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SECOND-ORDER DIVERSITY

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Much scholarship on democratic design is preoccupied with a single problem: how to treat electoral minorities in a majoritarian system. A term often deployed in those debates, particularly those focused on demographic difference, is "diversity." When scholars use the term, they usually mean that something — a class, an institution, a decisionmaking body — should roughly mirror the composition of the population. The problem with this debate is that its participants often unthinkingly extend theories about diversity derived from unitary institutions to disaggregated ones — institutions in which the governance system is divided into a number of equal subparts (juries, electoral districts, appellate panels, schools committees, and the like). Thus, despite the prevalence of such institutions, scholars have not systematically considered how to tailor our normative commitment to diversity to their unique features. This Article is a first step toward providing such a conceptual framework. It argues that we can seek at least two kinds of diversity in disaggregated institutions — first-order and second-order. First-order diversity mirrors the conventional intuition; it is the normative vision associated with statistical integration. The notion of second-order diversity, proposed here, posits that democracy sometimes benefits from having decisionmaking bodies that look nothing like the population from which they are drawn but instead reflect a wide range of compositions. The Article then deploys these two notions to examine a recurring set of trade-offs we face when designing disaggregated institutions.

INTRODUCTION

Much scholarship on democratic design is preoccupied with a single problem: how to treat electoral minorities in a majoritarian

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system. A term often deployed in those debates, particularly those focused on demographic difference, is "diversity." When scholars use the term, they usually mean that something — a class, an institution, a decisionmaking body — should roughly mirror the composition of the relevant population from which it draws its members;[1] it should "look like America," to borrow one of President Clinton's more evocative phrases.[2] Particularly in the wake of *Grutter v. Bollinger*,[3] "diversity" is often invoked in opposition to the term "segregation," as if the conceptual landscape were binary: our choice is segregation or statistical integration.

The problem with this debate is that its participants often unthinkingly extend theories about diversity derived from unitary institutions to disaggregated ones — institutions in which the governance system comprises a number of equal subparts (juries, electoral districts, appellate panels, school committees, and the like). Thus, despite the prevalence of such institutions, scholars have not systematically considered how to tailor our normative commitment to diversity to the unique features of these disaggregated institutions. Instead, we tend to treat debates about diversity in this part of the democratic infrastructure as if they, too, require a choice between segregation and statistical integration.

This Article attempts to complicate the conceptual landscape, to diversify our conception of diversity. It develops a competing normative vision, one that represents neither segregation nor integration. It is a first step toward providing a conceptual framework for describing a recurring set of tradeoffs that we face when designing disaggregated institutions. Specifically, this Article claims that there at least *two* types of diversity — first-order and second-order. The idea I term "first-order diversity" fits the conventional understanding of diversity; it is the normative vision associated with statistical integration, the hope that democratic bodies will someday mirror the polity. The notion of "second-order diversity," proposed here, posits that democracy sometimes benefits from having decisionmaking bodies that do not mirror the underlying population, but instead encompass a wide range of compositions. Second-order diversity involves variation among decisionmaking bodies, not within them. It favors *inter*organizational

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[1] PETER H. SCHUCK, DIVERSITY IN AMERICA 22–23 (2003). For a detailed analysis of this notion and its relationship to our understanding of representative democracy, see HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60–91 (1967).

[2] Clinton used this phrase in 1992 to describe his Cabinet. Dan Balz & Ruth Marcus, *Clinton Said To Fill Last 4 Cabinet Jobs: Baird, Babbitt, Espy, Peña Chosen*, WASH. POST, Dec. 24, 1992, at A1.

[3] 123 S. Ct. 2325 (2003) (affirming the constitutionality of affirmative action in higher education).

heterogeneity, not *intra*organizational heterogeneity. It fosters diversity without mandating uniformity.

In sketching this framework, this Article begins to construct a set of subsidiary terms — "disaggregated democracy," "overlapping majorities," "turning the tables," "democratic visibility," "cycling" — that connect to a number of debates about institutional design. These debates range from the legitimacy of peremptory challenges to the best districting strategy for implementing the Voting Rights Act, from doctrine governing Sixth Amendment cross-section claims to debates over multiculturalism, from unexplored doctrinal connections between different types of discrimination claims to cutting-edge research on the dynamics of dissent. The framework's payoff is a more precise set of analytic tools for examining the sorts of democratic tradeoffs that have long fascinated legal scholars.

Some of the arguments offered here are unique to the notion of second-order diversity. Others have already been mined in the legal literature, most notably in writings on federalism and local government law.[4] Scholars in those two fields have devoted considerable energy to thinking about the values associated with disaggregation in two areas: federal-state relations and state-local relations. But the two literatures, preoccupied with these particular institutional contexts, have mostly focused on a different set of values from those described here. Moreover, both literatures have yet to offer a transsubstantive vocabulary for identifying and describing what this Article reveals to be a recurring set of institutional design problems that arises in a range of subject areas.

The notions of first-order and second-order diversity provide such a framing device, allowing us to connect the insights offered by federalism and local government law to a broad array of legal scholarship. This framework thus allows us to play a divergent set of literatures against one another, to find new grounds of criticism and unexplored sources of connection among them. And it helps put some meat on the bones of a number of undertheorized design practices, identifying values attached to those practices that scholars have thus far neglected.

This Article begins with two concrete examples of an ongoing legal debate — one concerning juries, the other electoral districts. In both instances, the emerging scholarly consensus favors designing these decisionmaking bodies to look more like the populations from which they are drawn. In both instances, what is missing from the debate is an affirmative account for the heterogeneity that presently exists in the

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[4] Even when the arguments offered here find familiar cognates elsewhere, they take on a different form because of the special nature of the institutions in question. For a discussion of the relationship between the arguments offered here and the literature on federalism, democratic experimentalism, localism, dissent, and multiculturalism, see *infra* pp. 1109, 1127–32, 1182, 1190–94.

system, a framework for evaluating what we would lose were we to heed the advice of many scholars and move toward a system that is more first-order diverse.

This Article begins to sketch that affirmative account by developing a competing notion of diversity, one tailored to the unique structural features of juries, districts, and other small, disaggregated institutions. The analysis runs as follows. There are at least four reasons why we might value second-order diversity in some part of the democratic infrastructure. *First*, second-order diversity provides a strategy for allocating power to electoral minorities that serves as a counterweight to the influence model that otherwise dominates our system. It grants electoral minorities control over some subset of decisions, allowing them to exert the type of power usually reserved for the majority. It thus takes advantage of the disaggregated structure of these institutions to diffuse power.

Second, heterogeneity of this sort "turns the tables" on the majority. It creates a distinct type of political space, one where members of the majority experience what it is like to be deprived of the comfort — and power — associated with their majority status. And it is one where electoral minorities enjoy the dignity to decide, where they are no longer confined to the role of dissenter or junior partner in every decisionmaking process. By destabilizing conventional political dynamics, second-order diversity offers individuals a wide array of "scripts" for defining their civic and group identities.

Third, second-order diversity provides a richer, more textured view of the democratic order. If every decisionmaking body mirrored the population, as with first-order diversity, we would expect the decisions rendered roughly to mirror the preferences of the median voter. By avoiding the push to the middle in every case, heterogeneity among decisionmaking bodies reveals the views of the full democratic spectrum. Second-order diversity not only makes electoral minorities visible, it does so in a manner that showcases division and dissent *within* groups, providing a kaleidoscope view of group difference.

Fourth, second-order diversity allows us to "cycle." By varying the composition of decisionmaking bodies, second-order diversity allows us to take an experimental approach to designing decisionmaking institutions; it offers a feedback mechanism, providing additional information about how and when people divide. Further, second-order diversity allows us to cycle our normative commitments and thus to avoid privileging a single theory of democracy or identity over all others. And cycling allows us to vary our strategies for dealing with group conflict; it ensures that members of opposing groups revisit a political conflict in different contexts at different times. It thus avoids the problems associated with freezing into place a particular solution to group division.

There are, of course, costs associated with each of these benefits — a flip side to each of the arguments made above — and the notions of first-order and second-order diversity provide a framework for identifying those tradeoffs. For instance, while second-order diversity grants electoral minorities control over some decisions, the tradeoff is that electoral minorities lose the chance to influence a broader set of decisions. Although the tradeoff between influence and control is a well-worn debate with regard to unitary institutions like legislatures, there is something new to be said about that debate because of the unique way it plays out in the context of disaggregated institutions. We find a similar set of tradeoffs embedded in the other arguments relating to second-order diversity. The diffuse participatory benefits associated with turning the tables on the majority must be balanced against a discrete set of participatory costs. The benefits of visibility must be offset against the costs of variation, the loss of uniformity that occurs when electoral minorities have the power to issue outlier decisions. And the values associated with cycling should be weighed against the costs associated with endless experimentation, with the decision to make variation and conflict a permanent feature of any institutional structure.

Two caveats are in order. First, although the purpose of this Article is simply to provide an analytic framework for evaluating the tradeoffs we face in designing disaggregated institutions, much of the Article is devoted to identifying the affirmative case for second-order diversity. That is because, for the reasons noted above, the arguments in favor of first-order diversity have been thoroughly canvassed in the literature. The approach is bottom-up; this Article looks to the heterogeneity we already see in political institutions and tries to determine why we might value it. While this Article blends descriptive and normative elements — it tries to offer the most attractive explanation available for an existing feature of our democratic infrastructure — I do not claim that the Article offers a theory for resolving all debates about diversity in the democratic system.[5] Nor do I suggest that we ought to seek second-order diversity in every context possible. The purpose of this Article is simply to make the best case possible for second-order diversity and to provide a framework for identifying the tradeoffs inherent in the choice to pursue its benefits.

Second, the argument offered here approaches the question of democratic design from a structural rather than a rights-based perspective. My focus is on achieving a well-functioning democratic process,

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[5] For a more ambitious effort to build a coherent theory of diversity across a wide range of institutions and normative debates, see SCHUCK, *supra* note 1. For another recent exploration of questions of diversity in a range of institutional settings, see SANFORD LEVINSON, WRESTLING WITH DIVERSITY (2003).

not on preserving the rights of individuals.[6] By examining these issues from this perspective, this Article necessarily presents an incomplete picture. This lens obscures important aspects of disaggregated institutions even as it brings other, neglected facets into sharper focus — specifically, the role these institutions play in facilitating mass participation and aggregating community judgments.

Part I defines the key terms used in this Article. Part II identifies two ongoing legal debates that reveal a gap in the literature — the absence of an affirmative account for the heterogeneity that presently exists in parts of the democratic infrastructure. Part III then considers whether an affirmative case can be made in favor of that heterogeneity. It looks to four unusual functions performed by institutions that are second-order diverse — four features that seem inconsistent with our conventional intuitions about diversity — and considers why we might value them. Part III also describes the tradeoffs inherent in the choice between first-order and second-order diversity and provides a few examples of how those tradeoffs play out in two institutional contexts: juries and electoral districts. Part IV concludes by offering a sampling of the potential payoffs of conceptualizing diversity in these terms. It provides several examples of ongoing doctrinal, policy, and institutional design controversies in which the notions of first-order and second-order diversity might usefully frame the discussion.

I. TERMS OF THE DEBATE

Because some of the terms in this Article are my own, their meaning may not be intuitive. This Part defines the key terms used in this Article before turning to the main argument.

A. First-Order and Second-Order Diversity

There are as many definitions of the word "diversity" as reasons for caring about it.[7] Even when we use the word to talk about the issues

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[6] Rights and structural analysis are, of course, related. *See* Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1443–66 (2002) (exploring connections between individual voting-rights claims and structural concerns); *see also id.* at 1444 n.132 (collecting sources on the rights/structure debate in election law). For a thorough analysis of the relationship between structural analysis and individual rights outside of the voting rights context, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998). *See also* Laurence H. Tribe, *The Supreme Court, 1998 Term—Foreword:* Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future — Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999); and Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977 (1999) (reviewing AMAR, *supra*).

[7] As Peter Schuck notes, "[d]iversity, like most other things, means different things to different people, so rendering the notion mutually intelligible is difficult." SCHUCK, *supra* note 1, at 19. We care about diversity for many reasons, and we place different limits on how "much" diversity

with which this Article is concerned — decisionmaking bodies and the composition of their membership — a variety of normative commitments can inform our understanding of the term. Nonetheless, as Peter Schuck confirms, when academics use the term "diverse" in describing the composition of an institution, they usually mean that its composition should be diverse in the *first-order* sense. As he observes, most diversity discourse exhibits a "strong tendency to look to proportionality [between the relevant body and the population] as the measure" of diversity.[8] For instance, many believe that, in the best of all possible worlds, half of our legislators would be women, all of our schools would be racially integrated, and the proportion of African American corporate executives in the United States would correspond to the proportion of African Americans in the population. Even if proponents of first-order diversity would not necessarily endorse the steps needed to achieve this goal in the short term, they favor it as a long-term aspiration.

The term *diversity* is often invoked in opposition to *segregation*. When academics talk about "diversifying" an institution, they usually wish to integrate it. As a result, diversity has come to be equated with statistical integration. For example, when the University of Michigan boasts that its student body is "racially diverse," it means that the student body looks like the underlying population or applicant pool — majority white, with a population of students of color that hovers around twenty-five percent.[9] Concomitantly, a school with a student body that is twenty percent women would have trouble claiming gender "diversity." Given the nation's tragic history with the notion of "separate but equal," those who subscribe to the ideal of first-order di-

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we seek in different contexts. Even with regard to the more narrow set of institutional concerns discussed here — democratic institutions and the composition of their membership — there is likely to be a wide range of views as to what constitutes diversity. Consider, for instance, that studies reveal that whites and African Americans think of "diversity" in quite different terms. *See* Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 318 (1997) ("Blacks tend to think of an integrated neighborhood as being from thirty to sixty percent black. Among whites who express a commitment to integration, the optimal racial composition is around twenty percent black." (citation omitted) (citing Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 818 (1991); and Reynolds Farley et al., *Barriers to the Racial Integration of Neighborhoods: The Detroit Case*, 441 ANNALS 97, 105 (1979))); *id.* at 318–19 (criticizing the Supreme Court for describing majority-minority districts as "segregated" merely because they were majority-black).

[8] SCHUCK, *supra* note 1, at 22–23, 164; *see also* LEVINSON, *supra* note 5, at 24 (suggesting that one common definition of diversity hinges on the notion that an institution ought to reflect "the demographic composition of the surrounding society").

[9] Univ. of Mich., *Undergraduate Admissions: Fast Facts*, *at* http://www.admissions.umich.edu/fastfacts.html (last visited Jan. 15, 2005) (claiming a "[d]iverse" student body because students of color constitute twenty-five percent of its undergraduates).

versity, quite appropriately, tend to resist claims that there is anything positive associated with departures from statistical integration.

In the context of disaggregated institutions, the assumption that our choice is either segregation or statistical integration ignores a third possibility: that the democratic process may benefit from decisionmaking bodies that reflect a wide range of compositions. Second-order diversity seeks variation *among* decisionmaking bodies, not *within* them. It favors *inter*organizational diversity, not *intra*organizational diversity. Thus, whatever the axis of difference (race, gender, political affiliation), second-order diversity describes a system in which at least some decisionmaking bodies look nothing like the population from which they are drawn.

To offer a few concrete examples outside of the governance context, neighborhoods are diverse in the second-order sense. They are not statistically integrated — few, if any, perfectly mirror the statewide population — and they vary dramatically in their socioeconomic and ethnic makeup.[10] The nation's system of higher education — with its complement of traditionally black colleges and the "Seven Sisters," as well as its mix of specialized and liberal arts schools — is diverse in the second-order sense. And, as I explain below in discussing the two main examples presented in this Article, juries and electoral districts are second-order diverse as well.

B. Disaggregated Democracy

A key attribute of the democratic institutions that are the subject of this Article is that they are *disaggregated* — that is, the governance system comprises a number of roughly equal subparts. Juries, electoral districts, legislative committees, appellate panels, and school committees can all be understood to be disaggregated in this sense.

"Disaggregated democracy" represents a solution to the problem of facilitating participation and aggregating viewpoints in a mass society. Because we cannot bring the polity into a room to debate every verdict, set every policy, or pass every law, there are two main strategies for resolving these disputes. The first is to allow everyone to vote for representatives and allow those representatives to hash out these questions; that is the solution we have chosen in the electoral context. The second strategy is to give everyone a chance to participate in the process seriatim; that is the solution we have chosen in the jury context. While no single jury is likely to be "representative" in any sense be-

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[10] *See, e.g.*, GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 3 (1999); JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 4 (1961); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 236–41 (1990). For a survey of the academic literature on diversity within and among neighborhoods, see SCHUCK, *supra* note 1, at 214–18.

cause of its size, the jury system, *in the aggregate*, should give us a rich picture of communal norms.

Other institutions represent a blend of the two strategies. For instance, those who volunteer for committee work in small town governments or hold a position on a local school committee are, in some sense, "representatives" — they have been elected or have volunteered to stand in for the whole. But they may think of themselves as doing their "stint" — a rotation akin to service on the jury — with the expectation that their neighbors will do the same in subsequent years. Similarly, appellate panels are temporary bodies that stand in for the whole — they render the decision of "the" court — and yet every member of the circuit serves on panels simultaneously or seriatim. Roughly the same can be said of legislative committees.

Given their prevalence, disaggregated institutions as a class are surprisingly understudied. While scholars of federalism and local government law have spent considerable time analyzing the costs and benefits of disaggregation in their respective fields, they have largely focused on values other than those canvassed by this Article,[11] and these scholars' insights have not been generalized to other contexts. The lack of scholarly attention to the special features of the institutions described here — their small size, disaggregated structure, and varied composition — may explain why scholars so often unthinkingly extend theories about the design of unitary institutions to small, disaggregated ones. One of the main goals of this Article, then, is to tease out what makes disaggregated democracy special and what design strategy best takes advantage of its unique qualities.

C. *Minority, Majority, and Racial Identity*

Throughout this Article, I use the terms "minority" and "majority" to refer to numeric or electoral minorities and majorities. The notion of second-order diversity merely requires that the population be di-

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[11] This focus derives from the special features of those institutional settings. For example, federalism and local government law are preoccupied with a set of governing institutions that are, on average, considerably larger than the ones described here. As a result, those institutions are often too large to serve as a tool for empowering the wide array of electoral minorities discussed here. Put differently, states and local governments can offer local variation, but not the type of *intra*local variation that second-order diversity facilitates. *See infra* pp. 1162–63. Further, the relatively large size of these institutions precludes the type of direct participation in governance made possible by at least some of the institutions that are the focus of this Article. These institutional features may explain why the constitutive and participatory values associated with federalism and localism receive relatively little emphasis in the literature. Indeed, much of the intellectual work of federalism and local government law has focused on the relationship between governments — federal versus state, or state versus local. The institutions described here, in contrast, are generally part of the *same* sovereign or polity as the central institution, thus raising a different set of analytic puzzles. *See infra* pp. 1128–29.

vided along *some* axis of difference, and the arguments deployed here fit virtually any type of electoral minority — racial, socioeconomic, political, religious — however defined. Of course, individuals are multifaceted, and therefore almost everyone constitutes a minority along some axis of difference.[12] My assumption here is simply that there are categories that will be *salient* to the political process — sufficient grounds for dividing the polity on a regular basis — even if the precise boundaries of these divisions are either porous or contingent. Even in a Dahlian world where "minorities rule"[13] and no majority is a permanent one, permanent minorities may remain. Thus, the term "electoral minority" does not refer to someone who happens to be temporarily in the minority in a decisionmaking process characterized by constantly shifting majorities and fluid coalitional politics. For present purposes, the term refers to those trapped in a more stable political dynamic and *consistently* in the political minority on some meaningful subset of issues.

Given the salience of race to American legal discourse, it is difficult to separate questions about minority status from debates about racial identity. For this reason, I often refer to race when offering an example of how my arguments play out in practice. And the Article is certainly informed by a substantive commitment to an antisubordination theory of racial equality. Indeed, one way to understand second-order diversity is as a process-oriented rather than rights-oriented strategy for dealing with the problem of subordination. Nonetheless, I wish to bracket the debate about whether race is — or ought to be — a fluid identity category. Although a formal, stable conception of racial categories permeates most legal debates,[14] many commentators argue that race is a semifluid category, one that can be shaped by individuals as they participate in the political process.[15] A full consideration of

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[12] The leading proponent of the view that individuals have multiple identities that lead to cross-cutting alliances among different groups and majorities that shift on an issue-by-issue basis is, of course, Robert Dahl. *See, e.g.*, ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 20–32, 74–80 (1971); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 133 (1956).

[13] DAHL, A PREFACE TO DEMOCRATIC THEORY, *supra* note 12, at 133.

[14] *See* MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 59 (1997).

[15] *See, e.g.*, K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, *in* K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 30, 78–80 (1996) (arguing that although "racial identification is [hard] to resist" in part because racial ascription by others is so insistent, one "*can* choose how central [one's] identification with it will be — choose, that is, how much [one] will organize [one's] life around that identity"); Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, *in* LEFT LEGALISM/LEFT CRITIQUE 38, 48 (Wendy Brown & Janet Halley eds., 2002) (arguing in favor of a concept of racial identity "not as monolithic" but "as fluid and kaleidoscopic," and arguing that "American racial hierarchy creates a mix of racial identities"); *see also* MINOW, *supra* note 14,

whether we ought to promote a fluid conception of race — or any other identity category — is beyond the scope of this Article, but it is worth noting that many of the arguments I make in favor of second-order diversity fit well with scholarship that places special emphasis on the participatory dimensions of racial identity.[16]

II. MINDING THE GAP: THE NEED FOR AN ANALYTIC FRAMEWORK TO EVALUATE TWO ONGOING LEGAL DEBATES

In order to ground this Article's discussion of the tradeoffs between first-order and second-order diversity, this Part examines two ongoing legal debates in which these tradeoffs are at stake. The first is a doctrinal puzzle in the law governing jury discrimination; the second is an ongoing controversy about the appropriate strategy for implementing the Voting Rights Act. Each debate centers on an institution that is second-order diverse in practice: juries and electoral districts. In both contexts, there is an emerging scholarly consensus favoring policies that would, as a practical matter, move these institutions closer to the first-order end of the diversity spectrum. And while the *costs* of the heterogeneity we now see in these systems have been identified in both debates, the affirmative case for heterogeneity is largely absent. Moreover, neither literature offers a framing mechanism for identifying the

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at 50–51; IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 99 (2002); YOUNG, *supra* note 10. A number of important, often overlapping literatures have explored the fluidity of identity categories, including strands of the antiessentialism critiques, intersectionality, Critical Race Theory, and, most recently, Queer Theory. For a sampling, see Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 124–37 (2003); Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW 115, 115–16 (David Kairys ed., 3d ed. 1998); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 20–39 (1994); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990); Dan R. Ortiz, *Categorical Community*, 51 STAN. L. REV. 769, 804–05 (1999). For a survey of the way these ideas have played out among social anthropologists, see Jonathan Y. Ikamura, *Situational Ethnicity*, 4 ETHNIC & RACIAL STUD. 452 (1981). The notion that individuals can choose how central a group identification is to their individual identity should be contrasted with the notion of "covering," which involves downplaying certain traits associated with a group identity due to social pressures. *See generally* Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (examining the concept in the context of sexual orientation).

[16] *See, e.g.*, LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11–14 (2002) (arguing that race should be understood as a *political* category); *see also* YOUNG, *supra* note 10, at 156–91 (exploring how group members have participated in the reconstitution of their group identity). For example, much of this Article is preoccupied with the connections between identity and participatory experiences, and one of my primary claims is that we should value second-order diversity because it structures the political process in a manner that may help complicate identity categories. Other arguments in this Article, however, may be in some tension with a fluid conception of identity. The notion of turning the tables, for instance, depends on the existence of a set of socially recognizable categories of identity even as it seeks to undermine or complicate those categories.

tradeoffs embedded in the design choice at issue. Below I sketch out the basic terms of the two debates. I return to each of these topics at the end of the Article to show that second-order diversity provides a helpful conceptual framework for analyzing these issues.

A. Juries and the Doctrinal Puzzle Created by Batson

The jury system is a disaggregated institution that is second-order diverse in practice, and ongoing debates about the jury have paid little attention to that fact. Juries are second-order diverse because they are composed using a modified version of what is, at least in theory, a random assignment system.[17] Random assignment ensures that a number of juries will look nothing like the population from which they are drawn. This is because random assignment generates a set of juries that falls roughly along a normal distribution curve. Consider a state with a 35% African American and 65% white population. Under a system designed to achieve first-order diversity, three to four people on every jury would be African American. Under a system of random assignment, in contrast, about 33% of juries would include five to six

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[17] I include the caveat "at least in theory" because the process by which the jury is chosen is not nearly as random as one might think. The jury pool is often not representative, as it can exclude a predictable segment of the population (those who do not speak English, transient individuals, etc.). Moreover, for-cause strikes and the peremptory challenges exercised by counsel also undermine efforts to achieve a random draw. *See, e.g.*, HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 13–35 (1993); RANDALL KENNEDY, RACE, CRIME, & THE LAW 232–33 (1997); Hiroshi Fukurai et al., *Cross-Sectional Jury Representation or Systematic Jury Representation? Simple Random and Cluster Sampling Strategies in Jury Selection*, 19 J. CRIM. JUST. 31, 31–32 (1991); Hiroshi Fukurai et al., *Spatial and Racial Imbalances in Voter Registration and Jury Selection*, 72 SOC. & SOC. RES. 33 (1987); Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. BLACK STUD. 196, 200 (1991); Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 711–19 (1993) [hereinafter King, *Racial Jurymandering*]; Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273, 273–74 (1996); Charles J. Ogletree, *Just Say No!: A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1100 (1994). Nonetheless, at least as an aspirational matter, the system is intended to assign jurors randomly. *See, e.g.*, Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (2000) ("[A]ll litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries *selected at random* from a fair cross section of the community . . . ." (emphasis added)).

One commentator summarizes the consensus on the matter when he states that "[t]he logical, and desirable, way to impanel an impartial and representative jury — and the method chosen by Congress — is to put together a complete list of eligible jurors *and select randomly from it*." JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 18 (1977) (emphasis added). For a concise history of the development of the jury selection process in the United States, → Nancy Jean King, *The American Criminal Jury*, 62 L. & CONTEMP. PROBS. 41, 53–59 (1999).

African Americans and about 8% will have seven to eight African American jurors.[18]

The use of jury districts also promotes variation in the composition of juries.[19] Because jury districts are smaller than the state in which they are located and because of the existence of residential segregation, the use of jury districts increases the level of heterogeneity in jury composition. For instance, imagine that a jury district in a large urban area has a 65% African American population. About 4% of the juries randomly drawn from that district will contain eleven African Americans, about 11% will contain ten African Americans, and about 20% will contain nine African Americans.[20]

One doctrinal puzzle in the law governing juries stems from how each jury is chosen.[21] The law demands that jurors be drawn from a

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[18] For a population that is 35% African American and 65% white, a system of random assignment would yield the following probabilities for juries of various racial compositions:

TABLE 1. PROBABILITY OF JURIES WITH CERTAIN RACIAL COMPOSITIONS IN A SYSTEM OF RANDOM ASSIGNMENT

White Jurors (Population 65%)	African American Jurors (Population 35%)	Probability
12	0	0.6%
11	1	3.7%
10	2	10.9%
9	3	19.5%
8	4	24.7%
7	5	20.4%
6	6	12.8%
5	7	5.9%
4	8	2.0%
3	9	0.4%
2	10	Negligible
1	11	Negligible
0	12	Negligible

[19] Juries are typically drawn from territorially defined districts rather than statewide populations. *See* Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 389 (1999) (proposing a system of jury districting that would divide jury districts into even smaller subdistricts organized around "communities of interest"). Residential segregation ensures that individual jury districts depart from the statewide population breakdown, and the juries drawn from those districts will vary even more than they would if they had been drawn from a statewide pool.

[20] To arrive at these figures, simply reverse the ratios of African Americans and whites in the random assignment model above, *see supra* note 18.

[21] Few scholars have explored the doctrinal tensions between Sixth Amendment cross-section claims and *Batson v. Kentucky*, 476 U.S. 79 (1986). *See* Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 948 (1998) (noting the dearth of such scholarship). Much of that literature has been devoted to resolving another tension between the two lines of cases: between the antiessentialist impulses of *Batson* and the prem-

"fair cross section of the community."[22] But *Batson v. Kentucky*[23] forbids parties to take the direct steps that would be necessary to ensure that individual juries comport with the "fair cross-section requirement" — specifically, *Batson* prohibits using peremptory challenges to add or subtract jurors so that individual juries reflect the makeup of the community.[24] *Batson* thus precludes the actions that would be necessary to remedy the type of racial and gender imbalances on individual juries that the fair cross-section doctrine seeks to avoid in the jury

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ise of the cross-section claim that race and gender matter to jury decisions. *See* Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1815–33 (1993); Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 96–107 (1996); *see also infra* note 27 (collecting additional related sources).

