applies to majority-minority districts.⁴⁰⁶ Most devastatingly, these districts sow the seeds for a racially destructive discursive terrain, bleach surrounding districts of an integrated politics, and handicap minorities from winning politically powerful statewide races. Most devastatingly, they reproduce race as an organizing principle of American soci-

397. Nate Silver, *Why There Are No Black Senators*, FIVETHIRTYEIGHT, Jan. 1, 2009 <http://www.fivethirtyeight.com/2009/01/why-are-there-no-black-senators.html>.

398. *Id.*

399. *See Shaw v. Reno*, 509 U.S. 630, 642 (1993) (referring to majority-minority districts as “an effort to segregate the races”).

400. *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring in the judgment, joined by Scalia, J.).

401. *Id.*

402. *Id.*

403. *See, e.g.,* Karlan, *supra* note 311, at 94–95 (criticizing these characterizations of majority-minority districts).

404. *Id.*

405. *See supra* note 173 and accompanying text.

406. *See STOUT, supra* note 73, at 45 (quoting James Baldwin).

ety.

D. Crossover Districts Strengthen Civic Nationalism and Advance a Post-Racial Ideal

Crossover districts are a viable alternative to majority-minority districts that can help move the country toward a post-racial society. The idea of crossover districts emerged by accident. In order to amass a majority of minority voters in a single district, legislators frequently had to draw multi-sided, bizarrely shaped districts.⁴⁰⁷ In two important decisions in the 1990s, the U.S. Supreme Court declared that such excessive use of race in redistricting violated the Equal Protection Clause and lower courts applied the standard to strike down several majority-minority districts throughout the country.⁴⁰⁸ To the surprise of many observers who predicted that the decisions would greatly diminish the number of black legislators, only one black member of Congress subsequently lost a seat.⁴⁰⁹ In drawing more geographically compact districts, legislators were still able to net large minority populations, though they did not constitute a majority.⁴¹⁰ Together with the aid of a small percentage of reliable crossover votes from the white majority, however, minorities were able to elect minority candidates in racially polarized areas.⁴¹¹

To better grasp how crossover districts function, consider the results of a local race in North Carolina in a region at the center of a 2009 redistricting case before the U.S. Supreme Court.⁴¹² In 1999, black Democrat Sandra Spaulding Hughes ran for Wilmington City Council, winning the black vote 93 percent to 7 percent and the white vote 33 percent to 67 percent.⁴¹³ The results evince racial polarization since the black and white populations, by great margins, supported different candidates.⁴¹⁴ Indeed, the racial composition of Wilmington

407. *Id.* at 1605.

408. *See Shaw v. Reno*, 509 U.S. 630 (1993) (holding that a district's irregular shape can count as *prima facie* evidence of an Equal Protection Clause violation) and *Miller v. Johnson*, 515 U.S. 900 (1995) (holding that when race represents the predominant factor in a district's creation it violates the Equal Protection Clause).

409. Brief for The League of Women Voters of the United States as Amicus Curiae Supporting Petitioners [hereinafter League Brief] at 32, *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009) (No. 07-689).

410. Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Redistricting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1252-53 (1999).

411. *Id.*; *see also* Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1407-09 (2001) (examining twenty congressional elections with black candidates in the South from the 1990s and determining that blacks typically needed to constitute only 33 to 39 percent of the voters for a black to secure 50 percent of the vote); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1523-39 (2002) (listing the benefits of crossover districts from a social scientific perspective).

412. *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

413. LEAGUE BRIEF, *supra* note 409, at 14.

414. *Id.*

voters sealed Hughes's fate. In a district that had only 20 percent of black voters, she would have lost; whereas, she would have routed her opponent in a district that had 50 percent of black voters.⁴¹⁵ In other words, just as in majority-minority districts, black voters had the opportunity to elect a black candidate with the assistance of crossover voters. Importantly, these voting patterns were not limited to a single race in a single district, but are confirmed by empirical studies of North Carolina voting.⁴¹⁶ In fact, drawing on such studies, the North Carolina Supreme Court determined that a racially polarized district with a black voting-age population as low as 38.37 percent would have an opportunity to elect black candidates.⁴¹⁷

Crossover districts are similar to majority-minority districts in that they enable minority candidates to get elected in areas where citizens tend to vote as a bloc according to their race. Crossover districts differ in important respects, however. Most centrally, they encourage candidates to appeal to civic nationalism rather than racial nationalism. Winning candidates must gain the assent of a portion of the population outside of their own racial group, rendering rhetorical appeals to racial solidarity an unviable path to victory. The most successful candidates are post-racial ones who cultivate a message with appeal across demographic groups. Thus, crossover districts internalize the most important lessons of centripetalism.⁴¹⁸ Furthermore, crossover districts move away from a racial politics premised on pluralism⁴¹⁹—the aggregation of existing preferences—to one premised on civic republicanism⁴²⁰—the transformation of preferences through reasoned deliberation. In crafting a winning message, candidates can no longer rely on calibrating to the popular winds of minority communities shaped by the ethno-racial pentagon⁴²¹ and the race-industrial complex.⁴²² Instead, candidates must walk a tightrope between racial communities, marshaling consensus on even racially sensitive topics after prompting a deliberative conversation among citizens from diverse backgrounds.⁴²³ The experience successful minority candidates would gain from walking this tightrope and the exposure of white citizens to minority candidates that represent the interests of diverse constituencies would supply the ingredients for more success-

415. *Id.* at 15.

416. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1254 (2009) (Souter, J., dissenting).

417. *Id.*

418. *See supra* notes 316–331 and accompanying text (describing centripetalism).

419. *See supra* note 259 and accompanying text (describing the politics of pluralism).

420. *See supra* note 261 and accompanying text (describing the politics of civic republicanism).

421. *See supra* notes 180–207 and accompanying text (theorizing the ethno-racial pentagon).

422. *See supra* Part II.D. (theorizing the race-industrial complex).

423. *See* Jeffrey M. Chemerinsky and Kimberly C. Kisabeth, *Tracing the Steps in a Historic Election*, 86 DENV. U. L. REV. 616–30 (2009) (describing the tightrope that Obama had to walk in drawing support among diverse racial communities).

ful minority candidates in statewide races.

