



European
University
Institute

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

EUI Working Papers

RSCAS 2012/55

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
Global Governance Programme-28

A PROBLEM CONCERNING PROPORTIONAL
REPRESENTATION: CONSTITUTIONAL POLITICS AND THE
CRISIS OF DEMOCRATIC LEGITIMACY

Daniel Markovits

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
GLOBAL GOVERNANCE PROGRAMME

*A Problem Concerning Proportional Representation:
Constitutional Politics and the Crisis of Democratic Legitimacy*

DANIEL MARKOVITS

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

ISSN 1028-3625

© 2012 Daniel Markovits

Printed in Italy, October 2012
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu/RSCAS/Publications/
www.eui.eu
cadmus.eui.eu

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies (RSCAS), created in 1992 and directed by Stefano Bartolini since September 2006, aims to develop inter-disciplinary and comparative research and to promote work on the major issues facing the process of integration and European society.

The Centre is home to a large post-doctoral programme and hosts major research programmes and projects, and a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration and the expanding membership of the European Union.

Details of the research of the Centre can be found on:

<http://www.eui.eu/RSCAS/Research/>

Research publications take the form of Working Papers, Policy Papers, Distinguished Lectures and books. Most of these are also available on the RSCAS website:

<http://www.eui.eu/RSCAS/Publications/>

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).

The Global Governance Programme at the EUI

The Global Governance Programme (GGP) is research turned into action. It provides a European setting to conduct research at the highest level and promote synergies between the worlds of research and policy-making, to generate ideas and identify creative and innovative solutions to global challenges.

The GGP comprises three core dimensions: research, policy and training. Diverse global governance issues are investigated in *research* strands and projects coordinated by senior scholars, both from the EUI and from other internationally recognized top institutions. The *policy* dimension is developed throughout the programme, but is highlighted in the GGP High-Level Policy Seminars, which bring together policy-makers and academics at the highest level to discuss issues of current global importance. The Academy of Global Governance (AGG) is a unique executive *training* programme where theory and “real world” experience meet. Young executives, policy makers, diplomats, officials, private sector professionals and junior academics, have the opportunity to meet, share views and debate with leading academics, top-level officials, heads of international organisations and senior executives, on topical issues relating to governance.

For more information:

www.globalgovernanceprogramme.eu

Abstract

Proportional representation is often thought a democratic ideal. But whatever proportional representation's virtues in ordinary politics, it is poorly suited to sustaining democratic legitimacy in what might, speaking loosely, be called constitutional politics. Proportional representation may fairly balance citizens' views concerning incremental policy innovation. But proportional representation succeeds less well at uniting individual citizens' wills into a sovereign decision concerning the basic structure of the social contract.

This is not just an abstract problem. Many of the world's most mature democracies (including especially in Europe) face constitutional choices in this loose sense—choices concerning the scope and character of their political orders. At the same time, citizens of the mature democracies are losing confidence in the democratic practices and institutions through which these and other constitutional decisions must inevitably be made.

The mismatch between proportional representation and constitutional politics contributes to the current crisis of democratic legitimacy in Europe and, surprisingly, also in the United States. European democracies' explicit embrace of proportional representation makes it natural for the argument to take up the European case. The American case is included in part for its own sake, as the nature and even the existence of an American drift towards *de facto* proportional representation is not widely appreciated. The American case is also included because it might introduce novel ideas to this Working Paper Series' European audience, which will naturally have attended only casually to recent American developments.

Keywords

Democracy, proportional representation, constitutionalism, European integration

1*

Proportional representation is often thought a democratic ideal: fairer, more sensitive, and more accurate than alternative mechanisms of democratic decision. These pages conjecture that whatever proportional representation's virtues in ordinary politics, it is poorly suited to sustaining democratic legitimacy in what might, speaking loosely, be called *constitutional politics*. Perhaps proportional representation fairly, sensitively, and accurately balances citizens' views concerning incremental policy innovation. But proportional representation succeeds less well at uniting individual citizens' wills into a sovereign decision concerning the basic structure of the social contract.

This is not just an abstract problem. Many of the world's most mature democracies face constitutional choices: European states must decide whether a fiscal union will follow a monetary one; and the United States must decide whether to reject or to reaffirm the national social welfare state established in the New Deal. Increased economic and looming geo-political competition from states with emerging economies fixes stressful background conditions against which both choices arise. Each will determine the scope and character of the political orders in which it is made, for at least a generation. That is what makes these choices, in the loose sense, constitutional.