[22] Cross-section claims do not require evidence of intentional discrimination. *See* Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979). Instead, the key to the claim is showing that a group is underrepresented in the pool given the makeup of the population. *Id.* As a result, a cross-section claim does more than prevent intentional discrimination; in practice, it functions like a disparate impact test that effectively imposes an affirmative duty on the government to produce a pool that roughly reflects the population. *See id.* at 366–67 (vindicating a cross-section claim regarding a venire that disproportionately excluded women when the skew was engendered by voluntary individual decisions, not affirmative state discrimination); *see also* King, *Racial Jurymandering*, *supra* note 17, at 747 & n.153; Leipold, *supra* note 21, at 971. *But see* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 184 (1989) (questioning whether cross-section claims embody an effects test on the ground that "if any difference between 'systematic' exclusion and 'purposeful' exclusion exists, it is subtle"). Specifically, a prima facie case is established by showing (1) that the group excluded is "distinctive"; (2) that the group's representation "is not fair and reasonable in relation to the number of such persons in the community"; and (3) that "this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364. The burden then shifts to the state to offer a significant state interest "manifestly and primarily advanced by" the system chosen by the state. *Id.* at 367–68.

[23] 476 U.S. 79.

[24] Under *Batson*, one can challenge the exercise of a peremptory challenge used to exclude individual jurors on the basis of race or gender. In *Batson*, the Court held that the Equal Protection Clause forbids the exclusion of jurors on the basis of race through the exercise of peremptory challenges. *Id.* at 89. *Batson* involved a challenge by an African American defendant to the prosecutorial exercise of peremptory challenges against African American jurors. *Id.* at 83–84. *Batson* now extends to civil cases, *see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991); cases in which the juror and the defendant are of different races, *see* Powers v. Ohio, 499 U.S. 400, 402 (1991); peremptory challenges exercised by a criminal defendant, *see* Georgia v. McCollum, 505 U.S. 42, 59 (1992); and peremptory challenges based on gender, *see* J.E.B. v. Alabama, 511 U.S. 127, 129 (1994). Although cross-section claims have been litigated as equal protection claims, the Supreme Court has held that the cross-section requirement does not apply to peremptory challenges. *See* Holland v. Illinois, 493 U.S. 474, 478–84 (1990). *Batson* does, however, adopt a burden-shifting framework that bears some resemblance to the Court's approach for adjudicating cross-section claims. Under *Batson*, the party contesting the peremptory challenge must establish a prima facie case by showing that the jurors excluded are members of a cognizable racial group, the peremptory challenge leaves room for discrimination, or any other facts from which a court could draw an inference of discrimination. 476 U.S. at 96. The party exercising the peremptory challenge must then offer a neutral explanation to justify it. *Id.* at 97.

pool.[25] The problem for courts and scholars is to explain this differential approach.

Many criminal procedure scholars have chosen to resolve this tension by arguing, in effect, that the fair cross-section requirement should extend to individual juries — that is, they have claimed that juries ought to be first-order diverse.[26] That is unsurprising, as almost any theory that would explain why we care about a pool that mirrors the population would also favor a jury that does the same.[27] After all,

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[25] *See Batson*, 476 U.S. at 85 (noting that a criminal defendant has no right to a jury that includes members of his own race) (citing *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880)); *see also J.E.B.*, 511 U.S. at 145 n.19 (noting that the cross-section requirement does not mandate that juries be representative of "all the economic, social, religious, racial, political and geographical groups of the community" (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946))); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (noting "the rejected contention that the Fourteenth Amendment requires proportional representation of all the component ethnic groups of the community on every jury"); Cassell v. Texas, 339 U.S. 282, 286–87 (1950) (noting that "the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation"); United States v. Nelson, 277 F.3d 164, 207–08 (2d Cir. 2002) (holding that *Batson* forbids district courts from adding and subtracting jurors in order to achieve a fair racial and religious mix of jurors). *See generally* Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 716 n.58 (1995) (collecting sources); Forde-Mazrui, *supra* note 19, at 368 (noting the Court's "ambivalence concerning the effect of representativeness on the quality of jury decision-making"); King, *Racial Jurymandering*, *supra* note 17, at 736–37 (noting that the Court has rejected arguments for race-conscious jury selection based on its beneficial impact on minority groups); Leipold, *supra* note 21, at 965 (noting that a defendant is "entitled to a jury drawn from a fair cross section," but "when actually seating a jury, . . . he may not take those same characteristics into account"); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 730 (1992) (noting that "the Court has consistently . . . refused to order juries of any particular racial composition").

[26] *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 129–31 (1994) (describing the rationale for extending the cross-section requirement); King, *Racial Jurymandering*, *supra* note 17, at 709 & n.3 (documenting various efforts to diversify "jury district populations, juror lists, venires, and juries themselves"); *id.* at 726–29 & n.74. Political theorists have made similar arguments. *See, e.g.*, JON ELSTER, SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 97–98 (1989) (proposing stratified random sampling).

[27] For instance, one of the most common justifications for cross-section claims is that members of different racial groups or genders vote differently, or at least draw upon different backgrounds, experiences, and perspectives in judging cases. On this view, fairness to the defendant demands that the jury be drawn from a diverse group of jurors to achieve what the Supreme Court has termed "diffused impartiality." Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975) (quoting *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting)); *see also* ABRAMSON, *supra* note 26, at 101; Alschuler, *supra* note 25, at 721–23; Herman, *supra* note 21, at 1822. *See generally* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (surveying empirical data concerning the relationship between race and jury decisionmaking); King, *Racial Jurymandering*, *supra* note 17, at 751 (describing the fairness theory); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1209 (1992) (describing the relationship between fair representation and impartiality). As several judges and commentators have observed, proponents of this theory would also want the jury itself to mirror the relevant population. *See, e.g.*, *McCollum*, 505 U.S. at 60–62 (Thomas, J., concurring in the judgment); *Ex parte* Virginia, 100 U.S. 339, 368–69 (1880) (Field, J.,

if juries are making "the" law, we would presumably want everyone at the table when it is made.

Policymakers and legal scholars have thus proposed a wide range of strategies to ensure diversity *within* the jury — that is, juries that are first-order diverse — including racial quotas,[28] stratified selection procedures,[29] channeling litigant choice,[30] and jury subdistricting.[31] Even those scholars who do not argue for juries that are first-order diverse tend to do so largely on pragmatic grounds, either out of concern that the techniques for achieving that goal are too costly[32] or because

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dissenting); Herman, *supra* note 21, at 1823; Johnson, *supra*, at 1655; Leipold, *supra* note 21, at 965, 995; Underwood, *supra* note 25, at 730.

"Representation" is another notion invoked to support the argument that the pool from which jurors are drawn should reflect a fair cross-section of the population. *See, e.g.*, Herman, *supra* note 21, at 1814 (arguing that the Court's approach to *Batson* hinges on a "representation-reinforcement theory"). The idea is that jury verdicts can be trusted if the jury is truly a "representative" body, *see, e.g.*, Smith v. Texas, 311 U.S. 128, 130 (1940); *Strauder*, 100 U.S. at 308, and hence, that members of every community should be included in the venire. This theory is often closely related to the argument for first-order diversity described above; representativeness is often sought on the ground that jury verdicts ought to reflect the perspective of the entire community. Here again, supporters of this theory favor extending the cross-section requirement to the jury itself. As one commentator has noted, if the jury is a representative body, then the "full logic of the cross-sectionai ideal" indicates it is not just the venire that should include members of each community, but the jury itself. ABRAMSON, *supra* note 26, at 125.

Another theory used to buttress cross-section claims is, to paraphrase Justice O'Connor's oft-quoted line in a voting case, that the jury is one area where "appearances do matter." Shaw v. Reno, 509 U.S. 630, 647 (1993). On this view, whether or not the presence of women and racial minorities in the venire has an actual effect on verdicts, people think it does. As a result, public confidence in jury verdicts depends upon the juries' being drawn from a diverse pool of jurors. *See* Peters v. Kiff, 407 U.S. 493, 502 (1972); Alschuler, *supra* note 25, at 721–22; King, *Racial Jurymandering*, *supra* note 17, at 761; *see also* Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1186–90 (1994) (surveying empirical evidence for this claim). Here again, the theory plainly favors extending the fair cross-section requirement to juries themselves, so as to avoid controversies like those surrounding the juries in the Rodney King and O.J. Simpson trials.

[28] *See, e.g.*, Alschuler, *supra* note 25, at 711 (describing the benefits of a quota system); Forde-Mazrui, *supra* note 19, at 357 n.21 (collecting sources).

[29] *See* King & Munsterman, *supra* note 17, at 274–76 (canvassing strategies and assessing their constitutionality).

[30] *See* Forde-Mazrui, *supra* note 19, at 366–67 (describing several proposals for diversifying the jury by limiting or expanding litigant choice in the selection of jurors); Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 75–83 (1992) (proposing separate pools of men and women to assure proportional representation of women on juries).

[31] *See* Forde-Mazrui, *supra* note 19, at 389–95; Note, *The Case for Black Juries*, 79 YALE L.J. 531, 548 (1970).

[32] For instance, both Eric Muller and Andrew Leipold have argued that, in the words of the latter, "[a]ll a defendant should expect from the jury selection process is a pool that is in fact randomly drawn . . . ." Leipold, *supra* note 21, at 999; *see also* Muller, *supra* note 21, at 141–43. But Leipold explicitly acknowledges that his theory of impartiality naturally would require juries that also mirror the population: "If a jury is less likely to be impartial when a distinct group is excluded from the [venire], it is hard to explain why a jury *panel* that by chance turns out to be all male or all white is nevertheless acceptable." Leipold, *supra* note 21, at 999. Muller and Leipold

their approach to the question proceeds on an intentionalist account of discrimination.[33]

There are two things worth noting about this debate. The first is the absence of an affirmative account of the status quo — an explanation for why we might *value* the heterogeneity in juries that a random assignment system begets. The second is the need for a conceptual framework for identifying the tradeoffs involved in the choice to move toward a system that is more first-order diverse. The notion of second-order diversity helps remedy both omissions.

B. Districts and the Debate over Implementing the Voting Rights Act

Electoral districts, like juries, are disaggregated institutions that are second-order diverse in practice. Indeed, districting is one of the rare instances in which decisionmakers deliberately seek heterogeneity among political bodies,[34] although they do so for reasons that have little to do with a normative commitment to the values associated with second-order diversity.[35] The main reason districters draw districts with varying populations is to divide legislative power, fairly or otherwise. Rather than spreading members of an electoral minority evenly among all districts, as with first-order diversity, districters distribute

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thus try to justify the system on pragmatic grounds, an argument largely based on the view that mandating proportional representation on every jury is a "vain and impractical hope." Muller, *supra* note 21, at 141.

[33] *See, e.g.*, KENNEDY, *supra* note 17, at 169, 237–45; Underwood, *supra* note 25, at 727.

[34] Districters are always self-conscious about how they group voters. *See* Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 223; Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 101 (arguing that territorial-based districting requires a self-conscious choice); *see also* BRUCE CAIN, THE REAPPORTIONMENT PUZZLE 4–6 (1984) (describing districting from the perspective of a reapportionment consultant and arguing that it is inevitably a political issue). Even neutral districting commissions like Iowa's must make choices about grouping voters, even if they are able to eliminate partisanship from the process. Further, because districts are so large, alternative strategies for achieving second-order diversity in districts — such as a random assignment process — would generate almost no variation in district composition. Even the use of computer-generated districting plans is not neutral (assuming one adheres to a basic commitment to compactness and contiguity), because it privileges geography over other sources of community and, in any case, requires programming choices that preclude true neutrality. For an effort to harness computers to facilitate a fair districting process, see Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. (forthcoming 2005).

[35] One might argue that heterogeneity in districting simply results from the fact that we define political subdivisions in territorial terms. Given the realities of residential segregation and local identity, using geography as the basis for distributing political power lends itself to heterogeneity among districts. It is worth emphasizing, however, that the choice to organize representation along territorial lines was a deliberate one. Indeed, from the early days of the Republic, districters have used geography as a proxy for interests of many sorts and have deployed territorial lines to ensure that minority interests are represented in the legislature. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 1156–60 (2d ed. 2002) (describing the history of districting).

members of the group *unevenly* among districts to give them a chance to elect candidates to the legislature.[36] To offer a rudimentary example, in a state where the population is sixty percent Democratic and forty percent Republican, few would suggest that all districts ought to mirror that breakdown, because if they did, no district would elect a Republican legislator.[37]

As with juries, there is an ongoing debate in districting that maps onto the notions of first-order and second-order diversity.[38] At present, the central question in redistricting law concerns the appropriate strategy for empowering racial minorities under the Voting Rights Act of 1965.[39] Prior to 2000, the doctrine governing dilution claims under the Act was reasonably well settled. The inquiry largely centered upon *majority-minority districts*,[40] in which voters of color were likely to constitute more than half of the voters on election day. The widespread consensus was that when whites consistently voted in a bloc against the preferences of voters of color, the best way to ensure that

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[36] Thus, in the words of Richard Pildes, "[t]he very theory of districted elections . . . is that democratic institutions are best designed by . . . fragmenting majoritarian domination. Districted elections empower local minorities who would otherwise be swallowed up in a system not self-consciously designed to ensure some representation of their interests." Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL'Y 119, 124 (2000).

[37] As a practical matter, the composition of districts hinges on partisan concerns because state legislators usually draw the boundaries. Self-interest leads some legislators to maximize partisan advantage by packing members of the opposing party into a few districts while creating many others where members of their own party are likely to win. Other legislators prefer the bipartisan gerrymander, which guarantees safe seats to incumbents on both sides of the aisle. Both strategies push districting plans toward the second-order end of the diversity spectrum. Indeed, in a state divided, as the nation currently is, evenly between Republicans and Democrats, first-order diversity would ensure that all districts were evenly divided and thus highly competitive, something the party in power is unlikely to favor.

As with juries, demographic patterns enable districters to achieve variation in district composition. However, because of the size of most districts, we would nonetheless expect less variation in the composition of districts than in the composition of juries. After all, if people were evenly dispersed along every axis of difference, district composition would not vary at all. But the "law of large numbers" reduces variation among districts. Imagine, for instance, the odds of finding a jury that is seventy-five percent Asian American versus finding a federal congressional district that is seventy-five percent Asian American.

The law of large numbers also reduces variation among juries, of course, and one might worry that juries are large enough that there will not be many juries on which electoral minorities are able to exercise even a majority of the votes. The existence of jury districts mitigates this problem. So does the "tipping point" dynamic on juries. Electoral minorities need not constitute a majority of the jury in order to affect the verdict; they need only have enough members so that one of them sits at the "tipping point" of the jury. Put more simply, one need not be in the middle of the jury to be the swing decisionmaker. *See infra* note 62. I am indebted to Louis Kaplow for raising this point.

[38] I explore these and other questions in greater detail in Heather K. Gerken, Diversity and Districting (Jan. 3, 2005) (unpublished manuscript, on file with the Harvard Law School Library).

[39] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

[40] *See* Issacharoff, *supra* note 34, at 217–25 (describing the consensus at the time).

the latter could elect a candidate of their own choosing was to create districts in which they enjoyed a majority.[41]

Recent changes in voting patterns, combined with political pressures, have destabilized the Voting Rights Act's doctrinal foundations. Specifically, as some white Democrats have shown greater willingness to vote for African American and Latino candidates during the general election, a number of prominent political scientists and legal scholars have advocated creating what they term *coalition districts* — districts with a thirty-three to thirty-nine percent population of voters of color[42] — in which there is an even chance that a coalition of whites and voters of color can elect the candidate preferred by members of both groups.[43] The theory behind the coalition district is straightforward. Because white Democrats are more willing to vote for African American and Latino candidates in general elections than in past decades, it is possible for communities of color to elect a "candidate of choice"[44] with a smaller share of the district's population if they form a coalition with white voters. Minority voters can thereby spread their votes across more districts and thus enjoy greater influence in the legislature. To put it in more concrete terms, proponents of the coalition-district theory argue that voters of color can have their cake and eat it too:

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[41] *See* Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1524–26 (2002).

[42] *See* Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1407–09 (2001) (studying twenty southern congressional elections with black candidates from the 1990s and concluding that in most cases blacks needed to constitute only 33–39% of the voters to give a black candidate 50% of the votes).

[43] Specifically, coalition districts are those in which there is a fifty-fifty possibility that the candidate of choice of African American or Latino voters will be elected by a coalition of white voters and voters of color. *See id.* at 1407. The progenitors of coalition districts, a group of scholars who often clashed on issues of race and redistricting in the past, are Bernie Grofman, Lisa Handley, and David Lublin, *see supra* note 42. For a general introduction to the social science arguments in favor of coalition districts and their legal and normative ramifications, see Pildes, *supra* note 41, at 1523–39. For an examination of how the coalition-district theory was implemented in New Jersey, see Sam Hirsch, *Unpacking* Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002). Other academics have gone further in challenging majority-minority districts, arguing in favor of *influence districts*, where voters of color cannot realistically elect a candidate of choice given the likely decisions of white voters, but instead can only influence that choice. *See* Pildes, *supra* note 41, at 1539–40 (describing but not endorsing that strategy). The basic argument is that it is better for racial minorities to influence many elected representatives than to control a few. Although influence districts have gained some adherents, *see* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS 207–25 (1995), they have not received nearly as much support within the academy as coalition districts.

[44] For a more in-depth discussion of this term and its complexities, see Pildes, *supra* note 41, at 1526 n.22.

they can elect members to the Congressional Black Caucus and still have Mel Watt serve as a committee chair.[45]

Quite unexpectedly, the Supreme Court recently endorsed the newly minted coalition-district theory in *Georgia v. Ashcroft*, a case interpreting Section 5 of the Voting Rights Act.[46] The *Ashcroft* majority, in an opinion by Justice O'Connor, granted considerable deference to the state's judgment that coalition districts best served the interests of racial minorities.[47] Even more remarkably, while the case elicited a vigorous dissent from four Justices, the dissent drafted by Justice Souter also endorsed the theory behind the coalition-district strategy.[48] Both within the Court and the academy, then, coalition districts seem to be emerging as the new "third way" in race-conscious redistricting.

At first glance, setting aside important questions about how judges can sensibly implement the coalition-district theory,[49] one might think that there can only be one answer to the question posed by *Georgia v. Ashcroft*. If the purpose of the Voting Rights Act is to empower racial minorities, then the coalition-district strategy seems obviously superior to majority-minority districting because it allows racial minorities to elect more candidates "of choice" to the legislature.[50]

Here again, we have a gap in the literature: no one has systematically identified the costs and benefits associated with the abandonment of majority-minority districts *outside* the debate about legislative influence. Admittedly, the link between that debate and the notion of second-order diversity may not be immediately obvious, as the argument favoring coalition districts centers on the appropriate strategy for empowering racial minorities at the legislative level, not a broader normative commitment to first-order diversity.[51] Nonetheless, as with

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[45] *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 470 (2003) (noting that the switch to coalition districts in the state senatorial plan was endorsed by African American legislators in part because "[a]t least 7 of the 11 black members of the Senate could chair committees").

[46] *Id.* at 486–91.

[47] *See id.* at 482–83.

[48] *See id.* at 492 (Souter, J., dissenting). While the *Ashcroft* majority also endorsed influence districts as a strategy of minority empowerment, Justice Souter's dissent rejected that conclusion. *Ashcroft*, 539 U.S. at 482–83; *id.* at 492–93 (Souter, J., dissenting).

[49] *See, e.g.*, Karlan, *supra* note 7, at 300.

[50] *But see id.* at 294–313 (analyzing the weaknesses of a coalition or influence model as compared to a majority-minority archetype). I flag "of choice" in scare quotes precisely because what constitutes a candidate of choice is hotly contested, requiring both an empirical judgment about support and a normative judgment about how much compromise we should expect of African American or Latino voters.

[51] *Shaw v. Reno*, 509 U.S. 630 (1993), offered the closest thing one can find to a normative vision in districting that privileges first-order diversity. *See id.* at 648; *cf.* Pildes, *supra* note 41, at 1547–49 (drawing a connection between some of the concerns animating *Shaw* and support for coalition districts). Some arguments made in favor of *Shaw* concern the need to reduce the salience of race in politics, something that might lead to the inference that districts should look alike and generally reflect statewide population totals.

juries, the concepts of first-order and second-order diversity dovetail neatly with the debate, providing a framing device for assessing the relative merits of the two strategies. The notion of second-order diversity is useful here because, as a practical matter, the trend toward coalition districts is essentially a push from second-order diverse districts (in which majority-minority districts cause wide variations in the composition of districts) to first-order diverse districts (in which the percentage of racial minorities approaches their percentage of the overall population).

The debate over *Ashcroft* thus far has largely centered on dividing power within a unitary institution — the legislature — and both majority-minority districts and coalition districts have largely been conceived of as byproducts of competing legislative design strategies. By conceiving of heterogeneity in district composition as something more than a tool of legislative design — as embodying an independent set of democratic values — the notion of second-order diversity provides a vocabulary for describing the costs and benefits associated with majority-minority districts beyond those involving legislative control.

III. MINING THE GAP: THE TRADEOFFS BETWEEN FIRST-ORDER AND SECOND-ORDER DIVERSITY

As the preceding discussion suggests, there is a gap in the legal literature: we lack an affirmative account of the benefits of heterogeneity that we now see in some democratic institutions, as well as a framing device for identifying the costs and benefits associated with maintaining, or abandoning, this existing feature of our democratic infrastructure. This Article tries to remedy this omission by developing a conceptual framework for analyzing the tradeoffs involved in designing the disaggregated portions of our democracy. It begins with the premise that we ought to take these institutions' unique features into account when we consider the law that governs them and the many proposals to move them closer to the first-order end of the diversity spectrum.[52]

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[52] In his work on legislative decisionmaking, Jeremy Waldron argues that "statutes . . . are *essentially* — not just accidentally — the product of large and polyphonous assemblies." JEREMY WALDRON, LAW AND DISAGREEMENT 10 (1999). He therefore claims that "this feature should be made key to our understanding of how to deal with them — how to interpret them and how to integrate them into the broader body of the law." *Id.* This Article begins with a weaker version of Waldron's premise. It does not claim that the institutional features on which it focuses — the disaggregated structure, small size, and varied composition of the institutions in question — are necessarily "essential" to the function they perform. Nor does it suggest that the arguments offered here were the reason that such disaggregated institutions were created. As Hanna Pitkin observes, whether institutions are established with a clear purpose or are merely the product of historical accident, "institutions develop a momentum or inertia of their own." PITKIN, *supra* note 1, at 235. The question addressed in this Article, then, is simply whether "[t]he persistence of

This Part mines the territory within the gap that Hanna Pitkin identifies between "purpose" and "institutionalization" — between the principles that undergird an institution and its structure in practice.[53] It thus looks to the oddities produced by the disaggregated structure, small size, and varying composition of the institutions in question — the attributes of these institutions that seem inconsistent with our conventional intuitions about diversity — and suggests why we might value them. It considers the questions that would naturally arise about a governing institution that is second-order diverse: Why wouldn't we want to guarantee electoral minorities a fair share of power on every decisionmaking body? Why would we worry if members of the majority constitute the majority on a decisionmaking body? Why would we value a governing institution whose decisions vary, even conflict? Is there any justification for deliberately ensuring that decisionmaking bodies do *not* reflect a coherent design theory? This Part then identifies potential benefits to each anomaly and contrasts those benefits with their concomitant costs. In doing so, it begins to craft a vocabulary for talking about the tradeoffs inherent in the type of legal and policy debates described in Part II.

Disaggregated institutions that are second-order diverse typically perform four functions that distinguish them from institutions that are first-order diverse: second-order diversity gives electoral minorities a chance to *control* governmental power, as described in section III.A; it *turns the table* on the majority, creating a unique democratic space where members of the majority and minority abandon their usual participatory role, as explained in section III.B; it fosters *democratic visibility*, as discussed in section III.C; and it *cycles* our design strategy, normative commitments, and strategies for dealing with conflict, as explained in section III.D. This Part then offers a mix of intrinsic and instrumental reasons why we might value these functional differences and examines the tradeoffs inherent in pursuing such benefits in section III.E.[54]

[an] anomaly" in institutional design over time suggests not anachronism, but what Robert Cover would term "institutional evolution." Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 642 (1981).

[53] PITKIN, *supra* note 1, at 235–36.

[54] These terms are well-developed in the political theory literature, so what I offer here represents an extremely rudimentary definition. "Intrinsic" benefits are those we value in their own right. "Instrumental" benefits are those we value as a means to an end — here, a well-functioning democratic process. One could organize the arguments presented in this Article by type of benefit — intrinsic or instrumental — rather than by function. Most of the arguments offered in this Article are instrumental in nature. For example, this Article argues that we should value second-order diversity because it helps electoral minorities develop their participatory sea legs and educates members of the majority about the costs their decisions inflict on others, both of which promote a well-functioning democratic process. Some of the arguments touch upon intrinsic concerns. For example, this Article claims that we ought to value in their own right opportunities for

The bulk of this Part is devoted to discussing the benefits associated with second-order diversity and the costs that one might think of as internal to the theory — that is, the costs that arise directly from the same design feature as the benefits. This approach merely reflects the fact that the case in favor of second-order diversity is underdeveloped and I do not have much to say about the other costs associated with second-order diversity (which also might be described as the benefits of first-order diversity) beyond what has already been set forth in the literature.

Because the purpose of this Part is to sketch the framework at a fairly high level of generality, I do not offer a full analysis of the costs and benefits of second-order diversity in any particular institutional setting. Nonetheless, in order to ground the analysis somewhat, I use juries and districts as examples to illustrate how we might think about these considerations in particular institutional contexts. These examples are useful not only because both structures are second-order diverse in practice, but also because the differences between the two institutions — the *strategy* used for diffusing power, the institutional *role* they play, the democratic *outputs* they generate, and the *tools* used to achieve heterogeneity — nicely frame some of the arguments offered below. Thus, each section includes an analysis of the benefits associated with second-order diversity, a brief exploration of its concomitant costs, and one example showing how those tradeoffs might play out depending on the institutional setting.[55]

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electoral minorities to elect a champion or craft a decision. Admittedly, one might think that such opportunities are actually instrumental — a means to achieve a well-functioning democracy — but they can also be described, in some senses, as constitutive of a well-functioning democracy. *Cf.* J.L. Ackrill, *Aristotle on* Eudaimonia, 40 PROC. BRIT. ACAD. 339, 343 (1974) (arguing that activities can be "constituents of or ingredients in" a good life rather than means to achieve the end of the good life (emphasis omitted)). A third category of arguments — those associated with cycling as a strategy for dealing with normative difference or political conflict — are more methodological in nature, although these arguments, too, could be classified as "instrumental" or "intrinsic" in some rough sense.

[55] Vikram Amar makes a different type of connection between jury service and voting, arguing that both ought to be understood as "political rights" rather than as "civil rights." *See generally* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995). For a nuanced, historical analysis of these concepts as they played out in the wake of the Nineteenth Amendment, ➞ Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 LAW & HIST. REV. 479 (2002). Other commentators have drawn connections between juries and elections. *See, e.g.*, Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703 (1998) (proposing to replace peremptory challenges with a cumulative voting scheme in order to avoid discrimination in the selection of jurors); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1172 (1995) (drawing connections between juries and other forms of self-government); Forde-Mazrui, *supra* note 19, at 388–403 (proposing jury subdistricting to achieve more representative juries); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH.

A. The Tradeoff Between Influence and Control in Disaggregated Institutions

One of the functional oddities second-order diversity produces is that it grants electoral minorities control over some subset of democratic decisions. A central question in democratic design, of course, is how much power ought to be allocated to an electoral minority in a majoritarian system.[56] As long as we agree that the same majority should not decide things all of the time, the challenge is to figure out how to ensure that electoral minorities get a fair shake in the political process.[57] In answering that question, of course, we need to know more about the system itself, and the notion of second-order diversity helps tailor that inquiry to small, disaggregated institutions.

Specifically, one problem for addressing how best to treat electoral minorities is that we usually conceive of democratic bodies as unitary — there is *one* legislature rendering "the" law, *one* populace voting on "the" initiative.[58] It is thus quite difficult to discern what power an electoral minority ought to have in making "the" decision. Our intuitions about the legitimacy of majoritarian rule lead us to resist proposals to allow electoral minorities to "take turns"[59] exercising majority power or create a minority veto.[60] We thus assume that the best —

L. REV. 2001, 2016–17 & n.73 (1998) (connecting the Court's struggle with the problem of essentialism in the jury context to that of districting).

56 As Ian Shapiro notes, while for certain periods of our history majoritarianism was an oppositional ideal, in the United States "[t]he problem was to domesticate and institutionalize an idea whose historical use had been to destabilize institutions." Ian Shapiro, *Three Fallacies Concerning Majorities and Minorities in Politics*, *in* NOMOS XXXII: MAJORITIES AND MINORITIES 79, 80 (John W. Chapman & Alan Wertheimer eds., 1990). He observes that American theorists have long wrestled with the problem of protecting electoral minorities from majority rule. *Id.*

57 As Michael Klarman has observed, "majority rule can take a variety of forms — including . . . a majority's enjoying all of the political power or simply a majority of it." Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 525 (1997).

