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Democracy, Majoritarianism, and Racial Equality: A Response to Professor Karlan

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Democracy, Majoritarianism, and Racial Equality: A Response to Professor Karlan

*Christopher L. Eisgruber**

I. INTRODUCTION.....	347
II. THE CONSTITUTIONALITY OF MAJORITY-BLACK DISTRICTS.....	349
III. THE POSSIBILITY OF ASSEMBLY BACKLASH	352
IV. THE DIFFERENCE BETWEEN DEMOCRACY AND MAJORITARIANISM	354
V. RACIAL EQUALITY AND AMERICAN POLITICS.....	356
VI. CONCLUSION	359

I. INTRODUCTION

Only with great trepidation do I undertake to comment upon Professor Karlan's fine Article.¹ Much of what I know about voting rights law I have learned from her work, and her contribution to this Symposium is characteristically erudite, detailed, and cogent. I will therefore limit myself to offering four modest observations about her argument. My central point is simple: While Professor Karlan successfully identifies several empirical questions that critics of majority-black voting districts must answer, those same questions also raise problems for defenders of majority-black districts (including Professor Karlan herself).

Professor Karlan's argument is directed against what I shall call "the Assembly Backlash Hypothesis": the idea that districting plans that increase the number of black legislators may nevertheless

* Professor of Law, New York University School of Law. I am grateful to the other participants in the Vanderbilt Law School's Symposium on Defining Democracy for the Next Century, and especially Pam Karlan, for their helpful suggestions. I also wish to thank the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund at the New York University School of Law, which provided generous financial support for this research.

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

produce legislative assemblies less receptive to black interests.² The Hypothesis maintains that by packing minority voters into a few districts, racial gerrymanders increase the likelihood that the state's remaining districts will elect representatives hostile to minority interests. If the Assembly Backlash Hypothesis were true, it would provide a reason for proponents of minority rights to oppose the creation of majority-black districts. Such districts might do nothing more than produce token representatives who would be doomed to lose again and again in unsympathetic assemblies.³

Professor Karlan demonstrates that the Assembly Backlash Hypothesis holds only when multiple conditions are met. Some of these conditions describe the nature of black political interests: Black political interests must differ from white political interests (otherwise there would be no need to worry that black representatives would become persistent losers in unsympathetic legislatures), but they must not differ too radically (otherwise black voters could never form coalitions with white voters).⁴ Other conditions apply to white political behavior: If whites resent black political power, then white voters may realign to oppose black interests whenever black voters acquire sufficient clout to influence an election.⁵ Professor Karlan concludes that the truth of the Assembly Backlash Hypothesis depends on the ability of black voters to reinforce the power of the Democratic political party.⁶ "[V]irtual, party-based representation is the key to any

2. Professor Karlan devotes special attention to Professor Abigail Thernstrom's articulation of the Assembly Backlash Hypothesis. See *id.* at 298-99 (citing Abigail Thernstrom, *More Notes from a Political Thicket*, 44 *Emory L. J.* 911 (1995); Abigail M. Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (Harvard U., 1987)).

Professor Karlan, of course, does not call the argument "the Assembly Backlash Hypothesis"; she calls it "the bleaching hypothesis." See, for example, *id.* at 293. This seems to me a bit of rhetorical gamesmanship; after all, nobody wants to be a "bleaching theorist." In any event, "bleaching" misdescribes the essence of the hypothesis. "Bleaching" refers to the claim that the creation of majority-black voting districts increases the homogeneity of white majorities in other legislative districts; as Karlan notes, this is "a simple mathematical fact" about which she and Professor Thernstrom agree. *Id.* at 294. The disagreement is not about whether majority-black districts "bleach" a state's majority-white districts, but rather about whether such bleaching has an adverse impact in the legislature as a whole. Professor Thernstrom hypothesizes that it does; Professor Karlan disagrees. The dispute is about "assembly backlash," not "bleaching."

3. Indeed, "packing" minority voters into a small number of districts is a recognized tactic that has been used to disenfranchise black voters. See, for example, Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 *S. Ct. Rev.* 245, 249-50 (describing various means used to disadvantage minority voters). The crucial question is whether well-intentioned efforts to increase the voice of black voters might have the same deleterious effects as ill-intentioned efforts to decrease their power.

4. Karlan, 50 *Vand. L. Rev.* at 300 (cited in note 1).

5. *Id.* at 312-13. See also *id.* at 317-18.

