DEMOCRACY AND THE REPRESENTATION OF MINORITY INTERESTS

Richard H. Pildes, Professor of Law

New York University School of Law

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The issue of appropriate political representation of Aminority interests@ in democratic institutions raises complex questions of both democratic theory and institutional design. I will concentrate here primarily on the intriguing issues of institutional design, but those issues must first be framed by some consideration of the theoretical problems posed by how to conceive of Aminority interests@ within a democratic political system.

1. Theory*.*

The theoretical problems arise because, absent a rule of unanimous agreement, democratic choice necessarily entails that there be political winners and losers. Individual rights guarantees can protect political minorities against certain, narrowly defined intrusions on aspects of personal autonomy, dignity, and self-definition that liberal societies have come to consider beyond the appropriate bounds of majoritarian control. But individual rights protections can do only limited work; most constitutional rights actively enforced by courts still take the form of negative liberties that create spheres of individual immunity. But protected spheres of immunity do little to ensure the affirmative interests of individuals in the political minority, either to have those interests fairly considered in democratic decisionmaking or, more aggressively, to have the substantive interests of political minorities actually realized in the making of public policy. Nor, to the extent that minority groups as such have political interests, such as in the preservation and creation of various cultural goods constitutive of the group=s identity, do individual rights protections typically afford protection for these kind of constitutive common goods. If democracy requires an appropriate level of respect, protection, and promotion of the interests of political minorities -- whether taken as merely the aggregated interests of individuals who comprise a minority or as certain common

cultural or other goods that a minority group as such might collectively share -- that protection and promotion will not effectively be provided through individual rights guarantees. If such respect and promotion of minority interests is valued, it is therefore more likely to come if it can be built in advance into the very structures of democratic institutions themselves.

The first theoretical question is what should define a Aminority@ for purposes of a just democratic theory. Put in other terms, we require some theoretical account of *which* of the various Aminorities@ that will exist in any heterogeneous political community ought to be singled out for special protection in the institutional design of representative institutions. Not all Aminorities@ can be protected against the outcome of democratic processes without turning the idea of democracy itself on its head. Minorities cannot be Aentitled,@ either legally or morally, to prevail in democratic processes. We cannot escape the fact that democracy will, in its essence, mean that those who cannot marshal sufficient political support will lose political battles.

Pluralist political theory, in its ideal form, provides a useful starting point in considering when the losses of certain political minorities should be considered, not an acceptable consequence of democracy, but a problem for the design of democratic institutions. Pluralist theory suggests that there is no need, in fact, to worry that minority interests will not be adequately addressed. In ideal pluralist theory, the political majority is made up of a constantly shifting constellation of various minority interests; some of these interests prevail on some issues, others of these interests prevail on other issues. If a particular minority loses one political battle today, it is just as likely to win a different political battle tomorrow. Over time, in this vision, the benefits and costs of collective action are distributed across all the diverse interests in a way that ensures a rough equality of process and outcome. It is identifying the circumstances in which democratic systems depart in practice from this pluralist ideal, then, that we can begin to understand when the defeat of minority interests might pose special problems for democratic institutional design. These problems might be thought of either as ones of political morality -- it is morally unfair for minority interests to lose to majorities in these circumstances -- or as ones involving the social acceptability of democratic institutions -- when minorities lose out in these circumstances, democratic processes will not be accepted as fair and will therefore, perhaps, not be sufficiently stable. Moral or pragmatic reasons, then, might suggest that representative institutions should be designed specifically to represent the kind

of minority interests that, in different political communities, are unlikely to be protected through the standard pluralist bargaining process that characterizes well-functioning democratic systems.