Professor Gerken's concept of a "forced community"⁴²⁴ helps elaborate the benefits of reasoned deliberation among diverse citizens. According to Professor Gerken, a forced community is one in which citizens from diverse backgrounds are assembled and committed to completing a shared task.⁴²⁵ Choice is removed, as citizens cannot opt out of the grouping assigned to them.⁴²⁶ Jury systems are a prime example of this phenomenon.⁴²⁷ In the process of working through shared tasks, forced communities help destabilize existing ethno-racial categories and generate a spirit of national solidarity by exposing racial differences—that the race-industrial complex teaches are primordial and unbridgeable—as crude caricatures.⁴²⁸ Crossover districts are such forced communities, because the election of a representative requires citizens to build coalitions across the color line and "pull, haul, and trade to find common political ground."⁴²⁹ Majority-minority districts, however, do not require such cross-racial coalitions, leaving white citizens to operate in the political process only as "filler people" whose votes are not courted.⁴³⁰

Crossover districts thus have both functional and constitutive benefits.⁴³¹

424. See GERKEN, *supra* note 345, at 1152–60 (defining "forced community").

425. *Id.*

426. *Id.*

427. *Id.*

428. See BARTLETT, *supra* note 287, at 1949 ("Collaboration puts people in situations in which they are more likely to share the personal information upon which common bonds can be formed, and are thus less likely to stereotype.").

429. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994); cf. Richard Briffault, *Our Localism: Part I - The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 72 (1990) (recommending that local boundaries be drawn every ten years to encompass richer and poorer enclaves to foster inter-class community building); see also BARTLETT, *supra* note 287 at 1949 ("[T]he strength and duration of these [anti-stereotyping effects from interracial contact] are limited by the degree of exposure. When exposure is brief, so are its effects. Frequency of contact and salience would be expected to improve the effectiveness of counterstereotypes.").

430. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 601 (1993) (describing filler people as those placed in a subordinate position by the "demand for a right of political effectiveness on a nonpacked, nondiluted basis" by another group). The concept of forced communities can similarly distinguish the experiences of diverse bodies that do not require the completion of a shared task. For example, while diversity-driven affirmative action has diversified many colleges and universities, the absence of a shared task (e.g. students can opt to exclusively associate with their own community) has allowed the race-industrial complex, and racial segregation, to thrive in their environs. See FORD, *supra* note 199, at 268–69. This artificial diversity falls victim to what Dr. King called "the pernicious effects of a desegregated society that is not integrated," leading to a state in which "men are physically desegregated and spiritually segregated, where elbows are together and hearts are apart." Martin Luther King, Jr., *The Ethical Demands for Integration, Speech Before a Church Conference in Nashville, Tenn.* (Dec. 27, 1962), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 118 (James Melvin Washington ed., 1986).

431. See ADDIS, *supra* note 277, at 125 ("[D]emocracy is as much about the building and sustaining of a community as it is about ensuring that appropriate procedure is utilized to gather and weigh the judgments and preferences of citizens. In other words, democracy has consti-

The functional benefits are that they promote the transformation of distorted political preferences and cultivate racially reconciliatory candidates who are able to win statewide races. This creates a cadre of lawmakers across political institutions able to advance a racially reconciliatory message. Moreover, because, as a matter of simple math, states can draw more crossover districts than majority-minority districts, the benefits can be multiplied across the polity, minimizing the process of “bleaching” and the presence of “filler people.”⁴³² The constitutive benefits are that they foster conversation and kinship across the color line,⁴³³ enabling politics to “take on the sense of a journey in which . . . the relations among travelers are as vital as the destinations they . . . are seeking.”⁴³⁴ The process of working through differences can “benefit all by destroying stereotypes, suspicion, and mistrust”⁴³⁵ and destabilizing the underlying racial categories.

E. Bartlett v. Strickland and the New Incentives to Dismantle Crossover Districts and Create Majority-Minority Districts

Despite these advantages, last March the U.S. Supreme Court in *Bartlett v. Strickland* ruled that only majority-minority districts, and not crossover districts, count as districts where minority voters have the opportunity “to elect representatives of their choice” for purposes of Section 2.⁴³⁶ As a result, minority voters in crossover districts have no right to claim relief under Section 2 from a statewide districting scheme that dilutes their voting strength by, for instance, moving them into a non-crossover district. The decision also incentivizes legislators to dismantle crossover districts and create majority-minority districts in order to avoid Section 2 liability.

The case stemmed from a 2003 redistricting plan in North Carolina.⁴³⁷ The Eighteenth District of the state’s house of representatives had been a ma-

tive as well as instrumental dimensions.”).

432. The invocation of bleaching and filler people here should not cloud the compounded benefits for minorities, especially when compared to districting plans that discourage them from civic engagement by dispersing them across jurisdictions in a way that minimizes their electoral influence. See *Bush v. Vera*, 517 U.S. 952, 1074 n.4 (1996) (Souter, J., dissenting) (“When legislative districts are defined in ways that exclude the possibility of significant minority representation, potential minority voters see that their votes are not worth casting. Yet electoral mobilization is vital . . . to the group members’ perceptions that they belong to the community”) (quoting Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 351 (1986)).

433. Cf. Randall Kennedy, *On Racial Integration*, 43 DISSENT 3 (1996) (labeling the brand of integration associated with Martin Luther King, Jr. as “racial kinship” and advocating it because it “champions the creation of new communal affiliations in which interracial affections are a positive good.”).

434. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 120 (1984).

435. ADAMS, *supra* note 220, at 273 (listing the benefits of integration).

436. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009).

437. *Id.* at 1239. .

jority-minority district until 2003.⁴³⁸ At that point, the black voting-age population dropped below 50 percent and the general assembly could no longer draw a geographically compact majority-minority district.⁴³⁹ The state general assembly then split the district between portions of two counties (Pender and New Haven) in order to create one district with a 39 percent black voting-age population.⁴⁴⁰ Pender County sued the state in May 2004, alleging that the redistricting plan violated a provision in the state constitution demanding that counties remain intact in any districting plan.⁴⁴¹ State officials declared the districting plan necessary, however, in order to comply with Section 2, which trumps state law.⁴⁴² The North Carolina Supreme Court ruled that the district did not fall under the purview of Section 2 because the black population represented less than 50 percent of the population and ordered the map redrawn after the 2008 elections.⁴⁴³

In a 5-4 decision, the Court affirmed, declaring that crossover districts do not fall in the purview of Section 2.⁴⁴⁴ Justice Kennedy authored the plurality opinion, joined by Justices Roberts and Alito. Justice Thomas concurred in the judgment, joined by Justice Scalia. The plurality opinion held that the crossover district failed to meet the first precondition of *Gingles*, stating that because black voters formed only 39 percent of the voting-age population, they “standing alone have no better or worse opportunity to elect a candidate than any other group with the same relative voting strength.”⁴⁴⁵ To recognize such a claim would “grant special protection to their right to form political coalitions that is not authorized by the section.”⁴⁴⁶

Justice Kennedy’s opinion was also informed by the central goal of the VRA and the Fourteenth and Fifteenth Amendments: minimizing the impact of race on elections and society at-large.⁴⁴⁷ To the extent there were any doubts that Section 2 dictates a majority-minority rule, the Court stated that they must resolve in favor of the respondents, because adopting the petitioner’s interpretation would raise serious constitutional doubts in light of the Fourteenth Amendment’s Equal Protection Clause.⁴⁴⁸ According to the plurality opinion, a “moral imperative of racial neutrality” animates the Clause, demanding that racial classifications be used only “as a last resort.”⁴⁴⁹ This imperative carries ex-

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.* at 1239–40.

