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I. INTRODUCTION

I still don't get it. I can see why as partisans of this or that set of policies we will still care about how district lines are drawn, even if each district has an equal number of voters. We might wish to maximize black representation. We might wish to elect Democrats, or liberals, or incumbents. What I cannot see, however, is why the Constitution, or a supposedly nonpartisan measure like the Voting Rights Act,[1] should be enlisted in these partisan battles.

Professor Karlan does an admirable job of exploring whether and to what extent blacks benefit politically from being concentrated in a small number of districts rather than being spread more thinly among more districts.[2] I cannot gainsay anything she says. My problem with what she says is not that I think she is wrong, but that I do not understand the normative principles from which she is proceeding and that animate her concern. To put it simply: Why should the law care whether blacks—or Democrats, or anyone else—benefit from a

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1. 42 U.S.C. § 1973 et seq. (1994 ed.).

2. Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 Vand. L. Rev. 291 (1997).

particular way of drawing district lines, so long as the principle of "one-person, one-vote" is repected?

The bogey here, I take it, is something called "vote dilution." The drawing of district lines matters, we are told, because not every "one-person, one-vote" system is kosher. Some systems that formally comply with "one-person, one-vote" involve "diluting" the votes of some groups, while others do not. This dilution undermines the equality of the franchise that "one-person, one-vote" is meant to establish.

Now the point of this argument is presumably not the trivial truth that every way of drawing district lines affects who gets elected, what policies they support, and ultimately the legislative product. Everyone knows that. Moreover, because the manner in which district lines are drawn ultimately affects what laws get passed, there is no such thing as a "neutral" way to draw lines. Of course, we could draw lines by some random method, under which no one controls the outcome. But the outcome would not itself be neutral, since it would inevitably produce some partisan mix of policies. Indeed, there are no neutral outcomes in districting because every outcome will produce its own particular partisan mix of policies.

We therefore need some normative principle to tell us when we have drawn district lines and produced the partisan mix of policies we *should* produce, and when we have drawn district lines and produced the wrong policies. In the latter case we can be deemed to have "diluted" votes in the sense that we have distributed them in a way disfavored by our normative principle.

At this point I need to make a very painful confession. A few years ago I wrote an article for a symposium in a law review[3]—a symposium which contained several articles from very eminent legal academics,[4] I might add—and in that article I said essentially the same things I am about to say here. And here is the painful part: That article met with the worst fate that can befall an article. It was not ripped to shreds by critics. Rather, it was totally ignored by the entire academy. Only a student note in a recent *Stanford Law Review* devotes any attention to it and confirms that it was indeed published and is not a figment of my imagination.[5]

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3. Larry Alexander, *Lost in the Political Thicket*, 41 Fla. L. Rev. 563 (1989).

4. Frank I. Michelman, Anthony E. Cook, C. Edwin Baker, Terrance Sandalow, Sanford Levinson, Elizaheth Mensch, Alan Freeman, Daniel A. Farber, Martha Minow, and Nell Minow.

5. Grant M. Hayden, Note, *Some Implications of Arrow's Theorem for Voting Rights*, 47 Stan. L. Rev. 295 (1995).

Now there are two hypotheses for why an article is so thoroughly ignored. The first is that it is so powerful and unanswerable that everyone understands that there is nothing more to say about the subject it addresses. The other is that it is so obviously misguided and silly that kindness dictates not commenting. Although I would like to believe the first hypothesis, the fact that discussion of vote dilution has proceeded unabated, and indeed has intensified since *Shaw v. Reno*,[6] prevents me from claiming to have had the last word.

Therefore, I must assume that I have been ignored as an act of mercy. That means that repeating myself, as I am about to do, can be considered as tempting the wrath of the gods who saw fit to spare me public ridicule the first time around. Yet I am called upon by the occasion to say something; because I only know this one song, I am afraid I shall have to sing it again.[7]

II. COMPETING CONCEPTIONS OF DEMOCRACY

We are looking for a normative principle to guide the vote dilution inquiry. That is, we are looking for a particular conception of democracy from which we might deduce how district lines should be drawn. There are two basic types of such conceptions of democracy. The first type is a substantive conception of democracy, and the second is a procedural conception of democracy.