6. *Id.* at 306-09.

realistic account of how [the Assembly Backlash Hypothesis] works," says Professor Karlan.⁷

In light of this conclusion, Professor Karlan urges us to "think longer and harder" about whether to accept the Assembly Backlash Hypothesis.⁸ That suggestion is hard to resist: nobody—and least of all an academic—can object to thinking more about a complex problem. Of course, thinking longer is a neutral proposal; after pondering the Assembly Backlash Hypothesis, one might either accept it or reject it. But that does not seem to be quite what Professor Karlan has in mind. Indeed, she implies that it is chiefly the adherents of the Assembly Backlash Hypothesis who have more work to do, and that this is so because they are wrong. She says, for example, that the Assembly Backlash Hypothesis rests upon "contradictory premises,"⁹ and that "we should think longer and harder *than many frustrated and disappointed liberals have so far* about whether embracing the universalist aspiration of a colorblind Constitution will be a step forward, or a step back."¹⁰

II. THE CONSTITUTIONALITY OF MAJORITY-BLACK DISTRICTS

If Professor Karlan limited her fire to constitutional applications of the Assembly Backlash Hypothesis, I would be persuaded by her claim. The first of my four observations about Professor Karlan's argument emphasizes this point of agreement: *Neither the Assembly Backlash Hypothesis nor any ideal of colorblindness justifies reading the Constitution to prohibit the creation of majority-black voting districts.* For constitutional purposes, it suffices to observe that the Assembly Backlash Hypothesis depends upon complex sociological assumptions that might be false; it does not matter whether those assumptions are in fact false. Reasonable people can disagree about whether majority-black districts are a good means for promoting racial equality. Legislators ought therefore to be free to exercise their own best judgment about whether to create such districts. The great vice of *Shaw v. Reno*¹¹ and its progeny¹² is that those decisions reduce

7. Id. at 309.

8. Id. at 322.

9. Id. at 293.

10. Id. at 322 (emphasis added).

11. 113 S. Ct. 2816, 2832, 125 L. Ed. 2d 511 (1993) (holding that racial gerrymanders violate the Equal Protection Clause if they depart too far from traditional districting principles).

the options available to legislators trying to cope with the most important problem facing the United States, the problem of racial equality.

Of course, the Constitution often, and quite justifiably, limits legislative discretion in the name of political principle. But the Assembly Backlash Hypothesis is not a political principle. It is an empirically contingent strategy for achieving racial equality: The best way to protect the interests of racial minorities, according to the Hypothesis, is to facilitate the creation of electoral coalitions between minority voters and majority voters.

Nor is it possible to rule out majority-black districts on the basis of some other plausible constitutional principle. One might believe, for example, that the Constitution contains an absolute prohibition upon racial segregation.¹³ Justice O'Connor, in her opinion in *Shaw*, seemed to suggest that majority-black districts segregated the races. She wrote that such districts "bear[] an uncomfortable resemblance to political apartheid."¹⁴ But that is not so; newly minted majority-black districts are often highly *integrated* political units.¹⁵

Some people believe that the Constitution prohibits all laws that use racial classifications. Yet even that principle, which I think implausibly broad,¹⁶ would not render majority-black districts unconstitutional. Such districts are not defined by race. In majority-black districts, as in other voting districts, voter eligibility depends upon place of residence. Voters who show up at polling booths need not identify their race in order to prove that they are entitled to vote in the district.

In order to condemn majority-black districts, one must reach for a much broader principle. One would have to claim, for example, that legislators cannot *take race into account* when designing legislative districts. Such an expansive claim is implausible. In general, legislative districts are geographically contiguous regions that reflect

12. The Supreme Court has applied *Shaw v. Reno* to invalidate race-conscious districting schemes in *Miller v. Johnson*, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Shaw v. Hunt*, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996); and *Bush v. Vera*, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996).

13. I have argued that it does. I first endorsed a constitutional anti-segregation principle in Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. Rev. 1297, 1318-20 (1994), and elaborated my position in Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 Colum. L. Rev. 87, 92-93 (1996), and Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 Cumb. L. Rev. 515, 515-19 (1996).

14. *Shaw v. Reno*, 113 S. Ct. at 2827.

15. See, for example, Kenneth J. Cooper, *Voting Rights and Wrongs: Backers of Odd N.C. District Point to History*, Wash. Post A1 (July 13, 1993) (pointing out that North Carolina's 12th Congressional District, which was one of the districts challenged in *Shaw*, was only 53% black).