442. *Id.*

443. *Id.*

444. *Id.* at 1246.

445. *Id.* at 1237.

446. *Id.* at 1243.

447. *Id.* at 1247.

448. *Id.*

449. *Id.*

tra weight in the context of voting, in which racial gerrymandering threatens to “balkanize us into competing racial factions” and “carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.”⁴⁵⁰ Applying this vision to the facts of *Bartlett*, Justice Kennedy noted that under the petitioners’ proposal, courts and legislatures would be compelled to inappropriately inject race as the predominant factor motivating nearly every redistricting decision.⁴⁵¹

Justice Souter’s dissent, joined by Justices Breyer, Ginsburg, and Stevens, effectively rebutted the plurality’s interpretation of the statute and invocation of the constitutional avoidance canon. First, the dissent noted that nothing in the text of Section 2 even hints that minority voters only have the opportunity to “elect representatives of their choice” in majority-minority districts.⁴⁵² In fact, by adopting a totality of the circumstances test for violations, Congress affirmed a functional, rather than mathematically rigid, approach to vote dilution claims.⁴⁵³ And all evidence indicates that crossover districts serve a functionally equivalent purpose.⁴⁵⁴

Second, the dissent turned the plurality’s invocation of the constitutional avoidance canon on its head. They accepted the general premise that the VRA and the Constitution call on the Court to reduce the influence of race on American elections and society.⁴⁵⁵ They demonstrated, however, that the holding would have the exact opposite effect.⁴⁵⁶ The VRA requires that states draw a fair number of districts in which minorities have an opportunity to elect candidates of their choice.⁴⁵⁷ The number of such districts must correspond roughly proportionally to the percentage of minorities in the state.⁴⁵⁸ As a happy incident of using a redistricting process that references purely neutral factors, a state can end up with crossover districts quite easily.⁴⁵⁹ If these districts counted toward fulfilling a state’s obligations under the VRA, then the state would actually need to rely on race *less* and carve out *fewer* majority-minority districts.⁴⁶⁰ If they do not count, though, the State will be forced to comply by creating more majority-minority districts.⁴⁶¹ Often creating such districts is excessively race-conscious, because it entails connecting distant pockets of the black

450. *Id.*

451. *Id.*

452. *Id.* at 1251 (Souter, J., dissenting).

453. *Id.*

454. *Id.* at 1253.

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

population while trying to net the smallest number of white voters in the process.⁴⁶² The result is bizarrely shaped, multi-sided districts. Below, for example, are two figures that compare the North Carolina legislative district in question when it was a majority-minority district (Figure 1) and when it became a cross-over district (Figure 2).

Figure 1

56% Black Version of North Carolina HD 98 (now 18)



Figure 2

39% Black Version of North Carolina HD 18



Note: Figures are taken from League Brief, *supra* note 409, at 37.

462. *Id.* Justice Souter explicitly stated that crossover districts are better than majority-minority districts. *Id.* at 1254. ("A crossover is thus superior to a majority-minority district precisely because it requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions."). Justice Souter's dissent has important implications for Professor Gerken's defense of majority-minority districts and reservations about crossover districts since she draws extensively on Justice Souter's voting rights jurisprudence. See, e.g., Heather K. Gerken, *Race, Voting Rights, and the Genius of Justice Souter*, AM. PROSPECT (May 4, 2009), http://www.prospect.org/cs/articles?article=race_voting_rights_and_the_genius_of_justice_souter, Professor Gerken has yet to reconcile this inconsistency.

The Court in *Shaw* was correct to invoke segregation and Balkanization when declaring that majority-minority districts like those in Figure 1 are unconstitutional.⁴⁶³ In such an instance, it is clear by the shape of the district and the resulting composition that the state relied on race to slice and dice the population, producing a racial enclave. I would add that the segregation critique applies to all majority-minority districts, even the aesthetically inoffensive ones, because they reward racially polarizing candidates, bleach surrounding districts, handicap minorities from winning politically powerful statewide races, and reproduce race as an organizing principle of American society.⁴⁶⁴ Crossover districts, however, have exactly the opposite effect, as they reward conciliatory post-racial candidates, diversify many districts, facilitate minority success in statewide races, and advance civic nationalism as the organizing principle of American society.⁴⁶⁵ Thus, Justice Kennedy's application of Balkanization to crossover districts is completely inapposite.

The critique is all the more puzzling when one considers Justice Kennedy's concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*.⁴⁶⁶ There, Justice Kennedy opposed the city of Seattle's system of race-conscious student assignment to public schools to foster integration.⁴⁶⁷ He opposed the system because it classified each student on the basis of race and made an individualized school assignment according to the classification.⁴⁶⁸ He made clear, however, that generalized efforts that are integrative in effect and that do not instruct "each student he or she is to be defined by race" are permissible.⁴⁶⁹ Permissible efforts include the strategic site selection of new schools and the drawing of attendance zones with general recognition of the demographics of neighborhoods.⁴⁷⁰ The drawing of crossover districts comport with Justice Kennedy's criteria. As stated above, unlike majority-minority districts, which *Bartlett* will prompt a retreat to, states often arrive at crossover districts through consideration of race-neutral principles, and such districts possess the compactness for diverse civic communities to flourish.⁴⁷¹ Despite Professor Gerken's best efforts to harmonize Justice Kennedy's reasoning in race cases involving school desegregation and voting rights,⁴⁷² it is impossible to

463. See *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that a district's irregular shape can count as prima facie evidence of an Equal Protection Clause violation).

464. See *supra* Part IV.C. (enumerating the deficiencies of majority-minority districts).

465. See PILDES, *supra* note 411, at 1547–49 (describing why the values expressed in *Shaw* are consonant with crossover districting).

466. 551 U.S. 701 (2007).

467. *Id.* at 787 (Kennedy, J., concurring).

468. *Id.* at 784–85.

469. *Id.* at 789.