Pluralism can fail under any of several circumstances. Some of the theories that seek to identify these circumstances focus on the outcomes of democratic processes; other theories focus on perceived defects in the processes by which democratic decisions are made. One circumstance is when the interests of majorities and minorities are both static over time and when the majority is sufficiently unified that it is able to systematically defeat, time and time again, the interests of the minority. These clashing interests could be defined in economic terms; religious terms; ideological terms; racial, ethnic, or tribal terms; or along any other dimension. But if a unified, dominant majority exists along any of these dimensions and chooses to express its interest politically, the minority will lose out regularly. The pluralist assumption of tradeoffs and bargains among diverse minority interests no longer holds. This was the situation early in the history of the United States with respect to ideological differences about the desirable nature of government itself. Many states were divided between those who favored a strong, expansive, centralized government (the Federalists) and those who favored more decentralized, local control (the Anti-Federalists). Though states were often sharply split between supporters of each, the structure of elections and political representation could be designed either to take these divisions into account or to ignore them. Initially, some states chose to ignore these differences altogether; they did this by holding at-large elections for their representatives to the United States Congress. In an at-large election, the majority in the entire state votes for each and every political representative to the national legislature. Thus, if there are eight representatives to be elected from the state, and 55% of the state=s voters support the Federalists, in an at-large election, that same statewide majority would be able to control all eight seats. The entire delegation of representatives to the national legislature would therefore be Federalists. This is precisely what happened initially in some places in the United States. The result produced an outcry from supporters of the Anti-Federalists, who understandably believed it unjust that they were not able to elect a single representative of their choice, despite having 45% of the voters in the state. This outcry led to a change in election structures, with states replacing at-large elections with what are called individual-district elections; rather than have all eight representatives elected from the entire state, a districted election would create eight single-member districts in different parts of the state. Each

of these districts would elect one representative. As long as the minority interests, the Anti-Federalists, were geographically concentrated enough to be the local majority in some of these individual election districts -- as they were -- they would be enabled to elect at least some representatives of their choice. Whether this result is considered more just, or a necessary pragmatic accommodation to ensure that democratic institutions were perceived as fair and responsive, the United States eventually moved to a system of elections for Congress in which each representative is elected from an individual single-member district. This enables interests that are a minority in the entire state, but which might be a local majority in some regions, to have some level of political representation.

Note that in the example just discussed, the majority is not motivated by hostility, contempt, or prejudice against the minority. The majority simply has a distinct set of political ideologies, as well, perhaps, as a distinct set of political interests. But the majority need not be invidiously motivated for the consistent defeat of the minority=s interests to occur. The mere fact of that consistent defeat, regardless of what motivates is, might be enough to generate concerns -- as it did in early United States history -- that a better designed representative institution would be one that ensured, in these circumstances, some degree of minority representation.

A second circumstance in which the pluralist ideal no longer holds is when the majority does act for reasons that reflect hostility or prejudice towards the interests of minorities. In this context, the pluralist model fails because the majority is not willing to bargain with or in other ways accommodate the interests of the political minority. In the United States, this has been the context with respect to racial minorities in certain eras. Politically interests were conceived and expressed along the dimension of race, and the white majority was hostile to the interests of the black minority. A unified, consistently hostile white majority can systematically defeat the political interests of racial minorities, when groups conceive of themselves and their political preferences in these terms. We can conceive of this situation as one involving a democratic system that regularly discriminates against the interests of racial minorities, because the dominant, unified majority is affirmatively hostile to those interests. This situation was addressed in the United States with the passage of the Voting Rights Act. That Act applies an anti-discrimination model to the structure of political representation. The Act is triggered by a finding that, in the specific jurisdiction in question, voting is Aracially polarized.@ This means that in elections between

white and black candidates for office, white voters consistently prefer white candidates, black voters consistently prefer black candidates; the white majority is therefore able to consistently defeat candidates that black voters seek to elect. When voting is racially polarized in a specific jurisdiction, the Act then requires that some number of single-member election districts be designed where the black minority is concentrated enough to become an electoral majority. The number of such election districts must be roughly proportionate to the percentage of black voters; thus, if the 30% of the eligible voters are black, 30% of the election districts must have black electoral majorities if voting is racially polarized. The Voting Rights Act thus seeks to ensure roughly proportionate representation for those minorities whose candidates the majority is able regularly to defeat because the majority refuses to vote for any candidates the minority voters prefer.