The substantive conception would have us draw district lines by reference to a set of policy outcomes that moral theory deems ideal. Put differently, the substantive conception requires an institutional design—the drawing of electoral districts—that is empirically best suited to achieving results independently justifiable under one's preferred moral theory. Ronald Dworkin labels this substantive conception of democracy the "dependent" conception because whether a process is considered democratic depends on its ability to achieve desired substantive results.[8]

By contrast, the procedural conception of democracy—which Professor Dworkin calls the "detached" conception[9]—addresses

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6. 509 U.S. 630 (1993).

7. Much of what follows quotes and paraphrases extensively from Alexander, 41 Fla. L. Rev. at 569-76 (cited in note 3).

8. See Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F. L. Rev. 1, 3 (1987).

9. Id.

equality of power over political decisions. It concerns itself solely with decisional input, not with the decisions themselves. For example, a procedural conception might rule out deviations from "one-person, one-vote," even if the deviations likely would lead to electing a legislature more inclined to enact morally attractive legislation.

Suppose we accept the substantive conception of democracy as our standard for determining vote dilution. In that case, a court must proceed in the following manner whenever an individual or class brings a constitutional action premised on vote dilution. First, the court must ask what kind of legislation would be morally ideal. Second, the court must determine whether the challenged districting plan is less likely than some alternative plan to produce a legislature that will enact this morally ideal legislation. Third, if the court determines that the districting plan is inferior under that standard, it must then ask what interests will be hurt or slighted under the plan as compared to what should happen under an ideal districting plan. Finally, the court must relate the problems with this deviation from an ideal districting plan to some constitutional provision.[10]

Although the substantive conception of democracy yields a conception of vote dilution, this conception is not an attractive candidate for judicial enforcement under the Constitution for obvious reasons. For example, why does the constitutional concern for morally ideal legislation focus on testing districting plans that are two steps away from ideal legislation? If the Constitution is concerned with a morally ideal legislative program, why is that concern not implemented directly by constitutionalizing such a program? And what constitutional provisions embody this concern with ideal legislation through districting?

Beyond these textual problems lurk enormous institutional ones as well. Does anyone believe that the courts should proceed into moral theory and political science as far as this conception of vote dilution requires? To determine both the morally-required political program and the districting scheme most likely to produce it would place courts far deeper into the "political thicket" than even Justice

10. For example, while the Equal Protection Clause seems an appropriate constitutional peg on which to hang attacks on districting plans that threaten "equality interests," is it the appropriate peg for attacks on districting schemes that threaten other interests as well? Or should all attacks on districting schemes be brought under the umbrella of the heretofore nonjusticiable Guarantee Clause of Article IV? See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912) (dismissing a case challenging state referendum and initiative provisions for want of jurisdiction).

Frankfurter could have imagined in his darkest nightmares.[11] Merely to describe this conception of vote dilution shows how alien is the judicial role it assumes.[12]

In sum, the substantive conception of democracy does yield a conception of vote dilution in the abstract. Or if "dilution" seems to mischaracterize the problem, perhaps "vote maldistribution" is a more appropriate term. Terminology aside, however, the substantive conception is neither one that easily relates to the constitutional text nor one we would want judicially enforced. Its oddity as a conception of democracy is highlighted by the following paradox: In order to structure voting, we must already know how the vote should turn out.

The procedural conception of democracy also yields a particular conception of vote dilution. Under the procedural conception of democracy, every voter's vote should count equally, and the candidate or proposal with the majority of votes should win. In other words, the procedural conception of democracy relies upon the principle of "one-person, one-vote" and the related principle of majority rule. The Supreme Court has already constitutionalized the principle of "one-person, one-vote" under the Equal Protection Clause.[13] The focus here will therefore be on majoritarianism and its implications for vote dilution.

III. ARROW'S PROBLEM, MAJORITARIANISM, AND VOTE DILUTION

The baseline for assessing vote dilution under a procedural majoritarian conception of democracy is a situation in which a majority of voters within a jurisdiction agree on all aspects of a legislative program and on all other relevant qualities they would like their representatives to possess. Under such circumstances, the procedural conception would demand a districting plan designed to elect

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11. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (stating that the "remedy for unfairness in districting is to . . . invoke the ample powers of Congress").

12. But see Charles Beitz, *Equal Opportunity in Political Representation*, in Norman E. Bowie, ed., *Equal Opportunity* 155, 168-71 (Westview, 1988) (endorsing just such a judicial role). See also 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) (apparently endorsing a conception of voting equality mandating proportional shares of policy outcomes—"proportionate interest representation"—though without defining how to individuate "interests" or rank them without running afoul of Arrow's prohlem, see notes 14-19 and accompanying text, and without relating this bizarre idea to the constitutional text).