470. *Id.*

471. See *supra* text accompanying note 462 (detailing this benefit of crossover districts).

472. See GERKEN, *supra* note 345, at 120–22 (divining coherence in Justice Ken-

reconcile Justice Kennedy's endorsement of integrated school districts that emerge through consultation of race neutral factors with his condemnation of integrated electoral districts that emerge through consultation of race neutral factors.

Similarly disconcerting as the discrepancy in Justice Kennedy's jurisprudence is that in Justice Alito's jurisprudence. Justice Alito joined Justice Kennedy's opinion in *Bartlett*, which will entrench majority-minority districts that empower racially polarizing politicians.⁴⁷³ Justice Alito exhibited a disdain for racially polarizing politics and politicians in his concurrence in 2009's perhaps most closely followed case, *Ricci v. DeStefano*.⁴⁷⁴ The Court held that the City of New Haven could not throw out the results of an examination determining promotions for firefighters, because the City lacked a substantial basis in evidence for its fear that it would be subject to liability for the test's disparate impact on black firefighters.⁴⁷⁵ Justice Alito's concurrence stated that even assuming, *arguendo*, that avoiding disparate impact liability without a substantial basis in evidence were an objectively legitimate reason to throw out the examination, the city's reliance on that argument was merely a pretext.⁴⁷⁶ It actually scrapped the examination for an illegitimate reason—to "placate a politically important racial constituency."⁴⁷⁷ Justice Alito presented evidence that the decision to throw out the exam was not the product of reasoned deliberation concerning disparate impact liability, as the dissent stated.⁴⁷⁸ Instead, the decision emanated from a backroom deal with a powerful black pastor, Rev. Boise Kimber, who routinely made racially incendiary comments, described himself as a "kingmaker," and rallied black political support for the mayor.⁴⁷⁹ As a result, the district court's grant of summary judgment to the city, and the Court of Appeals affirmance, were misguided since reasonable jurors could have found that the city's proffered reason of compliance with Title VII was a pretext for intentional racial discrimination.⁴⁸⁰

Justice Alito's *Ricci* concurrence is novel and displays a keen attention to American racial politics. This point bears further emphasis because the opinion is not the product of color-blindness. Justice Alito does not pretend that race is irrelevant in American society. Indeed, only by examining *Ricci* through the

nedy's opinions on voting rights and school desegregation); Erin Miller, *Justice Kennedy's Emerging View on Race*, SCOTUSBLOG (Feb. 3, 2010, 3:05 PM), <http://www.scotusblog.com/2010/02/justice-kennedy%E2%80%99s-emerging-view-on-race/> (posting an essay by Heather Gerken).

473. See generally Part IV. E. (explaining the majority opinion and its flaws).

474. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

475. *Id.* at 2664.

476. *Id.* at 2683–84 (Alito, J., concurring).

477. *Id.* at 2684.

478. *Id.*

479. *Id.*

480. *Id.* at 2687–88.

lens of race's complex machinations in New Haven could Justice Alito make the case that the avoidance of disparate impact liability was merely a pretext to appease a race-based constituency. The opinion also exhibits a marked contempt for race-baiting leaders and racially polarizing politics. Justice Alito's silent agreement with the plurality in *Bartlett* thus is troubling because the approach he took months later in *Ricci* could have yielded a rich racial analysis. Such an analysis could have questioned the wisdom of a rule that discourages the creation of crossover districts, which neutralize the influence of race-baiting leaders (like Rev. Boise Kimber) and make politics less racially polarizing.

F. Amending Section 2 to Maximize Crossover Districts

In a brief dissenting opinion in *Bartlett*, Justice Ginsburg noted that the plurality's "decision returns the ball to Congress' court. The Legislature has just cause to clarify beyond debate the appropriate reading of Section 2."⁴⁸¹ Congress should take up her call. It should amend Section 2 to overrule the *Bartlett* decision and to expressly authorize vote dilution claims when citizens are moved from crossover districts to regular districts. In addition, Section 2 should authorize vote dilution claims when citizens are moved from majority-minority districts to regular districts, but allow only the creation of a crossover district as a remedy, unless racial polarization is so severe as to render that remedy impossible. This proposal does not immediately dismantle majority-minority districts, but does have the effect of maximizing the number of crossover districts and minimizing the number of majority-minority districts going forward.⁴⁸²

V. A POST-RACIAL APPROACH TO VOTE DENIAL

A. Background on Vote Denial and Its Disparate Impact on Black Citizens

"Vote denial" describes practices that inhibit people from voting or having their votes counted.⁴⁸³ The VRA was originally designed to weed out vote denial, particularly in the South, directed at minorities through literacy tests, poll taxes, all-white primaries, and English-only ballots.⁴⁸⁴ Part IV addressed "vote dilution," which describes practices that diminish minorities' political strength,

481. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1260 (2009).

482. It bears mentioning that this proposed change from a congressional preference for majority-minority districts to one for crossover districts does nothing to unsettle the status quo on Congress's power to enforce Section 2 of the VRA as a congruent and proportionate response to violations of the Fourteenth and Fifteenth Amendment. See *United States v. Blaine Cnty.*, 363 F.3d 897, 904 (9th Cir. 2004) (noting that the congruence-and-proportionality limitation actually strengthens the case for Section 2's constitutionality).

483. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 C. L. REV. 689, 712–13 (2006).

484. *Id.* at 702–09 (describing the first generation of vote denial claims).

typically through redistricting.⁴⁸⁵ Both vote dilution and vote denial are covered by Section 2 of the VRA as amended in 1982.⁴⁸⁶ The amended Section 2 does not contain an intent requirement, instead prohibiting any voting qualification or standard that “results” in the denial of the right to vote “on account of” race.⁴⁸⁷ A violation is established when, based on the totality of the circumstances, it can be demonstrated that members of protected minority groups have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁴⁸⁸

The VRA eradicated the original generation of vote denial.⁴⁸⁹ There is, however, a new generation of vote denial that manifests itself in photo identification laws, voter list purges, defective voting equipment, and felon disenfranchisement laws.⁴⁹⁰ These laws and practices “interact[] with social and historical conditions to cause an inequality” in minority voters’ access to the ballot box.⁴⁹¹

In his seminal article on the topic, Professor Daniel Tokaji supplies a useful taxonomy of new vote denial claims, classifying them in categories of “voting equipment,” “voter identification,” and “voter qualifications.”⁴⁹² Claims implicating voting equipment allege that dated or defective machinery used in an election has a disparate impact on minority, particularly black, voters. For example, plaintiffs have alleged that pre-scored punch card systems—at the center of the controversy in Florida in the 2000 presidential election—have a disparate impact on black voters by leading to a disproportionate number of black over- and under-votes on ballots that are then discarded.⁴⁹³ Claims implicating voter identification allege that laws requiring voters to establish their identity through burdensome methods, such as presentation of a drivers’ license or other valid state photo identification, disproportionately deny black citizens access to the ballot.⁴⁹⁴ Finally, claims implicating voter qualification restrictions allege that preconditions on voting, such as the absence of a felony conviction, disproportionately deny black citizens the opportunity to vote.⁴⁹⁵ Some

485. *Id.* at 691–92 (distinguishing between vote denial and vote dilution claims).

