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Book Review: Black Faces, Black Interests: The Representation of African Americans in Congress. by Carol M. Swain.

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American constitutionalism has elaborated the realizable rules and formal rationality of Roman law[94] into a full-blown, self-contained system of social morality. In America as in Rome, the legal apparatus of the secular state continues to ask, "What is truth?"[95] Powell's accomplishment is a powerful demonstration that neither twenty centuries of legal evolution nor twenty decades of American constitutionalism bring Caesar any closer to answering this question on his own.

BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS. By Carol M. Swain.[1] Cambridge, Mass.: Harvard University Press. 1993. Pp. xii, 275.

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For the past twenty years, the federal courts have been vigorously engaged in racial redistricting. Recently, this involvement was attacked by the only black member of the current Court. In his concurring opinion in *Holder v. Hall*,[3] Justice Thomas challenged the conceptual basis for race-based reapportionment. A contrary view, represented by writers such as Lani Guinier, is that current judicial efforts do not go nearly far enough. This viewpoint is exemplified by Randall Kennedy's harsh review of *Black Faces, Black Interests* in *Reconstruction*.[4] Notably, this debate about redistricting is not merely taking place between blacks and whites but also among blacks themselves—Kennedy, Guinier, and Swain are all African American.

Unlike many other contributions to this debate, the Swain book is richly empirical. Besides the multiple-regression analyses that are the staple of modern social science, Professor Swain presents the results of several years of patient interviews with

94. See generally Rudolph von Jhering, *Der Geist Des Romischen Rechts* § 4, at 50-55 (1883).

95. *John* 18:38.

1. Assistant Professor of Politics and Public Affairs, Woodrow Wilson School, Princeton University.

2. Associate Dean of Faculty and Henry J. Fletcher Professor of Law, University of Minnesota. Although I haven't burdened this review with citations to their work, my knowledge of this area is based largely on the work of Kathryn Abrams, Phil Frickey, Lani Guinier, and Sam Issacharoff.

3. 114 S. Ct. 2581 (1994).

4. Randall Kennedy, *Blacks in Congress: Carol Swain's Critique*, 2:2 Reconstruction 34 (1993).

black and white members of the U.S. House and their staffs. In this review, I will try to situate Swain's book within this ongoing debate. Part I of the review will explore the ongoing normative debate about the nature of representation, a debate in which Swain's views seem midway between those of Thomas and Kennedy. Part II will consider her empirical conclusions and how they relate to the normative debate.

I

To understand the debate over racial reapportionment, some understanding of legal doctrine is essential. As a constitutional matter, intentional racial discrimination is impermissible in redistricting as elsewhere. But under *Washington v. Davis*,[5] unintended impacts on blacks, no matter how severe, do not receive serious constitutional scrutiny. The statutory story is more complex. Under the original 1965 Voting Rights Act, the Attorney General could veto new laws in certain jurisdictions having the purpose or effect of interfering with black voting. As construed by the Supreme Court, this provision extended beyond voting procedures to include all electoral issues, such as apportionment. Lower courts allowed similar statutory challenges to existing laws to be brought by private citizens, and some important rulings recognized a cause of action for "vote dilution." The Supreme Court initially rejected these lower court decisions,[6] but Congress repudiated the Court's interpretation.[7]

As currently amended, the statute allows private suits to be brought without a showing of intentional discrimination. Virtually everyone agrees that the amendment was intended to allow suit for vote dilution. Congress was unable, however, to provide any real definition of vote dilution, although it did eschew any mandate of proportional representation. The courts have struggled ever since to clarify the concept of vote dilution; perhaps the only thing that is really clear is that the plaintiff must demonstrate the existence of racial bloc voting.[8]

As a result of actual or potential litigation, redistricting is now conducted with an eye to avoiding claims of vote dilution, which in practice has sometimes meant the drawing of torturously complex district lines in order to maximize black voting strength. Liberals applaud this practice as a remedy for decades

5. 426 U.S. 229 (1976).
6. *Mobile v. Bolden*, 446 U.S. 55 (1980).
7. VRA Amendments of 1982.
8. See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

of political subordination. The Court has generally acquiesced in this enterprise, but in one decision found a state guilty of unconstitutional racial gerrymandering.[9] Conservatives consider the whole project a particularly nefarious form of affirmative action, which they would like to jettison.