Two other circumstances are worth mentioning in which specific minorities are treated in some political systems as warranting special representative protection. One occurs when the minority does not lose time and time again, but when certain issues are considered so central to the interests and identity of that minority, that even a single loss on these issues is judged to be too high a cost. Thus, with respect to single issues, minority interests are sometimes recognized in the design of democratic institutions. These issues are typically the kind of cultural goods that groups might consider constitutive of their identifies or whose preservation is necessary to enable the group to maintain its identity. For example, the Belgium constitution requires that any legislation affecting the Acultural autonomy@ of the country=s two principal linguistic groups -- the Dutch-speaking majority and the French-speaking minority -- requires the approval, not only of two-thirds of each chamber in the legislature, but also a majority of the legislators from each linguistic group. These kind of Aconcurrent majority@ requirements, or the creation of a minority-veto power over certain issues, is a way that representative institutions are sometimes designed to protect certain interests perceived to be critical to the flourishing of minority interests. Finally, even if the majority is not currently acting out of hostility or prejudice toward some minority interest, the history of particular democratic states, judged from the present, might reflect a record of exploitation. In these circumstances of historical oppression, democratic states can build into their representational structures distinct representation of the relevant minority interests. This can be done either as a preventative measure, to

minimize the risk of future exploitation, or from a sense of perceived moral obligation -- a form of rectifying past injustices by making democratic institutions more favorable to these minority interests.

The distinction between Aordinary@ losses minority groups suffer in democracy and the kinds of groups whose political losses justify, morally or pragmatically, special representational structures is no simple theoretical matter. The examples of the latter are offered not as an exhaustive taxonomy of the possibilities, but as a means of prompting theoretical reflection on this elusive question. There are diverse circumstances in which minority interests might justifiably claim the legitimacy or need for representation as such in democratic institutions. No analytical formula can specific which groups, in which circumstances, warrant special representational status. That judgment will be informed by the values and principles articulated above, but the judgment inevitably reflects a moral and political self-assessment of a political community=s own history and differences.

Once the concept of Aminority interest@ is identified, there is a second theoretical question that must be confronted: what does it mean to Arepresent@ that interest appropriately in the design of democratic institutions. This question is often, but wrongly, taken for granted. Typically, we assume that appropriate representation means that the relevant group will have its representatives sitting directly in the legislative body. This also usually means representatives who Amirror@ the minority community in the relevant ways; if the minority is conceived in religious terms, for example, as Catholics, then the representative will be the choice of that community and most likely Catholic. This is known as *descriptive representation*. Political representation, on this view, appropriately takes into account the relevant minority interests when some portion of the seats is occupied by those who bear the same characteristics that make those interests politically salient: race, religion, ethnicity, ideology, tribal affiliation, and the like. Members Alook like@ the minority interests they represent. But there is an alternative way to think about political representation, which is in terms of *substantive representation*. On this view, what matters is whether the substantive interests of minority groups are effectively realized through democratic processes -- not how many representatives, with what characteristics, actually sit in legislative bodies.

If descriptive and substantive representation were always linked, there would be no need to distinguish between them. We often assume that they do go hand in hand; if more members of certain minority interests are represented in the legislature, is there not a correspondingly greater likelihood that

there will also be greater probability of realizing the substantive interests as well of that minority group? But though descriptive representation is often confused with substantive representation, they are not the same. In the most obvious sense, descriptive representation does not ensure the actual substantive representation, and certainly not the actual substantive realization, of minority interests. Even with representation of minority interests in legislative bodies, a minority remains a minority, of course, even when formally represented. Merely because the body has some portion of minority interests represented in the descriptive sense does not mean that the majority of legislators will accept those interests anymore than the majority of voters do. Descriptive representation is often treated as an end in itself, but if what we ought to care about is the actual, substantive interests of certain minority communities, we should keep in mind that descriptive representation cannot in itself ensure that.

But the concern is not just that descriptive representation cannot ensure substantive representation. For the two can actually directly conflict: the institutional design mechanisms that seek to ensure descriptive representation of specific minorities can actually undermine the likelihood that representative institutions will realize the substantive political interests of those same minorities. This is surprising, but it is possible because descriptive representation focuses on *parts* of a legislative body, but policymaking is done by the legislative body *as a whole*. A focus on ensuring descriptive representation might ensure that more minorities are represented, but if they now sit in a body that overall is more hostile to their substantive political interests, policymaking will be less, not more, responsive to the substantive preferences of these minority communities. This can happen when an unintended but unavoidable consequence of the means used to enhance descriptive representation turns out to cause the legislature as a whole to have fewer members likely to be responsive to minority substantive interests. Indeed, this is precisely what has happened in the United States during the 1990s. In an effort to ensure more descriptive representation of racial and ethnic minorities when voting was polarized along racial or ethnic lines, the national Voting Rights Act, mentioned above, required that minority voters be concentrated and made the majority in a certain number of election districts. This did lead to more minority legislators being elected throughout the country, including to the United States Congress. But at the same time, as minority voters were concentrated into a few districts, they lost influence over all the other districts in which they were not a majority. The legislators elected from these other districts had no reason to be