16. Eisgruber, 41 UCLA L. Rev. at 1319 & n.85 (cited in note 13).

commonalities of interest. One need not indulge in suspicious stereotyping in order to believe that interests will sometimes track racial lines. For example, racial minorities will sometimes have a special interest in fighting racial discrimination. A shared interest of this sort is no more suspect than, say, the special interest that farmers have in issues of agricultural policy, such as price subsidies for crops. The point is not that racial minorities or farmers think alike; instead, the point is that they are united by their shared concerns about an issue that affects them more than it does most other members of society.¹⁷ It would be odd (and exceedingly unrealistic) to think that legislators may legitimately take into account the shared interests of farmers, but not the shared interests of racial minorities, when designing legislative districts.¹⁸

I close this constitutional analysis with two caveats. First, I do not mean to suggest that racial gerrymanders are unproblematic from a constitutional standpoint. On the contrary, any gerrymander, racial or not, undermines important constitutional values. The calculated design of "safe seats" deprives voters of any real choice, protects stale policies against fresh challenges, and fosters cynicism about representative government. Moreover, when districts have irregular and complex boundaries, voters are unlikely to know who else votes with them in their districts; as a result, their capacity to become involved in grassroots politics diminishes. I do not know whether the judiciary has the practical capacity to remedy these problems,¹⁹ but I have no doubt that they possess a constitutional dimension. It bears repetition, however, that these constitutional difficulties have nothing to do

17. I have made this argument before in Eisgruber, 26 *Cumb. L. Rev.* at 523-24 (cited in note 13).

18. Even the conservative justices on the Supreme Court have conceded this point. See *Miller*, 115 S. Ct. at 2490 (admitting that an ethnically homogenous legislative district will sometimes be entirely consistent with traditional, respectable line-drawing practices). See also *Vera*, 116 S. Ct. at 1951 (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). As Justices Stevens and Ginsburg have pointed out, this inevitable concession undermines the logic of *Shaw v. Reno*. See *Miller*, 115 S. Ct. at 2504-05 (Ginsburg, J., dissenting) (collecting evidence that traditional districting principles are sometimes sensitive to race); *Shaw v. Hunt*, 116 S. Ct. at 1922 (Stevens, J., dissenting) ("Nor do I see how our constitutional tradition can countenance the suggestion that a State may draw unsightly lines to favor farmers or city dwellers, but not to create districts that benefit the very group whose history inspired the [Fifteenth] Amendment. . .").

19. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212, 1220-22 (1978) (arguing that considerations of institutional competence may make it appropriate to assign responsibility for enforcement of some constitutional norms to a body other than the Supreme Court).

with the Assembly Backlash Hypothesis; they apply to *all* gerrymanders, not just those that track racial lines.²⁰

Second, I do not wish to deny that racial gerrymanders may set back the cause of racial equality. I am considerably more skeptical about the long-term effects of race-conscious districting than is Professor Karlan. I agree with her, however, that the merits of such districts depend upon complex and contestable empirical premises. Those empirical issues make it impossible to defend any judicially enforceable constitutional rule prohibiting race-conscious districting.

III. THE POSSIBILITY OF ASSEMBLY BACKLASH

Professor Karlan does not, so far as I can tell, wish to limit her attack to the constitutional implications of the Assembly Backlash Hypothesis. She seems to believe that she has given us reasons to reject the Assembly Backlash Hypothesis entirely, even if it is offered only as a basis for legislative policymaking. I do not agree, and that leads me to the second of my four observations: *Professor Karlan promises to reveal a contradiction within the Assembly Backlash Hypothesis, but she does not deliver one.*²¹ I think that Professor Karlan's analysis of the empirical presuppositions of the Assembly Backlash Hypothesis is astute and important. I do not believe, however, that Professor Karlan has established that the Hypothesis is false, or even that it is less probable than competing hypotheses embraced by proponents of majority-black voting districts.

What Professor Karlan shows is that the Assembly Backlash Hypothesis can hold only if black interests and white interests occupy a complex, and perhaps delicate, equilibrium. Yet, that equilibrium, even if complex and delicate, might exist. According to Professor Karlan, the Assembly Backlash Hypothesis depends upon the claim that black interests benefit when the Democratic Party, rather than the Republican Party, holds power in legislative institutions.²² Would any sensible observer of American politics think otherwise? Professor Karlan also argues that the creation of majority-black districts will

20. *Vera*, 116 S. Ct. at 1991 (Stevens, J., dissenting) ("[T]he Court's real concern should be with the more significant harms that flow from legislative decisions that 'serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community.'" (quoting *Karcher v. Daggett*, 462 U.S. 725, 748 (1983))).