58 With apologies to those scholars who have labored to debunk the view that the legislature is a unitary actor. *See, e.g.*, WALDRON, *supra* note 52; Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

59 *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 5 (1994); *id.* at 65–66 (discussing deliberative gerrymandering as the "third-generation problem" of voting-rights claims). Guinier's proposal is more radical, however, as she suggests taking turns exercising power in unitary bodies, like legislatures, rather than disaggregated ones, like electoral districts. If, however, one thinks of legislative acts as a collection of decisions disaggregated *temporally*, our two visions of taking turns may dovetail.

60 *Cf.* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163, 178–79 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (describing tensions between majoritarian notions and the minority veto, and describing the latter as a "self-defeating extreme"). *But see* GUINIER, *supra* note 59, at 16–17 (proposing a minority veto); YOUNG, *supra* note 10, at 184 (same); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1145–54 (1991) (same).

perhaps the only — model for distributing power fairly is to give electoral minorities influence, but not control, over the decision.

When a democratic institution is disaggregated, there are more options for thinking about democratic fairness. The concept of first-order diversity dovetails with the influence model traditionally deployed in unitary systems. Under a system that is first-order diverse, members of an electoral minority will have the same share of seats or votes on every decisionmaking body. Under certain circumstances, this could be an excellent model — depending on the dynamics of the decisionmaking process, members of the group could affect every decision made. But they will also be destined to be in the minority coalition should the decisionmakers divide along group lines. Moreover, whether the decisionmakers reach a consensus or fragment along group lines, we would see the same decisionmaking process reproduced again and again. Decisions would reflect the views of the median decisionmaker, the institutional equivalent of the swing voter. Democratic outcomes would be roughly the same. In short, in a system that is first-order diverse, we would see one form of democratic compromise, not many.

One might think that these observations would not apply to first-order diverse institutions governed by a unanimity rule, such as the jury. On this view, the only person who matters is the fringe voter, who can "hold out" and force the other jurors to acquiesce to her more extreme position. While voting rules plainly affect jury deliberations, group dynamics matter a great deal as well. Indeed, contrary to this theory about hold-outs, "strong social-psychological evidence" suggests "that the pressure to conform was nearly irresistible when a single person was faced with a unanimous majority."[61] Thus, the jurors most likely to determine the outcome of a case are those at the "tipping point" of the jury, not those who hold the most extreme position in the group.[62] In sum, in institutions governed by a unanimity rule, indi-

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[61] Phoebe C. Ellsworth, *One Inspiring Jury*, 101 MICH. L. REV. 1387, 1396 (2003) (book review); *see also* JAMES P. LEVINE, JURIES AND POLITICS 153–55 (1992).

[62] Commentators have summarized the empirical evidence regarding the "tipping point" in jury decisionmaking by identifying which jurors are likely to represent the functional equivalent of the swing voter. *See, e.g.*, Dennis J. Devine et al., *Jury Decisionmaking: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 692 (2001) (finding different thresholds for acquittal and conviction, and challenging the traditional hypothesis that the critical threshold is the two-thirds mark); *see also* Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21, 21–22 (1988). For some empirical evidence regarding the complexity of group dynamics on the jury, see Devine et al., *supra*. For a discussion of the effects of voting rules on jury deliberations and verdicts, see *id.* at 669. *See also* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 164–65 (2003); Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133, 133–36, 144–48 (1996).

viduals who occupy the ends of the democratic spectrum are unlikely to prevail.

Under a system that is second-order diverse, in contrast, some decisionmaking bodies will mirror the population; others will consist of a majority of people from the "left" or the "right," Democrats or Republicans, fundamentalists or atheists, whites or African Americans. In some decisionmaking bodies, moderate Democrats or suburban whites will be the swing voters; in others, libertarians, Latinos, rural Republicans, fundamentalist Christians, or Greens will cast the decisive votes.

Second-order diversity thus offers an alternative strategy for achieving fairness in a disaggregated democracy. Rather than giving electoral minorities "influence" over each decision, it gives some electoral minorities the chance to be in the majority on a decisionmaking body and ensures that someone who is not in the middle of the political spectrum will have the chance to be the swing voter. In short, second-order diversity grants some minority group members the power to decide, a power usually enjoyed *solely* by members of the majority.[63]

The notions of first-order and second-order diversity provide a frame for examining the tradeoff between influence and control in disaggregated democratic institutions. First, this framing device reveals a set of instrumental benefits that have not yet been fully explored in the literature. Second, it points to some complexities in the influence/control tradeoff that have often been overlooked by scholars — specifically, the fact that the influence/control tradeoff occurs at *two* levels of governance.

1. The Benefits of Control: Diffusing Power. — Perhaps the most obvious reason to value second-order diversity and the control it gives to electoral minorities in disaggregated democratic institutions is an instrumental one. The concern one might naturally have about democratic institutions that are first-order diverse is that they might give a majority faction the power to decide in every case. Second-order diversity may be attractive because it is a useful strategy for diffusing political power in a majoritarian system.

The way that second-order diversity diffuses power in practice will depend on the institution in question. For some disaggregated institutions, second-order diversity frustrates the majority faction simply by disaggregating power. For others, it allows electoral minorities to

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[63] *Cf.* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 298 (1980) (concluding that one argument that favors a "responsive lottery" — a weighted lottery for resolving disputes — is that "it gives the egalitarian minority at least *some* chance of determining the political outcome"); RICHARD S. KATZ, DEMOCRACY AND ELECTIONS 44 (1997) ("Would not a better notion of popular sovereignty assure that each individual or group saw its view prevail a fair proportion of the time?").

"edit" the law they lack the power to "authorize," by making overlapping majorities necessary to get something done.

In one sense, second-order diversity is a structural strategy for achieving Madison's goal of thwarting majority factions in a society with entrenched group divisions.[64] Consider the electoral district. Madison and the Federalists favored large districts, even at-large districts, for electing legislators.[65] Large districts, of course, preclude much variation in population and thus move districts closer to the first-order end of the diversity spectrum. That, of course, is why Madison favored them; as he recognized, an increase in the size of a district makes it less likely that a faction will control it.[66]

We might, however, be equally suspicious of big districts or other large units of governance because they consistently submerge electoral minorities. Second-order diversity thus celebrates heterogeneous decisionmaking bodies (like small districts) because they give members of many groups a chance to exercise power. Put differently, while Madison sought to resolve the problem of factions by expanding the polity — making it large enough so that fluid coalition politics would prevail — second-order diversity tries to reduce the dangers of factionalism by disaggregating the polity.[67]

Given that most disaggregated institutions are, like juries, at the lower end of the political hierarchy — they are usually charged with implementing or applying a legislative mandate — there is a *second* way in which second-order diversity diffuses power: it grants electoral minorities the power to "edit" the law by trimming or softening majority mandates when they lack the power to "author" the law itself.[68]

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64 *See* THE FEDERALIST NO. 10, at 82–84 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 51, at 323–25 (James Madison) (Clinton Rossiter ed., 1961).

65 *See* THE FEDERALIST NO. 10, *supra* note 64, at 83; *see also* Mark A. Graber, *Conflicting Representations: Lani Guinier and James Madison on Electoral Systems*, 13 CONST. COMMENT. 291, 299–300 (1996). This strategy may be impossible for some disaggregated institutions, like the jury, unless we move toward the Athenian practice of convening juries composed of several hundred, even a thousand, members. *See* ANTONY ANDREWES, THE GREEKS 179 (1967). For an analysis of the differences between the modern jury and its ancient counterpart, see DANIELLE S. ALLEN, THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS 6–7, 168–79 (2000).

66 *See* THE FEDERALIST NO. 10, *supra* note 64, at 83.

67 For an analysis of how debates about the relationship between size and governance played out during the Founding, see AMAR, *supra* note 6, at 7–17; and Hills, *supra* note 6, at 981–83.

68 I borrow these phrases from Philip Pettit. *See* Pettit, *supra* note 60, at 164. Pettit, however, uses them in a slightly different context, discussing the need to grant electoral minorities the opportunity to "edit" the law by contesting it in an acceptably neutral process — such as a proceeding before a judge, a jury, or an administrative agency — and thereby to vindicate what he terms a "contestatory" or "oppositional" model of democracy. *Id.* at 183–85. His conception of dissent focuses more on elites and less on a populist conception in which the people speak for themselves.

Here, federalism,[69] the most fully theorized institutional strategy for diffusing majoritarian power through a "control" rather than an "influence" model, provides a useful counterpoint to the framing argument. For these purposes the crucial distinction is that federalism diffuses power by creating *competing* majorities, while second-order diversity does so through a system of *overlapping* ones.

The argument that federalism provides a strategy for diffusing majority power is well developed. Building on the work of academics like Herbert Wechsler, who lauded states as guardians of minority interests from centralized power,[70] proponents of federalism claim that it reduces the problems associated with centralized power by creating "two ongoing levels of government, each with leadership independently chosen by the people."[71] Proponents thus argue that federalism, by "forc[ing] us always to ask why . . . a majority of *this demos* [is] relevant for deciding *this* issue," facilitates "democratic social cooperation in many circumstances in which nationalism does not."[72]

The notion of second-order diversity strikes a different compromise with majoritarianism. Federalism hinges on the existence of state sovereigns, autonomous realms where the state decisionmaker is preeminent.[73] The disaggregated institutions that are the focus of this Article are quite different. These decisionmaking bodies tend to be charged with applying or implementing the law enacted by the polity (for example, juries applying the law handed down by the state legislature, or school committees implementing state law), and their governing au-

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[69] For simplicity's sake, I focus here on the American variant of federalism. For a comprehensive analysis of the arguments in favor of and against federalism in the United States, see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171–259 (1980); DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (3d ed. 1984); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229 (1994); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987); and Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

[70] *See* Wechsler, *supra* note 69, at 546–47. For a critique of this view, see Amar, *supra* note 69, at 1240–43.

[71] Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2219 (1998); *see also* McConnell, *supra* note 69, at 1503.

[72] Stephen G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 742, 763 (1995); *see also* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 403 (1997).

[73] Daniel Elazar thus distinguishes federalism from a purely decentralized system: Federalism "is often mislabeled *decentralization*, but should more appropriately be called *noncentralization*. The American federal union differs from a decentralized political system in that constitutional limits are imposed on the extent to which the national government can concentrate as well as devolve governmental power and functions." ELAZAR, *supra* note 69, at 2. Vicki Jackson has similarly argued that sovereignty is a crucial feature of American federalism. *See* Jackson, *supra* note 71, at 2219.

thority does not exist separate and apart from the sovereign's.[74] Their decisionmaking power is thus *bounded* by the majority's choices.

That is not to say that these institutions should be mistaken for subunits of a purely centralized system, in which a unitary body devolves some of its power to administrative underlings. At some level of abstraction, of course, states generally have the power to constitute and dissolve most types of disaggregated democratic institutions. But as a practical matter, these subunits are in some senses constitutive of the central authority. The law passed by a legislature cannot exist separate and apart from the juries that apply it. Legislators cannot enter every school in order to ensure compliance with their policies.[75]

Further complicating the relationship between disaggregated institutions and the central source of power is the fact that the central authority often cannot choose the membership of the implementing body. Thus, as with states in a federal system, the members of a jury or a school committee are not bureaucrats beholden to the central power, but draw their authority from an independent source.[76]

What this means in practice is that one needs *overlapping majorities* to get something done.[77] In order to convict a defendant, for example, a majority of the legislators needs to agree the conduct is generally harmful and a jury must agree to apply that legislative prohibition to a particular defendant.[78] In order to achieve a particu-

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[74] These institutions come closer to what has been termed "cooperative federalism," where Congress "invite[s] state agencies to implement federal law." Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665, 671 (2001); *see also* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); Susan Rose-Ackerman, *Cooperative Federalism and Co-Optation*, 92 YALE L.J. 1344 (1983).

[75] I am indebted to Jessie Amunson for helping me think through this question.

[76] As two well-known critics of federalism have claimed, the difference between federalism and mere decentralization is that only in a federal system do "subordinate units possess prescribed areas of jurisdiction that cannot be invaded by the central authority, and leaders of the subordinate units draw their power from sources independent of that central authority." Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 911 (1994).

[77] JOHN RAWLS, POLITICAL LIBERALISM 15, 39, 133–72 (1993) (exploring the idea of an "overlapping consensus" and its role in Rawls's theory of justice).

[78] *Cf.* Teague v. Lane, 489 U.S. 288, 314 (1988) (positing that juries "guard against arbitrary abuses of power by interposing the commonsense judgment of the community"); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 36–37 (2003) (arguing that juries "mitigate or temper" unduly broad criminal prohibitions, but expressing concern that the jury's ability to do so has recently been undermined). Bill Stuntz has suggested that there are actually three overlapping majorities in this example — the legislature, the prosecutor (often elected by a majority of the county), and the jury majority. That claim is supported by Kathryn Abrams's observation that "[t]he substance of prosecutions and the range of educational and legislative tasks undertaken by the prosecutor vary demonstrably from jurisdiction to jurisdiction — variations that arise not only from the demographics of each area but also from the expressed preferences of its citizens." Kathryn

lar educational policy in a school, a legislature must pass the law and a school committee must decide how to implement it.[79] The majorities in these subunits are not autonomous in the way states are under a federal system. Absent an unusual feature granting the lower body veto power — like the power of the jury to nullify — the lower body is partially constrained by the wishes of the centralized majority. Nonetheless, *in the gap between the rule and its interpretation lies the need for a second majority*, a significant source of political power that a centralized authority, at least in the long term, cannot eliminate. Put differently, second-order diversity takes advantage of the democratic possibilities associated with interstitial decisionmaking.

To add a further twist, the "overlapping majorities" in question intersect in intriguing ways with separation-of-powers issues.[80] Separation of powers, of course, also turns on a requirement of overlapping majorities. After all, the point of the separation of powers is that "no simple majority of any single body of deciders can do anything without the concurrence of a majority of some other body of deciders."[81] In the context of second-order diverse institutions, however, the separation-of-powers analysis takes on an interesting overlay. There are at least some disaggregated institutions in which the relevant decisionmaking bodies perform the kind of check we generally understand a tripartite governing scheme to perform. Juries, for instance, check legislative overreaching, and school committees can cabin the policies of the legislature.

Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1418–19 (1993). On this view, jurors "edit" or "trim" prosecutorial excesses (or, put differently, trim the *county* majority's decision, as implemented by the prosecutor). *Cf.* W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1095 (1996) (arguing that juries sometimes nullify to "censure . . . prosecutorial misconduct in particular, *especially misconduct in the charging decision*"); Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 88 (arguing that acquittal signals defects in "prosecutorial practices").

[79] *Cf.* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 730 (1992) ("The tradition of local control of public schooling itself can be seen as a manifestation of the first amendment value of checking monolithic government control over the exchange of ideas and information.").

[80] I am indebted to Bruce Ackerman for suggesting this line of inquiry and to Anton Metlitsky for helping me think through the question. For a general outline of the arguments in favor of the separation of powers, see THE FEDERALIST NO. 48 (James Madison); and THE FEDERALIST NO. 51 (James Madison). For a thorough analysis of the concept's current doctrinal and theoretical underpinnings, see 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 2-1 to 2-10, at 118–206 (3d ed. 2000). For an intriguing effort to debunk the common assumption underlying the separation of powers — the notion that each branch will, if left unchecked, seek to increase its power — ➡ Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

[81] Frank I. Michelman, *"Protecting the People From Themselves," or How Direct Can Democracy Be?*, 45 UCLA L. REV. 1717, 1724 (1998) (citing Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1528 (1990)).

In a system that is second-order diverse, the majority on the decisionmaking body exercising that checking function may be quite *different* from the one being checked. A jury majority, for instance, might be quite unlike the legislative majority it checks. In a typical separation-of-powers scenario, in contrast, an executive elected by a statewide majority generally checks a legislature elected by roughly the *same* majority.[82] Even if these institutions "represent" the polity in different ways,[83] variation in the composition of the "majority" of one of the governing branches in the usual separation-of-powers scenario stems primarily from temporal variation, the variation that results from staggered elections.[84] When institutions are second-order diverse, however, the separation-of-powers structure does not merely cabin the overreaching of other branches, but empowers electoral minorities.

In sum, some of the decisionmaking bodies at issue here are unique hybrids, exhibiting traits associated with federalism, separation of powers, and centralization.[85] They are sometimes autonomous, sometimes dependent on and policed by a central authority, and sometimes constitutive of the governance system itself. They tame majoritarianism not by creating a system of competing majorities, but by mandating agreement by overlapping ones.

Second-order diversity is necessary to take advantage of the unique opportunities these disaggregated institutions offer for diffusing power. Just as a federal system would do little to fracture national majorities if every state precisely mirrored the nationwide population, so too overlapping majorities do not have much bite when subunits are first-order diverse; the subunits will simply mirror the majority found in the central decisionmaking body. Second-order diversity diffuses power by ensuring that *different* majorities prevail in at least some of

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[82] *Cf.* Levinson, *supra* note 80, at 952 (suggesting that the arguments in favor of the separation of powers make more sense "in a system of governance in which each of the branches represents, and is drawn from, a distinct estate," and noting the danger that other lines of affiliation — for instance, party loyalty — may undermine the "checking" function of a tripartite system).

[83] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 184–86 (1991).

[84] Bruce Ackerman argues that "one of the most distinctive features of the separation of powers" is "the fact that the different lawmaking powers often operate on a staggered electoral schedule. Even if party A wins big at time one, it may have to win *n* times more before it can gain plenary lawmaking authority." Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 644 (2000). Ackerman argues that this feature of U.S. constitutional design leads to a number of problems that other constitutional schemes avoid. *Id.* at 644–64.

[85] For this reason, part of the federalism debate is orthogonal to the debate over second-order diversity. One way to frame the federalism debate is that it pits a national, centralized authority that is first-order diverse against a decentralized governance structure that is second-order diverse. The debate here, in contrast, focuses on the *same* set of institutional subunits — subunits that are constitutive of, rather than wholly dependent on or independent of, the whole — and considers whether first-order or second-order diversity represents the best organizational strategy.

the subunits, thus granting electoral minorities power to edit or trim the central majority's mandates.

2. The Costs of Control: The Loss of Influence at Two Levels of Governance. — If there are benefits to granting electoral minorities some degree of control in disaggregated democratic institutions, there are also costs to doing so: these costs — the loss of minority influence within those structures — are the flip side of the benefits. While that tradeoff has been thoroughly explored in thinking about the distribution of legislative power, the complex nature of that tradeoff has not yet been fully probed in the context of disaggregated institutions generally. Specifically, the notion of second-order diversity highlights what many commentators have overlooked in examining these questions — namely, that the tradeoff between influence and control can take place at *two* levels of governance in disaggregated institutions: first, at the level where decisions are aggregated; and second, at the level of the disaggregated decisionmaking unit.

In order to show that the influence/control tradeoff can take place at both of these levels, I will use districts and juries as examples. At first glance, one might think they are poor examples for these purposes. Districts, after all, are designed to elect representatives who will be grouped with representatives elected from other districts. The influence/control tradeoff, then, would seem to concern only the distribution of power at the legislative level — that is, at the level of aggregation. The tradeoff between influence and control for juries, in contrast, would seem to involve only the composition of individual juries — a tradeoff that takes place only at the level of disaggregated units — as there seems to be no mechanism for "aggregating" jury verdicts. The notion of second-order diversity casts doubt on both of these assumptions.

Scholarship on electoral districts has largely focused on the best districting strategy for distributing power between the majority and minority. In debating this question, scholars have focused almost exclusively on those tradeoffs at the *legislative* level — whether it is better for minorities to influence many legislators or to control a few[86] —

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[86] Much ink has been spilled over the relative merits of these two strategies. Political theorists have provided the terminology for the debate — descriptive versus substantive representation. *See, e.g.*, PITKIN, *supra* note 1, at 60–91, 112–43. Among empiricists, the debate has been quite heated with regard to districts drawn to augment the power of racial minorities during the 1990s. Some political scientists have debated whether there is a tradeoff between descriptive and substantive representation — that is, whether the creation of more majority-minority districts during the 1990s ultimately harmed the interests of voters of color, as such schemes packed racial minorities, "bleached" adjoining districts, and thereby helped the Republicans attain a majority in state and federal legislatures. *See, e.g.*, SWAIN, *supra* note 43; Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Redistricting and the Future of Black Representation*, 48 EMORY L.J. 1209 (1999); Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive*

and envisioned districts largely as a tool for distributing legislative power. First-order diversity is the byproduct of the view that it is better for electoral minorities to influence many legislators. Under this model, every legislator would have roughly the same constituency and, at least in theory, would look out for the interests of the members of a minority group. The main alternative is to grant electoral minorities controlling electoral power over a smaller number of legislators, who in turn can exercise influence within the legislature on group members' behalf. The side effect of this theory for allocating legislative seats is a set of districts that is second-order diverse. One particularly stark way to think about this tradeoff in the context of race is this: are African Americans better off electing a sizeable Congressional Black Caucus (something achieved through majority-minority districts, which push electoral schemes toward the second-order end of the diversity spectrum) or pursuing an influence model (the creation of districts that are more first-order diverse) that might result in the election of fewer African Americans to Congress but allow the Democrats to keep power in the House?

(a) Districts and the Influence/Control Tradeoff at the Level of Disaggregated Governing Units. — What has often been missed in the debate about influence and control in the districting context — and what is highlighted by the notion of second-order diversity, with its emphasis on disaggregated power — is that the influence/control tradeoff embedded in the choice of first- or second-order diversity takes place at *two* levels in the districting context. It occurs first with the election of a representative who can influence legislative outcomes, and second with the election of a representative who can distribute certain political goods and engage in useful agenda-setting activities whether or not

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Black Representation in Congress?, 90 AM. POL. SCI. REV. 794 (1996); Grofman et al., *supra* note 42; Lisa Handley et al., *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, *in* RACE AND REDISTRICTING IN THE 1990S 13 (Bernard Grofman ed., 1998); Karlan, *supra* note 7; David Lublin, *Racial Redistricting and African American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?"*, 93 AM. POL. SCI. REV. 183, 185–86 (1999); Kenneth W. Shotts, *Does Racial Redistricting Cause Conservative Policy Outcomes? Policy Preferences of Southern Representatives in the 1980s and 1990s*, 65 J. POL. 216 (2003); Kenneth W. Shotts, *Racial Redistricting's Alleged Perverse Effects: Theory, Data, and "Reality"*, 65 J. POL. 238 (2003). At the level of institutional analysis, scholars have debated whether racial minorities are more likely to obtain political goodies by having a small number of officials beholden to them in the legislature than by having political influence in a larger number of districts. *See, e.g.*, GUINIER, *supra* note 59, at 66–69, 75–76, 80–82; Karlan, *supra* note 7, at 300–02, 317–20; Pamela S. Karlan, *Maps and Misreading: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 217 (1989) [hereinafter Karlan, *Maps and Misreading*]. The debate hinges on assessments of whether electoral minorities can take advantage of those unique features that distinguish the legislative process, such as logrolling, a norm of collegiality, the presence of repeat players, and the many ways in which the legislative process mitigates collective action problems.

he can garner majority support for a piece of legislation. Indeed, it may be precisely because we are preoccupied with the notion of a legislature as unitary[87] that we focus on the power to control more than half of the votes.[88] The notion of second-order diversity is useful because it directs our attention to the many instances in which legislative power is disaggregated or in which individual districts function like independent governance units.

There are several ways in which legislators are, in effect, roughly equal in wielding legislative power — when power does not hinge on garnering more than half of the votes on the floor. One example of the power afforded to individual legislators is agenda setting. Legislators can serve as "conversational entrepreneurs"[89] — generating awareness of an issue and framing it for public debate[90] — by serving on a legislative committee, giving a speech on the legislative floor, sponsoring a bill, endorsing a candidate, publicizing what the majority is doing, demanding information from another governmental actor, or even hounding administrative agencies to reach a particular result.[91] In all of these capacities, legislators can serve as agenda setters. And, depending on the dynamics of legislative decisionmaking, these agenda-setting powers can be especially important for members of the electoral minority who lack the votes to pass their preferred legislation.

There is another way in which control over a district might assist a minority group in agenda setting. Elections tend to be centers of political energy — loci for organizing, lobbying, and learning about issues. Community groups and political structures are often organized loosely on a district-by-district basis, as groups within the community build relationships with the incumbent and as the incumbent reaches out to build ties within the community.[92] When minority group mem-

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[87] *See supra* pp. 1124–25.

[88] For an interesting analysis of the power of submajorities in the legislature and elsewhere, see ADRIAN VERMEULE, SUBMAJORITY RULES: FORCING ACCOUNTABILITY UPON MAJORITIES (Univ. of Chi. Law Sch., Pub. Law and Legal Theory Working Paper No. 54, 2004).

[89] ROBERT W. BENNETT, TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY 36–37 (2003).

[90] For a sampling of the literature regarding the role political elites play in framing issues and an analysis of its relation to racial politics, see DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 49 (Benjamin I. Page ed., 1999); DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 163–95, 281–85 (Benjamin I. Page ed., 1996); and Michael S. Kang, A Supralegal Theory of the Political Party (Dec. 1, 2004) (unpublished manuscript, on file with the Harvard Law School Library).

[91] Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 191 (1998).

[92] Consider, for example, what took place in Greensboro, North Carolina, after the city switched from an at-large to a districted city council. Representatives elected from the two predominantly African American districts ensured that residents of their districts served on appointed boards and commissions, thus building a network of representation for those communities

bers dominate a district, they can harness these built-in organizing apparatuses for their own causes. They may even be able to use elections within the district as a dress rehearsal of sorts — a chance to adapt and define their message until it is convincing enough to be accepted by the polity as a whole.[93]

Moreover, districts can sometimes function a bit like independent governance structures; the Chicago ward system is a well-known example.[94] In these instances, an individual legislator can assist members of her district whether or not she can command a majority when a bill is passed.[95] Whether one envisions constituent services as power or pork, individual election districts sometimes allow representatives to distribute political goods independently of one another.

While these powers are often limited at the level of Congress or state legislatures, if one looks to other governing bodies elected

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where none had existed before. Mark Binker, *Council Marks Anniversary, Still Strives To Be Responsive*, NEWS & REC. (Greensboro), Nov. 30, 2003, at A1, *available at* 2003 WL 5662467. Community members began to organize along district lines, and, in the words of one reporter, "the influence of changes brought by the district system can be found throughout the city," including "the rise of neighborhoods as platforms for political power," as demonstrated by the recent creation of a "neighborhood congress . . . organized to flex the grass-roots muscles on behalf of neighborhood concerns." *Id.* *But see* GUINIER, *supra* note 59, at 83 (arguing that district-based political organizing undermines the impetus for broader, community-based organizations).

93 The political dynamics stemming from regional concentrations of minorities may explain why it is easier to build a political movement in a district than in a state. For example, prior to the passage of the controversial anti-gay amendment to the Colorado Constitution invalidated in *Romer v. Evans*, 517 U.S. 620 (1996), gays and lesbians were building an equality movement one city at a time, building energy in places like Denver and Boulder — where a higher percentage of people supported gay rights than in the population statewide — so that they could eventually persuade the state as a whole to forbid discrimination on the basis of sexual orientation. *See id.* at 623–24. As Nicholas Zeppos argues, "[l]ocal democratic majorities, like other evolving competitive systems, may . . . require time to develop strength on their own before inclusion into a larger arena." Nicholas S. Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445, 452 (1997). Indeed, as Zeppos notes:

> It may be [the Supreme Court's] broader acceptance of the political significance of these local political-geographic lines — represented in *Romer v. Evans* by the political actions of towns like Aspen, Denver, and Boulder — that made Justice O'Connor and Justice Kennedy willing to set aside the statewide initiative and restore the governmental actions of these local political communities.

Id. at 455.

94 Individual Chicago aldermen exercise astonishing power over public works projects within their wards under a system known as "aldermanic prerogative," an informal political deal by which the aldermen grant Mayor Daley "unilateral control of the city" in exchange for "virtual dictatorial power within their wards." Patrick T. Reardon & William Gaines, *Council of Favors*, CHI. TRIB., Nov. 3, 1997, § 1, at 1. As a result, "[a]ldermen have gained so much power in their respective wards that no public action takes place there without their consent." John J. Betancur & Douglas C. Gills, *Community Development in Chicago: From Harold Washington to Richard M. Daley*, ANNALS AM. ACAD. POL. & SOC. SCI., July 2004, at 92, 99.

95 Even in the case of a typical legislator, we often underestimate the importance of the ombudsman service to legislative constituents. *See* Morris P. Fiorina & Roger G. Noll, *Majority Rule Models and Legislative Elections*, 41 J. POL. 1081, 1092–93 (1979).

through districts — city councils, school boards, special-purpose agencies — there are more instances in which districts function partially as mini-governance units. For instance, as Pam Karlan points out, a number of districted governing structures, like county commissions, grant specific powers to one or two rotating "chairs," thereby allowing individual members to wield significant power even when they cannot garner a majority of votes on the commission itself.[96]

Thus, districts reveal the tradeoff between influence and control in its most complex form. The debate about second-order diversity in districting concerns not only whether electoral minorities will have influence or control over some votes at the legislative level, but also whether they will exercise influence or control over the disaggregated portions of legislative power, such as agenda setting or the chance to preside over a mini-governance unit. The tradeoff in each case is comparable: more control in some districts generally means less influence in others. What the notions of first-order and second-order diversity add to the existing literature is a framing device that highlights that the tradeoff inheres at *two* levels of governance.