responsive at all to the interests of minorities who were no longer their constituents at all. As sophisticated social scientific studies have documented, the net effect of these policies has been to create legislatures less likely overall to support and enact legislation that reflects the substantive preferences of minority voters -- despite the greater presence of minority legislators.

This ironic effect is a direct consequence of the means used to enhance descriptive representation. In some contexts, there can be a direct tradeoff between enhancing descriptive representation and enhancing substantive representation. The reality of this tradeoff is often not appreciated, but as we gain more experience with designing democratic institutions to ensure fair minority representation, we have become aware of the potentially self-defeating character of certain efforts in this vein. In circumstances where a tradeoff between descriptive and substantive representation is unavoidable, institutional designers must therefore choose which of these values ought to be pursued. Descriptive representation can still have numerous benefits: it can give minorities a greater sense of inclusion in democratic bodies, it can create spokespersons for minority interests who now have an important public platform, and it can help get issues onto the agenda for discussion. These are important benefits. But they can come at the cost of substantive representation. Substantive representation is measured by the voting patterns of a legislature as a whole on the enactment of actual policies; diminished substantive representation means that legislatures are less likely to enact the actual substantive policies that minority voters prefer (this discussion assumes throughout, of course, that the relevant minority voters have cohesive political preferences). I do not mean to argue that substantive representation is more important ultimately than descriptive representation; I believe that minority communities themselves might value the two differently in different context. But I do mean to suggest that there is a serious question that must be confronted about whether to prefer descriptive or substantive representation, when the two directly conflict, and given other institutional features in particular systems, there can indeed be such conflicts.

The issue of Aminority representation@ thus poses two immediate theoretical questions. First, different political communities must determine which of the various potential Aminority@ interests or groups warrant special representational focus and for what reasons. Second, decisions must be made about what kind of Arepresentation@ should be the focus of this special concern: whether the goal should

be to enhance the presence of minority community representatives or whether it should be to seek to ensure that the overall design of a legislature as a whole makes it more likely that the substantive policy preferences of minority communities will be realized. This leads into more direct discussion of questions concerning institutional design.

2. Institutional Design.

 Once choices have been made about which minority interests warrant special representational concern, that concern can be reflected in the design of democratic institutions in a number of different ways. The ways of Ainstitutionalizing democratic differences@ are myriad, but I will identify here at least two general types of choices that can help organize reflection on how minority representation might best be achieved in diverse contexts. The two dimensions I identify here go to some of the most profound institutional design decisions systems must make in deciding not whether, but how, to represent minority interests.

A. Targeted Versus Universal Approaches.

Democratic systems can target specific, identified minorities for special political representation. In this approach, a centralized authority -- whether through a constitution or national legislation -- identifies certain specific minority groups for representation and builds that identification into the democratic process. Alternatively, democratic systems can design electoral process and representational institutions so as to empower Aminority interests@ in a more general, universal way, without identifying the specific minority groups that will be benefitted from this focus. In this approach, minority interests are enabled, if they choose to self-identify and act politically as a cohesive minority, to achieve political representation. But the democratic framework merely enables this possibility and it does so across the board for any minority group of a certain size.