13. See *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964); *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

legislators who would enact the majority agenda and would possess the other characteristics deemed relevant by the majority. In other words, the ideal baseline is direct democracy by a majority like-minded on all programs and personalities. Vote dilution in this scenario would consist of any legal impediment encountered by *the majority* in electing its candidates and enacting its programs. Vote dilution would constitute a harm exclusively to the majority: *Under the procedural conception, voters who turn out to be in the minority ideally should have no influence on what is enacted and who is elected.*

Now let us move from this imaginary world, in which an unchanging majority of voters agree on everything relevant, to the real world in which majorities shift depending upon the issue or personality under consideration. In this world, the concept of vote dilution becomes indeterminate. Given only the two constraints that all votes should be given the same weight and that the majority should win, we no longer can determine what legislative program should be enacted and what representatives should be elected. If we cannot determine what personalities and programs "the majority" would choose, we cannot determine the standard from which a deviation constitutes "vote dilution."

Failure to find a cohesive majority on all issues leads to this indeterminacy because of Arrow's problem.[14] Professor Arrow proved that democratic procedures for determining policy cannot avoid the possibility of the following dilemma. When the policy choices are A, B, and C, and the voters are V_1, V_2, and V_3, it is possible for V_1 and V_2 to favor A over B; it is possible for V_2 and V_3 to favor B over C; and it is possible for V_1 and V_3 to favor C over A.[15] In such a situation, majority rule produces indeterminate results.[16] Every policy a majority favors can be trumped by another policy favored by a different majority in an endless cycle. Unless restrictions are placed on the voters' agenda, extra weight is given to some voters' votes, or some other objectionable constraints are placed on the voters, this possibility of endless cycling is unavoidable.[17]

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14. Kenneth J. Arrow, *Social Choice and Individual Values* 2-8 (Wiley, 2d ed. 1963).
15. Id. at 2-3.
16. Id. at 3, 51-59.
17. The conditions Arrow identifies as necessary to ensure the problem are: nondictatorship (no single voter's preferences dictate the outcome); Pareto efficiency (if all voters prefer X to Y, Y should not win); universal admissibility (no voters' preferences are kept off the voters' agenda); independence from irrelevant alternatives (the presence or absence of an alternative that is itself not preferred should not affect the choice among remaining alternatives); and transitivity (if voters prefer X te Y and Y to Z, X should be preferred to Z). See id. at 22-31.

Arrow's problem clearly haunts the lawmaking process in a direct democracy, but how does it bear on vote dilution in a representative democracy? Recall that previously we attempted to measure vote dilution by reference to an ideal situation in which a majority of voters agreed on an entire legislative program and the desirable attributes of legislators. In the real world, of course, such a cohesive majority is unthinkable. Instead, we find that one majority of voters favors a certain defense policy, a different majority favors a certain tax policy, a still different majority favors a particular candidate, and so on. In a direct democracy, Arrow's problem may or may not arise, depending upon whether the preferences of these different majorities themselves cycle. If, for example, a majority favoring a certain defense policy remains cohesive and favors that policy above all alternative defense policies, Arrow's problem will not arise in a direct democracy. On the other hand, if the majority that favors defense policy D_1 over D_2 is noncohesive, and the presence of option D_3 produces cycling, even direct democracy will be plagued by Arrow's problem.

Now consider the situation in a representative democracy. No matter how the district lines are drawn, the representatives elected will not enact all the policies the different majorities favor, nor will they possess all the other relevant characteristics the different majorities favor. Some policies and personal qualities will inevitably lose out in any representative democracy. The question now becomes, which ones should lose?

This is where Arrow's problem surfaces with a vengeance. If the different majorities with respect to trade policy, taxation, health care, and legislator character traits are asked which of these policies and personalities they would most and least regret to see defeated in the construction of a representative democracy, Arrow's problem almost certainly will arise. The very differences among the voters that block the formation of a single majority that agrees on everything undoubtedly will block formation of a stable set of meta-preferences regarding which majority-favored items should win and which should lose. Only if we assume that a cohesive majority exists to say how policies and personalities rank in importance—for example, that the majority-favored foreign policy is more important than the majority-favored welfare program or the majority-favored tax program—can we determine which districting arrangement a majority would favor, given that every districting arrangement will inevitably thwart some majority-favored policies.