486. *Id.*

487. 42 U.S.C. § 1973(a) (2006).

488. *Id.* § 1973(b).

489. Tokaji, *supra* note 483, at 703.

490. *Id.* at 709–18 (characterizing the new vote denial).

491. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

492. Tokaji, *supra* note 483, at 709.

493. *See, e.g., Stewart v. Blackwell*, 444 F.3d 843, 877–80 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (holding that the use of punch cards in three counties violated Section 2 because of the disparate impact on black voters).

494. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 221 n.25 (2008) (Ginsburg, J., dissenting) (noting the disparate impact of voter identification laws on minority voters). *Crawford* involved a constitutional challenge, not a Section 2 challenge, to Indiana’s voter identification law. The law was upheld pursuant to the state’s legitimate interest in preserving the integrity of the electoral process and preventing voter fraud. *Id.* at 1617–20.

495. *See, e.g., Farrakhan v. Gregoire*, 590 F.3d 989, 1010–11 (9th Cir. 2010), *va-*

claims do not fall squarely in one category. For instance, the faulty maintenance of electoral rolls that purges ex-felons when the law is to exclude only current felons combines elements of the voting equipment and voter qualification categories.⁴⁹⁶

The new vote denial practices are troubling from a civic nationalist perspective. They compound the problems of structural racism traced to slavery and Jim Crow. Many black citizens are denied the opportunity to change their lot through deliberating with fellow citizens and casting ballots. In the Supreme Court's useful framing of the issue, voting is a fundamental right because it is "preservative of all rights."⁴⁹⁷ Without it, elected officials are free to trample on the rights of those denied the franchise because there will be no consequences for their actions.⁴⁹⁸ Furthermore, the electoral franchise is a powerful symbol that a citizen belongs to a community and a powerful tool to spur integration.⁴⁹⁹ On the flip side, vote denial tells citizens they fall outside of the community, eroding faith in the system and creating a potentially explosive sense of hopelessness. The legitimate feelings of anger create fertile ground for enterprising radicals to exploit. As Justice Souter has said, quoting an exhaustive study of ethnic politics, "we ignore at our peril the need to understand those processes by which being shortchanged . . . politically can become any group's motto or battle standard."⁵⁰⁰ Indeed, recall that it was the brutal struggle for voting rights in the 1960s that made black power so attractive to black citizens who previously identified with Dr. King and civic nationalism.

Courts do not have clear instructions on the scope of the VRA in regard to the new generation of vote denial and have, accordingly, issued varied rulings.⁵⁰¹ Consider the range of decisions on just one aspect of vote denial, felon disenfranchisement. Felon disenfranchisement has a disparate impact on black

cated *en banc*, *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (citing evidence of disparate impact of Washington felon disenfranchisement law on minorities).

496. See *Janis v. Nelson*, No. CR. 09-5019-KES, 2009 U.S. Dist. LEXIS 121086, at *21-31 (D.S.D. Dec. 30, 2009) (denying motion to dismiss for ex-felon plaintiffs alleging a Section 2 violation after having names purged from electoral rolls).

497. *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886).

498. See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("[T]he right of suffrage is a fundamental matter in a free and democratic society. . . . Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

499. *Bush v. Vera*, 517 U.S. 952, 1074 n.4 (1996) (Souter, J., dissenting) ("The surest path to assimilation is participation in the larger society's activities and institutions. Voting is not just an expression of political preferences; it is an assertion of belonging to a political community. . . .") (quoting Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 351 (1986)).

500. *Id.* (quoting Sidney Mintz, *Ethnicity and Leadership: An Afterword*, in *ETHNIC LEADERSHIP IN AMERICA* 198 (J. Higham ed., 1978)).

501. Tokaji, *supra* note 483, at 717.

citizens.⁵⁰² In fact, according to a 2008 Brennan Center report, three in ten of the next generation of black men are expected to lose their right to vote at some point in their lifetime.⁵⁰³ In many cases, the disparate impact can be traced to structural racism and the disproportionate targeting, prosecution, and sentencing of black citizens compared to white citizens.⁵⁰⁴ The First,⁵⁰⁵ Second,⁵⁰⁶ and Eleventh⁵⁰⁷ Circuits have held that felon disenfranchisement laws fall outside of the scope of Section 2 and have upheld the laws. Each decision, however, included vigorous dissents.⁵⁰⁸ The Sixth Circuit has treated a felon disenfranchisement law as cognizable under Section 2, though refused to invalidate it.⁵⁰⁹ The Ninth Circuit has also recognized felon disenfranchisement laws as cognizable under Section 2, though only on a showing that “the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent.”⁵¹⁰

B. Amending Section 2 to Guard Against Improper Vote Denial

Section 2 should be amended to provide better guidance to courts about coverage of vote denial claims. This Article argues that given the grave threats to civic nationalism that vote denial poses, Congress should provide a comprehensive framework for evaluating vote denial claims. This can be accomplished by codifying Professor Tokaji’s recommendation that allegations of vote denial use the same burden-shifting framework as disparate impact employment discrimination claims.⁵¹¹ Under this inquiry, voters would have to present a *prima facie* case that a particular voting procedure has a disparate impact on a protected population and that disparate impact is traceable to the challenged practice’s interaction with social and historical conditions. Then, the state could rebut the *prima facie* case with specific evidence showing that the voting procedure is narrowly tailored to serve a compelling government interest such as the sound administration of elections. If the state successfully rebuts the petitioner’s *prima facie* case, the petitioner could still prevail by persuading the factfinder that the state refuses to adopt an available alternative procedure that

502. See *supra* note 495.

503. ERIKA WOOD, RESTORING THE RIGHT TO VOTE 7 (2008).

504. See *supra* note 495.

505. *Simmons v. Galvin*, 575 F.3d 24, 30–39 (1st Cir. 2009).

506. *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc).

507. *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir.) (en banc), *cert. denied*, 546 U.S. 1015 (2005)).