Targeted approaches include, for example, the structure of the seven-member Federal Council that governs the executive branch in Switzerland. By understanding and practice, though not formal law, the linguistic groups in Switzerland are understood to be entitled to representation roughly proportionate to their size: four or five German speakers, one or two French speakers, and often an Italian speaker. The Amagic formula@ that controls representation on this Federal Council also locks into place representation of the major political parties in rough proportion to their support: the three large parties --

Christian Democrats, Social Democrats, and Free Democrats -- each of which has about one-fourth of the seats in the lower house of the legislature, and the Swiss People=s Party with about one-eight of the seats, share the seven seats in a 2:2:2:1 formula established in 1959. The emphasis on minority representation in the United States reflected in the enactment of the Voting Rights Act, originally in 1965, similarly employs a targeted approach. This national legislation identifies specific minority groups for special statutory protection; when those identified minority interests (but not others) are subordinated due to a hostile, bloc voting majority, the Act requires that election districts be redesigned. The Act singles out, for example, racial, ethnic, and language minorities. If their candidate preferences are regularly defeated, a districts must be constructed, where possible, in which these minorities then become the majority of voters. Thus, the Act leads to the creation of districts controlled by minority voters that the Act specifically singles out for this unusual representational protections. When the Act applies, the result is single-member election districts controlled by members of racial, ethnic, and language minorities. But no other minority groups benefit from these special statutory protections. Like Switzerland, Belgium institutions also specifically build in targeted minority representation; unlike Switzerland, Belgium has formalized these commitments by writing them into the country=s constitution. Thus, the Belgium Constitution requires that the executive cabinet be comprised of an equal number of French-speaking and Dutch-speaking Ministers. Belgium=s constitution also includes the concurrent majority provisions, described above, that give each of the two major cultural groups in the country a veto power over legislation affecting issues of Acultural autonomy.@ This concurrent majority requirement is a form of targeted, special representational protection to ensure that a majority cannot easily infringe upon the central interests of a political minority.

Federalism can be conceived as a form of targeted representation of minority interests, though it also has unique features. By singling out geographic regions for distinct political representation, federal structures target these regions as warranting distinct representation. Because national minorities are often majorities in local regions, federalism is a mean of giving those local majorities political representation they would not otherwise have. In some contexts, geography is strongly correlated with distinct political interests, as when cultural, religious, or other minorities are geographically concentrated. In these circumstances, federalism uses geography as a proxy for those underlying, distinct minority

interests. Rather than targeting those interests directly, federalism enables those interests to have political representation by structural national political representation through territorial units, some of which will be dominated by these minority interests. This was one of the justifications for the strong federal structure adopted in the recent South African Constitution. Because there was an intense, tribal identity that characterized one minority in the new nation, the Zulus, and that would have led to vehement resistance in that group to a strict majoritarian system, South Africa=s constitution makers were prepared to ensure some representation for that minority interest. But they did not so through entitling that group, as such, to specific representation -- as in the Belgium example. Instead, because this group was geographically concentrated, the constitution identified KwaZulu-Natal province, along with eight other provinces, and created a federal structure in which these provinces would be represented as such in one chamber of the legislature. Here geography is chosen in part because it is an indirect, but strongly correlated, marker for distinct minority identities.

In other contexts, geography does not correlate in strong ways with sharply defined minority groups. Nonetheless, federal representational structures can be desirable as a means of fragmenting the political power that would otherwise lie in the hands of a single, nationwide majority. Because federalism targets specific geographic regions for representation, it is a form of targeted enhancement of minority participation. At the same time, because the demographics, interests, and groupings in geographic regions can change over time, federal structures have more potential fluidity than forms of representation that identify and target specific groups, such as those identified by race or language. Federal structures can thus be seen as more intermediate in form than the most rigidly targeted forms of enhanced minority representation; they have the capacity for permitting changes in the nature of minority representation to occur from inside the local units of representation.

Universal, non-targeted forms of enhanced minority representation are those that enable any minority of a certain size to have political representation. In these non-targeted designs, there is no prior identification by the state of which specific minorities justify special representation. The proportional representation electoral system that characterize nearly all European systems are a form of non-targeted minority representation. But less well-known forms of universal enhancement of minority representation also exist. The voting mechanisms known as semi-proportional are an example. These include