(b) Juries and the Influence/Control Tradeoff at the Level of Aggregation. — Even if the tradeoff between influence and control takes place at two levels of governance in districting, one might wonder whether districts are unique in this regard. It seems likely that for most other disaggregated institutions, the tradeoff between influence and control takes place only at the level of the disaggregated unit. The jury system, indeed, seems at first blush to present a prime example of this phenomenon. Although we are not accustomed to thinking of juries in terms of distributing power,[97] when we press on the democratic under-

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[96] Karlan, *Maps and Misreading*, *supra* note 86, at 241, 244.

[97] Despite the jury's historical roots, *see* AMAR, *supra* note 6, at 81–118 (discussing the historical view that juries represent an important source of local autonomy), we tend to resist the notion that juries represent a strategy for diffusing power rather than for finding truth. *See* MARIANNE CONSTABLE, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE 51–54 (1994) (offering a survey of jury studies and our evolving conception of the juror's role in the second half of the twentieth century); George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575 (1997) (providing an in-depth historical analysis of the jury's evolving role as a truth-finder). The conception of the jury as an instrument for diffusing power suggests that juries are tools for aggregating democratic judgments, with all the intellectual baggage that accompanies that notion. Aggregation tends to suggest that preferences are involved, that jurors will engage in logrolling, compromise, and the other hallmarks of interest-based bargaining. As a result, many resist the idea that the jury should be *political* — or that jurors should be understood as *representatives* — in any sense. For example, the leading proponent of the jury as a forum for democratic participation, Jeffrey Abramson, firmly resists any normative or policymaking proposal that would suggest jurors are on a jury in order to represent a group rather than to deliberate to reach a just and impartial result. *See* ABRAMSON, *supra* note 26, at 102, 139–41, 143–76. Similarly, the suggestion that juries are editing rather than merely applying majority mandates runs counter to the role we expect juries to play within the system, suggesting that the role the jury plays is, in Abramson's scathing terms, a

pinnings of juries, they turn out to offer a useful example of the influence/control tradeoff in disaggregated institutions.

It is not surprising that we would initially think that the influence/control tradeoff takes place only at the level of individual jury verdicts. Although it is easy to grasp the disaggregated qualities of electoral districts,[98] the disaggregated qualities of juries have largely been overlooked. As noted above, we tend to think of most decisionmaking bodies as unitary. We thus envision each jury as self-contained: a temporary body that renders a verdict in a single case and then dissolves. On this traditional view, juries — and jury verdicts — bear no relationship to one another, except that each verdict represents an independent and self-contained pronouncement of "the law."

Our atomized view of juries helps explain why the metaphor most often invoked to describe the jury's democratic role is that of the *legislature*.[99] The legislature does not, of course, dissolve after rendering a decision. But it is a unitary lawmaking body. If juries were truly legislatures, then each verdict would be "the law" and we would presumably want members of every relevant group to be at the table when it was made. Given this conventional view of juries, it is unsurprising that many legal scholars seek to do just that.[100]

Thinking of individual juries as disaggregated — as decisionmaking bodies located within a larger system — gives us a different perspective on what constitutes "the law." On this view, juries look a bit less like legislatures. Instead, "the law" is what emerges from the collective decisions of many juries, in roughly the same way that "the price" emerges from the collective decisions of many market partici-

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"nakedly political one." *Id.* at 125; *see also* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 904–47 (1999) (noting the differences between these competing views of the jury's role, particularly as they relate to jury nullification). Indeed, far from conceiving of juries as important sources of local autonomy, today we are more likely to associate the notion that juries are editing majoritarian mandates with all the controversy associated with nullification. *Cf.* Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 134 (1985) (arguing that the debate over jury nullification is intense because "[a]s the jury's power is increased to encompass a greater degree of policymaking, essentially a legislative function, the tension increases and raises questions about our fundamental notions of the allocation of power in a democracy"). Talking about the distribution of power comes quite naturally in the districting context, however.

98 Despite this fact, courts sometimes ignore the disaggregated qualities of districts. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1689–1716 (2001).

99 *See* AMAR, *supra* note 6, at 94 ("[A]nalogies between legislatures and juries abound."); *see also id.* at 94–95, 100, 104; Forde-Mazrui, *supra* note 19, at 376–79; King, *Racial Jurymandering*, *supra* note 17, at 741; Muller, *supra* note 21, at 148. *But see* AMAR, *supra* note 6, at 102–03 (describing differences between juries and legislatures).

100 *See supra* pp. 1115–16.

pants.[101] Juries are thus a tool for aggregation — of community judgments, interpretations of the law, whatever democratic judgments we think juries render — when we cannot all sit at the same table to hash out such questions.[102]

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[101] Analogizing the anticipated penalty for a crime to its "price," Judge Frank H. Easterbrook observes that "[t]here are thousands upon thousands of criminals, attorneys, judges, and prosecutors making independent decisions. . . . [T]he collective set of interactions determines the price." Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL. STUD. 289, 298 (1983). For a criticism of Easterbrook's general argument that questions the extent to which jury verdicts affect prosecutorial decisions, see Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL. STUD. 43, 66 (1988).

One might argue that there is no difference in this respect between a system that is first-order or second-order diverse — that is, attorneys will agree to a plea based on whatever the "median" jury is likely to find in a given case. If all that matters is the middle, a system that is first-order diverse provides a similar picture of "the law" as one that is second-order diverse. It seems more likely, however, that attorneys will take into account *both* the likelihood of obtaining a verdict from a jury in the middle of the political spectrum *and* the chance of getting a verdict from a jury on the ends of the political spectrum. Moreover, prosecutors and defendants may also be risk averse — the former because of the scarce resources available to prosecute crimes and the political costs of failed prosecutions, the latter because of the high costs of criminal conviction. This aversion to risk would likely force both prosecutors and defendants to consider a wider range of possible juries than simply an anticipated "median" verdict. One treatise instructing practicing attorneys how to assess the risk of an adverse verdict confirms this hypothesis. *See* Mark B. Victor et al., *Evaluating Legal Risks and Costs with Decision Tree Analysis*, *in* SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 12:20 (Robert L. Haig ed., 2000), *available at* http://www.litigationrisk.com/ACCA%20Chapter%2012%20(2004%version).pdf (instructing lawyers to consider the "high," "low," and "most likely" jury verdict to arrive at an appropriate assessment). I am indebted to Louis Kaplow for raising this point.

[102] There is, of course, ample reason to be cynical about the extent to which jury decisions determine the law in light of the dominant role plea bargaining has taken in the criminal process. *See, e.g.*, Barkow, *supra* note 78, at 34; Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1148–50 (20➞ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1911–12 (19➞ William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004). Nonetheless, what is crucial for these purposes is that, to the extent criminal verdicts have *some* effect on parties' decisions, one can make the case that jury verdicts shape the law *in the aggregate* rather than as a unitary decisionmaking structure akin to a legislature. For instance, relying upon Robert Mnookin and Lewis Kornhauser's conception of "bargaining in the shadow of the law," Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979), and the literature it has spawned, Daniel Richman argues that "[i]f citizens have any voice in the fine-grained decisions that prosecutors make about resource allocations, they have it not because of appointive or electoral politics but because prosecutors make charging — and plea bargaining — decisions in the shadow of jury verdicts." Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 941 (1997). As Richman points out, "prosecutors . . . do not operate within the framework of a single case." *Id.* at 969. To the contrary, a prosecutor making a charging decision must take into account the myriad of possible juries that might be empaneled, thereby demanding prosecutorial attention to the wide range of groups that might represent a meaningful voting bloc on the jury. *See id.* at 975. Thus, Richman suggests, we should not conceive of individual jury verdicts as "some general community judgment." *Id.* at 974. Instead, we should focus on the effect of jury verdicts, *in the aggregate*, on prosecutorial decisions that lead to — or avoid — a trial. *Id.* at 974–75; *see also* LEVINE, *supra* note 61, at 170–71 (describing jury verdicts as "legal bench-

If we understand "the law," as shaped by jury verdicts, to be the aggregation of many jury verdicts, then the influence/control tradeoff takes place not only at the level of individual jury verdicts, but also at the level of jury verdicts *in the aggregate*. For instance, to the extent that one thinks that prosecutors bargain "in the shadow of the law," basing plea bargaining decisions on their sense of the verdicts that juries (in the aggregate) will render,[103] then one has to consider whether electoral minorities benefit more from influence or control at the aggregated level (jury verdicts taken together) than at the disaggregated level (individual jury verdicts). In other words, as with the legislature, the only way to attain first-order diversity among jury decisions in the aggregate is to create juries that are second-order diverse.

Put more concretely, the choice for electoral minorities is whether they want to influence the decisions rendered by a lot of juries — for instance, soften all verdicts a bit — or control the decisions rendered by a few. Is one likely to achieve "better" results when bargaining takes place in the shadow of jury verdicts if the median of jury verdicts moves slightly in one's preferred direction (as we would expect to occur with first-order diversity) or if the "ends" of the jury verdict spectrum embody dissenting views (as with second-order diversity), thus creating the risk of outlier verdicts?[104]

3. The Importance of Context for Evaluating the Tradeoff Between Influence and Control. — Although the notion of second-order diversity provides a lens for identifying some often overlooked concerns in the influence/control tradeoff in disaggregated institutions, it does not provide a framework for resolving that tradeoff — that is, it does not tell us when and where control is a better option than influence for electoral minorities, let alone the democratic system as a whole. Put differently, the notion of second-order diversity gives us an analytic framework for identifying the costs and benefits of each approach, but it does not tell us how to weigh them against one another.

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marks" that reveal "the law as modified by the jurors' political perspectives"); *cf.* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 63–64 (1978) (observing that "if a series of juries is viewed as representative, then the pattern of decisions which emerges from that series can also be taken to reflect the values of the community," but expressing doubt regarding both propositions).

103 *See* Mnookin & Kornhauser, *supra* note 102.

104 As I argue elsewhere, the influence/control debate described here may have analogs in the context of decisionmaking cascades. *See* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. (forthcoming 2005) (manuscript at 14–15, on file with the Harvard Law School Library). That is, to the extent that the influence/control debate takes place in districting circles because there is a formal mechanism for aggregating the democratic outputs of electoral districts — legislatures — there may be informal aggregation mechanisms in the context of other types of decisionmaking institutions. *See id.* (manuscript at 15–23).

Any such assessment would, of course, require a more contextualized understanding of how power is divided within the institution in question. Consider the districting example again. There are plainly contexts where the costs of second-order diversity swamp the benefits. Imagine, for instance, that pushing districts toward the first-order end of the diversity spectrum would flip a state legislature from Republican to Democrat (where Democrats are the party of choice for the minority in question), as was thought to be the case by many legislators in *Georgia v. Ashcroft*.[105] The value of having one's own party in power at the legislative level is quite significant. It is thus easy to imagine why an electoral minority would prefer the benefits associated with majority status at the legislative level over unfettered control at the district level, especially if state legislators serve as little more than ombudsmen for their constituents. As one of my colleagues puts it, why would any electoral minority "settle for being emperors of second-rate empires"?[106]

There may be instances, however, when the calculus is different. For example, in those instances when legislative control is not at stake — when ceding control over districts will, at best, win a few more seats for the party favored by the minority but will not ensure a legislative majority — the benefits associated with control at the district level might seem weightier. The power of individual legislators to help set the agenda — demand debate or a vote on an issue, request information from an agency, deliver a speech on the floor — might seem quite crucial for a minority group, *especially* when the group's favored party cannot defeat the majority on the floor.[107] As Adrian Vermeule notes of "submajority rules" that empower legislative minorities, legislators' agenda-setting powers can be "accountability-forcing" devices that enable minorities to "focus the majority's attention on an issue," counteract "the ability of entrenched majorities to exploit various low-visibility techniques for disposing of cases in unprincipled ways," and

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[105] 539 U.S. 461, 469–71 (2003).

[106] E-mail from Samuel Issacharoff, Harold R. Medina Professor in Procedural Jurisprudence, Columbia Law School, to Heather K. Gerken, Assistant Professor of Law, Harvard Law School (Oct. 2, 2004) (on file with the Harvard Law School Library).

[107] *See* VERMEULE, *supra* note 88. Consider a concrete example: African American aldermen on the Chicago City Council were able to force Mayor Daley, who exercises virtually unilateral control over city affairs because the council is packed with his supporters, to give more city contracts out to African American and Latino contractors. After well-publicized calls by African American aldermen for more racial diversity in the pool of contract recipients, Daley appointed an African American to be in charge of contracts and significantly increased spending on city programs that aided minority-owned firms. *See* Laurie Cohen & Jennifer Peltz, *Watchdogs To Keep an Eye on Chicago Contracts*, CHI. TRIB., Jan. 15, 2000, at N1; Fran Spielman, *Daley Rebuilds Inner Circle*, CHI. SUN-TIMES, June 25, 2000, at 6; Fran Spielman, *Daley Shifts Gears in Effort To Clean Up Contracts Mess*, CHI. SUN-TIMES, Feb. 20, 2000, at 8.

"collect and publicize information that the majority would prefer not to admit into the public record."[108]

Control at the district level might also seem more significant if the interests of minority group members and their party are not closely aligned — when an electoral minority is, in effect, a disempowered minority within its own party. Second-order diversity among districts would, for instance, make it easier for minority representatives to act independently of the party's preferences in the hopes of brokering a better deal for their constituents by, for example, defecting on certain votes. Moreover, depending on their level of dissatisfaction with the party with which they are aligned, electoral minorities might even value electing their "own" representative because he can use his agenda-setting power to police not only the activities of the majority party, but also those of the group's purported allies.

The influence/control tradeoff may also vary with the *type* of minority in question. While a sizeable African American community with enough votes to swing the legislature from Republican to Democrat might have every reason to privilege power at the legislative level, smaller minority groups may make a different assessment. For instance, a small or diffuse group capable of controlling, at best, one seat may prefer to have at least one legislator articulating its concerns than to have modest influence over a number of representatives.

Similarly, the value of control at the district level may vary with the level of government and the purpose of the governing institution. For instance, at higher levels of government — state legislatures or Congress — electoral minorities may think that individual representatives provide little to their constituents save White House tickets and the occasional bit of pork. If this were the case, they might well prefer even modest increases in influence at the aggregate level, where bills are passed.

The calculus might change, however, at the local level, especially when there is only one party in power or when a district's health depends heavily on its individual representative. Consider the Chicago ward example again. Although aldermen exercise extraordinary control over what takes place within their own wards,[109] the dominance of the Democrats — specifically, the Daley Democrats — on the City Council means that the aldermen's votes do not matter much. In the words of two observers of Chicago's City Council, "[n]othing comes up that does not have the stamp of approval of Daley. And never during

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[108] VERMEULE, *supra* note 88, at 8, 12, 14.

[109] *See supra* note 94.

the meeting is a vote taken for which the result — always an overwhelming administration victory — is ever in doubt."[110]

Control at the district level might also seem important for local agencies like the one challenged in *Presley v. Etowah County Commissioner*.[111] Prior to the changes reducing board-member power in anticipation of the appointment of an African American board member, individual board members presided over their own fiefdoms, making policy decisions and doling out patronage independently of one another.[112] Thus, in situations where political preferences find their strongest expression at the level of disaggregated local institutions rather than at the legislative level, second-order diversity may be useful.

In sum, any assessment of the influence/control tradeoff demands a nuanced, contextual assessment of the institution and community in question. Sometimes the benefits of second-order diversity will be marginal at best; at other times, they may be significant enough to affect our calculus. What the notions of first-order and second-order diversity provide here is not a solution to this longstanding problem of democratic design, but a framing device for talking about the full range of costs and benefits involved in such assessments.

B. Turning the Tables: The Benefits of Destabilization and the Costs of Forced Community

A second unusual characteristic of second-order diversity has less to do with the type of instrumental concerns addressed above — divvying power among members of the polity — and more to do with the unusual participatory dynamic that second-order diversity generates. By granting electoral minorities control over some decisionmaking bodies, second-order diversity *turns the tables* on members of the majority, depriving them of the powers and comfort usually conferred by their majority status. Second-order diversity thus destabilizes existing political dynamics, creating a unique political space in which electoral minorities no longer play the role of "influencer" or "dissenter" but enjoy the power to decide.

1. The Values Associated with Turning the Tables: Baselines, Identity, and Participation. — (a) Baselines and the Participatory Experience. — Debates about the treatment of electoral minorities usually center on how to distribute power — and the tangible goods that power brings — fairly among members of the polity. Scholars have

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[110] Reardon & Gaines, *supra* note 94.

[111] 502 U.S. 491, 510 (1992) (holding that a reduction in the power of county commissioners in anticipation of the ascension of a black commissioner is not a change "with respect to voting" in violation of section 5 of the Voting Rights Act).

[112] *Id.* at 497.

thus devoted considerable energy to thinking about the best system for ensuring the fair distribution of tangible political goods — government services, funding, pork — between the majority and minority.

Much less attention has been devoted to distributing *participatory experiences* among citizens.[113] One way to think about second-order diversity from a participatory perspective is as a competing or complementary strategy to the influence model. Rather than confining electoral minorities to the role of "influencer" or "dissenter" on every decisionmaking body, second-order diversity distributes participatory experiences more symmetrically. It grants electoral minorities a chance to enjoy the same type of participatory experience — the sense of efficacy or agency associated with being in charge — that is usually reserved for members of the majority. Instead of being the junior partners to *every* decision, electoral minorities occasionally enjoy the power of seniority.

It is not difficult to imagine why members of the electoral minority would desire a chance to be in charge for reasons that have nothing to do with political outcomes or the distribution of tangible goods. For instance, if being part of the majority or casting the swing vote on a jury enables one to map out the common terrain for the group's decision, members of the electoral minority may value the chance to experience that sense of efficacy regardless of the verdict. Or imagine a decisionmaking body like an electoral district, where citizens gather to elect a representative. Here again, if a member of an electoral minority has a sense that members of the majority have been able to elect a champion, someone fighting on their behalf, she might relish the chance to elect a champion of her own for purely dignitary reasons. As Anne Phillips has observed, "[p]olitics is not just about self-interest, but also about self-image."[114]

Further, granting electoral minorities decisive power in implementing the majority's will is a sign of trust, an acknowledgment of equal status.[115]

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[113] Iris Marion Young cautions against conceptualizing nonmaterial goods in distributive terms out of concern that "the distributive paradigm tends to conceive of individuals as social atoms" and thus fails to appreciate that such goods are often "relations and processes in which the actions of individuals are embedded." YOUNG, *supra* note 10, at 27. However, the notion of second-order diversity — with its emphasis on the relationship between identity and power and on the *comparative* treatment of groups — seems at least consistent with the spirit of Young's effort to conceptualize political dignity in relational terms.

[114] ANNE PHILLIPS, THE POLITICS OF PRESENCE 79 (1995); *see also* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 56 (1991) ("The deepest impulse for demanding the suffrage arises from the recognition that it is the characteristic, the identifying, feature of democratic citizenship in America, *not a means to other ends*." (emphasis added)).

[115] DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 9–10 (2002) (describing the principle of equal respect).

Many proponents of the "politics of recognition"[116] have argued that it is important for members of traditionally subordinated groups to participate in the political process, as such inclusion represents a symbol of equality. Presence in politics signifies "a public acknowledgement of equal value."[117] It conveys the "social meaning" that minorities have "the ability to rule."[118]

Second-order diversity goes one step further: it posits that providing electoral minorities not just a vote, but a working majority, is similarly a sign of trust. It thus extends the argument underlying calls for inclusion — that the vote matters for dignitary reasons — to the exercise of decisionmaking authority. It grants electoral minorities not only the dignity to participate, but *the dignity to decide*. It enables electoral minorities to wield the same power and authority as members of the majority, rather than merely to cast a vote.

Consider the jury as an example. Granting electoral minorities the power to render a verdict gives them a chance to "take turns standing for the whole."[119] When they decide a case, the verdict they render is the decision of "the" jury. It is easy to imagine valuing such participatory opportunities regardless of the verdict eventually rendered. Indeed, even if one attaches no intrinsic value to symmetry in the distribution of participatory experiences, one can easily imagine an instrumental justification for prizing it. Turning the tables promotes a healthier democratic process for reasons that sound in the language of process. It may help electoral minorities feel that they have gotten a

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116 There are as many different versions of this theory as there are theorists, and their views of identity and the role it ought to play vary dramatically. Some find group identity to be a meaningful category; others focus simply on the experience or social status shared by group members; others posit that shared experiences will lead to common interests or perspectives; and still others question the very usefulness of such categories. For a helpful introduction to identity theory and the history of its development, see Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994). For additional reflections on the politics of recognition, both supportive and critical, see MINOW, *supra* note 14, at 30–58; MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra*; PHILLIPS, *supra* note 114; NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 319–48 (1998); MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION (1998); YOUNG, INCLUSION AND DEMOCRACY, *supra* note 15, at 121–53; YOUNG, *supra* note 10, at 44, 183–91; and Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"*, 61 J. POL. 628 (1999).

117 PHILLIPS, *supra* note 114, at 40; *see also* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 120 (1984) ("Where democracy is end as well as means, its politics take on the sense of a journey in which . . . the relations among travelers are as vital as the destinations they . . . are seeking."). For a general defense of the right to vote as a symbol of inclusion, see SHKLAR, *supra* note 114.

118 Mansbridge, *supra* note 116, at 628.

119 George Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 ETHICS 357, 360 (1981).

"fair shake" from the majority, and thus feel more invested in the political process.[120]

One need not think that second-order diversity provides the only — or even the best — model for distributing political power to value its presence within the democratic infrastructure. As noted before, in most democratic institutions the influence model is the *sole* paradigm we use to measure the fair treatment of electoral minorities. The question, then, is whether it is useful to pursue an alternative strategy — as a complement or counterweight to the influence model — by turning the tables on the majority somewhere in the political system. Second-order diversity takes advantage of the special attributes of disaggregated decisionmaking institutions to create such an alternative. First-order diversity in disaggregated institutions, in sharp contrast, simply reproduces the same influence model that already dominates unitary bodies.

(b) Fostering Positive Participatory Habits. — A second reason we might value the opportunity to turn the tables is that it helps members of the entire polity — those in the majority and minority — practice better participatory habits.

First, second-order diversity ensures that members of the majority sometimes lose the comfort of majority status. Some members of the majority will feel the sting of defeat, the bitter aftertaste that comes from compromising too much, or the frustration of not being heard. On a jury, for instance, the small size and intimate nature of the deliberations might make a significant impression on a majority group member who finds himself on the losing side. Imagine, for instance,

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[120] Positive participatory experiences generated by second-order diversity could help integrate electoral minorities into the political system by granting them a "stake" in the political process and pushing them to connect their own democratic aims with those of the polity more generally. *Cf.* Shapiro, *supra* note 56, at 108 (noting that one value of pluralism is its assurance that no "group will lose so often as to have no commitment to the system"). Indeed, one of the central assumptions of most participatory theorists is that participation teaches all of us to take the needs and concerns of others into account. *See, e.g.*, BARBER, *supra* note 117, at 136 ("The test of legitimacy is whether an individual value has been changed in some significant way to accommodate larger — that is, more common or public — concerns."); ROBERT E. GOODIN, REFLECTIVE DEMOCRACY 3 (2003) (summarizing basic tenets of participatory theory); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 27, 29–31 (1970) (same); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067–73 (1980) (arguing for more "city power" as a vehicle for participatory democracy and fostering morals and values). Some have offered a more pragmatic variant of this claim. Justice Souter, for instance, has suggested that granting racial minorities the power to elect genuine candidates of choice will reduce, not exacerbate, racial divisions. In his view, political division among white ethnics has declined precisely because members of those groups were granted a real stake in the decisionmaking process. *See* Bush v. Vera, 517 U.S. 952, 1074–76 (1996) (Souter, J., dissenting). Nancy Rosenblum has offered a more limited variant of this hypothesis, suggesting that certain seemingly antiliberal private associations, like militias, may sometimes be preferable to having political extremists with no ties to anyone. ROSENBLUM, *supra* note 116, at 273–77.

the experience of a white man who thinks of himself as "tough on crime" and finds himself on a jury with ten African American jurors who are deeply suspicious of prosecutorial overreaching or police misconduct. We might similarly think that those who feel comfortable in the liberal environs of Austin notice that their votes are swamped by Republicans' in Texas state-level elections.

One would hope that such experiences deepen majority members' awareness of the costs their decisions impose on those who cannot muster more than half of the votes. At the very least, turning the tables forces members of the majority to realize that they could be in the minority on *some* decisionmaking body, knowledge that could reduce their incentive to ride roughshod over minority interests.[121] Second-order diversity, in effect, creates an iterated game in which *all* players must accept the possibility that they either may wield, or may have to submit to, the majority's power. This possibility increases the incentives for people on both sides of the political divide to listen to one another. Turning the tables, then, may help foster the norm of reciprocity among those who usually wield majoritarian power.

In order to provide a sense of why turning the tables might be effective, consider two intriguing examples outside the governance context. The first is the Buraku Liberation Movement in modern Japan.[122] The Burakumin are the descendants of Tokugawa Period outcasts and remain the object of significant discrimination in Japan. One technique they use to combat discrimination is "denunciation," which involves the temporary abduction of the discriminator. The Burakumin isolate the discriminator in a large room, where he is surrounded — and shouted at — by numerous Burakumin in an effort to elicit a renunciation of the discriminatory practice in question.[123] In defending denunciation against state efforts to moderate (but, interestingly, not to forbid) the practice, the Burakumin have argued that the discomfort inflicted upon their targets is necessary because the discriminator can learn the error of his ways only when he experiences

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[121] Although Madison hoped that our constitutional structure would refine and enlarge public opinion to focus on the common good, strands of his argument focus on a similar set of arguments to those offered here. *See* THE FEDERALIST NO. 10, *supra* note 64, at 82–84; *see also* GUINIER, *supra* note 59, at 4, 17 (arguing that the Madisonian ideal is possible only when voter groupings are fluid and temporary); Jane J. Mansbridge, *Living with Conflict: Representation in the Theory of Adversary Democracy*, 91 ETHICS 466, 471 (1981) (arguing that majority rule precludes optimal equality unless "citizens' interests so crosscut one another that minorities can hope 'that one day they will not lose out and will be deferred to in turn'" (quoting MICHAEL WALZER, OBLIGATIONS 47 (1970))). And Madison, of course, is not the only one to suggest that eliminating an individual's privileged status would promote a well-functioning society. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971).

[122] FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 78–123 (1987). I am indebted to Kenji Yoshino for suggesting this example.

[123] *See id.* at 86–96 (describing a denunciation that took place in 1969).

the isolation of being in the minority — that is, when he "begins to stand in the shoes of a Burakumin."[124] Consistent with this claim, at least one scholar argues that this political strategy has had powerful, albeit mixed, effects on Japanese society.[125]

Another example suggestive of the participatory benefits that might be associated with turning the tables can be found closer to home: the United States military. As a recent Note in the *Harvard Law Review* argues, the military has had tremendous success in achieving racial integration.[126] The integration observed by social scientists exists not just in the military workplace, where African Americans serve in the upper echelons of leadership at a rate unseen in any corporate setting, but appears in more informal settings as well.[127] Thus, for instance, African American culture "is part and parcel of the institutional culture," and interracial socializing is much more common than elsewhere in the country.[128] Drawing on the concept of turning the tables proposed in an earlier version of this Article, the Note's author credits the military's success, at least in part, to the fact that the military "'is the only place in American life where whites are routinely bossed around by blacks'"[129] and members of *every* racial group experience what it is like to be at the "bottom of the ladder."[130]

A second, less obvious benefit to second-order diversity is that it may allow members of the electoral minority to develop a different set of participatory skills. Members of a minority group, perhaps recognizing that they lack the power to govern, often decline to participate in a decisionmaking process because the exercise appears futile. Second-order diversity may help counter this trend. For instance, Archon Fung's research suggests that there may be a tipping point in decisionmaking bodies — the more poor people and people of color are involved in the decisionmaking process, the more likely it is that members of these groups will take an active role in the process.[131] By

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[124] *Id.* at 110; *see also id.* at 89 (quoting a Burakumin leader as asking the object of the denunciation, "Do you understand the pain of being downtrodden that Burakumin experience?").

[125] *Id.* at 103–23.

[126] *See* Note, *Lessons in Transcendence: Forced Associations and the Military*, 117 HARV. L. REV. 1981, 1988 (2004).

[127] *Id.* (citing CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, ALL THAT WE CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION THE ARMY WAY (1996)).

[128] *Id.* at 1990 (citing MOSKOS & BUTLER, *supra* note 127).

[129] *Id.* (quoting MOSKOS & BUTLER, *supra* note 127, at 2).