At the same time, citizens of the mature democracies are losing confidence in the democratic practices and institutions through which these and other constitutional decisions must inevitably be made. A recent Italian opinion poll, for example, reports that citizen confidence in the governing political parties ranges from four to ten percent.¹ And in the United States, the most recent Gallup "Confidence in Institutions" poll reports that Congress enjoys high confidence among only 12 percent of respondents, less than half the historical average and the less than the confidence enjoyed by any other of the sixteen public institutions included in the poll.²

The citizens' lagging democratic faith no doubt has many causes. The stresses that established democracies face will naturally strain confidence in every political system; and the purely instrumental ineffectiveness of the policies through which governing elites are responding to these stresses— austerity in Europe has not produced growth, and stimulus in the United States has not increased employment—can only increase the strains. One need not look far to connect economic causes to political consequences.³

Perhaps, however, the mature democracies' loss of political faith has an additional, political explanation. Perhaps the mismatch between proportional representation and constitutional politics contributes to the current crisis of democratic legitimacy in Europe and, surprisingly, also in the United States. European democracies' explicit embrace of proportional representation makes it natural for the argument to take up the European case. The American case is included in part for its own sake,

* I would like to thank Miguel Maduro and the participants in the EU's June 2012 Executive Seminar on "Political Participation in a Globalised World" for generous and insightful discussions of themes related to the argument developed here.

¹ Tony Barber, *Europe Must Confront Crisis of Legitimacy*, FINANCIAL TIMES (Apr. 23, 2012, 5:13 pm), available at <http://www.ft.com/intl/cms/s/0/4e2c793c-8d50-11e1-8b49-00144feab49a.html#axzz1yCqwMOSJ>.

² Jeffrey M. Jones, *Americans Most Confident in Military, Least in Congress*, GALLUP (June 23, 2011), available at <http://www.gallup.com/poll/148163/Americans-Confident-Military-Least-Congress.aspx>. The "Confidence in Institutions" poll is conducted annually. The most recent results available on the Gallup website are from 2011; figures for 2012 may be forthcoming later this summer. The other institutions, in the order of public confidence, are the military, small business, the police, the church or organized religion, the medical system, the U.S. Supreme Court, the presidency, the public schools, the criminal justice system, newspapers, television news, banks, organized labor, big business, and health maintenance organizations.

³ Other explanations—for example, the corrosive influence of money and proprietary media on political campaigns, especially in the United States—also naturally present themselves.

as the nature and even the existence of an American drift towards de facto proportional representation is not widely appreciated. The American case is also included because it might introduce novel ideas to this Working Paper Series' European audience, which will naturally have attended only casually to recent American developments.

The arguments that follow are speculative at every step. They conjecture only, and do not purport to demonstrate. Their point, as suits a Working Paper, is credibly to raise a possibility rather than authoritatively to assess it.

2

The argument aspires to display the particular problems associated with the democratic legitimacy of constitutional politics implemented through proportional representation. But before it can move forward to take up this particular case, the argument must step back to consider democratic politics more generally. What are the bases of democratic legitimacy?

Democracy, at its conceptual core, is collective self-government—that is the form of political life in which collective decisions are made by the entire body politic, including all of the governed.⁴ Different democratic systems present divergent institutional elaborations of this idea, to be sure. But all modern large-scale democracies include two basic, structural features. A successful theory of democracy—a theory that captures the intuitive appeal of democratic practice—must explain at least these features.

First, although democracies all incorporate a majoritarian element (and certainly reject concentrating political power in a minority caste or class), no democracy adopts simple, direct majority rule. To begin with, the counting rules by which democracies convert votes into policy uniformly depart from flat-footed majoritarianism. Most immediately, modern democracies depart from simple majoritarianism by employing representative government rather than just direct referenda. They also (at least since Burke's time⁵) self-consciously insist that representatives enjoy broad discretion to follow their consciences even against their constituents' preferences. Democracies additionally accept and indeed celebrate methods of preference aggregation—involving, in various combinations, electoral districts, multi-tiered elections, and divided government—that all depart from choosing policies simply by adding up votes to see which policy alternative receives more. Finally, modern democracies depart from simple majoritarianism in that they are not merely systems of voting and counting votes. Instead, democratic political systems support, and indeed require, forms of political activity that aim to change how the votes that will eventually be counted are cast. Accordingly, not just elections but also constitutional protections for freedom of expression (both by individuals and through an institutionalized independent press), freedom of assembly, political parties, and organized election campaigns all belong to the characteristic forms of democratic politics.⁶