cumulative voting, single-transferrable voting, and limited voting. Cumulative voting is exemplary. Cumulative voting is a simple concept: each voter is given as many votes to cast as there are seats to be filled. Voters are free to distribute their votes among candidates in any way they choose. This approach enables voters to express not just their raw preferences, but the intensity with which those preferences are held. If a jurisdiction is going to elect five representatives, for example, a voter has five votes to distribute. The voter can cast all five votes for one candidate, one vote each for five candidates, or anything in between. If minority groups with common interests and strong preferences concentrate all their votes on one candidate, that candidate can be elected to office even if the majority is hostile to the minority=s interests. If the minority community votes cohesively and concentrates all its votes on one candidate, that group need only be just larger than 16.6% to be able to elect one member to the five-member representative body (the formula for determining how large a minority must be to elect one candidate in a cumulative-voting system is $1/(1+ N) + 1$, where N is the number of seats to be filled). Single-transferrable voting and limited voting are variations on this same basic concept; for various reasons, single-transferrable voting is perhaps the ideal version of these semi-proportional systems. Single-transferrable voting is used currently for all legislative elections in Ireland and some in Australia. Cumulative and limited voting are used in many local jurisdictions in the United States. These are just a few examples of devices for enhancing minority representation in universal, non-targeted ways.

These non-targeted methods have advantages and disadvantages compared to more targeted minority representational devices. Institutional designers must weigh these effects in specific contexts to judge among competing methods of enhancing minority representation, when a prior decision has been reached to do so. These non-targeted methods enhance minority representation within the framework of a universal conception of democratic citizenship. Voters voluntarily define their own interests and the voting affiliations that best promote them. These non-targeted systems enable Aminority@ voters to decide for themselves whether their political values are better defined by what they have in common or by what they do not. Any group that feels the urgency to vote cohesively is able to do so. Moreover, the identity of Aminority@ groups can shift easily over time, without the difficulties involved in changing formal institutions. In different election contexts, different aspects of a voter=s interest and identity might be salient; these universal systems of minority representation enable voters to express the interests that

most motivate them in particular contexts. Thus, the state does not essentially assign (or recognize) a pre-existing political identity to Aminority@ interests and groups. The state does not determine in advance that certain minority groups are sufficiently monolithic so as to share a political identity, and to share that identity one election after another. And as interests change over time, those shifts can immediately be translated into representational structures.

Targeted approaches, especially if entrenched into constitutional structures, thus run the risk of more deeply embedding into their societies the minority identities that targeted representative institutions make salient. The concern is not just that if the targeted minority interests no longer have as unified interests, the institutions of the state will still be designed as those interests endure. The concern is that, precisely *because* the state has made these identities salient through formal democratic institutions, institutional structures will now encourage majorities and minorities to identify in particular ways and create electoral incentives for doing so. The paradox of targeted minority representation is that the very effort to find a political way to accommodate or minimize difference might turn out to more deeply entrench difference. Institutional designers thus confront another theoretical and pragmatic question. Should enhanced structures of minority representation be conceived as a politics of the second-best, one only made necessary by circumstances that should be hoped to be contingent and fluid? On this view, the democratic ideal is the ordinary pluralist process in which no minorities are permanently blocked, for whatever reason, from a fair share of political success. If this is the ideal, then enhanced representation for minorities might be a temporary necessity, but should not be considered a permanent ideal. In that case, non-targeted means of responding to this necessity might be more desirable; those means have a built-in capacity for change, should circumstances change. From a pragmatic perspective, the judgment must also be made whether the differences in a particular society are already so deeply embedded that the risk of further entrenching them through targeted representation-enhancing devices is outweighed by the risk of instability, oppression, and lack of minority acceptance of the political system if these targeted devices are *not* used.

There are other advantages of targeted approaches as well. Because non-targeted approaches enable any self-identified minority of a particular size to gain representation, these approaches create the possibility that the political extremes will gain representation. Including these interests in governance can

be a benefit in some contexts, but the public platform and potential legitimation these interests receive by being part of the public institutions of the state can also be a cost. Non-targeted approaches thus run the risk of fostering political extremism by interests other than those which might justifiably warrant special representational status. In contrast, targeted approaches, by identifying particular minority groups, give institutional designers more control over how much minority representation, to what interests, will be provided. Targeted approaches will also often be a more convincing signal of credible pre-commitment to minority interests that they will be have effective representation. When new democratic systems are being formed in the midst of intense cleavages, a minority group might demand reassurance that its interests will be formally represented in democratic institutions. Targeted structures, such as representation by geographic region or consociational structures with identified minority groups be given minority veto powers, can be a more effective form of security to convince minority groups that their interests will be represented.