[130] *Id.*

[131] *See* ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 99–131 (2004) (describing data showing that when Hispanics constitute a minority within a neighborhood, they are underrepresented at community policing meetings, but that they turn out in large numbers once Hispanics make up at least half of the population of the neighborhood). Gerald Frug suggests a reason for this dynamic. *See* Frug, *supra* note 120, at 1070 ("Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than

creating decisionmaking bodies with large concentrations of electoral minorities, second-order diversity could help members of those groups overcome their reluctance to get involved in the process of governance. Turning the tables may thus give electoral minorities the chance to get their participatory sea legs.

Moreover, even those electoral minorities accustomed to taking part in the democratic process can acquire a new set of participatory habits in a system that is second-order diverse. That is because, rather than playing the role of "dissenter" or "influencer" on every decisionmaking body, they sometimes will enjoy the power to decide. Minority group members will thus have a chance to forge an affirmative agenda, spearhead a compromise, deal with dissenters, and enjoy the sense of efficacy (and discomfort) that accompanies the power to make a decision. They will have a chance to craft a verdict in the face of disagreement or organize the community to rally behind a candidate and her platform in an electoral district. Because turning the tables gives electoral minorities a chance to step into the shoes of the majority, they may, as a result, become more willing to trust — and participate — in the majoritarian process. In short, second-order diversity helps foster habits on both sides of the political divide that are likely to produce a healthier democratic process.

(c) Destabilizing Political Hierarchies and Identity Categories. — A third set of reasons we might value the opportunity to turn the tables on the majority stems from the relationship between participation and identity. Whereas first-order diversity risks reinforcing existing political hierarchies, second-order diversity may destabilize the power dynamics associated with participation for members of both the minority and majority. And even setting aside categories like "majority" and "minority," second-order diversity generates a wide range of participatory experiences for *all* individuals, thereby providing them more choices in defining their civic identities.

(i) Winners, Losers, and Group Identity. — One reason to value the chance to turn the tables on the majority is that it may help undermine political divisions that correspond with identity categories. Many democratic theorists believe that participation allows an individual to *constitute* her identity, to define her political self and her relationship to the community.[132] From a constitutive perspective, there

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participation, while the existence of power encourages those able to participate in its exercise to do so.").

[132] *See, e.g.*, BARBER, *supra* note 117, at 120, 152; C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 99 (1977); YOUNG, *supra* note 10, at 92; Ellen D. Katz, *Race and the Right To Vote After* Rice v. Cayetano, 99 MICH. L. REV. 491, 512–14 (2000); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41

are reasons to value a system that turns the tables, letting the usual losers win and allowing the presumptive winners to lose. Specifically, if being part of a permanent political minority is qualitatively different from being part of a permanent majority, the former experience might lead one to define one's relationship to the community differently than the latter. This phenomenon may be particularly worrisome when, as is often the case, one's status as an electoral minority coincides with one's status as a racial or ethnic minority.

Admittedly, the term "constitutive" is typically used in a more abstract way, describing the way participation shapes an *individual's* relationship to the polity as a whole. The term is generally not used to take into account the possibility that political *outcomes* — specifically, the experience of repeatedly losing — might taint one's view of that relationship. Nor is the term often used to explore the possibility that membership in a *group* — especially a group that is often defeated in politics — might shape an individual's relationship with the polity as a whole.

The term, as employed here, thus moves away from such an atomized view of individuals. It picks up on Melissa Williams's observation that membership in a marginalized group is defined "from *within* the group's or culture's own history and values" and "defined from without" by societal structures.[133] It posits that civic identity may similarly be shaped by the complex interaction between political success and group identity. This argument thus flips the claim, made by some political theorists, that one's group identity influences the way that one participates in the political process. It claims that individuals' participatory experiences may help shape group identity. The definition thereby acknowledges the significance of instrumental concerns — those associated with the distribution of political power among groups — to the individual's participatory experience.[134] Put

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FLA. L. REV. 443, 478–79 (1989). For an analysis of the intellectual roots of this vision, which began with Mill and Rousseau, see PATEMAN, *supra* note 120, at 24–33.

133 WILLIAMS, *supra* note 116, at 185.

134 In arguing that constitutive experiences are refracted through group identity, I do not mean to suggest that a group is somehow a monolithic entity whose sense of identity is easily defined or that automatically absorbs each experience of its members. I envision something much less systematic: the simple possibility that members of a group interact with one another and, in doing so, convey information about their democratic experiences, which gradually helps shape each other's sense of themselves and their group identity. My assumption is that these interactions eventually take on a common shape within the group as a whole; they eventually become part of the story that serves as a narrative for members of the group to explain themselves and their relationship to the world. Group narratives, in my view, thus bear some resemblance to the conversations that Jane Mansbridge terms "everyday talk." In Mansbridge's words, "[e]veryday talk produces results collectively, but not in concert . . . through the combined and interactive effects of relatively isolated individual actions." Jane Mansbridge, *Everyday Talk in the Deliberative System*, *in*

simply, in the presence of salient and persistent group identities, instrumental notions like "winner," "loser," and "swing voter" can carry symbolic baggage with them.

A different way of making this point is to note that if every decisionmaking body is first-order diverse, there is a risk that members of both the majority and the minority will "normalize" their participatory experiences. We might expect members of the majority to assume that their views are universal, or at least to grow complacent about their status.[135] Similarly, we might anticipate that members of the minority will understand themselves solely as outsiders — dissenters or junior partners on every decision — and thus treat all of the majority's choices with skepticism.[136]

Second-order diversity is attractive, then, because it creates a distinct type of political space. It is one where members of the majority are temporarily deprived of the comfort — and power — associated with their majority status. It is one where members of the electoral minority are not permanent dissenters, but sometime participants in the governance process. Second-order diversity thus destabilizes the power dynamics associated with a "normal" participatory experience.

Finally, it is worth noting that the notion of turning the tables depends on the existence of social categories even as it seeks to undermine them. The notion of turning the tables is, of course, meaningless in a world without readily recognizable social distinctions. One way to think of turning the tables is as a process-based strategy for combating subordination, using the processes that tend to reinforce status inequalities to erode them. That response is not a complete one, however; as I explore in section III.B.3, the *tools* used to turn the tables may sometimes undermine the effectiveness of the strategy itself.

(ii) Variation and Identity Formation. — Setting aside the somewhat rigid paradigm described above — a system involving "winners" and "losers" — second-order diversity may be useful because it generates compromise along all parts of the political spectrum. It thus ensures that an individual enjoys a wide variety of participatory experiences over the course of a civic life.[137]

DELIBERATIVE POLITICS: ESSAYS ON *DEMOCRACY AND DISAGREEMENT* 211, 212 (Stephen Macedo ed., 1999).

135 *Cf.* Mansbridge, *supra* note 116, at 641. To the extent that members of the majority group assume the universality and neutrality of their views, turning the tables may thus further Iris Marion Young's goal of forcing "the dominant culture . . . to discover itself for the first time as specific." YOUNG, *supra* note 10, at 166; *see also id.* at 169–72.

136 I am indebted to Lani Guinier for suggesting this line of analysis.

137 This argument bears some connection to those made by Nancy Rosenblum in lauding "[t]he possibility of shifting involvements among associations — the *experience of pluralism* by men and women personally and individually." ROSENBLUM, *supra* note 116, at 17.

There are several reasons we might value the opportunity to offer individuals a wide variety of participatory experiences. First, granting individuals from the edge of the political spectrum a chance to compromise with those who share similar views may generate an important — albeit atypical — type of experience. We usually think that democratic compromise means members of opposing camps finding common ground. That is, indeed, the type of compromise we see in institutions that are first-order diverse — decisions are rendered by a few people from the ends of the political spectrum compromising with lots of people from the middle. Turning the tables means that those individuals on the ends of the political spectrum will sometimes be concentrated in a decisionmaking body. It gives them a chance to spend their time building on common assumptions and refining a principle rather than quarreling over which principle ought to apply in the first place. Such experiences may offer an important source of participatory energy by allowing group members to perfect a political platform or by increasing individuals' confidence in their views.[138] But only the presence of second-order diversity somewhere in the democratic infrastructure creates such participatory opportunities.

Further, to the extent that one constitutes one's civic identity through participation, there are reasons to value the chance to do so in a wide range of participatory contexts. If we believe that personal identity is or ought to be fluid,[139] second-order diversity may be attractive because it creates conditions in which *civic* identity can be fluid as well. Variation in the composition of disaggregated bodies creates the opportunity for the unexpected to happen. It places individuals in a political dynamic that may differ markedly from the dynamic they routinely experience, which may in turn lead individuals to privilege different parts of their identity at different times. An individual might find herself in the majority on a jury, a swing voter in electing a local representative, and a consistent loser in electing her governor. Put differently, the variety of participatory opportunities second-order diversity engenders may offer individuals more "scripts,"[140] to use Anthony Appiah's term, for defining their civic identity.

In sum, second-order diversity may help vary participatory experiences over the course of a civic life. It ensures that an individual will encounter a variety of power dynamics over time, perhaps leading her

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138 *Cf.* SUNSTEIN, *supra* note 62, at 159 ("Even if group polarization is at work — perhaps *because* group polarization is at work — enclaves can provide a wide range of social benefits, especially by enriching the number of available facts and arguments. And when members of such groups eventually speak in more heterogeneous groups, *they often do so with a greater degree of clarity and confidence*." (second emphasis added)).

139 *See supra* pp. 1110–11.

140 Appiah, *supra* note 15, at 97.

to privilege different aspects of her identity at different times. It may thus help reduce the salience of certain lines of political division by complicating each individual's sense of her own identity.

2. Forced Communities and the Costs Associated with Turning the Tables. — As with other attributes of second-order diversity, there are costs associated with turning the tables. One might, for instance, disfavor efforts to destabilize identity categories. As noted elsewhere,[141] there is a lively debate on this topic in the academy, one that extends well beyond the scope of this Article. Even if one has no view on this debate, there is another set of costs associated with second-order diversity that arises directly from the design feature that allows us to turn the tables: individuals are forced into a participatory experience they would not choose.

Because we associate the jury with a particularly rich and intense participatory experience, the jury ought to provide a particularly vivid example of the costs associated with turning the tables.[142] Jury service, of course, allows individuals to take part directly in the democratic process, without the mediation of a representative negotiating on their behalf.[143] We also value the process by which jurors decide. Jurors do not merely vote individually on a verdict. The verdict is a collective democratic act.[144] Jurors try to reach agreement through dis-

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[141] *See supra* pp. 1110–11.

[142] Although I believe that districts can also be the site of an important participatory experience, most scholars do not think of voting in these terms. The notion that voting is a thin participatory experience dates back at least to Mill. PATEMAN, *supra* note 120, at 30; *see also* BARBER, *supra* note 117, at 187–88 (arguing that "[v]oting . . . is already the least significant act of citizenship in a democracy," and comparing the act of voting to "using a public toilet"); SHKLAR, *supra* note 114, at 27 (concluding, despite a robust endorsement of voting as an "affirmation of citizenship," that the right to vote and not the exercise of voting carries deep significance for most voters). For a sketch of the argument that districts may provide an important participatory experience, see Gerken, *supra* note 38, at 15–20.

[143] *See* ABRAMSON, *supra* note 26, at 1–2; LEVINE, *supra* note 61, at 16.

[144] I use the term "collective" rather than "deliberative" in order to leave room for the notion that the political act in which juries are engaged is properly democratic even if it involves old-fashioned foot-stamping, even if the discussions are not framed as a means to achieve the common good but involve logrolling and other hallmarks of interest-based bargaining, even if the jurors understand themselves to be "representing" the interests of their communities rather than the common good, or even if they cannot achieve consensus and must resort to voting. For critiques of conventional conceptions of deliberative democracy that touch on these and other concerns, see WALZER, *supra* note 121, at 59; Mansbridge, *supra* note 134, at 225–26; and William H. Simon, *Three Limitations of Deliberative Democracy: Identity Politics, Bad Faith, and Indeterminacy*, *in* DELIBERATIVE POLITICS: ESSAYS ON *DEMOCRACY AND DISAGREEMENT*, *supra* note 134, at 49, 51–52. In my view, juries need not be deliberative — at least in the most commonly used sense of the term — in order to be democratic. For a useful exploration of the relationship between a liberal pluralist conception of democracy and deliberative democracy, see AMY GUTMANN & DENNIS F. THOMPSON, WHY DELIBERATIVE DEMOCRACY? 27–49 (2004); Michelman, *supra* note 132, at 447–50; and Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714, 1719–23 (1988). *See also* Jon Elster, *Introduction*, *in* DELIBERATIVE

cussion,[145] something that can involve hours of face-to-face interaction and thus result in a political experience of unusual intensity. Further, the jury wields genuine democratic power.[146] It engages in the process of compromise and does not simply vote up or down on a charge, thereby relegating juries to a Schumpeterian validation or rejection of the decision of an elite.[147] As a result, at least since de Tocqueville, most commentators have ascribed a rich democratic role to the jury.[148]

DEMOCRACY 1, 8 (Jon Elster ed., 1998) (noting the wide range of definitions of deliberative democracy).

[145] *See* BARBER, *supra* note 117, at 267 ("Without talk, there can be no democracy."); Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH L. REV. 2348, 2406–07 (1990). Juries thus epitomize one element of the deliberative ideal, the Habermasian hope "that democracy revolves around the transformation rather than simply the aggregation of preferences." Elster, *supra* note 144, at 1; *see also* GUTMANN & THOMPSON, *supra* note 144, at 33. Thus, one of the most interesting aspects of the jury as a democratic institution is that the end result of jury decisionmaking looks different from a simple aggregation of the views of the jurors going into deliberations. The verdict is shaped by group dynamics, individual arguments, and everything else that makes group decisionmaking such a complex and unpredictable process. *See, e.g.*, ABRAMSON, *supra* note 26, at 140; LEVINE, *supra* note 61, at 150–67; Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, LAW & CONTEMP. PROBS., Autumn 1989, at 205, 206.

[146] We do not value the jury merely because its decisions have real-world effects, although that is plainly important. *Cf.* John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 593 (2002) (finding evidence that the number of criminal charges heard by juries positively correlates with voting behavior and speculating that such correlation extends to the gravity of the alleged offense). We care about jury participation because the jurors' decisions involve the exercise of discretion. *See* ABRAMSON, *supra* note 26, at 6; VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 157 (1986) (citing cases that make this claim); Wells, *supra* note 145, at 2402–10.

[147] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 270–72 (1942). To be sure, jurors do not engage in what Nancy Rosenblum would term "long-term" or "comprehensive" judgments. Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 825, 838 (2000). Nonetheless, as Stephen Schulhofer observes, jurors do not "merely raise [their] hands and vot[e] up or down on binary issues . . . . Very few criminal cases involve only one count, and when there are several counts, compromise verdicts are always a possibility." Schulhofer, *supra* note 101, at 76; *see also* LEVINE, *supra* note 61, at 156–57; Andrew G. Deiss, Comment, *Negotiating Justice: The Criminal Trial Jury in a Pluralist America*, 3 U. CHI. L. SCH. ROUNDTABLE 323, 323 (1996). Even on the thinnest view of the jury's role, when only one question is before the jury and the jurors are merely applying law to facts, jurors are jointly engaged in an interpretive act. *See* Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1201–02 (1986); Lawrence M. Solan, *Jurors as Statutory Interpreters*, 78 CHI.-KENT. L. REV. 1281, 1285–88 (2003). Together jurors must hash out how to apply a general principle to the facts of a given case. And they often must make discretionary judgments — for instance, judging the "reasonableness" of an action — along the way. *See* Scheflin & Van Dyke, *supra* note 78, at 69–74; *see also* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1052–57 (1995). As Dennis Thompson and Amy Gutmann observe in terming such decisions "everyday politics" or "middle democracy," when "resolving moral conflict in politics, the interpretation matters just as much as the principle." GUTMANN & THOMPSON, *supra* note 144, at 35, 40.

[148] Scholars have, for instance, termed it the "lower house" of the judiciary, AMAR, *supra* note 6, at 100; a "bottom-up" or "incremental" lawmaker, Steven Hetcher, *The Jury's Out: Social*

Perhaps the best way to understand the participatory costs associated with turning the tables — or at least to understand why these costs cannot be avoided in this context — is to think of the jury as a "forced community."[149] The jury system assembles people from different backgrounds and forces them to work together on a shared task. The forced nature of the community prevents an individual from making a choice; individuals cannot opt out of whatever experience the system randomly assigns them. And if we think juries afford an important participatory experience, we might worry about the type of experience second-order diversity forces upon *some* members of the polity. Heterogeneity in jury composition means that for every African American who sits on a jury with a large number of African Americans, another African American will sit on a jury where she is the only one. For every jury of ten women, another will contain only two. Thus, while second-order diversity may help members of the polity as a whole define their relationship to the community through the diffuse system of

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Norms' Misunderstood Role in Negligence Law, 91 GEO. L.J. 633, 652 (2003); Marder, *supra* note 97, at 909; a policymaker, Gary J. Jacobsohn, *Citizen Participation in Policy-Making: The Role of the Jury*, 39 J. POL. 73, 74–76 (1977); Lisa Kern Griffin, *"The Image We* See *Is Our Own": Defending the Jury's Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332, 361–65 (1996); Scheflin & Van Dyke, *supra* note 78, at 69–71; or a feedback mechanism by which the people "inform lawmakers about the 'harmony, or lack thereof, between the laws and the people,'" *id.* at 364 (quoting Scheflin & Van Dyke, *supra* note 78, at 69).

[149] I model this phrase on one Jerry Frug uses when he celebrates cities as "fortuitous associations" that pull together a group of individuals and require them "to get along." FRUG, *supra* note 10, at 174. Cynthia Estlund similarly posits that the workplace represents another locus of compelled integration and lauds it as such. *See* CYNTHIA ESTLUND, WORKING TOGETHER 3–5 (2003). Rick Hills offers a different angle on this debate, arguing in favor of allowing what he terms "private governments" — private associations, unions, political parties — to exert coercive pressure on their members. Roderick Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 146–47 (2003). For a spirited challenge to the practice of forcing unwanted members on private associations, see ROSENBLUM, *supra* note 116, at 158–90.

Many of the small, disaggregated institutions on which this Article focuses are "forced communities" in at least a weak sense. Consider districts, for example. Individuals are not given a choice about the district in which they will vote. And, if we are concerned that "exit" is not a meaningful option where local governments or states are concerned, *see, e.g.*, SHAPIRO, *supra* note 69, at 37–38 (arguing that the exit option is overstated in federalism literature), "exit" is likely to be an even less realistic option where districting is concerned. After all, even if one were willing to absorb the costs associated with moving in order to avoid being included in a particular type of district, districts are redrawn every ten years, thus creating the possibility that the move would prove futile. Richard Briffault has proposed taking advantage of the fact that decennial line-drawing reduces any realistic incentive to move, arguing that local boundaries should be redrawn every ten years to combine more and less affluent areas and to reduce the incentive of the more affluent to move to avoid such groupings. Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 72 (1990).

interactions by which we define our group and civic identities,[150] it may impose a heavy cost on individuals.[151]

One way to frame an assessment of this tradeoff is the voice/exit paradigm.[152] "Voice" and "exit" are the two main strategies individuals adopt when they disagree with a group or organization of which they are a part: they can protest (voice) or they can leave the group (exit). What makes the jury interesting as a locus of democratic participation is that exit is not an option.[153]

Perhaps counterintuitively, the fact that juries are forced communities is one of their main attractions from the perspective of second-order diversity. Even setting aside the possibility that restrictions on exit encourage voice,[154] thereby promoting some of the participatory aims of second-order diversity, the forced nature of the community guarantees that second-order diversity in the jury system will provide a set of democratic benefits that other decisionmaking institutions cannot. After all, we can presume that members of the majority would be quite reluctant to choose the uncomfortable experience of losing. A robust exit option for juries could undermine the goals of second-order diversity altogether.

If a forced community is necessary for the full achievement of second-order diversity's participatory benefits, it is also the main source of its participatory costs. We worry, of course, when individuals do not get to make choices about their participatory experiences.[155] Indeed, from a constitutive perspective, the notion of a "forced community" seems like a contradiction in terms and, in any case, seems unlikely to promote democratic values. Further, because the jury is a forced community, we cannot invoke one of the best arguments offered in favor of community variation by scholars of federalism and local government law: that we can make *everyone* better off by allowing individuals to choose among a varied range of participatory experi-

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150 *See supra* pp. 1142–45.

151 Consider a debate that has taken place in the voting rights context. Samuel Issacharoff and Alex Aleinikoff have observed that one of the concerns that may explain the Court's *Shaw* jurisprudence is the notion of "filler people" — individuals deliberately placed within a district with the knowledge that they will lose. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 601 (1993).

152 These terms are drawn from the influential work of Albert Hirschman. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 3–5 (1970).

153 Passive participation, however, may represent a form of exit. Hirschman describes "acquiescence or indifference" as a form of voice, but he does so in a context where he assumes that exit is a realistic option. *See id.* at 31.

154 *See id.* at 34.

155 *Cf.* BRIAN BARRY, CULTURE & EQUALITY 112–93 (2001) (analyzing the question of forced association from the traditional liberal perspective); ROSENBLUM, *supra* note 116, at 158–90 (arguing against forcing a private association to accept unwanted members).

ences.[156] Indeed, this argument seems to cut the other way with respect to jury participation, as we deliberately force an unwelcome participatory experience on some in order to grant an enjoyable participatory experience to others. The theory thus bears an uncomfortable resemblance to trading off the rights of individuals.

The argument that we are trading off individual rights is undermined, however, by the disaggregated nature of the jury system. *Every* jury is going to have winners and losers on it, people who disagree more or less with the verdict rendered. Rather than imposing those costs systematically on electoral minorities, the democratic system is likely to be healthier if members of *both* the minority and majority sometimes feel the triumph of prevailing as well as the sting of defeat.

Put differently, when decisionmaking power is disaggregated, thinking of fairness in purely individualist terms ignores the ways in which individual claims to fairness are connected to the relative treatment of groups.[157] It is difficult to imagine an individual right to be on the winning side of a jury verdict or election. That is because every decisionmaking body is likely to contain both "winners" and "losers." The only way to determine whether one has been treated fairly is to assess whether one is *less* likely than someone from another group to have a chance at winning. The individual injury, then, necessarily rises and falls with the treatment of other members of one's group. To have any critical force, the baseline for measuring individual fairness in disaggregated systems must be the relative treatment of groups, not individuals.[158]

The perception of trading off rights may be inevitable with such a baseline. Here, for instance, some electoral minorities will find themselves isolated on a jury or in a district because of a scheme that grants other members of that group decisionmaking power. The question, then, is how to balance the tradeoff between individual and group — how to measure the diffuse group-wide and polity-wide benefits of second-order diversity against the costs of episodically demoralizing

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156 The seminal argument is made by Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Consider Michael McConnell's oft-cited example:

> [A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B . . . .

McConnell, *supra* note 69, at 1494. For a further exploration of the notions of voice and exit as they relate to second-order diversity and localism, see *infra* note 209.

157 *See* Gerken, *supra* note 98, at 1681–88.

158 *See id.* at 1683–84.

experiences for individuals. One part of that calculus will involve an assessment of the relative weight of those individual costs.[159] A second question is how those costs balance out over time, both for individual group members and for the polity as a whole.[160] If, as one political theorist has speculated in a different context, "one [participatory experience] can compensate for the deprivations and degradations of another,"[161] should that change our calculus of the costs here?[162]

The final question to ask is more fundamental. In a world with forced political communities, second-order diversity may be the fairest strategy for designing disaggregated institutions. And the problem of individuals' losing out — being stuck with a participatory experience that is not to their liking — is inevitable in a disaggregated system no matter what we decide is "fair." The harder question, however, is whether we ought to have forced communities in the first place.[163] If

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159 The main question to ask, of course, is an empirical one: what kinds of participatory experiences are likely to exacerbate the isolation of a minority group member, and what kinds of experiences are likely to empower her? For instance, if it turns out that African Americans in a jury district with a twenty-five percent African American population feel silenced on any jury consisting of three or fewer black jurors, then silencing will occur whether or not some juries have only one or two African Americans on them (as with second-order diversity) or all juries have three jurors on them (as with a system that is first-order diverse). There may therefore be benefits to designing a system where at least some African Americans sit on juries with larger concentrations of African American jurors. Conversely, if it turns out that increasing the number of African American jurors to five or six accomplishes little and the costs of having only one or two African American jurors are great, second-order diversity may not be the best strategy.

160 For instance, even if an African American is an isolated minority on a jury, does the fact that she has a chance to vote in a majority-minority district or serve on a seventy-five percent African American school committee compensate for that disempowering experience?

161 ROSENBLUM, *supra* note 116, at 16 (discussing voluntary associations).

162 And how great will the benefits be if second-order diversity is confined to only one part of the democratic infrastructure — if, for instance, one's varied experiences derive solely from jury membership and are spaced a decade apart? Further, if we turn to a less individualistic assessment of these costs and benefits, how do we assess the more nebulous effects of varied participatory experiences within a group? *See supra* note 134 (discussing the possibility that group members will be indirectly affected by one another's participatory experiences). Will an African American governed by a predominantly white school committee be affected by the fact that elsewhere African Americans are setting educational policy? Such a claim would, of course, raise a number of questions related to the debates over virtual representation. For a survey of these debates, see A.H. BIRCH, REPRESENTATION 51–53 (1971); and PITKIN, *supra* note 1, at 168–89. It is worth noting, however, that debates about virtual representation inhere in a system that is first-order diverse as well.

163 Indeed, one of the primary attacks on territory-based districting stems from the forced nature of the electoral community, leading scholars to propose granting individuals greater autonomy in defining their community identities (for example, by implementing proportional representation systems or softening residency restrictions for local elections). *See, e.g.*, FRUG, *supra* note 10, at 106–07; GUINIER & TORRES, *supra* note 16, at 168–222. *See generally* Richard Thompson Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1909–10 (1994). For an interesting exchange touching upon this and related issues, see Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV.

our ability to achieve second-order diversity depends on forcing people from different backgrounds to work together, is the game worth the candle? Why not give everyone the option of exit that is available, at least in theory, in the context of federalism and local government law?

The notion of second-order diversity does not provide an answer to that question. As noted above,[164] the goal of this Article is to see whether a normatively attractive case can be made for an *existing* feature of our democratic design, and the theory thus does not offer a complete answer to debates about other possible design strategies. While a defense of the forced community as a strategy for democratic design is beyond the scope of this Article, I offer two observations about that debate. First, as a purely empirical matter, there may be some instances in which we have little choice but to rely on forced political association to achieve our broader democratic aims.[165] Second, as a purely normative matter, we might conclude that forced communities sometimes make sense as a democratic design strategy even when not dictated by necessity.[166]

3. Evaluating the Costs and Benefits of Turning the Tables from an Institutional Perspective. — As with the tradeoffs discussed in the previous sections, context matters in assessing the tradeoff between the costs and benefits of turning the tables. For instance, consider just one difference between the tools we used to generate the wide variety of participatory experiences described above. As noted above,[167] the state creates heterogeneous juries through a random assignment system, whereas districts are created through self-conscious choice. These two strategies implicate a distinct set of costs and benefits and highlight the tensions inherent in the argument that turning the tables can erode social categories even as it depends on them.

1115, 1156–62 (1996); and Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1188–94 (1996).

164 *See supra* pp. 1105–06.

165 Thus, while one could easily imagine avoiding the problem of the forced community in districting — when a proportional representation system offers a readily available alternative for electing representatives — juries might not function if we allowed jurors to choose the jury on which they served. Once we have concluded that a forced community is our best or only option, we can address the question with which this Article is preoccupied: whether first-order or second-order diversity represents the superior design strategy.

166 Should we follow this line of analysis, we must deal with a difficult structural question: how do we weigh the individual costs of forced communities generally (and forced communities that are second-order diverse in particular) against the more diffuse benefits that forced communities generally (and second-order diversity in particular) afford? Thus, in assessing whether we are willing to force individuals into a given political community with the knowledge that some will find the experience frustrating or disempowering, we must also consider the benefits that accrue to all members of the polity — those associated with complicating identity categories, fostering better participatory habits, and destabilizing the "normal" political baseline.

167 *See supra* pp. 1112–13.