508. *Simmons*, 575 F.3d at 45 (Torruella, J., dissenting); *Hayden*, 449 F.3d at 343–62 (Parker, J., dissenting, joined by Calabresi, Pooler, and Sotomayor, JJ.), *id.* at 362–67 (Calabresi, J., dissenting), *id.* at 367–68 (Sotomayor, J., dissenting), *id.* at 368–69 (Katzmann, J., dissenting); *Johnson*, 405 F.3d at 1239–44 (Wilson, J., dissenting in relevant part); *id.* at 1247–51 (Barkett, J., dissenting).

509. *Wesley v. Collins*, 791 F.2d 1255, 1259–62 (6th Cir. 1986).

510. *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

511. See Tokaji, *supra* note 483, at 723–26 (presenting his test).

has less of a disparate impact and serves the state's legitimate needs.

This test is designed to ferret out discriminatory practices.⁵¹² Yet, it still respects state and local autonomy by allowing governments to maintain electoral practices even when they have a disparate impact, so long as they can show that they are narrowly tailored to serve a compelling government interest. The only practices that will be uprooted are those that are insufficiently linked to a compelling justification, or in other words, based on a pretext. For example, a state only loses a disparate impact challenge to a photo identification law if it fails to present specific evidence that the law is necessary to prevent fraud, or if the plaintiff presents a reasonable alternative procedure that would achieve the same objective and have less of a disparate impact.⁵¹³ In addition, another limiting principle on government liability is the requirement that the practice interact with historical and social conditions in producing the disparate impact. Thus, to make out a *prima facie* Section 2 challenge to a felon disenfranchisement law, plaintiffs would have to show not only that the law has a disparate impact on black voters, but also that this impact is linked to, for example, a history of discriminatory law enforcement methods, such as racial profiling. Finally, the framework is not all-or-nothing in terms of invalidating voting procedures. A judge using the burden-shifting framework could decide that only certain elements of the practice are not narrowly tailored to serve a compelling interest and specify how a government could alter its practice to comport with Section 2. For instance, in a challenge to a state law that disenfranchises all felons, the judge could hold that, based on the state's proffered justifications, the state has legitimate reasons for denying the franchise to present felons, but not former ones who have already served their sentence. Alternatively, the judge could hold, if a state's only valid justifications are rooted in morality, that there is only a legitimate case for denying the franchise to those who have committed felonies of moral turpitude.⁵¹⁴

VI. A POST-RACIAL PRECLEARANCE SCHEME

A. *Background on Section 5's Preclearance Scheme and Its Counterproductive Formula*

Section 5 establishes a set of "covered jurisdictions" that must receive preclearance for all changes to voting practices with the U.S. Department of Justice (DOJ) or the U.S. District Court for the District of Columbia to ensure that the changes are not discriminatory in purpose or effect.⁵¹⁵ The drawing of

512. *Id.* at 732.

513. *See id.* at 725–26 (describing the criteria to be met for the government to carry its burden).

514. The language of moral turpitude is familiar in the felon disenfranchisement literature. *See, e.g.*, ALASKA STAT. § 15.05.030 (2010) (disenfranchising persons upon conviction of felony involving moral turpitude).

515. 42 U.S.C. § 1973(c) (2006).

district lines constitutes a practice that must be precleared for covered jurisdictions.⁵¹⁶ The original formula for determining whether a jurisdiction qualifies as covered is whether the state or political subdivision: (1) used a discriminatory test or device (such as a literacy test), and (2) had low voter turnout in elections in 1964, 1968, and 1972.⁵¹⁷ Other jurisdictions have been expressly added when Congress has amended the VRA.⁵¹⁸ The preclearance mechanism proved to be a tremendously powerful tool in crushing minority disenfranchisement, particularly in the South in the wake of massive resistance to the Civil Rights Movement.⁵¹⁹ Prior to preclearance, the federal government was consistently a step behind the resistance movement.⁵²⁰ Resisting jurisdictions would develop a new way of disenfranchising minority voters, the federal government would regulate the practice, and then yet another method would be devised. Preclearance ended the riddle.⁵²¹

The question is whether this intrusive measure is still required today.⁵²² Congress used the same thirty-five-year-old criteria when it renewed Section 5 of the VRA in 2006.⁵²³ Section 5 currently applies to: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas; most of Virginia; counties and townships in California, Florida, Michigan, New Hampshire, North Carolina, and South Dakota; and three New York City boroughs.⁵²⁴ The coverage scheme is flawed on several levels. First, it leaves states uncovered that have long histories of racial discrimination (such as Arkansas)⁵²⁵ and jurisdictions uncovered with recent spates of racially-tinged disenfranchisement (such as Ohio and the densely populated portions of Florida).⁵²⁶ Second, it covers states even though they have made significant strides in minority voter registration and turnout. For example, while voter registration for white citizens

516. *Allen v. State Bd. of Elections*, 393 U.S. 544, 564–65 (1969).

517. *Id.*

518. Civil Rights Div., U.S. Dep't of Justice, About Section 5 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Mar. 1, 2010).

519. THERNSTROM, *supra* note 355, at 31–33.

520. *Id.*

521. *Beer v. United States*, 425 U.S. 130, 140 (1976) (“Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.”).

522. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2512 (2009) (“The statute's coverage formula is based on data that is now more than thirty-five years old, and there is considerable evidence that it fails to account for current political conditions.”); *Riley v. Kennedy*, 553 U.S. 406, 429 (2008) (Stevens, J., dissenting) (“Even though many of those changes are, at least in part, the consequence of vigorous and sustained enforcement of the VRA, it may well be true that today the statute is maintaining strict federal controls that are not as necessary or appropriate as they once were.”).

523. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(3), 120 Stat. 577.

524. 28 C.F.R. pt. 51 appx. (2008).