B. Malleable Versus Entrenched Representational Structures.

The second dimension of choice over institutional design is already suggested in the above analysis. But it is worth making more explicit, because analysis of minority representation often fails to pay enough attention to this dimension of choice.

The structure of democratic institutions is strongly constrained by the constellation of political and other circumstances that exist at the moment those institutions are formed. Yet this constellation might be a product of contingent factors that may not endure long into the future. Nonetheless, institutional designers often make the mistake of not just taking into account the particular Aminority interests@ that dominate at the moment of institutional creation, but of entrenching those particular differences into virtually permanent institutional form. For example, when the United States was formed, differences along state lines were especially salient. Today,

those differences are far less central to the way citizens identify their political interests and communities. Yet the structure of the United States Senate, with representation based on states, is written into the United States Constitution. In addition, the Constitution further underwrites this structure of representation by explicitly prohibiting any state from being denied its representation in the Senate without that state=s consent. Despite the greatly diminished centrality of state identity as the most

significant dimension of minority interest in the United States, the United States Senate has thus continued for over 200 years to protect state-based political identities and interests.

This is one of the design problems that regularly create long-term pathologies in democratic institutional structures. It is unclear why institutional designers so frequently fail to recognize that the differences of the moment are not necessarily going to be the differences of the future, and whether it is political constraints, or lack of foresight, that generates this problem. Universal, non-targeted structures for minority representation are, by their very nature, more malleable than targeted ones. Although these non-targeted structures require some threshold judgments that might be constitutionally entrenched -- such as whether the threshold of exclusion in proportional representation systems should be 5% or some other level -- they nonetheless have the built-in capacity for change noted above. But even if targeted representation is judged more appropriate in specific contexts, that representation need not be entrenched in relatively permanent form.

Targeted structures of representation can be more or less rigidly entrenched. Where politically feasible, sunset provisions, which automatically terminate particular provisions after a fixed period of time, can be a way of building malleability into electoral processes and institutions. Where entrenched representational structures are not easily changed, this can be a catalyst for judicial intervention; if the design of the system both targets specific minority interests and entrenches them, those interests will have substantial political power to resist any political efforts to update representative structures. Those who are elected under existing rules are unlikely to be interested in changing those rules. Though different constitutional systems have different substantive provisions that might bear on this problem, the general features of these circumstances provide a strong, functional case for judicial application of constitutional doctrines. Using the United States as an example again, this has been precisely the history of one of the most important applications of the power of judicial review. For much of United States history, state legislatures were structured so that representation in one chamber was based on geography rather than population; this gave rural interests more representation than they would otherwise have. Over the course of the 20th Century, the United States became much more urbanized, which resulted in the population disparities between rural and urban districts becoming far more substantial than when these institutions were originally designed. Yet because those who were elected to them were in control,

there was no effective political mechanism by which those institutional structures could be seriously reconsidered. For many years, the United States Supreme Court refused to hear constitutional challenges to these structures; the Court concluded that such challenges to the basic structures of political representation were essentially Apolitical questions@ and therefore not appropriate for courts to entertain. But after years of legislative inactivity, the Court reversed itself, held that the structures of political representation did raise constitutional questions, and then developed the requirement that all election districts had to have roughly equal numbers of voters to ensure that political representation was consistent with the constitutional obligation of political equality. Thus, targeted structures of representation were forced to become more malleable through constitutional doctrine in the United States. Because legislators are so unlikely to change the structures of representation under which they were elected, an important, well-justified role for courts enforcing constitutional principles can be preicsely to ensure that these structures remain consistent with such principles. But it is far better to build this malleability into the original forms by which representation occurs, rather to rely on courts to ensure that representation changes over time in an appropriate way.