This brings us back to Justice Thomas's concurrence in *Holder*. The narrow issue before the Court was whether the Voting Rights Act applies to a change in the size of a governing body, when that change has the likely effect of reducing black representation. Justice Thomas used the case, however, as an occasion to rethink the entire issue of racial gerrymandering. He argued, not very persuasively, that the statute was never intended to cover electoral issues such as apportionment—an argument that might conceivably have been valid in 1965 but now comes many years too late.[10] Our present concern, however, is not with this question of statutory interpretation but rather with Thomas's broader attack on the idea of vote dilution.

The first prong of Thomas's critique relates to the concept of representation. There are various theories of representation, he pointed out, with a variety of implications for vote-dilution cases. At least under one tenable theory of representation, a group need not be a majority for its interests to be represented: "in a two-party system such as ours, the influence of a potential 'swing' group of voters composing 10% to 20% of the electorate in a given district can be considerable."[11] Under another theory of representation, only formal access to the polls is necessary:

> Some conceptions of representative government may primarily emphasize the formal value of the vote as a mechanism for participation in the electoral process, whether it results in control of a seat or not. Under such a theory, minorities unable to control elected posts would not be considered essentially without a vote; rather, a vote duly cast and counted would be deemed just as 'effective' as any other. If a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections.[12]

Without any constitutional or statutory grounding for choosing a particular theory of representation, Thomas concluded, the

9. *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

10. For a response to his arguments, see Justice Stevens's separate opinion in *Holder*, 114 S. Ct. at 2625.

11. 114 S. Ct. at 2596 (Thomas, J., concurring in the judgment).

12. Id.

Court has no way of determining when a group is properly represented and when its influence has been diluted.

The second prong of Thomas's attack challenged the assumption that "racial groups can be conceived of largely as political interest groups," an assumption he said "should be repugnant to any nation that strives for the ideal of a color-blind Constitution."[13] The logical and unacceptable implication of current law, he suggested, would be a racial register, in which members of each racial group would be identified so they could vote separately for representatives of their own group. In Thomas's view, the effect of racial redistricting may well be to increase the racial polarization of politics.

Taken on its own terms, Thomas's concurrence makes some persuasive arguments. We have not reached the point at which racially drawn districts swerve to include or exclude particular households, but some of the more byzantine boundaries sometimes seem to be plotted almost in the same spirit. The analogy to the racial registry is overdrawn but not entirely inapt, and apart from die-hard segregationists and some black nationalists, the registry idea would be almost universally repugnant. Moreover, Thomas is clearly correct about the theoretical difficulty of defining the adequacy of representation. Suppose we wanted to know whether farmers or the elderly were properly represented in Congress. It would be hard to know where to begin in making this determination about the members of these groups. Still, the historic situation of blacks in America seems quite clearly distinct from that of other groups in a way that Thomas's analysis seems to ignore.

The opposing view animates Randall Kennedy's review of the Swain book. The crux of Kennedy's position is found in the following paragraph:

> Swain's final and most general objection to race conscious districting aimed at enhancing black representation is that "[r]ace relations suffer when 'electoral remedies' favor one racial group over another." This understanding of the issue, with its implicit belief that existing majoritarian procedures are race neutral and fair, is pervasive, influential, wrongheaded, and disasterous for efforts to create a more racially just polity. So long as racial group competition constitutes an important aspect of American social dynamics, any and every electoral procedure will either favor one group or another. Existing electoral rules, with their strong majoritarian bias,

13. Id. at 2598.

> strongly favor whites in electoral competition for the great majority of seats in Congress. The race conscious districting to which Swain objects constitutes a partial exception to that tilt, an exception which "favors" blacks only in the sense that it somewhat mitigates the disadvantage of white majoritarian dominance.[14]

On one reading, this strongly worded passage seems to assert that majority rule is inherently unfair to minority groups. That is, it seems to be a square rejection of what Justice Thomas terms a central aspect of democracy: "numerical minorities lose elections."[15] It was this kind of interpretation of her work that led to Lani Guinier's demise as a nominee.[16] If given this interpretation, Kennedy's argument is rather vulnerable to the critiques Thomas sets forth in *Holder*.

In context, however, Kennedy's argument is open to another interpretation. His discussion of the role of racial considerations in the design of electoral systems begins with the comment that "Swain seriously minimizes the extent to which white voters and politicians, on the basis of race, resist the empowering of black voters and politicians."[17] This comment is followed by a lengthy discussion of a racist gerrymander in Georgia in 1980.[18] It seems at least possible, therefore, that Kennedy's argument really turns on the existence of racist motivation rather than being a general rejection of the inevitable arithmetic of majority rule. If this is the argument Kennedy means to be making, it remains undeveloped, but it is interesting to consider how a motive-based defense of vote dilution claims could be elaborated.