Basing districting on the policies a direct democracy would produce presents a further problem. Many voter preferences, especially those relating to characteristics of representatives and not to general policies, themselves depend on how voting districts are drawn.[18] Thus, if I am in an ethnically homogenous district, I might prefer a representative with qualities A, B, and C, whereas if I am in an ethnically heterogeneous district, I might prefer a representative with qualities X, Y, and Z (the qualities most conducive to effectiveness might vary with the nature of the constituents). Moreover, even if I am in the majority on the issue of which qualities are preferable in which districts, I may be in the minority when it comes to choosing whether my district should in fact be ethnically homogeneous or heterogeneous; and the latter choice may have a majority that is itself divided on the importance of ethnic homogeneity and heterogeneity in comparison to other related choices, including the choice of representative qualities. Arrow's problem is thus inevitable in attempting to achieve a stable set of majority preferences about which other majority preferences should be honored and sacrificed in districting. And because Arrow's problem denies us an ideal baseline of stable majority preferences, it prevents us from determining how to draw the districts.

The problem of drawing districts by reference to some ideal set of majority preferences is actually quite familiar. Suppose a state has a majority of blacks or Democrats. Does that mean that votes have been diluted if district lines are drawn, or multimember districts created, that likely will lead to a predominantly white or Republican legislature? The answer is obviously "no." Every individual voter who happens to be black or who identifies herself as a Democrat may prefer in the abstract that blacks or Democrats dominate the legislature. But every way of assuring that outcome may trample upon other preferences on which individual blacks and Democrats are quite divided, and on which some of them join with individual whites and Republicans to form a majority.[19] Some individual blacks and

18. See Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket At Last*, 1986 S. Ct. Rev. 175, 224 ("Individual legislative elections are often intensely personal matters, turning not in the slightest degree on which party the voter wants to control the legislature.").

19. See the criticisms of proportional representation systems on these grounds in Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1367-77 (1987).

Proportional representation schemes do not avoid Arrow's problem. For example, suppose that the Democratic Party endorses policies 1, 2, and 3, and the Republican Party endorses policies 4, 5, and 6. Voter 1 favors policies 1, 2, and 6. Because two of the three policies he favors are policies the Democratic Party favors, he votes Democrat. Voter 2 favors policies 2, 3,

Democrats may think the foreign policy that most whites or Republicans favor is preferable to the one most blacks or Democrats favor, or they may favor a different domestic policy from most other blacks or Democrats. Moreover, individual blacks and Democrats might prefer some individual white or Republican candidates over the individual black or Democratic candidates that other voting arrangements would likely produce. And, of course, if they are in a minority, blacks and Democrats are likely to split over whether they want to control a minority of legislative seats or have great influence on a majority of legislative seats.

As individual voters we are all blacks or nonblacks, Democrats or Republicans, hawks or doves, pro-regulation or pro-market, pro-abortion or anti-abortion, and so on. Moreover, we are divided in a vast number of other ways, including over which particular people would be ideal representatives. Thus, no districting plan is "better" or "worse" than any other, if the terms "better" and "worse" refer to the people and policies that a given plan will likely prefer, and if the terms reflect evaluations based on the standard that majority preferences should prevail.

IV. CONCLUSION

Our version of democracy combines substantive and procedural conceptions. The substantive conception is embodied in the various constitutional rights and rules that trump pure majoritarianism and in the institution of judicial review that enforces those rights and rules. It is not reflected in a concern for the demography of electoral districts. Even those who argue for judicial enforcement of rights not located in the constitutional text focus on the products of legislation, not on how the legislatures are selected. To my knowledge, no court or commentator has publicly advocated enforcing either textual or nontextual rights through the roundabout method of specially tailoring voting districts over the direct method of the judicial veto of legislation. Not only does the indirect method call for skills that probably no one, including judges, possesses, but it also has absolutely nothing to commend it over the direct method. Such a method is not a sensi-

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and 4 and again votes Democrat. Voter 3 favors policies 4, 5, and 6 and votes Republican. The Democrats win (2 to 1) and enact policies 1, 2, and 3. The policies favored by a majority of voters, however, are 2, 4, and 6. If the Republicans had won, policies 4 and 6 would have prevailed, whereas only policy 2 prevailed under the Democrats.

ble basis on which to premise judicial involvement in legislative districting.