Specifically, if we think of juries — and, to a lesser extent, districts — as forced communities, the tool we use to determine the membership of those communities may matter a great deal. For example, we might value a random assignment system because it allows the state to be neutral in the way that has attracted so many theorists to lottery systems for distributing political power and goods.[168] The random assignment system used in the context of juries conveys no message about community identity.[169] Random assignment is simply premised on the notion that *some* differences will emerge among jurors. It does not identify *which* differences will emerge (for instance, it does not assume that race or gender will divide juries), let alone place a particular individual on a jury based upon his or her group membership. It thus avoids the inference that the state is treating an individual "as the surface to which a certain label can be applied."[170] Indeed, precisely that

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[168] For discussions of the use of lottery as a decisionmaking procedure, see NEIL DUXBURY, RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING (1999); ELSTER, *supra* note 26, at 62–67, 78–122 (1989); and BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 8–84 (1997). For a proposal to use a two-tier lottery system in order to foster greater jury deliberation, see Lichtman, *supra* note 62, at 135–36. Many scholars have advanced arguments in favor of randomness in the context of electoral systems. *See* ACKERMAN, *supra* note 63, at 285–89, 298 (discussing a "responsive lottery" as an alternative to majority rule); BARBER, *supra* note 117, at 291–92 (proposing filling local offices by lot); JOHN BURNHEIM, IS DEMOCRACY POSSIBLE? THE ALTERNATIVE TO ELECTORAL POLITICS 9–12, 110–19 (1985) (proposing a lottery system for choosing public officials to ensure "a representative sample of the people concerned" (emphasis omitted)); DUXBURY, *supra*, at 163–64 (proposing randomized resolution of majority-minority divisions on occasion); Akhil Reed Amar, *Lottery Voting: A Thought Experiment*, 1995 U. CHI. LEGAL F. 193, 195 (same); Dennis C. Mueller et al., *Representative Democracy Via Random Selection*, 12 PUB. CHOICE 57, 60–61 (1972) (advocating a system of random selection of representatives); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2197 (1990) (suggesting use of a lottery as a means of setting an agenda and avoiding potential problems identified by social choice theory); Richard H. Thaler, *Illusions and Mirages in Public Policy*, 73 PUB. INT. 60, 72 (1983) (proposing that congressional committees be assigned randomly to avoid the problems associated with self-selection); Robert Weissberg, *Collective vs. Dyadic Representation in Congress*, 72 AM. POL. SCI. REV. 535, 544 (1978) ("If one's constitutional goal were simply the best institutional representation of mass opinions, the optimal solution is clearly a random sample of about 1500 citizens . . . ."); Richard Zeckhauser, *Majority Rule with Lotteries on Alternatives*, 83 Q. J. ECON. 696 (1969) (discussing the use of lotteries or alternatives as potential choices in the context of a majoritarian system); Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1283 (1984) (proposing choosing representatives through random selection of a single decisive vote out of all votes cast). For historical accounts of the use of a lottery to choose office holders, see DUXBURY, *supra*, at 26–34; ELSTER, *supra* note 26, at 78–86; and MANIN, *supra*, at 8–93. For an effort to connect the debate over elections by lot to the debates of the Framers, see ISSACHAROFF ET AL., *supra* note 35, at 1151–55.

[169] *See* Pauline T. Kim, *The Colorblind Lottery*, 72 FORDHAM L. REV. 9, 23 (2003) (noting the argument that using chance is superior to using race as deciding factor); *see also* DUXBURY, *supra* note 168, at 51–53.

[170] Bernard Williams, *The Idea of Equality*, *in* MORAL CONCEPTS 153, 159 (Joel Feinberg ed., 1969). For an extended criticism of state efforts to promote diversity (in the first-order sense) and

concern has animated much of the opposition to peremptory challenges, which undermine efforts to achieve a random draw.

In the districting context, however, districters cannot avoid deliberately grouping together voters based upon some part of their identity, be it race, socioeconomic status, or geography.[171] They must choose, therefore, who is going to be a member of the forced community and decide the axis along which the tables will be turned.[172] As the controversies over racial gerrymanders suggest, it is one thing for the state to group people using a random assignment system, another to do so through deliberate social engineering.[173] To be sure, the placement of particular types of people within a district does not mean that they *must* coalesce. It does, however, depend on the assumption that race (or socioeconomic characteristics or geography) is a salient feature in the lives of voters. Thus, to the extent we value second-order diversity because it may help destabilize identity categories, the tool used to attain this goal might affect our assessment of this tradeoff, as some strategies used to achieve the type of destabilization second-order diversity promises may, in fact, risk reifying identity categories in the long run.

C. Dissenting by Deciding: The Tradeoffs Between the Benefits of Visibility and the Costs of Variation

If the arguments in the previous two sections dealt with the *input* side of the democratic equation — the fair distribution of decisionmaking authority and participatory experiences — then this section focuses on democratic *outputs*. Specifically, this section addresses another unusual feature of second-order diversity: it allows electoral minorities to issue a decision that differs from what the majority would prefer. The result is a varied, sometimes conflicting, set of democratic outcomes that make differences within the polity visible to the polity.

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the costs those efforts may entail, see SCHUCK, *supra* note 1, at 134–202. These tensions have certainly been evident in the doctrine governing jury discrimination claims. As some scholars have observed, there is a tension between the Sixth Amendment fair cross-section doctrine, which is premised on the notion that a juror's race and sex may affect how she views a case, and *Batson v. Kentucky*, 476 U.S. 79 (1986), which is premised on traditional anti-essentialist grounds. *See supra* notes 21–25 and accompanying text.

171 Although independent commissions can reduce the extent to which self-interest taints decisions about how to group voters, as long as those commissions do not district randomly, at some level they must make choices about which groupings matter. *See supra* notes 34, 37.

172 The best defense that can be offered against this claim is that such choices are inherent in the use of territorial-based districting as a strategy for electing representatives. *See* Gerken, *supra* note 6, at 1452–55. Thus, even if one preferred *first-order* diversity as a design strategy, one would still have to choose what axes of difference to consider in designing individual districts.

173 *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 648–49 (1993).

Consider the difference we would expect in the outputs of democratic systems that are first-order and second-order diverse. If every decisionmaking body mirrored the population, as with first-order diversity, we would expect their democratic outputs — whether in the form of a jury verdict, a school committee decision, or an elected representative — to be roughly the same. We would expect those decisions to reflect the views of the rough equivalent of the "swing" or median voter.

Second-order diversity avoids a push to the preferences of the median decisionmaker in every case. Because second-order diversity varies the composition of decisionmaking bodies, we would expect variation in democratic outputs as well. Some democratic outputs will reflect the views of those in the middle, while others will reflect the perspectives of those closer to the ends of the political spectrum. What that means in practice is that second-order diversity allows dissent to take the form of a *decision*. Those who differ with the majority on a given issue can express that disagreement not by making an argument, but by adopting an outlier position. Thus, while first-order diversity can give us a clear sense of the views of the median of the political spectrum, second-order diversity can give us a richer picture of the views of the community as a whole. We can see the ends as well as the middle, the spread as well as the median of the political distribution.

In the districting context, for example, first-order diversity tends to generate a set of moderate candidates who cater to the median voter. Second-order diversity is necessary to elect a representative like Barney Frank, Charles Rangel, or Tom Delay — someone capable of articulating the views of those closer to the edge of the political spectrum. Similarly, if we think that one's views on a criminal case are connected to one's race or gender, then second-order diversity is necessary to generate the type of outlier verdicts that would reveal the existence of such divisions. A jury system that is first-order diverse, in contrast, should produce a more homogeneous set of verdicts and is thus likely to submerge evidence of such disagreement.

The notions of first-order and second-order diversity help identify the benefits associated with variation in democratic outputs. Here again, I begin with the benefits associated with such variation, turn to its attendant costs, and end with an example of how those tradeoffs can vary by institutional context.

1. The Benefits of Visibility. — The primary benefit afforded by variation in democratic outputs is "democratic visibility." By granting electoral minorities a chance to issue outlier decisions, second-order diversity gives members of the electoral minority a chance to call attention to themselves and their views. It thus offers us a more complete and textured view of the democratic order.

Second-order diversity offers a type of visibility that cannot be reproduced by a poll or a survey. It is visibility *with a political consequence* — a verdict rendered, a policy implemented, a candidate elected — which may force others to act, reevaluate, and engage with the decision and those who rendered it. It thus allows electoral minorities to engage in the type of agenda setting that is usually difficult for those outside the political mainstream to achieve.

Further, because second-order diversity grants electoral minorities the power not just to articulate their views, but to resolve democratic controversies in the best way they see fit, it allows them to remap the politics of the possible. It grants them at least a limited opportunity to put their ideals into practice, to move from abstract principles to concrete action, and to show how a governance alternative would actually work. Second-order diversity can thus not only generate debate, but change how that debate takes place.

Consider, for instance, what has been taking place in San Francisco at the time of this writing. The city — where many more people support gay marriage than do people statewide or nationwide — spent several weeks marrying gay and lesbian couples until a court put a halt to its activities.[174] During that period, newspapers across the country carried stories about elderly lesbian couples or gay lovers of forty-five years marrying one another. As a result, we, as a nation, now have a concrete practice, not just an abstract issue, to debate. And we have also had a chance to observe reactions to this action throughout the country, providing us a far richer sense of what members of the majority think about the issue than a poll or a theoretical debate could offer. Thus, regardless of one's views on gay marriage and on whether visibility in this instance has furthered a cause or resulted in a backlash, San Francisco's decision to issue marriage licenses has fundamentally altered the political landscape. For good or for ill, the debate about gay marriage is different than it was a year ago, and second-order diversity may help explain the democratic dynamic behind that fact.

One can imagine a number of reasons why making electoral minorities visible in this fashion can help foster a healthier democratic process. To begin, second-order diversity makes electoral minorities visible to the majority. It gives the majority a chance not only to see the existence of difference, but to examine how those differences affect concrete governance choices. It thus may allow ideas from the ends of the political spectrum to bubble up into the mainstream.[175] A system

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[174] *See* Dean E. Murphy, *San Francisco Forced To Halt Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at A1.

[175] *Cf.* Cover, *supra* note 52, at 673–74 (praising "polycentric norm articulation").

that is first-order diverse, in contrast, could systematically submerge those differences.

Further, second-order diversity creates space for electoral minorities to contest the decisions of the majority and voice disagreement in a manner visible to the entire polity.[176] By rendering a contrary decision or electing a representative to serve as the group's champion, members of a minority group can remind the majority that differences exist. Offering some opportunities for contestation is attractive as a procedural matter, as it is more likely to be viewed by everyone — especially the minority group — as "fair."[177] And it may reduce complacency on the part of the majority by pointing out the costs of the majority's decisions. Consider the decision by Benton County, Oregon, which decided in the wake of San Francisco's action not to issue marriage licenses to *anyone* because Oregon state law precluded the county from marrying gay and lesbian couples. One advocate of the policy wryly observed, "It's not altogether bad for a heterosexual couple that has always thought of marriage as an inalienable right to be told no. *It might make them think how same-sex couples get told no all the time.*"[178]

Second-order diversity makes electoral minorities visible not only to the polity, but *to each other*, thereby providing an important source of political energy. The choice made by a decisionmaking body dominated by a minority group signals to other group members that a critical mass exists somewhere within the system and provides a decision around which the group can coalesce. Witness, for example, the political energy that has been generated around San Francisco's decision. We have already begun to see its effects, as officials in Sandoval County, New Mexico; New Paltz, New York; and Portland, Oregon, have tried to follow suit.[179]

The visibility afforded by second-order diversity may be especially important to small or diffuse minority groups, like members of the Green Party, Naderites, or Asian Americans. Members of such groups have little hope of wielding decisionmaking power within a state or even within most local governments should the electorate divide along

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[176] Second-order diversity thus provides chances for contestation that differ from the opportunities provided by first-order diversity and the influence model, in which contestation takes place largely *within* the decisionmaking body. *See* Gerken, *supra* note 104 (manuscript at 9–24).

[177] *See* Pettit, *supra* note 60, at 178–80. For a comparison of Pettit's conception of contestation and my own, see *supra* note 68.

[178] Kate Zernike, *Gay? No Marriage License Here. Straight? Ditto.*, N.Y. TIMES, Mar. 27, 2004, at A8 (emphasis added) (internal quotation marks omitted).

[179] *See* Joshua Akers, *Clerk Says She Was Doing Job by Issuing Licenses*, ALBUQUERQUE J., June 15, 2004, at 1, *available at* 2004 WL 82119090; Alan Cooperman & David Von Drehle, *Same-Sex Marriage Vaulted Into Spotlight*, WASH. POST, Mar. 8, 2004, at A1; *Gay Marriage Chronology*, BURLINGTON FREE PRESS, May 16, 2004, at 4, *available at* 2004 WL 60192910.

these lines. Small, disaggregated decisionmaking bodies provide one of the few places in the democratic infrastructure where members of such groups have a chance to exercise control in making democratic judgments — a rare chance to achieve *intra*local, not just local, variation in decisionmaking. But only second-order diversity takes advantage of the potential democratic values associated with this institutional feature. A system that is first-order diverse, by contrast, would render these groups invisible even within small decisionmaking bodies.

Finally, in canvassing the benefits associated with the visibility second-order diversity generates, it is worth noting what *kind* of visibility it offers. Second-order diversity not only ensures that electoral minorities are seen; it fosters visibility of a particular sort. Visibility in a disaggregated system comes from a set of disaggregated data points. A jury system that is second-order diverse, for instance, might produce a wide variety of verdicts rendered by predominantly African American juries. A districting system that is second-order diverse might result in both John Lewis and Cynthia McKinney representing majority-black districts, or elect Republican congressmen whose politics range from Tom DeLay's to Chris Shays's.

Second-order diversity thus offers us a kaleidoscopic view of minority group members, a view that is constantly shifting and composed of many distinct parts. We may be able to discern a pattern — the existence of politically salient groups — within the kaleidoscope, but we can also discern dissent and division, change and instability, external connections and internal differences in those patterns. Put more simply, under a system that is second-order diverse, *visibility takes the form of a pattern, not a point.* When an institution is second-order diverse, one cannot identify "the" group perspective, yet one also cannot fail to notice group differences where they exist.[180]

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[180] Second-order diversity thus, in some senses, represents a middle ground between those who believe that group identities exist and those who believe that the notion of group identity is utterly incoherent. *See supra* section I.C, pp. 1109–11. It bears some resemblance to the description of the term "critical mass" offered by one current law school dean in *Grutter*, who noted that there must be enough members of a minority group in a law school class to make clear to the majority that group members do not share a single point of view. Grutter v. Bollinger, 123 S. Ct. 2325, 2334 (2003) (describing testimony in the district court by Kent Syverud); *see also* LEVINSON, *supra* note 5, at 15 (arguing that "[o]ne way of interpreting Harvard's [affirmative action] policy is simply the recognition that no sane person could in fact believe that there is a singular 'black point of view' or 'black experience'"); Mansbridge, *supra* note 116, at 636 (asserting that "a variety of representatives is usually needed to represent the heterogeneous, varied inflections and internal oppositions that together constitute the complex and . . . contested perspectives, opinions, and interests . . . of any group"). Indeed, the first and — as far as I am aware — only use of the term "second-order diversity" is Alex Aleinikoff's description of what the *Grutter* participants later termed "critical mass." T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 371 (1992).

2. The Costs of Variation. — There are, of course, costs to the visibility second-order diversity provides. To begin, visibility itself can be costly; for instance, it can make electoral minorities a target of public outcry or exacerbate group tensions.[181] Even if one thinks that democratic visibility is, on balance, a democratic good, there is a set of costs associated with specifically using governance *decisions* to generate visibility: variation in democratic outputs.

Here it seems useful to use the jury system as an example, as it seems to reveal the costs of variation in a particularly stark form. The jury system, of course, tolerates — even guarantees — a certain amount of variation among jury verdicts. Juries work with standards like "reasonableness" that leave room for discretionary judgments.[182] Moreover, the application of law to facts necessarily involves interpretation and thus engenders some inconsistency.

Nonetheless, as with most decisionmaking bodies, consistency matters, particularly to those most affected by the decisions. Jury verdicts represent an extreme example of the discrete, individual costs that can arise from variation. After all, verdicts, especially in the criminal context, can have a dramatic effect on the fate of individuals. Some of these costs are reduced by the process of judicial review; because the case made by a prosecutor needs to be within a certain evidentiary range to survive appellate scrutiny, juries simply choose who among those "within the range" are punished.[183] Still, even variation "within the range" can impose weighty costs. Further, it is quite likely that a number of individuals not directly affected by a verdict may suffer as a result of variation in jury outputs, as it is more difficult to order one's conduct if the legal system is unpredictable.

Because the discrete, individual costs associated with variation are intuitively easy to grasp, I'd like to focus here on another, more diffuse set of costs associated with variation: the costs associated with what Ronald Dworkin has termed "checkerboard" decisionmaking.[184]

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[181] While canvassing all of the costs and benefits of democratic visibility is beyond the scope of this Article, it is worth noting that one's assessment of these questions often boils down to one's views on transparency — whether a healthy system requires the submergence or acknowledgment of evidence of group conflict. For an analysis of these competing impulses and an argument that "strong democracy" requires the transformation — rather than the suppression or tolerance — of conflict, see BARBER, *supra* note 117, at 118–19, 135, 151–52. For a discussion of agnostic views of politics, see Cover, *supra* note 52, at 671–72; and *infra* p. 1174.

[182] *See* SCHUCK, *supra* note 1, at 36 (noting that standards "such as 'reasonableness' encourage[] diverse, context-sensitive outcomes at the expense of predictability," and arguing that the common law's "pronounced contextuality assures that it will reflect the remarkable heterogeneity of American life"); Hetcher, *supra* note 148, at 640 (arguing that juries infuse negligence standards like the reasonable person with informal social norms).

[183] *See* Andrew G. Deiss, *supra* note 147, at 341 (arguing that "on any given set of facts there is a range of [verdicts] that could be considered just").

[184] RONALD DWORKIN, LAW'S EMPIRE 179 (1986).

Here again, the jury system provides a particularly acute example. That is because our normative vision of the court, and thus the jury, as an "impartial" decisionmaker runs directly contrary to the argument made in favor of visibility — that we ought to *value* the fact that different juries will render different verdicts in similar cases.[185] Variation in verdicts, of course, raises questions about the existence of judicial objectivity.

Here, then, is a particularly clear example of Pitkin's gap between purpose and institution, principle and practice.[186] We think that juries are supposed to "represent," or stand in for, the community. But their institutional features — their small size, disaggregated structure, and varied composition — are in tension with efforts to paint jury decisions as unitary embodiments of "the" law or "the" community's judgment, with those terms' many normative connections to the jury's role as a truth-finder.[187]

Put differently, the notion of second-order diversity highlights the distinction between the two definitions of the word *partial*. We worry about different juries rendering different verdicts because we fear it is a sign that one of the juries was partial — in the sense of biased.[188] The notion of second-order diversity recasts jury verdicts as partial in a different sense — as a fraction of the whole.[189] It suggests that a verdict is best understood as one data point in figuring out what the "law" is or ought to be. And that notion may be difficult to reconcile with our normative vision of the role the jury ought to play.

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185 *See, e.g.*, Leipold, *supra* note 21, at 955, 960–66 (contrasting Supreme Court decisions that assume that "excluding certain groups from the jury pool might change the outcome of cases" with later decisions taking the opposite view); Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 442–48 (1992) (describing the tension between the view of a juror's duty as "discovering objective facts" and the view that "honest jurors of different backgrounds" would differ in their assessments of the facts).

186 *See supra* p. 1122.

187 For one analysis of this tension, see *Bush v. Vera*, 517 U.S. 952, 1051 n.5 (1996) (Souter, J., dissenting). Several authors explore the related tension between "representativeness" and judging. *See* Abrams, *supra* note 78, at 1419–21; Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 97–99 (1997) (exploring these questions as they relate to judging and race); Frank I. Michelman, *Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary*, 47 UCLA L. REV. 1221, 1249–50 (2000) (cautioning against assigning an overtly political role to the judiciary because the courts ought to "shroud moral disagreement in the pale cast of legal thought" and thereby "numb the sting of political disagreement over questions of fundamental political morality").

188 For an exploration of the slippery nature of the notion of impartiality, see Minow, *supra* note 27; and Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). For an analysis of these terms in the context of jury discrimination claims, see CONSTABLE, *supra* note 97, at 36–38.

189 *See supra* section III.A.2.b, pp. 1136–39.

The diffuse costs associated with variation in democratic outputs may be generalizable well beyond the jury. For instance, as Ronald Dworkin points out in criticizing "checkerboard" legislation, there are good reasons to value integrity in the decisionmaking process.[190] Sometimes we care about integrity on the type of process grounds noted above — we expect juries to treat similar cases similarly. But Dworkin argues that this concern is related to a broader argument — we value integrity because there are issues for which we seek to establish a *principle* for the political community.[191] In such cases, we are unwilling to tolerate variation because it involves an underlying commitment that, in effect, defines the community and the standards by which all of its members are expected to live.[192]

While identifying such principles is beyond the scope of this Article, it is worth noting two things. First, dissent and disagreement in this context are *bounded*. As noted above, because disaggregated institutions tend to be at the lower end of the political hierarchy,[193] juries and their counterparts usually render decisions within a range that is acceptable to the majority. Thus, when the type of community-defining principles Dworkin discusses can be identified, the majority generally retains the ability to restrict the scope of minority decisionmaking to ensure that it comports with such larger principles. For those issues and instances in which the costs of variation are intolerable, the majority can identify a narrow range of "acceptable" deviation.

Second, the question in some contexts may not be whether any inconsistency is acceptable, but what level of inconsistency is tolerable.[194] For example, it is possible that at least some decisions rendered by disaggregated bodies like juries fall into a category that Frederick Schauer suggests will inevitably generate checkerboard decisions: those "where questions of degree predominate, and where seemingly arbitrary lines are necessary to settle temporarily, but not to resolve in any deeper sense, intrinsically competing policy objectives."[195]

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190 *See* DWORKIN, *supra* note 184, at 178–90.

191 *See id.* at 179, 184–85, 189–90. For a thoughtful set of reflections on the relationship between variation and community, see FREDERICK SCHAUER, PROFILES, PROBABILITIES AND STEROTYPES 278–98 (2003).

192 *See* DWORKIN, *supra* note 184, at 179, 184–85, 189–90.

193 *See supra* pp. 1127–28.

194 As Harry Kalven wrote, "the law has a great capacity to tolerate inconsistencies; perhaps the most difficult thing for the beginning law student to grasp is this sense of tolerable inconsistency." HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 4–5 (1965).

195 Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 990 (1995).

Finally, there may even be instances where inconsistency is not only tolerable, but preferable, as I explore in section III.D.[196]

3. Evaluating the Tradeoff Between Visibility and Variation in Context. — While second-order diversity provides a framework for identifying the tradeoff between the benefits of visibility and the costs of variation in democratic outputs, it does not determine the weight we ought to accord to these arguments. That tradeoff simply cannot be assessed in the abstract. Consider, for instance, how markedly the visibility/variation tradeoff differs when we consider districts rather than juries. Because the two institutions render such different democratic *outputs* — a candidate and a verdict — they nicely illustrate how these costs and benefits can vary.

If we begin with the visibility side of the equation, districts and juries promote visibility in quite different fashions. For instance, the jury verdict is one of the rare instances in which the people speak for themselves rather than through a representative,[197] and its real-world consequences can help electoral minorities force other political actors to engage with their concerns.[198] Nonetheless, the form a jury decision takes limits its effectiveness in promoting visibility. As a practical matter, verdicts are little more than data points. We rarely know much about a jury save its composition and the verdict rendered. Even if jury verdicts are a rich source for empirical studies by scholars, "visibility" within the polity often depends on individual verdicts in highly publicized cases. In such instances, however, members of the community may not know enough about the case to understand what the verdict signifies to those who rendered it.[199] Indeed, there is a risk

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[196] One obvious example is Lee Bollinger's seminal work lauding the benefits of differential regulatory strategies for the mass media. *See* Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976). I explore other examples in section III.D, *infra*, pp. 1171–79.

[197] *Cf.* Scheflin & Van Dyke, *supra* note 78, at 69 ("Jury verdicts provide significant information about the harmony, or lack thereof, between the laws and the people. This information, when fed back to the legal system and to the community, can serve to bring the law and its administration in line with popular sentiment . . . .").

[198] *See* Mark Curriden, *The American Jury: A Study in Self-Governing and Dispute Resolution*, 54 SMU L. REV. 1691, 1694 (2001) (discussing an empirical study that identified large numbers of cases in which jurors "used their verdict to send a message about a broader political or social issue" and found that "[j]ury verdicts do have an impact" on political actors based upon the identification of "250 specific cases in which jury verdicts led to some change"); Marder, *supra* note 147, at 1059 ("The reach of the jury's decision extends beyond the individual parties before it and sends a powerful message about issues . . . in our society."); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 513 (2003) (concluding that "[v]erdicts matter . . . to public policy makers" and "[s]tories about jury verdicts can have a profound effect on public opinion and public policy").

[199] For this reason, Andrew Leipold argues that jury nullification is an "unwieldy instrument for legal reform. At the heart of any successful reform effort is the ability to convey a clear mes-

that when the public knows nothing about a verdict except for the composition of the jury and the outcome, it will fill in the gaps of its knowledge with inferences about the group in question. In such circumstances, verdicts seem as likely to reinforce stereotypes as to debunk them.

The districting system generates a different set of democratic outputs: the election of political leaders.[200] Districts are much larger than juries, so community leaders play a crucial role in electoral politics — framing issues, rallying support for candidates, and building coalitions.[201] Community leaders thus must serve as political — or, to use Robert Bennett's term, "conversational"[202] — entrepreneurs to generate support for a candidate.

The visibility afforded to electoral minorities in districting, then, may be quite crucial. In essence, districts are a place where we link the fate of the electorate with the fate of the political elite.[203] It is not simply that elected leaders can speak on behalf of group members or provide an obvious rallying point; elected leaders actively help group members coalesce. Put differently, second-order diversity in districting creates incentives for "conversational entrepreneurs" to foment democratic debate at the *ends* of the democratic spectrum as well as in the middle. It is, in effect, an institutional mechanism for ensuring that democratic conversations take place throughout the polity. Such opportunities might be particularly valuable for minority groups who have dropped out of the broader democratic conversation or are unlikely to be heard in it.

Further, while an electoral scheme admittedly produces fewer democratic outputs than a jury system, they take a more complex form. Candidates have platforms — sets of issues on which they have staked out positions. Thus, as with other institutions that are second-order diverse, identity takes the form of a pattern, not a point, in districting. Consider, for instance, the votes on which the Congressional Black Caucus (CBC) unites and divides, those on which CBC members agree with each other but not with the party, those on which they resemble generic Democrats, those on which they vote with conservative House

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sage, but because general verdicts in criminal cases are opaque, any message that the jurors hoped to send can easily be lost." Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 127 (1996); *see also* Marder, *supra* note 97, at 926 (arguing that juries that acquit in response to social conditions provide only minimally effective feedback to the government).

200 I explore these ideas in more detail elsewhere. *See* Gerken, *supra* note 38.

201 Kang, *supra* note 90, at 8–11.

202 BENNETT, *supra* note 89, at 37.

203 *Cf. id.* at 36 ("[T]he routine use of single-member legislative districts . . . establishes easily identifiable constituency relationships that serve to direct and focus primary [democratic] conversational interactions.").

members, and those on which no clear pattern is identifiable.[204] This type of variation helps us see whether group members occupy a distinct political space or whether their internal divisions correspond to those of the party or polity at large.

On the flip side of the visibility/variation equation, the costs of variation in districting are also quite different from the costs of variation in jury verdicts. It is hard to identify the type of discrete costs of variation in districting that we see in the jury context; after all, the fate of third parties does not directly depend on the outcome of an election. Further, concerns about the diffuse costs of variation in the jury context — the costs stemming from the *appearance* of variation, described above[205] — seem less likely to arise in the districting context. In elections, we are comfortable with disagreement and dissent; they are tolerated as being "just politics." Indeed, we design districts on the assumption that they will generate inconsistent outcomes in order to ensure first-order diversity at the legislative level.

Nonetheless, there are ways in which heterogeneity in district composition can also impose a diffuse set of costs on the electorate. Those costs have been thoroughly canvassed in the debate between advocates of territory-based districting and proponents of proportional representation (PR) systems.[206] One concern has to do with the potential dangers of extremism. If districts are at the far end of the second-order diversity spectrum, they may elect a set of candidates who are incapable of engaging in productive compromise at the legislative level, thus leading to the paralysis and instability that critics of PR systems fear. The likelihood that any territorial-based districting scheme will routinely result in the parade of horribles sometimes associated with PR schemes is fairly slim, however. Even where there is significant variation in district composition, the size of most districts and the dynamics of a winner-take-all system reduce the chances that extreme candidates will be elected, let alone hold sway in the legislature.

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[204] For an overview of CBC voting patterns, see DAVID A. BOSITIS, THE CONGRESSIONAL BLACK CAUCUS IN THE 103RD CONGRESS 31–46 (1994); and CANON, *supra* note 90, at 150–54.

[205] *See supra* pp. 1112–16.

[206] For an analysis of these tradeoffs, see GARY W. COX, MAKING VOTES COUNT (1997); ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES (Bernard Grofman & Arend Lijphart eds., 1986); ELECTORAL SYSTEMS IN COMPARATIVE PERSPECTIVE: THEIR IMPACT ON WOMEN AND MINORITIES (Wilma Rule & Joseph F. Zimmerman eds., 1994); AREND LIJPHART, ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES 1945–1990 (1994); AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999); G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS (2000); DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS (1971); KENNETH SHEPSELE, MODES OF MULTIPARTY ELECTORAL COMPETITION (1991); and REIN TAAGEPERA & MATTHEW SOBERG SHUGART, SEATS AND VOTES: THE EFFECTS AND DETERMINANTS OF ELECTORAL SYSTEMS (1989).