Such an argument might begin with one of the central norms of American constitutional law: governmental decisions cannot be based on theories of racial inferiority. Despite its virtually unquestioned status, however, this norm is seriously underenforced by Courts in three respects. First and most obviously, proof of malignant intent is difficult. Inevitably, many actions by legislators and administrators evade successful litigation. It was for this reason that Congress empowered the Attorney General to veto changes in voting laws without proof of discriminatory

14. Kennedy, 2:2 Reconstruction at 40 (cited in note 4).

15. See text accompanying note 12 supra.

16. In my opinion, Guinier's argument was actually much more subtle and should not have been a barrier to her confirmation.

17. Kennedy, 2:2 Reconstruction at 38 (cited in note 4).

18. Swain herself devotes only a page to this litigation. Kennedy's criticism of her discussion of the litigation seems well-founded. In general, she is not at her best in discussing specific legal issues, which is not surprising since she is a political scientist rather than a lawyer.

intent. Second, proof of intent is particularly problematic when legislative inaction is involved. Yet what a legislature leaves undisturbed is just as important as what it changes. Undoubtedly, this was part of the reason for the amendment extending the "effects" test to existing electoral schemes (as opposed to changes in voting rules). Finally—and most likely to be overlooked—one set of governmental actions is exempt from judicial scrutiny: the decisions of individual voters. Although we do not customarily consider them to be a form of "state action," these decisions clearly are not part of the private sphere. The Court has held that the participation of private attorneys in the selection of a jury is state action; surely the selection of a governor or a state senator is equally a part of governance.[19] Even if most white voters are immune to racist motivations, a sufficient number of racists may exist to skew election results unconstitutionally. Yet it is inconceivable for courts to supervise the motives of individual voters.[20] In short, we can expect legislative policy outcomes to be distorted on occasion by racist motivations at various levels: the distortions are clearly unconstitutional but resistant to judicial correction.

Thus, direct judicial efforts to enforce the anti-racism norm are seriously underinclusive. Discriminatory motive must therefore be attacked less directly. In this regard, redistricting and other electoral reforms serve dual functions. They can create countervailing power by ensuring that black interests are well represented in the legislature. Also, they can attempt to minimize the influence of racist-motivated white voting by preventing bloc-voting against blacks. This is a classic remedial argument. It doesn't require the recognition of any new constitutional right to group representation, but only seeks to remedy the effects on governance of undoubtedly improper racist motives.[21]

Such an argument would not be vulnerable to Justice Thomas's criticisms, for it does not require courts to recognize group entitlements to political power or to define the concept of adequate representation. It might well also be acceptable to Professor Swain, who seems quite at home with the idea that black interests need full representation in the political process. In principle, in other words, this interpretation (or modification) of

19. See *Terry v. Adams*, 345 U.S. 461 (1953).
20. See *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986).
21. Cf. *City of Rome v. United States*, 446 U.S. 156 (1980).

Kennedy's argument ought to be broadly acceptable.[22] Note, however, that the argument is keyed to ensuring the influence of black interests on legislation, not necessarily to increasing the number of black legislators. Yet reapportionment efforts seem directed largely at the latter goal. This makes it crucial to investigate the strength of the connection between the two goals.

II

The previous section presented an argument for race-based apportionment as a remedy for discriminatory legislation. To be effective, however, this remedy requires that the legislators elected from majority-black districts be particularly likely to represent black interests. Since at present all of the legislators from majority-black districts are themselves black, we can narrow our empirical inquiry to black representatives.

Do black legislators have any particular tendency to represent the interests of black voters? This is a topic of heated dispute between Swain and Kennedy. Swain is particularly skeptical about the quality of representation with respect to historically black districts (which are typically inner-city). She quotes one black representative as saying, "One of the advantages, and disadvantages, of representing blacks is their shameless loyalty to their incumbents. You can almost get away with raping babies and be forgiven. You don't have *any* vigilance about your performance." Her position on this issue is a central focus of Kennedy's critique. He characterizes her argument as resting on "impressionistic comparisons that are all too often conclusory and non-verifiable."[23]

Kennedy focuses on Swain's narrow argument that black representatives from one specific type of district lack accountability. Even on this limited point, her evidence is a bit better than he suggests. Apart from recounting the views of seemingly knowledgeable black politicians, she adduces the following additional evidence. First, a study by leading political scientists concluded that "blacks consider policymaking the least important of a representative's activities; in their view, it lags behind helping constituents and protecting the district." Presumably, voters with this view will impose less constraint on a legislator's positions. Second, blacks seem to enjoy a greater incumbency effect than

22. For an earlier argument linking racial apportionment with the limits of the intent text, see T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. Colo. L. Rev. 325, 358-64 (1992).