525. Karlan, *supra* note 153, at 26.

526. Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 711 (2006).

exceeded black citizens by 50 percentage points in the covered states of Alabama, Louisiana, and Mississippi in 1964, the white registration exceeded black registration by only 3 percentage points in Alabama and 8 points in Louisiana in 2006.⁵²⁷ In Mississippi, black registration surpassed white voter registration by 1.5 percentage points.⁵²⁸ Perhaps most tellingly, if coverage were based on voter registration and turnout under 50 percent at the county level for the 2000 and 2004 presidential elections, hundreds of counties currently covered would no longer be, and counties in states as far-flung as Montana, Missouri, and Maryland would be covered.⁵²⁹

Some scholars may justify the coverage scheme on the basis that the 2008 black Democratic presidential candidate Barack Obama won a smaller share of the white vote in covered jurisdictions than would be expected given the performance of the 2004 white Democratic presidential candidate John Kerry, and when compared to Obama's performance among whites in non-covered jurisdictions.⁵³⁰ Nevertheless, the same scholars would still need to explain why of three states where Obama did worse than Kerry—Louisiana, Arkansas, and Tennessee—only Louisiana is covered by Section 5.⁵³¹ Given these tensions, it is no wonder that last year eight members of the Court effectively said the clock was ticking for Congress to harmonize the coverage formula with contemporary realities to avoid having Section 5 declared unconstitutional on federalism grounds.⁵³²

This Article argues that not only is Section 5 based on a clunky formula that is constitutionally suspect on federalism grounds, but that the preclearance scheme harms the cause of civil rights. The VRA is designed, in part, to root out racism in the practice of the electoral franchise. In 1965, pervasive racism in covered jurisdictions meant that an intrusive preclearance scheme was the only way to prevent the adoption of discriminatory voting practices.⁵³³ In 2010, racism is no longer pervasive and other mechanisms can achieve the same result.⁵³⁴ In addition, preclearance comes at a grave cost. It prevents election offi-

527. *NAMUDNO*, 129 S. Ct. at 2525 (Thomas, J., dissenting).

528. *Id.*

529. 152 CONG. REC. H5180 (statement of Rep. Norwood).

530. See Persily et al., *supra* note 5 at 1424.

531. See *id.* at 1413.

532. *NAMUDNO*, 129 S. Ct. at 2516 ("More than 40 years ago, this Court concluded that 'exceptional conditions' prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. . . . [W]e are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.").

533. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1710–11 (2004) (noting the early need for Section 5 and its profound impact).

534. See *id.* at 1731 ("My suspicion is that the combination of section 2 of the Voting Rights Act, the protections of the Fourteenth Amendment, and the fact of being in the process and at the table would afford much protection.").

cials from forming the affirmative commitment to antidiscrimination norms necessary to reduce racism in the long-term.

Recent social science research demonstrates that overly intrusive antidiscrimination measures may produce compliance in the short-term, but harm the greater cause by creating indifference, or even hostility, toward the underlying antidiscrimination norms.⁵³⁵ In an exhaustive survey of the relevant social science literature, Professor Katharine Bartlett found that coercive measures evoke resentment and resistance, reactions that actually increase stereotyping and racism.⁵³⁶ Consider an analogy to the corporate workplace. Researchers have shown that when bosses introduce intrusive measures, such as surveillance systems, workers feel that their sense of identity is insulted and respond by “working less hard, bad mouthing others, or using company resources in an unauthorized manner.”⁵³⁷ When workers were asked why they responded in this manner, they replied that they thought it was the right thing to do, indicating that a visceral sense of resentment can transmute into a moral imperative of resistance.⁵³⁸ In response, bosses may craft even tighter workplace controls, which will produce compliance, but inhibit achievement of broader corporate objectives.⁵³⁹ Even if an intrusive measure does not foster antagonism, it may prevent the internalization of antidiscrimination norms by “crowding out” internal motivation.⁵⁴⁰ That is, coercive enforcement signals to people that they are not expected to diligently perform their duties without external monitoring and inducement.⁵⁴¹ “This signal,” wrote Bartlett, “can undermine their sense of autonomy, competence, and relatedness, and elicit shame, resentment and resistance, ‘in ways that include abandoning self-regulation.’”⁵⁴²

Section 5’s preclearance scheme is excessively intrusive. It presumes that the smallest and most innocuous voting changes are invalid, and precludes their enforcement until the federal government gives its permission.⁵⁴³ This form of federal intervention also falls into the category of “playing the race card,” since it starts from the presumption that a jurisdiction’s actions are tainted by racist considerations, even though the formula that gave rise to the presumption is dated.⁵⁴⁴

For the election officials who must comply with the preclearance scheme,

535. See BARTLETT, *supra* note 287, at 1901.

536. *Id.* at 1902.

537. *Id.* at 1936–37.

538. *Id.* at 1937.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2513 (2009).

544. See *supra* notes 239–240 and accompanying text (defining playing the race card).

the combination of excessive intrusiveness and presumed racism most likely evokes resentment.⁵⁴⁵ As with surveillance in the corporate workplace, preclearance probably makes election officials feel insulted and prompts them to engage in acts of defiance when the federal government is not watching. At a minimum, their internal motivation to vigorously enforce voting rights laws must be crowded out by the federal micromanagement of their duties. These effects are troubling. The federal government can prevent the adoption of discriminatory voting practices through Section 5. It lacks the resources, however, to monitor the disgruntled election officials when they administer elections. When left to their own devices, these officials will not have the impulse to actively implement voting rights protections. If the VRA is to achieve its objective of reducing racism in voting, then it will need to have rules that both produce compliance with the letter of the law and instill a commitment to live up to its spirit.

B. Amending Section 5 to Include a Trigger in the Preclearance Formula that Maximizes Deterrence and Minimizes Resentment

Professor Gerken has formulated a novel “opt-in” approach to balance the competing considerations.⁵⁴⁶ Under her plan, Section 5 would not require preclearance upfront, but merely disclosure of all changes to voting practices.⁵⁴⁷ Local lawmakers and the civil rights community, then, would have the chance to review the disclosure and, if they found any part objectionable, bargain with the relevant officials to reach a mutually agreeable solution.⁵⁴⁸ If negotiations broke down, the objector could lodge a complaint with the DOJ and trigger preclearance.⁵⁴⁹

The proposal has attractive features such as maintaining a strong deterrent effect while preserving the federal government’s resources. Nevertheless, it is not without its shortcomings. Most prominently, the proposal places incredible bargaining power in the hands of unnamed members of the civil rights community. It is unclear who is authorized to strike such deals on behalf of minorities in a jurisdiction. The image of select individuals acting as though they speak for the “African-American” or “Latino-American” community under the authorization of the state would represent a troubling entrenchment of the ethno-racial pentagon. More worrisome, this power could easily fall into the hands of polarizing figures such as Joe Reed⁵⁵⁰ and Boise Kimber.⁵⁵¹ The bargaining

545. Bartlett, *supra* note 287, at 1961 (“[T]elling people that they would discriminate if they were allowed to do so, or unless they were taught not to do so, undermines their senses of autonomy, competence, relatedness, and basic goodness.”).

546. See Gerken, *supra* note 526, at 709–10 (presenting her proposal).

547. *Id.* at 717.