And second, democracies apply the mechanisms for collective decision just described broadly, to decide nearly the full range of disputes that collective political life engenders. Thus, although most democratic constitutions typically entrench some basic protections for individual rights and minority interests against majoritarian usurpation, these rights-based limits on democracy are always carefully defined and narrowly cabined exceptions to a general principle of democratic authority. Most importantly, democratic politics does not shy away from deciding matters of moral principle. The

⁴ This general understanding of democracy is as old at least as Aristotle's *Politics*.

⁵ See Edmund Burke, Speech on Fox's India Bill (Dec. 1, 1783), in 5 THE WRITINGS AND SPEECHES OF EDMUND BURKE: INDIA: MADRAS AND BENGAL, 1774-85, at 378 (Paul Langford et al. eds., 1981).

⁶ Note that judicial review, in the American sense that gives courts the power to invalidate legislative actions as unconstitutional, is *not* on this list.

range of subjects that democratic politics reaches varies from democracy to democracy.⁷ But every democracy extends the authority of the democratic process not just to balancing citizens' preferences but also to deciding conflicts among citizens' values, including prominently conflicts among citizens' competing conceptions of justice. Indeed, democracies typically provide constitutional guarantees for justice-based democratic political participation, including through the constitutional protections mentioned in the past paragraph. A summary indicator of these guarantees' power to expand the scope of democratic decision is the permissible place of comprehensive moral ideals in democratic politics. In spite of occasional suggestions that political participation should be cleansed of controversial comprehensive ideals before it is inserted into democratic politics, no actual democracy insists on this. To the contrary, such ideals—for example, Christian commitments in favor of universal love cited as grounds for opposing racial segregation—have had longstanding and influential careers in democratic politics. In this way, democracies include what were earlier called constitutional questions within the scope of democratic politics.

Constitutional politics in this loose sense is not limited to the interpretation of a legal tradition or written text (where one exists) that is given the technical label “constitutional” by professional lawyers. Rather, it encompasses all political disputes concerning the basic structure of a society's social contract. Constitutional politics thus includes fixing the functional allocation of a state's core decision-making competences and the basic outlines of its versions of the market and the welfare-state. Once again, the questions that contemporary Europe faces concerning fiscal union (and associated austerities) and that the contemporary United States faces concerning health care, pensions, and the base-line size of the Federal government are both constitutional in this general sense.

Any adequate and sympathetic reconstruction of democratic practice must explain both these core features of democratic politics.

A familiar view—for a time the dominant view among political philosophers—holds that democracy constitutes a branch office of the general practice of liberal equality. A narrow version of this view treats democracy as equality applied directly to the allocation of political power. This view of democracy appears in Rawls's early work, as in the suggestion that “[p]erhaps the most obvious political inequality is the violation of the precept one person one vote.”⁸ An alternative, broader version of the view acknowledges that democracy does not directly produce an equal distribution specifically of political power, and instead proposes that it indirectly enables citizens to relate to one another on equal terms more generally. According to this account, democracy's principal contribution to political equality is to foreclose certain arguments and arrangements, for example based on hierarchies of status or caste, that are broadly inimical to equality. Ronald Dworkin, for example, develops a version of this broader view, elaborating an account of democracy expressly in response to the question, “How would a community based on equal concern [for all its members] choose its representative officials?”⁹

Nevertheless, in spite of its intuitive appeal and philosophical prominence, the suggestion that democracy promotes the political equality of all citizens cannot accommodate the central features of democratic politics identified a moment ago.

Thus the narrow conception of democracy as political equality cannot accommodate the many departures from simple majoritarianism on which democracies uniformly insist. Democracy secures neither the equal impact on policy of citizens' direct choices or votes nor the equal influence on policy

⁷ European states thus tend to give liberal rights a broader scope and democratic sovereignty a narrower scope than the political culture of the United States.