The more likely costs of heterogeneity stem not from instability, but from stasis. Heterogeneity among districts can eliminate competition; indeed, the heterogeneity we already see in the districting system stems largely from the incumbents' desire for safe districts, and many worry about the concomitant loss of the energy generated by political competition.[207] Such concerns would favor a variant of second-order diversity that includes a "diverse portfolio" of districts — some that compete for the median voter and some that compete for the votes of those closer to the ends of the political spectrum.[208]

D. Cycling: The Costs and Benefits of Varying Institutional Design Strategies

The final functional oddity that second-order diversity produces is that it can result in a set of decisionmaking bodies that seem to embody no coherent theory of design. In a system that is second-order diverse, some decisionmaking bodies will be dominated by women, some by Latinos, some by the poor. The composition of some will be conducive to measured deliberation; others will promote old-fashioned foot-stamping. Some decisionmaking bodies will be the type one would design if racial equity were the overriding value; others will privilege religious differences. At any given moment, a jury that fosters an interracial coalition will be replaced by one granting racial minorities a measure of decisionmaking independence. In any given districting scheme, a district that groups together communities that have nothing in common save their zip code will coexist with one that deliberately clusters voters who share the same racial or socioeconomic status. Put differently, second-order diversity allows us to *cycle* our strategies for designing decisionmaking bodies.

1. The Values Associated with Cycling. — There are three related reasons why we might value the opportunity to cycle. First, cycling

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[207] For competing views on the value of competition and the forms it can take, compare Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 620–30 (2002), with Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 668–69 (2002).

[208] Counterintuitively, second-order diversity along political lines may result in a set of legislators that includes more moderates than we see today. If one seeks heterogeneity in district composition — a full sense of the political spectrum — one might conclude that what is missing in the districting context are districts that mirror the state population — that is, districts that cater to the *median* voter. *See, e.g.*, Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 421–31 (2004). After all, while many states are closely divided politically, few seats at the congressional level are remotely competitive. *See id.* at 424–26; Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 1 ELECTION L.J. 7, 182–84 (2002). In some states, then, the part of the political spectrum that is not visible is the *middle*, and at least one vision of second-order diversity in districting would result in *more* competitive districts that cater to voters in the middle of the political spectrum.

embeds an experimental approach into the system by ensuring that the composition of decisionmaking bodies varies. It thus generates important information about where and how people divide. Second, second-order diversity allows us to cycle our normative commitments, thereby avoiding the need to privilege a single theory of identity — or democracy — over all others. Finally, cycling provides a particularly useful strategy for dealing with conflict, as it avoids freezing particular political dynamics permanently into place.

(a) Cycling and Experimentation. — One reason we might find cycling valuable is that it allows us to experiment and thus to gain important information about the dynamics of our democracy. For instance, in a jury system that is first-order diverse, decisionmaking dynamics are likely to be fairly static. We would expect to see roughly the same line-up of supporters and dissenters in every case and minorities exercising approximately the same amount of influence over each verdict. First-order diversity, in short, generates one form of democratic compromise, not many.

Second-order diversity, in contrast, ensures that decisionmaking dynamics on juries vary. On some juries, the dissenters or influencers may be electoral minorities; on others, members of the majority will play those roles. The jury equivalent of the "swing" voter will differ from decision to decision. Second-order diversity thus tells us not only when and where people divide, but how group dynamics can mute or amplify those divisions. It therefore can reveal not only lines of division and connection that first-order diversity conceals, but the ways that known group divisions manifest themselves — or fail to emerge — when internal power dynamics vary.[209] And we can see lines of division — subtle fractures in groups that seem unified in the normal po-

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[209] This argument finds some support in the federalism literature, in which a number of scholars have argued that the states are what Justice Brandeis termed "laborator[ies]," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), or are engaged in a dialogue with the national government about governance questions. *See* SHAPIRO, *supra* note 69, at 103 (stating that one of the best arguments in favor of federalism is that the states can engage the national polity in "a continuing dialogue about the proper resolution of the clash of interests between individuals and groups"); Amar, *supra* note 69, at 1233–36 (describing "the 'laboratory' perspective" as one of the five main visions of federalism); Friedman, *supra* note 72, at 398 ("[T]he spirit of state experimentation is one of creative response to immediate necessity, often addressed to solving a real problem staring the official in the face."); McConnell, *supra* note 69, at 1498–99 (observing that "federalism has been thought to advance the public good [because] state and local governmental units . . . have greater opportunity and incentive to pioneer useful changes"). *But see* Rubin & Feeley, *supra* note 76, at 924–25 (arguing that federalism does not encourage experimentation because no state has the incentive to take the necessary risk). One key difference between federalism and second-order diversity is that experimentation in federalism is promoted, in part, by the ability of individuals to exit, whereas experimentation under a system that is second-order diverse is often achieved by *preventing* exit. *See supra* notes 149–166 and accompanying text.

litical process — and unexpected connections that would be invisible under a system that is first-order diverse.[210]

For instance, imagine trying to figure out which group divisions "matter" for purposes of composing the jury. In a world where people have multiple facets to their identity, it is difficult to determine which identities matter. Virtually every community divides along some lines. But political identity is also multidimensional, and different dimensions may matter in different contexts and at different times. For instance, does race matter more than socioeconomic status in affecting a person's view on a verdict? Religion more than socioeconomic status? Does the nature of the case — civil versus criminal, drug crime versus sex crime — affect how these divisions play out? Does the composition of the jury mute or amplify such divisions?

Second-order diversity provides an empirical safety net of sorts. It leaves an opportunity for lots of decisionmaking preferences to dominate.[211] Creating a wide range of juries may allow some lines of cohesion or division to gain prominence and others to recede from view. In the aggregate, however, a fairly complete picture will emerge that reflects the multiple identities, connections, and fissures within a given community.

If we seek such information from juries, however, it is necessary to vary their composition. After all, when sorting through a large number of data points, patterns matter. And patterns are easier to discern when we can see a broad swath of the democratic spectrum, not just the middle slice.

(b) Normative Cycling. — A second reason we might value second-order diversity is as a strategy for cycling our normative commitments. Varying the composition of decisionmaking bodies enables us to avoid privileging a single theory of identity — or democracy — over all others.[212]

Normative cycling of this sort is attractive when, as here, it is difficult to determine not only which differences matter, but whether — and how — we should recognize those differences in the first place. It is a useful strategy in those instances when we are skeptical of our ability to choose among conflicting normative values.[213] Just as

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[210] *Cf.* Cover, *supra* note 52, at 664–72 (lauding jurisdictional redundancy for revealing both agreement and division within the polity).

[211] *Cf.* Kang, *supra* note 90, at 8–11 (lauding the use of a random diversification sytem); Lichtman, *supra* note 62, at 141 & n.38 (same).

[212] The notion of cycling, of course, sounds many of the themes of pluralism. *See generally* JOSEPH RAZ, THE PRACTICE OF VALUE (2003) (exploring values pluralism); William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. MARY L. REV. 869 (1999) (discussing political pluralism).

[213] *Cf.* DUXBURY, *supra* note 168, at 71 (arguing in favor of lottery-based decisionmaking in the face of incommensurable choices because it is "the most honest and practical thing to do");

money managers favor a diverse portfolio to maximize returns on investments in an unpredictable world,[214] so too we might favor a diverse portfolio of decisionmaking bodies in trying to achieve a well-functioning democracy.

Normative cycling can also be attractive when we are confident of our normative judgments but those norms either clash in theory or cannot be implemented together in practice. It is, in essence, "a choice not to choose" in the manner lauded by Guido Calabresi and Philip Bobbitt in *Tragic Choices*.[215] Calabresi and Bobbitt argue that in a world where one is forced to choose between "essential yet conflicting values," cycling is a viable strategy.[216] By alternating the values we privilege, we avoid rejecting a fundamental one.[217] In the words of Richard Pildes, "[w]hen values are diverse but important, the preservation of this tension between values — rather than the total triumph of one set of values — fosters the richness of a complex society with multiple aspirations."[218] Normative cycling thus signals a reluctance to indulge in absolutes, a recognition of the variety of normative commitments that undergird any democratic system, and an acknowledgment that our identities are multiple and complex.

Imagine, for instance, we were thinking about the problem of districts and race. On the one hand, we might believe that African Americans ought to enjoy a measure of electoral independence, akin to that enjoyed by white voters, to elect a champion of their own (a goal furthered by majority-minority districts). On the other hand, we might also think that African Americans, like other members of the polity, "are not immune from the obligation to pull, haul, and trade to find common political ground"[219] (a view that might favor a coalition-district strategy). We might find it hard to choose between these views simply because we do not know which strategy best serves African Americans in practice. Or we might find it difficult to choose among the normative commitments that undergird any assessment of what strategy is "best" for racial minorities. In either case, cycling could be a sensible strategy. Rather than choosing among these competing vi-

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ELSTER, *supra* note 26, at 38 ("[T]he use of lotteries to resolve decision problems under uncertainty presupposes an unusual willingness to admit the insufficiency of reason.").

214 *See generally* Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952).

215 CALABRESI & BOBBITT, *supra* note 102, at 41.

216 *Id.* at 195–96.

217 *Id.*

218 Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 724 (1994); *see also* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1142–43 (2002).

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

sions of minority empowerment, second-order diversity allows us to pursue a mix of empowerment strategies.

(c) Cycling as a Strategy for Dealing with Political Conflict. — A third reason to value the cycling that second-order diversity facilitates is that it may represent a sensible strategy for dealing with political conflict over time. Disaggregated bodies tend to be temporary — juries meet and dissolve, districts are redrawn every ten years, school committee members face regular elections. Second-order diversity allows not only for variation within such institutions, but for variation *over time*. And temporal variation may offer a useful strategy for dealing with group divisions.

Specifically, second-order diversity avoids the problems associated with freezing into place a permanent "solution" to intergroup conflict. By constituting and reconstituting a decisionmaking body in an endless cycle, second-order diversity allows members of opposing groups a chance to revisit the conflict in different contexts and at different times. It does not ossify a particular set of power relations, but instead ensures that political dynamics vary over time.

Consider a jury system that is second-order diverse in a polity that is racially divided. African Americans and whites will encounter each other on juries where they each may enjoy more, fewer, or the same number of votes as members of the other group. They will come together to resolve cases that stem from shared problems (like teenage drug use), conflicts that polarize the polity (perhaps a racially tinged policing incident), issues that divide each group internally (capital punishment), and questions that neither group cares much about (a low-level shoplifting incident). They will come together when the broader political context is polarized along group lines and when it is relatively harmonious. And precisely because the political environment — whether it is defined in terms of power, issues, or political atmospherics — is temporary, there may be greater freedom for participants to experiment with their own identity choices, as well as with different strategies for addressing the conflict.[220]

Put differently, cycling can be understood as a *temporal* strategy for dealing with the problem of faction. To return to the discussion of Madison, while Madison's solution makes it difficult for the members of any small group to hold power, it nonetheless allows the majority itself to hold *permanent* sway. Second-order diversity turns Madison's strategy on its head, ensuring that members of *all* groups have a

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[220] Indeed, while the temporary nature of the interaction may undermine chances that participation will create long-term affective ties, as Nancy Rosenblum points out in discussing voluntary associations, "[p]recisely because [such associations] are *not* minicommunities and involve only weak ties, small groups may be a training ground for ordinary interactions." ROSENBLUM, *supra* note 116, at 361.

chance to exercise power, but only *temporarily*. Cycling ensures that intergroup relations are constantly in a state of flux and that no particular power dynamic is frozen into place.

2. The Costs of Cycling: Privileging Conflict over Consensus, Instability over Stasis. — If there are benefits to cycling, are there also costs to this design strategy? After all, at least at first glance it might seem difficult to resist calls to pursue a dynamic view over a static one, an experimental strategy over a permanent one, a multifaceted solution over a unidimensional one.

A first cut at this question might involve asking whether cycling ought to be a *permanent* strategy. That is, it is one thing to envision democratic institutions as "little laboratories"[221] helping us choose the "right" answer that we will eventually impose uniformly. It is another to seek variation for its own sake. One might reasonably think that there is not much to be said for an experiment that lasts forever.

The weak argument in favor of cycling would suggest that the experiment ought to end when an answer is reached. That is, to the extent that experimentation has revealed better and worse strategies for creating decisionmaking bodies that contribute to a well-functioning democratic process, we would implement the better strategies and avoid the worse ones going forward. And second-order diversity would still be useful in a more limited sense, because we could continue to experiment within the range of design strategies we have found useful. Put differently, second-order diversity does not require us to abandon social engineering of all sorts or indulge in normative values we have rejected. After all, a money manager creating a diverse portfolio does not invest mindlessly; she organizes her investments around a clear goal (profit) and avoids strategies unlikely to achieve that goal. On this view, then, second-order diversity simply suggests that, no matter what normative choice we have made, we should be flexible in our approach.

Imagine, for instance, that our goal is to foster vibrant interracial coalitions. We might initially create a mix of influence, coalition, and majority-minority districts to assess which best achieves that goal. Such a mixed system would reveal how racial coalitions form in districts that are majority white *and* in districts where voters of color enjoy an electoral majority.[222] Under a system that is first-order diverse — made up entirely of coalition or influence districts — we would

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[221] *See supra* note 209.

[222] We would thus be deprived of the type of study produced by David Canon, who found that, despite predictions to the contrary, majority-minority districts "appear to break down racial barriers rather than erect[] them" and to result in new interracial coalitions built by representatives elected in those districts, thereby promoting the "politics of commonality." CANON, *supra* note 90, at 263–64.

have a less heterogeneous sample to study: we would have information about what takes place in districts that are at least sixty percent or more white, but not the reverse. Nonetheless, when the next redistricting cycle begins, we might want to reevaluate the experiment and rely on a narrower range of district design strategies to empower minorities.

A stronger variant of the cycling argument, however, would counsel against a uniform design strategy even in the long run. On this view, cycling "signal[s] respect for difference,"[223] as do legislatures on Jeremy Waldron's view: with their unstable and multiple legislative pronouncements, legislatures allow us to acknowledge that "[t]he community for which law is made is essentially plural . . . and in its essence incapable of representation by a single voice."[224] A decision to pursue second-order diversity in a given institutional setting thus requires one to embrace a vision of democracy that, like Robert Cover's view of federalism's jurisdictional structure, rests on acceptance of "a messy and indeterminate end to conflicts which may [not] be tied neatly together by a single authoritative [decision]" and an institutional design that "permits the tensions and conflicts of the social order to be displayed."[225]

Returning again to the question of districting, the strong variant of the cycling argument would suggest that we ought to preserve a mix of influence, coalition, and majority-minority districts even if one strategy emerges as the most effective method for empowering minorities. On this view, even if we thought, for example, that coalition districts best served the aims of the Voting Rights Act, we would nonetheless insist on majority-minority districts capable of electing someone like Cynthia McKinney to Congress. Or, to shift to the example of juries, even if we were confident that a particular type of jury best served a particular end, the strong variant of the cycling argument would nonetheless favor creation of a number of juries that would render outlier verdicts and thus undermine any chance of reaching a consistent, stable set of results from the jury system.

The stronger vision of cycling, of course, runs contrary to a certain set of commitments in legal scholarship — orderliness, finality, and predictability. A robust commitment to second-order diversity thus demands a normative commitment to deliberative conflict, a willingness to embed disagreement into the decisionmaking process, and a rejection of the values associated with consensus and uniformity in at least part of the democratic infrastructure. It is an approach premised

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223 WALDRON, *supra* note 52, at 196, 213.

224 *Id.* at 60.

225 Cover, *supra* note 52, at 682.

on the permanence of division and one that, in turn, ensures that those divisions are visible.[226] Acceptance of the strong view of cycling might demand that we not only "celebrate the perpetuity of contest,"[227] consistent with an agonistic view of politics,[228] but perhaps move toward treating "law as a part of political contest rather than as the instrument . . . of its closure."[229]

3. The Costs and Benefits of Cycling in a Given Institutional Context. — Any evaluation of the tradeoff between the costs and benefits of cycling will turn on the institutional context, perhaps even on *which* subsidiary justification for cycling appeals to us most. Here I focus on a single justification for cycling — experimentation — and suggest how the costs and benefits of experimentation hinge on the tools we use to achieve heterogeneity.

Imagine, for example, that we cycle because we want a feedback mechanism, a source of information about how well our democracy is functioning. One might think that the jury is a better site for experimentation than districts. Juries are (at least in theory) randomly assigned. In contrast to districts, whose design involves the exercise of deliberate choice at some stage in the line-drawing process, a random assignment process helps remove the human element in the composition of juries, thus allowing *unexpected* fissures and cross-community connections to emerge. Put differently, we might value random assignment for the same reason social scientists value it. At least since Dewey failed to beat Truman, there has been widespread consensus among social scientists[230] that random selection represents the optimal strategy for producing a representative sample because it guarantees that all sources of difference — including those one might not anticipate — are able to emerge.[231] As one leading text explains, "[i]n a world in which there are many potential confounding variables, some of them unknown, randomness has many virtues."[232]

The problem with random assignment, however, is that we cannot control what kinds of decisionmaking bodies it generates. A random

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226 *See supra* section III.C.1, pp. 1161–64.

227 BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 14 (1993).

228 *See generally* HANNAH ARENDT, THE HUMAN CONDITION (1958).

229 HONIG, *supra* note 227, at 15.

230 This consensus developed after purposive sampling — a system in which a social scientist handpicks a representative sample — resulted in an incorrect prediction of the winner of the 1948 presidential election. *See* Martin R. Frankel & Lester R. Frankel, *Fifty Years of Survey Sampling in the United States*, PUB. OPINION Q., Winter 1987, at S127, S128–29.

231 *See* ALAN STUART, THE IDEAS OF SAMPLING 4–5 (1984); *cf.* Frederick F. Stephan, *Practical Problems of Sampling Procedure*, 1 AM. SOC. REV. 569, 580 (1936).

232 GARY KING ET AL., DESIGNING SOCIAL INQUIRY 124 (1994); *see also* DUXBURY, *supra* note 168, at 70–71.

assignment system threatens to create juries we might find intolerable — for example, the proverbial all-white jury, which, given our history, is unlikely to be welcomed by many.[233] Indeed, a random assignment process will empower minority group members who do not often appeal to traditionally liberal academic sensibilities, like fundamentalist Christians or libertarians. One might well conclude, of course, that all-white juries have democratic value regardless of our preferences[234] and, in any case, are the necessary result of a design strategy intended to grant African Americans or Latinos decisive control elsewhere in the system. But the episodic nature of the jury offers an additional reason to discount this concern: the all-white jury is *temporary* in the strong sense. It is part of the cycle that second-order diversity produces, but only *part* of that cycle. Like the Bobbitt metaphor comparing cycling to "the game of scissors/paper/stone with its circular hierarchy that brings different values to a decisive but momentary preeminence and is then replayed,"[235] juries are created and disbanded seriatim, ensuring that every jury enjoys only a "momentary preeminence" and that no type of jury is permanently entrenched within the system.

Nonetheless, it is not difficult to imagine a parade of horribles — a set of decisionmaking bodies (totalitarians, racists) that we would find so intolerable that we would be reluctant to pursue a cycling strategy for any democratic institution that is randomly composed. We might prefer instead to seek second-order diversity in districting, since the tool for creating districts is self-conscious choice (by a legislature, independent commission, or court) and we can avoid creating districts that will undermine our democratic aims.

Similarly, we might favor seeking second-order diversity in districts if we are persuaded by the experimental justification for second-order diversity but expect the experiment to end. Because districts are not randomly assigned, we can better design our "experiment" — that is, we can seek a diverse portfolio that pursues a particular goal. Self-conscious design, in short, allows districters to choose *among* variants of second-order diversity.

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233 In the words of Albert Alschuler, "[f]ew statements are more likely to evoke disturbing images of American criminal justice than this one: 'The defendant was tried by an all-white jury.'" Alschuler, *supra* note 25, at 704.

234 *See supra* sections III.A.1, pp. 1126–32; III.B.1, pp. 1142–52; III.C.1, pp. 1161–64. For an interesting analysis of similarly homogeneous private associations and the democratic benefits they afford, see ROSENBLUM, *supra* note 116, at 319–48.

235 PHILIP BOBBITT, CONSTITUTIONAL FATE 248 (1982).

E. Finding the Best Fit

Having sketched out a conceptual framework for evaluating the choice between first-order and second-order diversity as a design strategy, the next questions are where and how to implement second-order diversity in practice. That is, how do we "manage" second-order diversity? How do we take advantage of the benefits this design strategy offers while avoiding its more problematic costs? How do we identify those institutional contexts in which second-order diversity does, and does not, make sense? Below are a few preliminary thoughts.

1. Balancing Costs and Benefits. — As the preceding discussion makes clear, the costs and benefits of second-order diversity not only vary from context to context, but often cannot be separated from one another; they are two sides of the same coin. As a result, we cannot reduce the *costs* associated with second-order diversity without relinquishing some of its benefits.

Consider, for example, the costs associated with variation in democratic outputs. There are a variety of ex ante and ex post strategies for reducing the costs of variation. As an ex ante matter, for instance, we could seek modest rather than significant variation in decisionmaking bodies — that is, we could move a bit closer to the first-order end of the diversity spectrum.[236] Even if we are reluctant to change the composition of a decisionmaking body, recent work on behavioralism suggests strategies for reducing variation in democratic outputs by altering the dynamics of the decisionmaking process.[237] Alternatively, we could pursue ex post strategies to cabin the costs that second-order diversity engenders. As noted above, most disaggregated decisionmakers are, like the jury, located in the lower tiers of the political hierarchy. There are a number of examples of formal strategies for policing extremes in such contexts, such as judicial review of jury verdicts.[238] There are also informal strategies for policing decisionmaking excesses by disaggregated institutions — the give-and-take between institutional actors that we call politics.[239]

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[236] This could be done subtly — for instance, simply increasing the size of juries and districts would reduce the extent to which any single jury or district will depart significantly from the population median. Or we could use less subtle means to reduce heterogeneity among these decisionmaking bodies by determining their composition in advance.

[237] *See* HANS & VIDMAR, *supra* note 146, at 104–08; SUNSTEIN, *supra* note 62, at 164–65; *infra* section IV.B.1, pp. 1190–93.

[238] Districting offers another example. To be sure, the legislature does not reject extreme candidates. But the requirement of majority rule at the legislative level means that extreme candidates must persuade moderate representatives in order to pass legislation.

[239] Thus, a school committee that defies a state mandate or a legislative committee that ignores the commitments of the governing majority may find itself subject to a variety of political pressures that move those decisionmaking bodies closer to the middle. Discomfort with the outputs of

The problem with most ex ante and ex post strategies for reducing the costs of variation, however, is that we risk losing the benefits to second-order diversity as well. For instance, if we push the composition of disaggregated bodies closer to the first-order end of the diversity spectrum, there will be fewer opportunities for turning the tables and engaging in experimentation. If decisionmaking bodies produce more moderate decisions, we lose some of the advantages associated with democratic visibility. Reducing the discretion granted to decisionmaking bodies or minimizing the political impact of their decisions may undermine some of the intrinsic and instrumental benefits associated with participation in the decisionmaking process. Individuals may feel a greater sense of political agency if the decision matters[240] — if electoral minorities are not merely getting a chance to play "Queen for a Day."[241] Similarly, on the output side of the equation, the importance of the decision may correlate with the visibility it offers to electoral minorities.

Put differently, when we grant citizens the chance to exercise significant discretion or to resolve questions of considerable import, the arguments in favor of second-order diversity are generally at their strongest, and worries about the costs of second-order diversity similarly peak.[242] The obvious solution in such cases is to balance. Bal-

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some decisionmaking bodies may also lead the central authority to reduce their discretion by defining the permissible "range" of outcomes more narrowly or taking certain functions away from the decisionmaker entirely. Consider, for instance, the history of the relationship between judge and jury. Scholars have long noted judicial reluctance to grant the jury significant decisionmaking authority and judges' concomitant efforts to take such authority away from juries. *See, e.g.*, Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939). For a more recent exploration of the decline of the jury's power due to "the courthouse crowd," see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994). *See also* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 100–02 (2001) (connecting this trend to the decline in popular constitutionalism); Solan, *supra* note 147, at 1282. For a quite different analysis of the history of the judge-jury relationship, see Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587 (2001), which notes the many "modern adherents" to the view that the jury's power has been "ever-declining," but argues that "pre-modern federal control of juries . . . exceeded the overall level of modern judicial controls." *Id.* at 592.

240 *Cf.* Richard D. Parker, *Power to the Voters*, 24 HARV. J.L. & PUB. POL'Y 179, 185 (2000) ("If something really significant seems to be at stake, people are more likely to take part."); Maimon Schwarzschild, *Pluralism, Conversation and Judicial Restraint*, 95 NW. U. L. REV. 961, 961 (2001) (arguing that political conversation, one form of participation, "thrives best when it can actually make a difference to public decisions").

241 I am indebted to Sam Issacharoff for raising questions along these lines.

242 I use the term "generally" because there may be some decisions that matter a great deal to the electoral minority but not much to the majority. Party politics, after all, depend on such a calculus.

ancing is, of course, a routine task for policymakers, even courts,[243] and there may be useful strategies for doing so.

First, it might be useful to follow the lead of several scholars of federalism and local government law, two fields that have long been occupied with balancing the democratic values associated with local autonomy against its attendant costs.[244] Some of the most interesting work in these areas has attempted to complicate the traditional story of a tradeoff between the values of centralism and localism — to bypass the seemingly inevitable balancing test — by exploring the ways in which centralism and localism can complement or reinforce one another.[245] There may thus be fruitful avenues of inquiry that explore strategies that can be "shown to promote local discretion even as [they] also limit[] it."[246]

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[243] Legal scholars, perhaps unsurprisingly, have largely focused on judicial balancing. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 77–83 (1997); Pildes, *supra* note 218; Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998).

[244] Both literatures are preoccupied with what Roderick Hills has termed in the local government context the "inherent" tension "between [a] desire to promote democratic localism and [a] desire to avoid parochial localism." Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2025 (2000) (reviewing FRUG, *supra* note 10). Similarly, much of the federalism literature focuses on how best to balance state and national power. For a noteworthy example of such an effort, see SHAPIRO, *supra* note 69, at 107–40. Perhaps unsurprisingly, few are willing to advocate the wholesale abandonment of the values associated with local autonomy, despite its costs. Like Richard Briffault, most commentators have endorsed neither "complete . . . dominance" by the central power nor "complete local autonomy," but instead have sought to blend "elements of both perspectives." Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 453 (1990); *see also* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 432 (2001).

[245] Akhil Amar, for instance, offers a vision of federalism he terms "converse-1983," where state and national governments check each other's intrusion upon citizens' individual rights. Amar, *supra* note 69, at 1230. Similarly, local government scholars like David Barron have argued that instead of seeking to replace "the local with the Leviathan," David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2385 (2003), we ought to recognize that "no city or state is an island jurisdiction" and focus on legal rules keyed to the fact that "the local sphere is part and parcel of a larger coordinated system of local jurisdictions that is structured by less visible background central-law rules . . . ." Barron, *supra* note 244, at 378–79; *see also* Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1795 (2002) (favoring an EU model for regional government — one in which regional citizenship would supplement rather than replace local citizenship — because the EU "attempt[s] to build localism into the very fabric of European institutions, rather than simply to divide authority between a 'centralized government' and 'local control'"); Roderick M. Hills, Jr., *Dissecting the State*, 97 MICH. L. REV. 1201, 1276–80 (1999) (noting the ways in which the promotion of federal values depends on local institutions and arguing in favor of allowing the federal government to delegate powers to local governments even without explicit state authorization).

[246] Barron, *supra* note 244, at 389. To offer one possible example of the lines such analysis might take, consider the literature on democratic experimentalism. The seminal articles articulating and developing the theory are Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyar-*

Second, even in those instances in which we cannot avoid making a tradeoff, one way to think about this dilemma is to return to the metaphor of the diverse portfolio. Just as risky stocks tend to be those with the greatest potential payoff, so too the sites where second-order diversity offers the greatest benefits will also pose the greatest democratic risks.[247] If we wish to pursue a risk-averse strategy, we could "diversify" our portfolio of second-order diverse institutions — one might even be tempted to call it "third-order diversity" — so that those risks will seem less weighty in the aggregate.

Nonetheless, there may be costs we simply find unacceptable. We might decide, for instance, that the danger of the all-white jury judging a black criminal defendant is too great to seek second-order diversity on criminal juries, even if we are willing to foster heterogeneity among civil juries. We might be willing to promote second-order diversity for some groups, such as racial minorities, but reluctant to cede decisionmaking power to members of a militia.

2. Choosing Among Values. — The preceding discussion also suggests that while the primary values associated with second-order diversity fit together neatly in theory, in practice they may involve important tradeoffs. For instance, if we value second-order diversity because it turns the tables on the majority, we might prefer second-order diversity in institutions that foster an intense participatory experience, like the jury, in the hope that it will produce a lasting effect on an individual's civic sensibilities. Yet the jury, with its "black box" decisionmaking process, may not offer the most conducive institutional forum for fostering democratic visibility. Similarly, the use of a random assignment process — which brings with it many experimental and normative benefits — may not promote other types of values, like ensuring a fair distribution of political power or making electoral minorities visible.