The procedural conception of democracy is reflected in the principle of majoritarianism that is the default position in the electoral and legislative processes. It is also reflected in the principle of "one-person, one-vote" that the Supreme Court has found inherent in the Constitution's Equal Protection Clause and is likewise discernable in the Court's close scrutiny of all restrictions on the franchise, and in its deference to congressional extensions of the franchise.[20]

When courts attempt to move beyond the actual denial of the franchise or the denial of voting equality in a *quantitative* sense and focus on *qualitative* equality, they encounter an electorate that divides along a multitude of different lines. As voters we are Democrats and Republicans, blacks and whites, males and females. But we are also hawks and doves, redistributionists and laissez-faire advocates. We are atheists, agnostics, Catholics, Protestants, Jews, Muslims, and Buddhists, all of various stripes. We are trade unionists and managers, Main Streeters and cosmopoles. Some of us prefer hot, charismatic candidates; others prefer cooler types. Some of us prefer the well-educated or the well-bred. Others prefer regular Joes and Joans. The list of our voting-relevant divisions is virtually endless. Moreover, we are just as divided over how these divisions rank in importance.

The upshot of this commonplace observation is that no standard exists beyond the mathematical "one-person, one-vote" by which to measure vote dilution. We cannot say that anyone's votes are diluted if Democrats, blacks, Teamsters, Rotarians, or Catholics are concentrated in a few voting districts, nor can we say that anyone's votes are diluted if such groups are spread thinly among many voting districts. No person *qua* Democrat or black can show that a given districting plan harms that person in the form of vote dilution. Or if she can, *then so can someone else with respect to any alternative districting plan.* If every plan dilutes votes, we might as well say that no plan does.

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20. See *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (approving of § 4(e) of the Voting Rights Act of 1965, which provided that no person who has successfully completed the sixth primary grade in an American school in which the predominant language is other than English shall be disqualified from voting under a literacy test); *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966) (approving various remedial provisions of the Voting Rights Act of 1965). But see *Oregon v. Mitchell*, 400 U.S. 112, 129-30 (1970) (disapproving of an amendment to the Voting Rights Act of 1964 which mandated an 18-year-old voting eligibility requirement for state and local elections).

So where do I stand on intentional gerrymandering based on race, political party, or incumbency? Are these acts not patently unfair, and should they not therefore be deemed unconstitutional? My answer is that while such practices are unseemly, and while the drawing of lines based on race is unwholesome, I cannot conclude that anyone is unfairly disadvantaged by such practices.[21] Or rather, if people *are* unfairly disadvantaged, it is not because their representatives and policies should have prevailed, but rather because fairness requires an outcome-blind process for drawing district lines.[22] If the Constitution speaks to the drawing of district lines at all beyond "one-person, one-vote," it should invalidate all outcome-driven plans, no matter what proxies are used, whether they be race, political affiliation, or something else.

In conclusion, the outcome-blind drawing of district lines is fair, no matter what the legislative results. But if it is also fair to let outcomes drive the drawing of district lines, then no particular way of doing so is unfair or "diluting," again no matter what the legislative results. The way out of the political thicket is clearly marked. The way through it does not exist.

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21. See Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 S. Ct. Rev. 245, 270, 278-81 (attacking *Shaw v. Reno* partly on the ground that no voter inside or outside the racially gerrymandered district could show the harm required for standing). The Supreme Court, of course, disagrees. See *Miller v. Johnson*, 115 S. Ct. 2475, 2485, 132 L. Ed. 2d 762 (1995); *United States v. Hays*, 115 S. Ct. 2431, 2435-36, 132 L. Ed. 2d 635 (1995); *Shaw v. Hunt*, 116 S. Ct. 1894, 1900, 135 L. Ed. 2d 207 (1996); *Bush v. Vera*, 116 S. Ct. 1941, 1951, 135 L. Ed. 2d 248 (1996).

22. Perhaps this is what *Shaw v. Reno* and its progeny—*Johnson*, *Hays*, *Shaw v. Hunt*, and *Vera*—are driving at in declaring race conscious processes for drawing district lines to be unconstitutional. At the moment, however, almost all the Justices on the Supreme Court have explicitly approved of outcome-driven districting plans. See, for example, *Vera*, 116 S. Ct. at 1954, 1969-70, 1974-75, 2011.