⁸ JOHN RAWLS, *A THEORY OF JUSTICE* 231 (1971). Rawls's final views were subtler than this simple remark reveals. See *id.* at 232 ff.

⁹ RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 184 (2000).

of citizens' broader political interventions.¹⁰ Democracies straightforwardly violate equality of impact in any number of ways. Democracy's representative element (especially insofar as representatives jealously guard their discretion to follow their consciences) necessarily gives *unequal* impact to ordinary citizens and public officials. And the intricate methods by which democracies, departing from simple majority rule, aggregate votes only exacerbate inequalities of impact—including by creating inequalities even among ordinary citizens (and, for that matter, also among representatives who hold equivalent offices). Moreover, democracies also violate equality of influence. They permit political practices—for example, public deliberation (including through a free press), and activist campaigning (including through organized political parties)—whose principal aim is to achieve *unequal* influence.¹¹ Crucially, democracies self-consciously champion both departures from equality: a political process that abandoned every form of representation or that prohibited the practices generating unequal influence would commonly and properly be thought clearly *undemocratic*.¹²

The broad conception of democracy as political equality, for its part, fails because it cannot accommodate the scope of democratic practice and, in particular, the fact that democracy's authority reaches even constitutional politics. The broad conception, recall, defended democracy not because it equally allocates political power specifically but rather because it enables citizens to stand in a generally egalitarian relation to one another. The enabling may be instrumental, as in Dworkin's suggestion that democracy is the form of government "most likely to produce the substantive decisions and results that treat all members of the community with equal concern."¹³ Or the enabling may be intrinsic and constitutive, as in suggestions that the rejection of political caste orders associated with democracy constitutes citizens as equals more generally¹⁴—so that political democracy properly-so-called is also culturally and socially democratic, as might be said. Neither suggestion persuades, however. Democratic resolutions of disputes concerning justice, and especially democratic constitutional politics, can predictably—in some cases even reliably—cause unequal substantive policies and constitute *inegalitarian* cultural and social orders. The outbreaks of democratic nationalism that followed the end of the Cold War represent notable and extreme instances of this lesson.¹⁵

Likely for this reason, defenders of the broad conception of democracy typically propose to constrain the scope of democratic politics properly-so-called in the service of their broader egalitarian aims. Dworkin, for example, admits that democracy merely serves the end of "improv[ing] the accuracy" of political decisions, by making them more consistent with the demands of liberal equality.¹⁶ The broad view thus places democratic decisionmaking, in the intuitive sense associated with voting and elections, at the mercy of these substantive values, so that voting must give way to equality's demands whenever the two conflict. The resulting constraints on democratic politics are dramatic indeed. Dworkin would limit majoritarian decision-making to the narrow (and indeed almost

¹⁰ The distinction between impact and influence follows RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 184 (2000).

¹¹ None of this, of course, is to say that democracies should or indeed may accept every form of inequality of influence. In particular, unequal influence whose sole ground is unequal wealth is commonly, and plausibly, thought to be anti-democratic, and many democracies take steps to eliminate it by insulating political power from economic power. The United States, in particular its Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), is increasingly an outlier in this respect.

¹² Dworkin makes this point also. See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 194-98 (2000). Others have made similar observations. See, e.g., Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1523-24 (1997) (book review).

¹³ RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 186 (2000).

¹⁴ I owe this formulation to a conversation with Daniel Viehoff.

¹⁵ A vivid general treatment is AMY CHUA, *THE WORLD ON FIRE* (2002).

¹⁶ RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 204 (2000).

vanishing¹⁷) class of what he calls choice-sensitive issues, that is, issues “whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the political community.”¹⁸ Rawls perhaps sums up the status of this conception of democracy most clearly, when he admits that if democracy serves liberal equality, then we should “submit our conduct to democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system.”¹⁹ This cramped conception is once again belied by the lived experience of democratic politics: even if the extremes of democratic nationalism are illegitimate, democratic resolutions to conflicts concerning justice, including to constitutional conflicts in the loose sense, remain the norm in legitimate democratic states.