There are forms of minority representation that are intermediate between entrenched and malleable types. Federalism is perhaps best understood in these terms. On the one hand, federalism is typically written into the constitutional architecture of a political system; in that sense, it is a targeted, entrenched technique of minority representation. On the other hand, basing representation on geographic units, rather than linguistic, religious, racial, or ethnic identities, inherently builds in greater possibilities for change over time. As the circumstances of a country and different regions change, people face new incentives and disincentives for where to locate. With freedom to move, people can themselves dilute the kind of differences originally associated with specific geographic regions simply through moving to new regions. Thus, differences that seem to be sharp and difficult to negotiate at the formation of a country=s institutions can get eroded over time simply through such movement. The differences that were once considered too rigid to permit the ordinary pluralist bargaining process to go forward can weaken over time through the way people redistribute themselves over time. In the United States, for examples, people strongly identified themselves and their interests with the States in which they lived when the Constitution was formed. That is why the original political context of the United

States Constitution required State-based representation in national political bodies. But over time, people in the United States have come to identify their political interests and identities much less in terms connected to the specific State in which they reside. State boundaries have much less salience than they once did. The political differences that underwrote the initial pressure for State-based representation have, to a considerable extent, dissolved. But federal structures of representation did not entrench these differences; instead, federal structures could remain in place while people could move and dissolve the meaningfulness of these original differences from within.

If our political ideal is that of the pluralist vision, it is all to the good when the kinds of differences that originally require special minority representation can dissolve over time. This is not based on any requirement that minority identities be assimilated into that of the majority. Instead, it is based on the more limited ideal offered by the pluralist ideal: society and politics will contain many, diverse, minority interests, but none of these interests will be shut out of the ordinary bargaining and compromising characteristic of a well-ordered democratic system. There will still be minority interests and identities, but none of these will be sharply segregated from other interests and identities to such an extent that the ordinary democratic process cannot accommodate those differences. Special representational commitments to certain minority interests may be necessary at particular moments in a country=s history, including when its basic democratic institutions are designed or reformed. Profound political differences that correlate with race, language, religion, tribe, geographic area, or other factors might have to be reflected in the institutions of representation. But we would prefer for the depth of those differences, in the political sense, to diminish over time. We can institutionalize these profound differences in different ways. If a system does so through identity-based rules -- such as in consociational structures -- those identities are likely to follow people wherever they locate. When representation is assigned on the basis of race or religion, for example, people cannot escape these structures except, in the latter case, by changing their religion. When representation can instead by assigned on the basis of federalism and geography, people *can* escape these differences by patterns of movement that erode the political significance of geographic boundaries. Federalism should thus be seen as a more attractive concession than other possibilities to the need to recognize differences in the design of democratic institutions.

When designing representation, then, institutional framers should keep in mind that special minority representational devices are usually a second-best necessity because the ideal of the pluralist vision cannot yet be realized in a particular context. But the choice among structures for enhancing minority representation should then be made in a way that enables, rather than frustrates, the realization of the pluralist ideal as circumstances change. Malleable structures of minority representation more readily do this than entrenched structures. Even if structures of representation must be entrenched, because the original political circumstances require that, those structures can be designed so that they automatically must be revisited, or so that they automatically dissolve, after some specified period of time. And on some occassions, intermediate forms of representation, such as federalism, might be available that are not fully malleable, but that do allow the gradual dissolution of what once seemed to be nearly intractable political differences.

The problem of difference is one of the most pressing problems for modern democracies. Liberal societies now tolerate differences, rather than seeking to ground democracy in a strongly shared and unified political culture. But that commitment creates heterogenuous socities whose profound differences might demand, either morally or pragmatically, special representational protection for specific minority interests. Which interests justify such treatment, and in what form, requires answering the question of both what should count as the relevant kind of Aminority@ and what should count as an adequate kind of Arepresentation.@ But beyond these theoretical challenges are equally important questions of institutional design. Minority representation can be pursued through either targeted or univeral institutional structures. It can also be pursued through either entrenched or malleable devices. As democracies struggle with how to ensure fair consideration and treatment of all the interests and citizens that comprise their communities, it is important that institutional designers have before them the full range of options for ensuring that political represention ensure respect for both majorities and minorities in democratic states.

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[1]Some of the ideas in this chapter derive from Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Regulation of the Political Process* 1089-1172 (Foundation Press 2d. ed. 2001), Richard H. Pildes, Diffusion of Political Power and the Voting Rights Act, 24 Harvard Journal of Legislation and Public Policy 119 (2000), and Richard H. Pildes and Kristen A. Donoghue, Cumulative Voting in the United States, 1995 University of Chicago Legal Forum 241.