548. *Id.*

549. *Id.*

550. See *supra* note 392 and accompanying text (describing Reed).

process, then, might entail unsavory deals that, for example, would allow the implementation of a troubling election practice in exchange for a concession on an identity politics issue, like the cancellation of a firefighters' promotion exam that only rewarded white firefighters.⁵⁵² Finally, the delegation of power from the federal government to local civil rights leaders wielding the threat of federal government intervention is not likely to reduce resentment among election officials in covered jurisdictions.⁵⁵³

This Article proposes an alternative framework. The slate should, initially, be wiped clean and no jurisdiction should be required to preclear voting changes. This step would represent a grand gesture that the country has progressed and that racism no longer contaminates every policy choice made in the South. Rather than play the race card, it would affirm the competence of election officials and, thereby, encourage the good intentions necessary for an enduring commitment to the cause of voting rights.

Section 5 should not be abolished, however. Rather, preclearance should be triggered when a jurisdiction receives an enforceable judgment against it for diluting the influence of minority voters or denying minority voters access to the ballot.⁵⁵⁴ That is, preclearance would be triggered when jurisdictions violate this Article's proposals for an amended Section 2. The judge adjudicating the underlying dispute would determine the length of the preclearance term by referencing a set of aggravating and mitigating factors. These factors could draw on the ten so-called "Senate Factors" that the U.S. Senate developed, following amendments to the VRA in 1982, for judges to consult when evaluating Section 2 claims.⁵⁵⁵ Aggravating factors could include the presence of invidious intent

551. See *supra* note 479 and accompanying text (describing Kimber).

552. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683–84 (Alito, J., concurring) (2009) (describing a similar backroom deal between the local civil rights community and the local government). Professor Gerken's proposal would prevent government intervention to stop such deals. See GERKEN, *supra* note 526, at 710 ("[T]he courts and the DOJ would assess whether the negotiating process was fair, not whether its end product was the 'right' one for racial minorities. The fate of any challenge under the VRA would thus turn on the fairness of the process that produced the change, not on its substantive merits.").

553. See GERKEN, *supra* note 526, at 710 ("If negotiations break down . . . the sword of Damocles falls.").

554. The VRA already contains a similar, though much weaker, "bail-in" provision that enables a court to order coverage of a jurisdiction when the latter is held liable for a voting practice that violates the Fourteenth or Fifteenth Amendment. 42 U.S.C. § 1973(c) (2006). See *Jeffers v. Clinton*, 740 F. Supp. 585, 586, 601–02 (E.D. Ark. 1990) (ordering Arkansas to preclear any new runoff requirements before implementation because the state had "committed a number of constitutional violations of the voting rights of black citizens" stemming from such requirements), *aff'd*, 498 U.S. 1019 (1991). For a thorough examination of this provision, see generally Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

555. See S. Rep. No. 97-417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206–07 (presenting factors such as government responsiveness to concerns presented by minority citizens); Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 EMORY L.J. 1, 14–39 (1987) (conducting a thorough

and a history of racial discrimination in the jurisdiction. Mitigating factors could include good-faith consultation with neutral experts prior to implementation of the challenged practice and recent bottom-line improvement of minority civic engagement following affirmative steps taken by the jurisdiction.

Unlike the status quo which achieves compliance through playing the race card and systematizing federal micromanagement, the Section 5 trigger achieves compliance through respecting the autonomy of state and local officials while structuring incentives in a way that nudge them to institute their own best practices. These officials will know the ground rules. Namely, they are entrusted with safeguarding voting rights, and if they violate this trust by implementing a discriminatory practice, they will suffer the consequences of enrollment in the burdensome preclearance process. The current system operates almost entirely on a deterrent effect as the DOJ objects to less than one-half of one percent of preclearance requests.⁵⁵⁶ The trigger proposal maintains this deterrent effect since jurisdictions will want to avoid enrollment in preclearance. In fact, it expands the effect from currently covered jurisdictions to the country as a whole. The hope is that the trigger would rarely go off, such that the vast resources currently committed to preclearance requests from covered jurisdictions could be redirected to strengthening voting rights enforcement in more useful ways. Finally, the aggravating and mitigating factors of the trigger proposal are designed to encourage state and local officials to implement a set of best practices and take affirmative steps to maximize minority civic engagement, so that if a discriminatory practice does slip through, the length of the preclearance term will be short.⁵⁵⁷

VII. CONCLUSION

This Article began with a puzzle. How did the first black president manage to lose a congressional race just ten years ago by a two-to-one margin? The answer is that the majority-minority district made for favorable discursive terrain for the racial nationalist, Bobby Rush, and unfavorable terrain for the civic nationalist, Barack Obama. Chicago South Side operator Al Kindel captured the tenor of the race. “The accusations were that Obama was sent here and owned by the Jews,” he said. “That he was here to steal the black vote and steal black land and that he was represented by the—as they were called—the white

examination of the Senate factors).

556. Richard Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 191–92 (2005).

557. It almost goes without saying that this proposal to overhaul Section 5 by wiping the slate clean and triggering preclearance only after an adverse judgment comports with the Supreme Court’s desire for a Section 5 rooted in contemporary racial realities, and, thereby consistent with the governing congruence-and-proportionality inquiry for Congress’s enforcement powers. See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2512 (2009).

man.’ And that Obama wasn’t black enough and didn’t know the black experience, the black community.’⁵⁵⁸ Despite the fact that Obama worked for years as a community organizer in the South Side, the tactic worked and he was easily defeated. When Obama returned to the state senate in 2000, the Democrats had won the right to redistrict and Obama had the opportunity to draw the state senate district he wanted.⁵⁵⁹ Rather than pack as many minorities as possible into his district, as he might have done earlier in his career, he realized that he had stronger appeal with a diverse constituency.⁵⁶⁰ He then crafted a district of citizens from across income brackets and racial groups.⁵⁶¹

As Congress contemplates how to modernize the Voting Rights Act and make it better-suited to reduce the salience of race in America, let’s hope they consider the career of the nation’s first post-racial president. First, Congress should encourage the formation of crossover districts that reward conciliatory post-racial candidates, facilitate minority success in statewide races, and advance civic nationalism as the organizing principle of American society. Second, Congress should fortify safeguards against practices that have a disparate impact on minority voters’ access to the ballot. Third, it should trust election officials to do their jobs by wiping the preclearance slate clean while maintaining a deterrent effect through a trigger mechanism. Simply put, Congress should let a post-racial president sign a post-racial Voting Rights Act.

558. Ryan Lizza, *Making It; How Chicago Shaped Obama*, NEW YORKER, July 21, 2008, at 49, available at http://www.newyorker.com/reporting/2008/07/21/080721fa_fact_lizza?currentPage=all.

559. *Id.*

560. *Id.*

561. *Id.*

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EDITOR'S NOTE