21. Karlan, 50 Vand. L. Rev. at 293 (cited in note 1) (arguing that the Assembly Backlash Hypothesis "rests on a series of contradictory premises about voting behavior").

22. *Id.* at 307-09.

hurt the Democratic Party only if particular conditions hold.²³ Those conditions might, however, in fact hold,²⁴ and the Republican Party's aggressive defense of majority-black districts in recent years suggests that some Republicans, at least, believe the conditions do hold.²⁵ Unless Professor Karlan believes that Republicans have suddenly become more sympathetic to minority rights or that they are poor judges of electoral self-interest (and if she believes either of these things, the general tone of her article ought to be less pessimistic), the Republicans' behavior is good evidence that the Assembly Backlash Hypothesis is sometimes true.

Of course, the Assembly Backlash Hypothesis will sometimes be false. Efforts to create legislative assemblies sympathetic to minority interests will sometimes fail. Legislators interested in racial equality might adopt a districting scheme that reduces the number of majority-black districts and then watch as Republicans win most of the seats anyway. But similar contingencies attach to the creation of

23. See, for example, *id.* at 317-20.

24. I do not think Professor Karlan disagrees. She states, for example, that competing studies of why the Democratic Party suffered losses in 1994 are all "almost entirely a prisoner of [their] assumptions"—an assessment that suggests that the underlying question remains open. *Id.* at 303-04.

25. At a 1990 meeting of the Southern Republican Leadership Conference, the Republican National Committee announced its plan to join forces with civil rights groups to bring suits designed to create majority-black and majority-Hispanic voting districts. Paul Taylor, *GOP Will Aid Civil Rights Groups in Redistricting; Party Sees Additional Minority Legislative Seats Boosting Republican Fortunes Elsewhere*, Wash. Post A6 (Apr. 1, 1990). Republican politicians said that the party's "interest in carving out new minority districts is to make Republican candidates more competitive in a state's remaining districts by reducing their percentage of minority voters." *Id.* For related reports, see, for example, John Harwood, *Blacks, GOP Join Forces for Reform*, St. Petersburg Times A1 (Sept. 2, 1990) (reporting that the Republican National Committee had offered computer software and data to any civil rights group wishing to design its own reapportionment plan); Michael Oreskes, *Political Memo; Seeking Seats, Republicans Find Ally in Rights Act*, N.Y. Times A11 (Aug. 20, 1990) (analyzing Republican support for the creation of majority-black and majority-Hispanic voting districts); Adam Pertman, *Nationwide, the Biggest Battle Is Over Redistricting*, Boston Globe A17 (Nov. 5, 1990) (reporting that "civil rights leaders in Arkansas and Ohio, with the backing of the GOP, are pressing court cases for more black and Hispanic seats in the US House—while Democratic officials oppose those attempts").

More recent evidence comes from the complex politics of reapportionment in Georgia. In the wake of the Supreme Court's decision in *Miller v. Johnson*, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995), in which the Supreme Court upheld a constitutional challenge to Georgia's majority-black 11th Congressional District, *id.* at 2485-94, the Democrats in the state legislature were unable to agree upon a reapportionment plan. One barrier to agreement was the possibility that black Democrats, seeking to preserve majority-black districts even at the risk of losing seats for the party, might form a coalition with white Republicans. Kevin Sack, *Legislators Letting Court Remap Georgia*, N.Y. Times A14 (Sept. 13, 1995); Steven A. Holmes, *For Very Strange Bedfellows, Try Redistricting*, N.Y. Times A16 (July 23, 1995). Legislators eventually abandoned the efforts to produce a reapportionment plan and permitted a federal court to draw a plan for the state. Kevin Sack, *Court Draws Georgia Map of Congressional Districts*, N.Y. Times A22 (Dec. 14, 1995).

majority-black districts. When the Assembly Backlash Hypothesis holds, those districts will reduce the legislative clout of minorities. And even when the Assembly Backlash Hypothesis is false, such districts may do nothing to increase the legislative power of black voters. If the white majority is strong enough, and if its interests are sufficiently distinct from those of the black minority, minority legislators will be consistent losers.