Finally, neither the narrow nor the broad version of the liberal view can accommodate democracy concerning what might be called the boundaries of politics. The idea that democracy is political equality cannot answer the questions: equality *among whom* and *of what*? It cannot fix the extension of the state and hence the outer boundaries of the set of citizens who are to be equal and thus who will participate in democratic politics going forward; and it cannot fix the intensity of the state and hence the reach of a political order into the social, cultural, and economic lives of the citizens subject to it. Questions in these veins have in recent years returned to the forefront of the actual politics of mature democracies: citizens of some member states of the European Union (for example, Greece) are being forced to decide to what degree their domestic public policy should become, as of right, subject to regulation by politics among citizens of other member states (for example, Germany); and citizens of the United States must decide what share of GDP should be placed directly under state regulation and control. Applying the idea of equality to politics does not require any particular answer to these choices, because they concern the antecedent questions what scope (along dimensions of extension and intensity) politics should have, and hence across what persons and with respect to what resources political equality should apply.

Together, these arguments reveal that suggestions that democracy is simply a (political) branch office of liberal equality cannot, in several respects, explain actual democratic practice.

An alternative account of democracy, more republican than liberal, emphasizes that democratic politics squares individual freedom and collective government,²⁰ roughly by sustaining agreement

¹⁷ Dworkin observes that “[t]hough it might seem odd,” he believes that it is “sensible” even “to speak of a decision . . . to give aid to the [Nicaraguan] Contras as either accurate or inaccurate,” so that his liberal conception of democracy requires that this decision be made accurately, regardless of citizens’ actual preferences or the outcomes of a majoritarian process. *Id.* at 204. As an example of a choice-sensitive issue, Dworkin imagines the decision “whether to use available public funds to build a new sports center or a new road system,” although even here he suggests that choice-insensitive issues like distributive justice may “merge in that decision.” *Id.* at 204.

¹⁸ *Id.* at 204. Dworkin thus insists that the democratic process must defer to substantive principles of equality concerning “the distribution of resources and opportunities into private ownership, about the use of collective power and resources in public programs and foreign policy, about saving and conservation, and about the other topics of public principle and policy that confront a modern government.” *Id.* at 204.

¹⁹ JOHN RAWLS, A THEORY OF JUSTICE 355 (1971). Thus Rawls’s theory of justice restricts the democratic process by imposing substantive requirements on policy concerning not just basic liberties but the distributions of all primary goods, including income and wealth, powers and opportunities, and even the social bases of self-respect. *See id.* at 62.

²⁰ Republican theories of democracy are commonly said to replace the liberal emphasis on equality with an emphasis on liberty. Thus the republican theory has been thought to address itself to what Post calls “[t]he essential problematic of democracy,” namely, “the reconciliation of individual and collective autonomy.” ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 7 (1995). In particular, the republican idea of individual authorship of collective decisions has been thought to solve this problematic, as in Hans Kelsen’s observation that “[a] subject is politically free insofar as his individual will is in harmony with the ‘collective’ (or ‘general’) will expressed in the social order. Such harmony of the ‘collective’ and the individual will is guaranteed only if the social order is created by the individuals whose behavior it regulates.” HANS KELSEN, GENERAL THEORY OF LAW AND STATE 285 (Anders Wedberg trans., 1945).

about which political decisions to obey even in the face of entrenched disagreement about which decisions to adopt. The liberal approaches treat the democratic political process as *transparent*, so that citizens' preferences and values are not changed by their democratic engagements, and principles of liberal equality apply in the same way, to support the same policies, before and after democratic politics has occurred. The republican account of democracy, by contrast, emphasizes the *transformative* aspects of the democratic process: democracy can reconcile individual freedom with collective government because democratic politics changes the preferences and values of the individual citizens who employ it to reach collective decisions.

The republican theory of democracy familiarly proposes that democratic citizens, uniting to form a democratic *sovereign*, share authorship of the collective decisions by which they live.²¹ This is what led Rousseau to observe that democracy combines the private wills of the several citizens into a general will, through which each embraces all the laws as his own, including "even . . . those passed against his [private] will,"²² so that democratic sovereignty provides a political mechanism through which each person "uniting with all, nevertheless obeys only himself and remains as free as before."²³ As Alexander Bickel said (implicitly contrasting liberal and republican conceptions of democracy), the republican account casts democracy "not merely as a sharer of power but as a generator of consent."²⁴