23. Kennedy, 2:2 Reconstruction at 38 (cited in note 4).

white legislators, as measured by reelection success. "Almost all black members of Congress, unless they represent nonblack districts, are returned to office with high reelection margins that come from a tiny fraction of the electorate." Third, black legislators seem to feel free to take positions without great concern for their popularity with the electorate. This is partly reflected by the broad range of ideologies embraced by various representatives of similar black districts. It is also suggested by the fact that a majority of the black representatives in 1989 voted for a large congressional pay raise, which was so highly unpopular with the electorate that only 8% of white representatives voted for it. This evidence is certainly far from definitive, but it does suggest that heavily black constituencies exert less pressure on the policy positions taken by black representatives than white constituencies do on their representatives.

In any event, the real question is whether black legislators are more likely in the end than white legislators to represent black interests within the legislative process. Swain is dubious. Besides mustering considerable anecdotal evidence on this score, she presents some more rigorous statistical evidence. As a gauge of black interests, she uses a battery of legislative assessments by interest groups such as civil rights organizations. By using this measure, she gives the benefit of the doubt to liberal advocates of racial redistricting by adopting their own concept of black interests. In one regression analysis, she found that by far the strongest predictor of support for black interests (so defined) was party affiliation. Political party far outweighed district characteristics such as region, urban status, or minority percentage. She then examined levels of support while holding district composition constant, and found that "[r]egardless of the percentage of blacks in their districts, almost all white Democrats are supportive of black interests. For the Republicans, it is their party and not the number of their black constituents that guides them politically."[24]

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24. Swain devotes particular attention to whites who are associate members of the Black Caucus. Their records on racial issues tend to be indistinguishable from those of black representatives, but they are not full members of the Caucus. One of these white associate members tells the following amusing story:

> I didn't know that an associate member couldn't go into a regular Black Caucus meeting, that it was just for full members only. And so they had a Black Caucus meeting and I went to it, and I noticed everybody was real nice, but there was a lot of scratching their heads. And so when I came out of the meeting, Marva said: "What were you doing in that meeting? Didn't you know you weren't supposed to be there—white people aren't supposed to be in that meeting!" I said: "No, Marva, you're wrong. That fellow Gus Hawkins from California was in

The other regression analysis focused on the race of the representative. It found no statistical difference between the positions of black and white representatives, once political party and region were taken into account. Looking specifically at Democrats, she found only a "shade of difference" between white and black Democrats. In short, she concludes, "partisanship and region are far more important than race in predicting whether representatives will pursue black interests" as conventionally defined. Again, these results cannot be regarded as definitive, but neither should they be ignored.

The upshot is that the support for the interest-representation theory seems somewhat shaky.[25] Increasing the number of black legislators appears weakly linked with strengthening the weight given by the legislature to black interests. Perhaps support for the continued recognition of vote dilution claims should primarily look elsewhere. One possibility is that black legislators serve important functions for black constituents other than exerting policy influence.[26] They function as a symbol of acceptance and empowerment. The importance of such symbols should not be overlooked in light of the high level of alienation felt by many blacks. Black representatives may also help deliver badly needed constituent services to a population that has little other leverage. Swain's accounts of discussions with these legislators makes it clear that they take service to their constituents very seriously. So should we, given the pressing needs of many of those constituents. Also, just as blacks ought to be entitled to equal access to other careers, they deserve equal opportunity to pursue political careers.

Thus, there may well be other reasons to explore redistricting or devices such as cumulative voting that would allow black constituents to elect more black legislators. But Swain's evidence casts some doubt on the argument that such electoral changes will increase the weight given to black interests in the creation of public policy.

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there." Marva said: "Congressman, he's black!" "No he's not!" I said. "Yes, he is!" Marva replied. I felt like a fool.

25. Swain's study is limited to members of Congress. State or local representatives may well be subject to different dynamics. See Kenneth Mladenka, *Blacks and Hispanics in Urban Politics*, 83 Am. Pol. Sci. Rev. 165 (1989).

26. Other possible benefits of electing black representatives are explored in Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077, 1103-12 (1991).