Insofar as Professor Karlan hopes that majority-black districts will not merely increase the number of black politicians but also increase the likelihood that black voters will influence legislative policy, she and other proponents of majority-black districts must contend with exactly the same empirical paradoxes and tensions that beset the Assembly Backlash Hypothesis. Legislators representing majority-black districts will exercise significant power only if they are able to form coalitions with white legislators, and their ability to do so will depend upon all the complex considerations about interests and voting behavior described in Professor Karlan's Article.

IV. THE DIFFERENCE BETWEEN DEMOCRACY AND MAJORITARIANISM

This line of argument leads directly to my third observation, which describes a self-evident but crucial feature about democratic decisionmaking: *Any minority with well-defined and distinctive interests will be a consistent loser in a majoritarian political process (unless the majority has some reason to identify with or care about the minority)*. That is why it should not be surprising that the Assembly Backlash Hypothesis can hold only if a set of relatively delicate conditions exist. The Assembly Backlash Hypothesis is a strategy for configuring legislative districts so as to enable a well-defined and distinctive minority to exercise significant influence within a majoritarian political system. Only in rare circumstances will *any* such strategy—be it the Assembly Backlash Hypothesis or the creation of majority-black districts—succeed.

My observation about majoritarianism is no doubt crushingly obvious—if majorities win, then minorities lose—but it has deep and often overlooked implications for our understanding of democracy. Democracy ceases to be an appealing idea if it is reduced to mere majoritarianism. Majoritarianism is a system wherein 40% of the people lose 100% of the time. That is not a fair way to run a political system. For democracy to deserve our esteem, it must mean government by the people—the *whole people*—not government by a majority

at the expense of minorities. But democracy so conceived makes sense only if the American people share enough in common to constitute a single people rather than a host of competing peoples.

More specifically, democratic politics is possible only if at least one of two conditions holds. The first possibility is that interests might vary greatly from person to person, so that everybody is in the majority on some issues. If that were so, everybody would occasionally benefit from majoritarian procedures, and majoritarianism might be a sensible way to implement democracy. Alternatively, citizens might take an interest in one another. They might, in other words, believe that their own well-being depended upon the well-being of their fellow citizens, including citizens in the minority. If that were so, members of the minority would enjoy virtual representation through the concerns of the majority, and majoritarianism might serve democratic ideals.

Both conditions are put in jeopardy by the existence of enduring, cohesive, and self-conscious political factions. When such factions exist, interests vary from group to group, rather than from person to person, and people in one faction are unlikely to identify with those in competing factions. In the United States, racial divisions—and especially the division between black and white Americans—have always been the most potent and dangerous source of political division. The great and enduring challenge of American politics has been to forge a single people with a common interest out of the many groups present in this country.²⁶

This observation brings me to what is, in my view, the most important and intractable empirical question about majority-black districts: Are such districts, in the long run, likely to ameliorate or exacerbate racial divisions? It is possible that the naked use of racial criteria to draw political districts will highlight racial differences and encourage people to conceive of political disagreements in racial terms. If indeed race-conscious districting reinforces racial divisions, that would be a good reason to oppose it. On the other hand, Professor Karlan praises race-conscious districting as a kind of affirmative action measure. She contends that majority-black districts enhance the possibilities for a unified politics by, for example, nurtur-

26. I have previously pursued these arguments in Eisgruber, 26 *Cumb. L. Rev.* at 516-19 (cited in note 13).

ing minority candidates who can later compete successfully to earn the votes of white majorities.²⁷

One might reasonably take either side in this empirical debate.²⁸ One also might believe that race-conscious districting has little or no impact on the way Americans conceive of their political interests. If, however, majority-black districting can soften or harden racial divisions, then those effects will be more important than any short-term impact upon legislative policy. To the extent that America is divided into racial factions, the argument over majority-black districts, whichever side you take, matters only at the margins. Draw political boundaries as you will; if racial minorities constitute distinct and cohesive interest groups, they will usually lose in majoritarian politics.