The democratic political process serves, on the republican view, to sustain this embrace. The central challenge for democratic theory is to identify the "social processes . . . that somehow connect the democratic system as a whole to the autonomous will of the entire citizenry,"²⁵ and, moreover, to explain in useful detail how the connection is established. Note that posing the question in these terms at once makes clear why democracies must depart from flat-footed, directly majoritarian preference aggregation. Simple aggregation—accomplished, for example, through continuous direct referenda among policy options—could not possibly transform citizens' preferences and values and would therefore generate political alienation rather than shared authorship of collective decisions.²⁶

(Contd.) _____

It is surely right to observe the role of individual freedom in republican political thought, but this emphasis alone cannot sustain the republican view. The observation concerning freedom simply assumes that democratic politics can sustain the individual embrace of the collective will rather than explaining how this embrace is actually achieved. The materials below identify the mechanisms through which citizens come to embrace democratic sovereignty. For a discussion of the aspects of human nature that allow these mechanisms to function—the human interests that democratic sovereignty serves—see Daniel Markovits, *Democratic Disobedience*, 114 YALE LAW JOURNAL 1897 (2005). The discussion that follows here also reprises and builds on that text.

²¹ See Robert C. Post, *Democracy and Equality*, 1 LAW CULTURE & HUMAN. (2005).

²² JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 110 (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press 1978) (1762). Rousseau thought that this logic applies even "to those [laws] that punish [a citizen] when he dares to violate one of them." *Id.* Indeed, he added, imagining a conflict between his private will and the democratic (general) will, that "[i]f [the] private will had prevailed, I would have done something other than what I wanted. It is then that I would not have been free." JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 111 (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press 1978) (1762).

These remarks suggest that Rousseau thought that a well-functioning democratic process not only *transforms* but *subsumes* citizens' individual political agency. But the republican view need not go to such extremes—carrying the participation in a collective will that democratic sovereignty involves into a denial of individuality—to sustain its central point.

²³ JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 53 (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press 1978) (1762).

²⁴ ALEXANDER BICKEL, THE MORALITY OF CONSENT 15 (1975). Bickel was commenting approvingly on Edmund Burke's defense of the right of elected representatives to vote their consciences and the related authority of representative government. See Edmund Burke, Speech on Fox's India Bill (Dec. 1, 1783), in 5 THE WRITINGS AND SPEECHES OF EDMUND BURKE: INDIA: MADRAS AND BENGAL, 1774-85, at 378 (Paul Langford et al. eds., 1981).

²⁵ Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in NOMOS XXXV: DEMOCRATIC COMMUNITY 163, 170 (John W. Chapman & Ian Shapiro eds., 1993).

²⁶ A related observation appears in Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1523-24 (1997) (book review).

The central means through which democracies establish transformative political procedures and encourage legitimating political engagements is *representation*. Every modern, mass democracy employs representatives in its principal mechanisms of political decision, and some forswear direct democracy entirely and employ representation exclusively.²⁷ Representation itself, and the several associated political practices that necessarily arise around representation, contribute to democratic legitimacy in several ways.

To begin with, the creation of representative offices encourages participants in democratic politics to pursue not raw power (that is, the direct capacity to implement policy) but rather the intermediate end of political office, narrowly understood. Political offices, being creatures of the wider political system in which they appear, can be obtained only against the backdrop of the procedures that this system employs for allocating them. (Revolutionaries may implement policy when they overthrow a government, but they cannot become *Senators*.) And this encourages would-be officials to recast their political ambitions in forms that implicitly embrace the legitimacy of democratic decisions—the forms of authority, recognition, and constraint implicit in the idea of political offices with specified but limited powers. Democratic representation also stimulates legitimating engagements among non-elected political actors (*voter*, after all, is itself a public office). By channeling decision through representative officers, representative democracies create the opportunity, and also the necessity, for citizens generally who wish to influence outcomes to do so through argument, persuasion, and pressure—through political engagement—and not just, as in simple majority-rule, by revealing their individual preferences in political isolation. Representatives serve as focal points for political deliberation and for the reciprocal recognition that deliberation involves.