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chy, 3 EUR. L.J. 313 (1997); and Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1988). Proponents of democratic experimentalism have identified important strategies for harnessing central authority in a fashion that facilitates rather than trumps or counterbalances local autonomy. As Dorf and Sabel note, democratic experimentalism points to ways that "central authority and decentralized actors can together explore and evaluate solutions to complex problems that neither alone would have been likely to identify, much less investigate or address, without the exchanges with the others." Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 834 (2000); *see also* Dorf & Sabel, *A Constitution of Democratic Experimentalism*, *supra*, at 291 (arguing that democratic experimentalism offers "mutually reinforcing solutions to central dilemmas of constitutional interpretation" at issue in debates over federalism and the separation of powers). For a consideration of some of the connections between second-order diversity and democratic experimentalism, as well as a critical analysis of the latter, see Gerken, *supra* note 104 (manuscript at 23–24).

247 I am indebted to Anton Metlitsky for suggesting this line of analysis.

Several conclusions follow from these observations. First, our decision as to whether and when second-order diversity makes sense may depend on which set of benefits we value most or which set of democratic ills we think are most in need of a cure. And we will have to pursue different "types" of second-order diversity — seeking a different mix of decisionmaking bodies — depending on the values we primarily wish to pursue.

Second, there may be areas that are, in effect, *fora non conveniens* for second-order diversity.[248] We may be reluctant to pursue the notion of second-order diversity when its normative underpinnings conflict with our understanding of what the decisionmaker is supposed to do. For instance, if we envision the disaggregated decisionmaker as serving the role of the "agent" of the central decisionmaker — as some view the legislative committee — second-order diversity, with its mandate for "overlapping majorities," may be a poor fit. Similarly, our assessment of whether second-order diversity is appropriate for juries depends largely on our view of the jury's role. It may be easier to reconcile the notion of second-order diversity with the conception of the jury as a check on prosecutorial abuse or legislative overreaching[249] than with the view that the jury performs a truth-finding role[250] or that it ought to serve as a representative for the community *as a whole*.

Finally, even when we find a good normative fit for second-order diversity, we may be reluctant to cede certain types of issues to institutions that are second-order diverse on purely substantive grounds. For instance, there may be situations when systematic political or economic inequalities undermine rather than buttress the case for second-order diversity. In this vein, some commentators, like Richard Briffault, have argued that abstract arguments in favor of localism fail to recognize that "local land use regulation and local responsibility for funding basic public services" are problematic given wealth inequalities among local governments.[251]

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248 I borrow this metaphor from Frank Michelman. *See* Michelman, *supra* note 132, at 469.

249 *See supra* note 97 (discussing the difficulty many people have in conceiving of the jury as a political institution).

250 *See supra* note 87 and accompanying text.

251 Briffault, *supra* note 149, at 72; *see also* YOUNG, *supra* note 10, at 94, 248–56 (expressing fears about local autonomy where distributive questions are at stake); Rose-Ackerman, *supra* note 74, at 1345–46 (noting that there are strong arguments in favor of federal preemption when redistributive policies are at issue). For a general analysis of the difficulties involved in giving local officials responsibility to redistribute wealth, see PAUL E. PETERSON, CITY LIMITS (1981); and PAUL E. PETERSON, THE PRICE OF FEDERALISM (1995).

IV. SECOND-ORDER DIVERSITY AS A FRAMING DEVICE

The discussion above is fairly theoretical in its scope. Even if it presents a plausible descriptive or normative account of current features of our democracy's design, one might ask whether the notions of first-order and second-order diversity tell us anything new about existing, real-world controversies. This Part offers a sampling of doctrinal, policy, and academic controversies in which the notions of first-order and second-order diversity may help recast the debate, or at least offer a vocabulary for analysis and critique that has not yet been deployed in these contexts.

Section IV.A returns to the examples with which this Article began. It argues that the notion of second-order diversity can help resolve a longstanding puzzle in the doctrine governing jury discrimination claims, thereby lending some coherence to a much-criticized Supreme Court decision and revealing a set of unexplored connections between the doctrines governing jury discrimination claims and vote-dilution claims. It similarly suggests that the notion of second-order diversity provides a different angle on a debate currently raging about the best strategy for implementing the Voting Rights Act. Section IV.B sketches connections between the arguments explored in this Article and two seemingly unrelated literatures on democratic design: recent work on institutionalizing dissent and writings on multiculturalism.

A. Juries and Districts: A Redux

1. Juries, Swain v. Alabama, *and Vote-Dilution Claims.* — Consider the first example offered at the beginning of this Article. The notion of second-order diversity might help resolve a longstanding doctrinal puzzle in the law governing jury discrimination claims. As noted above,[252] the puzzle in the law governing the composition of the jury is this: the law demands that jurors be drawn from a "fair cross section of the community," yet it forbids parties from using peremptory challenges to remedy the type of racial and gender imbalances on individual juries that the cross-section doctrine is designed to eliminate in the pool from which juries are drawn.[253] Most criminal law scholars who write on the subject either favor juries that are first-order diverse or begrudgingly accept second-order diversity as an unfortunate necessity.[254]

The bête noire in the eyes of the many criminal procedure scholars who favor first-order diversity on the jury is the Supreme Court's deci-

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[252] *See supra* pp. 1113–15.
[253] *See supra* pp. 1113–15.
[254] *See supra* pp. 1115–17.

sion in *Swain v. Alabama*,[255] in which the Court refused to allow an equal protection claim based on the composition of individual juries. In a passage overruled in part by *Batson*,[256] the Supreme Court held that one could not establish a discrimination claim based solely on the makeup of "a particular jury."[257] It insisted that the defendant must "show the prosecutor's systematic use of peremptory challenges against Negroes *over a period of time*."[258]

The notions of first-order and second-order diversity dovetail nicely with this controversy. Few criminal procedure scholars can envision a plausible theory for wanting juries to be diverse in a second-order sense — indeed, almost any theory that would explain why we care about a venire that reflects the population similarly favors a jury that is first-order diverse.[259] And the intuition in favor of first-order diversity — the sense that every jury is, like a legislature, rendering "the" law[260] — makes *Swain*'s conclusion that one cannot challenge the makeup of an individual jury hard to defend. After all, on this view the injury is quite clear: members of a particular group lack a seat at the table when the law is established.

The notion of second-order diversity reframes this debate. First, it provides an affirmative account in favor of a random assignment system for juries. It thus reveals what we would lose should we heed the suggestions of many criminal procedure scholars and move toward a jury system that is more first-order diverse.

Second, the notion of second-order diversity suggests a plausible rationale for the Court's decision in *Swain*. The theory suggests that each individual jury is best understood as one part of a larger institution that establishes what the law is. If we think of individual juries as part of a larger, disaggregated system, then it does not matter whether every group is represented on every jury so long as their representation on juries *in the aggregate* is fair — hence the Court's requirement that the pool from which juries are drawn mirror the population and its otherwise puzzling refusal to impose the same requirement on individual juries.

Swain thus mirrors the established rule in vote-dilution cases that an individual group member cannot challenge her placement in a particular district if her group collectively enjoys a fair share of political

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[255] 380 U.S. 202 (1965).

[256] 476 U.S. 79, 89–96 (1986).

[257] *Swain*, 380 U.S. at 222–23.

[258] *Id.* at 227 (emphasis added). *Batson* overruled this portion of *Swain* when it allowed for challenges under the equal protection clause to the makeup of individual venires. 476 U.S. at 95–96.

[259] *See supra* note 27.

[260] *See supra* p. 1137.

power.[261] The reason for these rules is the same. Fairness cannot be assessed by looking at the composition of an individual jury any more than fairness in a districting scheme can be measured by examining the makeup of a single district.[262] In both instances, we would expect to see juries — or districts — with a wide range of compositions. It is only in the aggregate — when we consider the composition of all the juries or districts put together — that we can evaluate whether political power has been distributed fairly among members of the electorate.[263]

Finally, the notion of second-order diversity could offer an alternative path for conceptualizing the injury in jury discrimination claims, an alternative that presses hard on the jury's democratic underpinnings. Specifically, the theory suggests that there is a nested set of harms when a juror is excluded from a jury on the basis of race. First, there is the harm to the individual juror, who has been excluded from participating on the basis of his identity. This is presumably the injury with which *Batson* is concerned. Second, when the exclusion of that juror is part of a systematic skew, there is an injury potentially shared by all members of the racial group in a given jurisdiction when their participatory opportunities or decisionmaking power, in the aggregate, have been diluted. The "fair cross-section" requirement could be understood to address this problem.

Should we conceive of jury discrimination claims in this fashion, we could imagine bringing jury "dilution" challenges to the composition of jury districts, as we see in the districting context.[264] Indeed, this type of analysis might lead us to think differently about a wide

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[261] *See* Gerken, *supra* note 98, at 1681–88. Vote dilution and cross-section claims are not similar in every respect, of course. One crucial difference is that vote-dilution claims do not involve the direct interests of a third party, whereas decisions about the jury's composition are of great relevance to a criminal or civil defendant. This reframing of *Swain* would thus push toward the notion, supported by some scholars and Court opinions, that the "injury" in a cross-section or *Batson* case is suffered by those who are denied the chance to participate in jury service. *See, e.g.*, AMAR, *supra* note 6, at 273–74; Amar, *Jury Service as Political Participation Akin to Voting*, *supra* note 55, at 204, 209; Underwood, *supra* note 25, at 742–50. *But see* Sheri Lynn Johnson, *The Language and Culture (Not To Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 22 (1993) (arguing that nondiscrimination in jury selection should be understood primarily as the right of the criminal defendant).

[262] For a detailed exploration of this notion, see Gerken, *supra* note 98, at 1681–88, 1700–02.

[263] For a quite different argument drawing connections between the group-based underpinnings of jury discrimination claims and vote dilution claims, see Amar, *Jury Service as Political Participation Akin to Voting*, *supra* note 55, at 206–07.

[264] Although jury districting is not yet a significant source of civil rights litigation, several authors have called for more attention to the question. *See* FUKURAI ET AL., *supra* note 17, at 29–30; Forde-Mazrui, *supra* note 19, at 389–95 (proposing jury subdistricts built around communities of interest); Note, *supra* note 31, at 548 (proposing drawing jury districts along the boundaries of identifiable black communities). For a rare example of a successful equal protection challenge to a jury district, albeit with unusual facts, see *Spencer v. State*, 545 So. 2d 1352 (Fla. 1989).

variety of jury design strategies, including the size of the jury[265] and the use of peremptory challenges.[266]

2. Georgia v. Ashcroft. — Returning to the second example offered at the beginning of this Article, the notion of second-order diversity provides a framing device for thinking through the choices at stake in *Georgia v. Ashcroft*. As noted above, coalition districts — which move districts closer to the first-order end of the diversity spectrum — are rapidly becoming the new "third way" in redistricting circles.[267] To many, they seem like a better tool than majority-minority districts for empowering electoral minorities. By spreading out African American or Latino voters, coalition districts help them increase their legislative influence while still ensuring that those voters are able to elect a "candidate of choice." If we focus solely on the number of legislative seats beholden to racial minorities, the question in *Georgia v. Ashcroft* might seem like an easy one.

The analytic frame offered here, with its emphasis on disaggregation, helps flesh out this debate by envisioning majority-minority districts as something more than byproducts of a particular strategy for empowering minorities at the legislative level. Indeed, the notion of second-order diversity — with its emphasis on the importance of making electoral minorities visible, its concern about assigning group members to the role of permanent junior partner, its emphasis on symmetry in distributing participatory opportunities, its conception of some districts as mini-governance units, and its vision of heterogeneity as a strategy for dealing with group conflict — points to costs resulting

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265 The Supreme Court has traditionally addressed challenges to a jury's size by considering whether the jury would be large enough for effective group deliberation, would result in an accurate expression of the community's views, and would avoid undue variation in verdicts. *See, e.g.*, Ballew v. Georgia, 435 U.S. 223, 239 (1978) (concluding that juries must be made up of at least six people). *See generally* HANS & VIDMAR, *supra* note 146, at 165–71 (canvassing debate about jury size); LEVINE, *supra* note 61, at 27–28 (same). To the extent the Court has considered the relationship between jury size and the participation of electoral (here, racial) minorities, it has considered only whether the jury would be so small as to preclude "the representation of minority groups in the community." *Ballew*, 435 U.S. at 236. The notion of second-order diversity reframes this debate. The smaller the jury, the more variation in composition is possible, and the easier it is to generate juries in which members of an electoral minority dominate. Therefore, while the Court has thus far lauded larger juries for helping racial minorities, the notion of second-order diversity underscores potential costs of increasing the size of juries that have thus far largely been overlooked.

266 Specifically, peremptory challenges undermine the values associated with randomness as a strategy for achieving second-order diversity. *See supra* pp. 1159–60. Moreover, depending on how they are administered — for example, depending on whether they result in a systematic skew against a particular group — they may result in a set of juries that is closer to or farther away from the second-order side of the diversity spectrum. Second-order diversity, then, does not firmly favor or disfavor peremptory challenges, but it adds a new set of questions that should be answered in evaluating their appropriateness.

267 *See supra* pp. 1119–20.

from the wholesale abandonment of majority-minority districts, costs which have not yet been systematically explored in the voting rights literature or the case law.[268]

These benefits, of course, must be balanced against the costs associated with second-order diversity — particularly, the tradeoff between "influence" and "control" — described above.[269] The point here is simply that the costs associated with the influence/control tradeoff have been thoroughly documented in the commentary on *Ashcroft*. The notion of second-order diversity fills a gap in that literature by suggesting a *different* set of costs and benefits that ought to be considered in making such assessments. As described in great detail above,[270] in some cases — for instance, when legislative control is at stake — the benefits of first-order diversity in districts may swamp the costs. In other instances — such as when legislative control is not at stake, when the minority group is small, when the group's interests do not align closely with either party, or when representatives wield significant independent power — the calculus may favor moving closer to the second-order end of the diversity spectrum when drawing district lines. While the notions of first-order and second-order diversity do not resolve this tradeoff, they offer a framing device that allows us to consider a wider set of values associated with districts than control of a unitary legislature. These ideas offer a vocabulary for a more comprehensive debate about the costs and benefits of the districting choices at stake in *Ashcroft*.

B. Theories of Institutional Design

Finally, the notion of second-order diversity connects up with ongoing debates that are more general than the doctrinal and policy controversies described above. Scholars in many fields have long been preoccupied with questions regarding the appropriate treatment of electoral minorities, and at least some of those debates can usefully be recast as explorations of the tradeoffs between first-order and second-order diversity. This section offers a quick sketch of two instances in which the notion of second-order diversity complements or complicates a current debate about democratic institutional design. The examples offered below are necessarily superficial and take a somewhat caricatured form, but they should at least give a flavor for the ways in which the notions of first-order and second-order diversity might provide a framing device for thinking more systematically about a variety of democratic design strategies.

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[268] For more detailed exploration of these tradeoffs, see Gerken, *supra* note 104.

[269] *See supra* section III.A, pp. 1124–42.

[270] *See supra* section III.A.3, pp. 1139–42.

1. The Dynamics of Dissent. — Dissent has long been a preoccupation of democratic theorists.[271] Due to the work of Cass Sunstein and others,[272] legal scholars have begun to focus on the dynamics of group decisionmaking and the importance of institutionalizing mechanisms for fostering dissent within democratic institutions. Sunstein, for instance, has pointed to the dangers of homogeneous decisionmaking bodies, which tend to polarize and reach incorrect answers due in part to the failure of individual participants to express a contrary view.[273] He thus favors what could roughly be cast as a first-order design strategy: ensuring that at least one potential "dissenter" sits on each decisionmaking body.

Sunstein's theory of dissent[274] provides an important counterweight to the arguments in favor of second-order diversity. After all, to the extent we believe that one's identity as an electoral minority makes it more likely that one can serve the role of dissenter — bringing a new perspective or a different type of information to the table — first-order diversity guarantees the presence of at least one member of any sizeable electoral minority on every decisionmaking body.[275] Because second-order diversity creates some decisionmaking bodies that are homogeneous in order to ensure heterogeneity in the aggregate, Sunstein's concern about the dangers of polarization are well taken.

Second-order diversity similarly sheds some critical light on the dynamics of dissent. Setting aside the fact that the theory points to a set of democratic values that Sunstein's arguments are obviously not intended to address, the notion of second-order diversity — with its emphasis on the relationship between power and participation — highlights the importance of determining how the dynamics of dissent play out with regard to certain types of minority groups. As Sunstein notes in several parts of his book, the research that has been done on the dynamics of dissent reveals that members of a minority group are less likely to influence others' views if the minority group "clearly consists of social outsiders."[276] Sunstein thus proposes creating "deliberating

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[271] Mill, of course, has authored the seminal defense of dissent. *See* JOHN STUART MILL, ON LIBERTY 58–100 (Edward Alexander ed., 1999) (1859).

[272] *See* SUNSTEIN, *supra* note 62; *see also* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

[273] SUNSTEIN, *supra* note 62, at 113–14, 118, 124–27.

[274] Rather than discuss the theories of all of those who have written on dissent, I focus here on Sunstein's, both for simplicity's sake and because his recent work in this area focuses on mechanisms for institutionalizing dissent and thus dovetails with some of the themes of this Article.

[275] For example, Sunstein argues in favor of creating as many panels with a mix of Democrat- and Republican-appointed judges as possible. SUNSTEIN, *supra* note 62, at 188.

[276] *Id.* at 31; *see also id.* at 158–61.

enclaves"[277] — groups consisting entirely of members of the electoral minority. Sunstein envisions that after deliberating in this fashion, members of such groups will then resume contact with the polity with clearer arguments and more confidence in them.[278]

The notion of second-order diversity raises questions about the sufficiency of homogeneous deliberative enclaves as a corrective to the dynamics of dissent. As an initial matter, it suggests that one's sense of political efficacy may be associated with the power to *decide*.[279] Taking part in a deliberative group may not provide as empowering a political experience as being in charge of a governmental decision. Nor is it likely to provide the same type of educative experience. Discussing, after all, may involve a different set of participatory skills than deciding.[280] For these reasons, private deliberation in small enclaves may not do as much to help electoral minorities gain their participatory sea legs as turning the tables in bodies that wield real democratic power.

The notion of turning the tables, with its emphasis on generating productive participatory habits among members of both the majority and minority, also reminds us that the problem with existing dissent dynamics is not only that dissenters do not speak up. As Sunstein himself observes, the problem is also that members of the majority do not *listen* as well to traditionally disempowered groups.[281] Even if the creation of deliberative enclaves changes the participatory habits of disempowered groups, they still may not be able to dissent effectively because members of the majority are not used to listening to them. Turning the tables, in contrast, is an institutional strategy that creates incentives for the majority — at least those who want to have any political influence — to listen to members of the electoral minority. It is, in that sense, consistent with Sunstein's overall project of identifying the best strategy for institutionalizing dissent.

Finally, the notion of second-order diversity highlights an important tradeoff at stake in Sunstein's theory of dissent, at least with regard to disaggregated bodies like juries and appellate courts. Sunstein identifies three decisionmaking phenomena for which dissent may provide a needed corrective: conformity, polarization, and cascades.[282] "Conformity" refers to the human tendency to do what everyone else is doing. The presence of a dissenter, say, on a corporate board or in an

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[277] *Id.* at 160–61.

[278] *Id.* at 159.

[279] *See supra* section III.B.1, pp. 1142–52.

[280] GUTMANN & THOMPSON, *supra* note 144, at 30–31, 35–36.

[281] SUNSTEIN, *supra* note 62, at 31.

[282] *See id.* at 10–11 (defining all three terms). The descriptions that follow in this paragraph are drawn entirely from Sunstein's work.

investment group can reduce the pressure to conform and thus free individuals on a decisionmaking body to share information or challenge the wisdom of a particular course of action. "Polarization" takes place when a group of people who agree upon an outcome reinforce each other's views during the decisionmaking process. As a result, the group takes a more extreme position than one would predict given its members' predeliberation tendencies. "Cascades" take place over time; a set of decisionmakers makes a choice, and subsequent decisionmakers, influenced by the apparent agreement of the first movers, make the same choice even if they would have not reached such a decision independently.

The notions of first-order and second-order diversity suggest that these phenomena may require different institutional cures. First-order diversity — the presence of one or more potential dissenters on every decisionmaking body — seems the natural cure for conformity and polarization. The presence of one or more dissenters in every group seems likely to reduce the chances that the group will reach the "wrong" decision. But second-order diversity — ensuring that would-be dissenters can exercise control over some subset of decisionmaking outcomes — may be necessary to avoid cascades. That is because it ensures that dissent is visible at the aggregate level to subsequent decisionmaking bodies. It destroys the appearance of unanimity by offering an alternative view — a competing paradigm — for subsequent decisionmakers to consider.

Put differently, the notion of second-order diversity suggests that it is precisely when dissenters speak up and the majority listens — that is, precisely when the dynamics of dissent are working properly throughout the system, on Sunstein's view — that one of the primary dangers associated with conformity can arise. Ensuring the presence of dissenters on *every* decisionmaking body (first-order diversity) reduces heterogeneity *among* decisionmaking bodies (second-order diversity). Thus, while we will have dissent within individual decisionmaking bodies, there may be less dissent in the aggregate.

As a result, it is precisely the homogeneous groupings of which Sunstein is rightly wary that may produce *visible* dissent in the system as a whole, and it is the heterogeneous groupings that Sunstein lauds that submerge dissent at the aggregate level. For instance, in the context of appellate panels — one of Sunstein's primary examples — if every judicial panel were to contain a member of the other party, as Sunstein proposes, it would push appellate panels toward the first-order end of the diversity spectrum and we would expect the decisions those panels render to be relatively homogeneous.[283] From the per-

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[283] Sunstein terms this phenomenon "ideological dampening." *Id.* at 167 (emphasis removed).

spective of individual cases, one might think this is all to the good. But if one is worried about the health of the entire system, it may be useful to have the perspective that an "ideologically ampli[ied]"[284] decision from an all-Democrat- or all-Republican-appointed panel would provide to offset the "precedential cascade" that might otherwise take place were all appellate decisions to resemble one another.[285] In sum, second-order diversity suggests a tradeoff embedded in the dynamics of dissent: guaranteeing dissent within individual decisionmaking bodies may systematically submerge dissent within the system as a whole.[286]

2. Multiculturalism. — Finally, and perhaps most controversially, the notion of second-order diversity may also complement recent scholarship criticizing the theory of multiculturalism. A number of scholars have begun to raise a rich and varied set of challenges to multiculturalism and the "politics of recognition."[287] Richard Ford, for example, has expressed concern that the cultural "difference" approach that has come to dominate much equality discourse may result in models of racial identity that are too narrow, partial, or unidimensional.[288] Similarly, Anthony Appiah and Janet Halley worry that current debates about racial identity and sexual orientation limit the number of identity "scripts" available to individuals.[289] Such scholars argue in favor of more opportunities for individuals to experiment — or "play"[290] — with identity categories.

Second-order diversity provides a different perspective on the strengths and weaknesses of multiculturalism, one that echoes some of these arguments and points to other avenues for criticism that have not

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284 *Id.* at 179.

285 *Id.* at 59. Sunstein may be correct that dissenting opinions can serve that role. *See id.* at 71. In order to answer that question in this context, we would want to know whether dissents are more moderate when written for a mixed panel and whether, in the presence of significant agreement among two-judge panels, dissenting opinions constitute effective dissent. For speculation as to why dissents might be less likely to short-circuit cascades, see Gerken, *supra* note 104 (manuscript at 14–15).

286 Thus, we ought to seek a "diverse portfolio" of appellate panels for many of the same reasons that scholars have called for a "diverse portfolio" of judges. *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 119–21 (2003); ADRIAN VERMUELE, THE JUDICIARY IS A THEY, NOT AN IT, 24–26 (Univ. of Chi. Law Sch., Public Law and Legal Theory Working Paper No. 49, 2003); *cf.* Ifill, *supra* note 187, at 119–28 (arguing in favor of racial diversity among state trial court judges to achieve "structural impartiality").

287 For a thought-provoking analysis of multiculturalism and race issues that sounds some similar themes but is more wide-ranging in its analysis, see Ford, *supra* note 15, at 38–79. For an equally provocative account of some of these questions as they relate to gay rights, see Halley, *supra* note 15.

288 Ford, *supra* note 15, at 47–48.

289 Appiah, *supra* note 15, at 97–99 (race); Halley, *supra* note 15, at 115–18 (sexuality).

290 Appiah, *supra* note 15, at 104; *see also* MINOW, *supra* note 14, at 94–98 (arguing that the state should create opportunities for individuals to identify with groups temporarily).

yet been fully explored. If one considers implementation strategies, the politics of recognition would produce a set of decisionmaking bodies that is first-order diverse and thus is subject to challenge based on values associated with second-order diversity.

For instance, the politics of recognition envisions a standard of fairness that involves representation — voice — on every decisionmaking body. If one thinks concretely about implementing such a strategy, it would presumably require us to ensure the presence of at least one member of the group in question on each decisionmaking body. The result is likely to be a set of decisionmaking bodies in which racial minorities, for instance, are *always* numerical minorities. The notion of second-order diversity, in contrast, emphasizes the need for voice *at the aggregate level.* It thus flags the possibility that the politics of recognition may result in the systematic submergence of minority perspectives in the aggregate.

Similarly, the notion of second-order diversity offers a countervailing argument to the dignitary claims associated with the politics of recognition. It counters the dignity associated with recognition or voice[291] with the dignity associated with the power to decide or control. It suggests that we ought to value the chance to grant traditionally disempowered groups the opportunity to be in charge, to enjoy the sense of political efficacy and autonomy usually enjoyed solely by members of the majority.

The notion of second-order diversity, with its emphasis on participatory values and destabilizing political experiences, also fits neatly with the arguments of those who place emphasis on the fluidity of identity categories and experimentation.[292] Second-order diversity can destabilize the dynamics of group interaction, allowing members of the majority and minority to try on each other's shoes. It creates a distinct political space in which members of a minority group are present not to voice dissent from a particular perspective, but to decide on behalf of the polity. Thus, rather than putting into place a permanent "solution" to group divisions, second-order diversity allows members of groups to revisit questions of politics and identity in different contexts and different times as the decisionmaking bodies cycle and reconstitute themselves.

The notion of second-order diversity also suggests a path for generating "visibility" that may sit more comfortably with the views of multiculturalism's critics. "Visibility" does not involve announcing a preexisting view. In a structure that is second-order diverse, visibility

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[291] *See, e.g.*, PHILLIPS, *supra* note 114, at 39–41 (arguing that the "politics of presence" affirms the dignity of individuals in the political process).

[292] *See supra* note 15 and accompanying text.

takes the form of a pattern, not a point. Second-order diversity thus provides a kaleidoscopic view. It reveals differences when they exist, but does not identify what "the" minority perspective is.

CONCLUSION

Small, disaggregated political institutions — though quite common within our democratic system — remain surprisingly understudied. Perhaps as a result, we often extend theories about diversity derived from unitary institutions to disaggregated ones without giving adequate thought to that decision. Our conception of diversity is, counterintuitively enough, too uniform.

This Article represents an initial attempt to think systematically about the potential democratic possibilities associated with the disaggregated portions of democracy and about the design strategy best equipped to take advantage of them. It tries to build a normatively attractive theory in favor of heterogeneity we already see, and take for granted, in our current system. It then uses those arguments to provide an analytic framework — organized around the notions of first-order and second-order diversity — for examining a set of recurring tradeoffs embedded in a wide variety of debates about democratic design.

While the notions of first-order and second-order diversity cannot definitively resolve the tradeoffs we encounter when designing disaggregated institutions, they at least provide a useful tool for systematically identifying the costs and underappreciated benefits of an existing feature of our democratic design. Further, by moving these debates up by one level of generality, this Article offers a conceptual framework that enables us to play off a divergent set of literatures and ideas against one another, and it puts some meat on the bones of a common, but undertheorized, design practice in our democracy.

Much work remains to be done in developing this framework. Most obviously, this Article is a conceptual and normative project, not an empirical one. Throughout this Article, I have tried to flag the theoretical nature of the claims I have been making by using phrases like "may" or "likely." While I have offered examples of why I think the empirics are likely to support my hypothesis, more empirical work is plainly necessary.

Moreover, this Article is pitched at a fairly high level of generality, as its purpose is to delineate the conceptual structure of the argument. Future work should offer a more contextual, fine-grained exploration of how these arguments play out in a given institutional context.

Finally, a full exploration of these ideas would demand not only a more detailed map of the institutional terrain, but also a bird's-eye view. Many of the values described here depend on an interinstitutional perspective — a sense of how differently designed democratic

institutions interact with one another and how an individual's participatory experiences vary over the course of a civic life. Questions of whether and where we ought to seek second-order diversity will thus turn on an assessment of the democratic process as a whole.