V. RACIAL EQUALITY AND AMERICAN POLITICS

I come finally to my last observation: *To the extent that Professor Karlan suggests that adherents of the Assembly Backlash Hypothesis fail to share a sincere commitment to racial equality, her claims find no support whatsoever in her argument.* I put this claim in the conditional since I am not sure whether Professor Karlan means to attack the good faith of her rivals. She never says so directly, and I am reluctant to impute any such accusation to her, but some of her rhetoric is hard to interpret in any other way. So, for example, she quotes racist statements from Justice Harlan's dissent in *Plessy v. Ferguson*,²⁹ and then maintains that "[t]he lens of colorblindness loses a bit of its clarity when we see how its very framer understood its compatibility with white educational, economic, and political dominance."³⁰ What does Professor Karlan mean by these remarks? It barely seems necessary to repeat the familiar warnings against guilt by association, but I'll do so anyway: The fact

27. Karlan, 50 Vand. L. Rev. at 306 (cited in note 1). The issue is mooted in Kevin Sack, *Victory of 5 Redistricted Blacks Recasts Gerrymandering Dispute*, N.Y. Times A1 (Nov. 23, 1996).

28. For that reason, these speculative long-term effects of race-conscious districting, like the more immediate effects predicted by the Assembly Backlash Hypothesis, cannot supply the foundation for any judicially enforceable constitutional limits upon the reapportionment process. See *Shaw v. Hunt*, 116 S. Ct. at 1910 (Stevens, J., dissenting) ("I know of no workable constitutional principle, however, that can discern whether the message conveyed is a distressing endorsement of racial separatism, or an inspiring call to integrate the political process.").

29. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

30. Karlan, 50 Vand. L. Rev. at 322 (cited in note 1).

that Harlan was a racist³¹ and that Harlan embraced the ideal of colorblindness does not mean that colorblindness is a racist ideal, or that others who adopt colorblindness as an ideal are unfaithful to racial equality.

Indeed, one might go further. It is, perhaps, a commendable feature of the colorblindness principle that it is powerful enough and simple enough to constrain even a racist like Harlan. If Americans were untainted by racial prejudice, one might urge them to do whatever advanced the cause of racial equality. Yet, if Americans were untainted by racial prejudice, the Equal Protection Clause would hardly be necessary.³² If, on the other hand, many Americans are racist, as Justice Harlan apparently was and as Professor Karlan supposes many white Americans to be,³³ then it helps to have bright-line principles sufficiently rigid and compelling to resist the pull of prejudice.

I would not make so much of Professor Karlan's reference to Harlan's racism were it a lone example. But it is not; the example resonates with larger, rather apocalyptic themes in Professor Karlan's argument announcing and criticizing "an exhaustion of the national commitment to economic and racial justice for blacks."³⁴ The willingness of some liberals to entertain the Assembly Backlash Hypothesis and to criticize majority-black voting districts is apparently, in Professor Karlan's view, one piece of this more general regression. Professor Karlan's portrait of the American political climate is so bleak that she pauses to reassure us that "no one within a mile of the political mainstream today argues that the solution [to America's race problem] is outright black disenfranchisement."³⁵ Well, thank goodness for that!

America's race problems are serious and America's commitment to racial equality is weaker than it ought to be, but, contrary to Professor Karlan's suggestions, today's politics is nothing like the

31. This is not the place to parse the strengths and weaknesses of Justice Harlan's vision of American citizenship, which was in many respects both remarkable and inspiring. See T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. Ill. L. Rev. 961, 964-65 (1992) (discussing Justice Harlan's views); Eisgruber, 41 UCLA L. Rev. at 1314-16 & n.72, 1319 n.83 (cited in note 13) (discussing Justice Harlan's views and responding to Professor Aleinikoff).

32. Compare Federalist No. 51 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 320, 322 (Mentor, 1961) ("If men were angels, no government would be necessary.").

33. See, for example, Karlan, 50 Vand. L. Rev. at 314 (cited in note 1) (suggesting that white voters left the Democratic Party because it became identified with black interests).

34. *Id.* at 292. See also *id.* at 321-22 (comparing opponents of majority-black districts to the progressives who betrayed Reconstruction).

35. *Id.* at 321.

racist reaction that choked off Reconstruction.³⁶ President Clinton in his first term appointed more racial minorities to political office than did any other President.³⁷ Far from obstructing black enfranchisement, the Clinton Administration lobbied for and secured passage of the Motor Voter Law, which requires states to permit citizens to register to vote when they apply for a driver's licenses.³⁸ This President, whose commitment to racial equality is real if imperfect, was re-elected by a substantial margin (though he might have lost if Colin Powell, an African American, had run against him). Shortly after Clinton's election, the *New York Times* reported statistics suggesting that during the 1990s the quality of life for African Americans had improved in encouraging and sometimes unprecedented ways.³⁹

The *New York Times* report, however, is hardly reason for unbridled celebration. One of the improvements reported, for example, was a decline in the percentage of black babies born out of wedlock: it dropped from just over 70% to slightly more than 69%.⁴⁰ Both numbers are shockingly high. They put the debate about majority-black voting districts in perspective; unfortunately, it is hard to believe that the creation or elimination of such districts will have much effect on a problem with such deep sociological roots. At a minimum, though, these numbers reinforce Professor Karlan's suggestion that we must think more intensively and more creatively about how to achieve racial equality in the United States.

That effort must, of course, include a critical reassessment of conventional liberal wisdom. The Assembly Backlash Hypothesis, which questions the value of majority-black districts, is an effort in that direction. Professor Karlan's useful analysis points out why the Hypothesis might be false, but also leaves open the possibility that it

36. C. Vann Woodward reports that at the close of Reconstruction even some of "the Negro's champions," such as the *New York Tribune*, believed that "[after] ample opportunity to develop their own latent capacities' the Negroes had only proved that '[a]s a race they are idle, ignorant, and vicious.'" C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* 214 (Oxford U., 3d ed. 1991) (quoting *Southern Society*, N.Y. Tribune 4 (Apr. 7, 1877)).

37. Steven A. Holmes, *On Civil Rights, Clinton Steers Bumpy Course Between Right and Left*, N.Y. Times A16 (Oct. 20, 1996).

38. *Id.* The bill was passed over a Republican filibuster and was projected to register as many as 50 million new voters. Adam Clymer, *Voter Bill Passes in a G.O.P. Defeat*, N.Y. Times A1 (May 12, 1993). The legislation is codified at 42 U.S.C. §§ 1973gg et seq. (1994 ed.).

39. For example, the percentage of black babies born out of wedlock dropped for the first time since 1969, and the poverty rate for black households fell below 30% for the first time since the Census Bureau began keeping track of the statistic in 1959. Steven A. Holmes, *Quality of Life Is Up for Many Blacks, Data Say*, N.Y. Times A1 (Nov. 18, 1996).

40. *Id.*

might be true. We do the cause of equality no credit if we doubt that adherents of the Hypothesis share an appropriate commitment to that ideal.

VI. CONCLUSION

In one respect, majority-black districts are a sure bet: they are certain to increase the number of black legislators even if they do not produce legislative assemblies sympathetic to black interests. This benefit is nothing to sneeze at. Black politicians may become powerful national leaders and, even if they do not, can help to articulate interests and needs which might otherwise go unnoticed. The Assembly Backlash Hypothesis thus asks black Americans to gamble. They give up a sure thing—more black legislators—for a chance at something that may be nearly impossible to achieve: legislative assemblies more sympathetic to black interests.

This could be a rotten gamble. Neoliberal critics of race-conscious policies, including affirmative action and the creation of majority-black voting districts, maintain that, in the long run, colorblindness will lead to a more egalitarian ethic in American society by minimizing the importance of color. These projections are quite speculative, and they might be dead wrong. As has been noted, it is possible that race-conscious efforts to nurture black politicians will be the most successful means to overcome racial polarization in American politics.

So the colorblindness gamble asks blacks to give up sure gains (more black people in elite positions) plus speculative future improvements in exchange for nothing but speculative future improvements. In light of the way American history has treated blacks, it is not surprising that most black leaders greet this gamble skeptically. And in light of the fact that some who favor the gamble are conservative Republicans with a poor track record on civil rights, some people will inevitably worry that the gamble is a swindle.

These considerations help to explain the polarized character of political debate about colorblindness. They also account, I suspect, for some of the heat in Professor Karlan's rhetoric. Yet, the fact that the benefits of colorblindness are speculative does not foreclose the possibility that they not only exist but also are weighty enough to justify abandoning the concrete benefits of race-conscious policies. In other words, neoliberal critics of race-consciousness might be right. More specifically, majority-black districts may do more harm than good.

In the face of terrible and entrenched inequality, we inevitably confront unpleasant choices. We must pay attention to the long-term consequences of policies, and we must be willing to think openly and honestly about those consequences. Professor Karlan's detailed and rigorous analysis of the Assembly Backlash Hypothesis is an important contribution to that enterprise. It leaves us, however, with as many questions as it answers. In this area, as in much of politics, we may have to select among cloudy options on the basis of highly contestable judgments about human nature and inferences from history.