Moreover, and critically, representative democracy, by creating a quasi-professional form of democratic officialdom, encourages the formation of political parties. Political parties obviously serve as sites for elite level political engagements among their members who hold public office. Less obviously, but no less importantly, the mass parties that accompany representative democracy (democratic political parties characteristically penetrate widely and deeply into the overall citizenry) implicate non-office-holding party members in democratic legitimacy. It is often thought that political parties are important primarily because they connect the political system, and in particular political elites, to the masses (serving to keep ruling elites informed of the wishes of the people). But the greatest contribution that political parties (and especially democratic mass parties) make to politics may be rather to bring the masses within the political system. Political parties channel the political ambitions of their mass-membership into forms that implicitly recognize the legitimacy of democratic decision, including even when they have lost an election.²⁸

²⁷ One prominent country even makes direct democracy constitutionally suspect. The German Grundgesetz expressly declares the Federal Republic of Germany a representative democracy, in which sovereignty is exercised through specific legislative organs (“durch besondere Organe der Gesetzgebung”) rather than by the people directly. GRUNDGESETZ [GG] art. 20(2) (F.R.G.), see also Horst Dreier, *Demokratie*, in 2 GRUNDGESETZ KOMMENTAR 20, 31 (Horst Dreier ed., 1998) (connecting the “broad-ranging exclusion of direct-democratic elements” from German politics to article 20(2) of the Grundgesetz). Moreover, this feature of the German political system has been expressly connected to skepticism about the consequences of direct popular political engagement, as for example in Theodor Heuss’s remark in the constitutional assembly that drafted the Grundgesetz that direct democracy merely presents a “bonus [or welcome reward] for every demagogue.” *id.* at 32. Direct democracy is not entirely excluded from German politics. The German Länder are permitted to adopt forms of direct democracy. See, Friedrich E. Schnapp, *Der Bund und die Länder*, in 2 GRUNDGESETZ-KOMMENTAR 1, 8-9 (Ingo von Münch & Philip Kunig eds., 2001). And the Grundgesetz expressly contemplates that changes in the borders of the German states be proposed by parliamentary legislation and confirmed by popular referenda. See GRUNDGESETZ [GG] art. 29(2) (F.R.G.).

²⁸ Something like this suggestion, cast in historical terms, appears in RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* (1969). An underappreciated early account is MARTIN VAN BUREN, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* (Smith T. Van Buren et al. eds., New York, Hurd & Houghton 1867).

Parties play a similar channeling function even at the parliamentary level, where they help to coordinate the agendas of multiple legislators and also to coordinate the agendas of the several branches of government (or at least of party-factions

Actual democracies fill in this outline of the basic representative model and secure legitimacy in different ways, depending on the structures of their democratic practices. It is worthwhile to distinguish between two pure or ideal typical approaches to the filling in, even if only to fix ideas and to structure the subsequent argument.

One ideal-typical democratic form structures politics around proportional representation. Proportional representation encourages politicians (office-holders and candidates for office) to organize themselves into disciplined, cohesive political parties that speak to their base supporters and try to grow their bases, but do not emphasize drawing substantial transient electoral support from across party lines. At the same time, especially where proportional representation is combined with an official politics structured in the manner of parliamentary government, office-holders are encouraged to engage in wide-ranging parliamentary negotiations across party lines, in order to form stable and effective governing coalitions. Popular political engagement under proportional representation thus arises in the internal deliberations that parties have with their core supporters, perhaps as they go about drafting a party platform. Voters become party supporters through a process that includes engagement and compromise across limited political difference in fixing the agenda that elected officials will, following their party platform, pursue.²⁹ Official political engagement arises paradigmatically through parliamentary negotiations: through the cross-ideological disputes that political coalitions bridge and through the within-ideological party discipline that successful parliamentary maneuvering requires.³⁰ Finally, the elite political compromises associated with coalition building are legitimated at the popular level by each party's officials' connections to that parties' supporters, and in particular by the supporters' trust that their representatives will serve as their faithful agents in parliament. Indeed, some commentators have gone so far as to say that under proportional representation, "most candidates serve primarily as conduits for communicating the party platform to the public."³¹

This species of democracy—which might be called the *European* model—thus substantially suppresses direct popular political engagement across fundamental ideological divides and, at the same time, encourages just this sort of official political engagement. Officials selected through proportional representation are elected by, and represent, specifically those voters who support them.³² They then make political compromises amongst themselves and sell the compromises to mass-supporters who were never directly engaged in making them.

An alternative ideal-typical democratic form structures popular politics by first-past-the-post voting in single member electoral districts. This electoral mechanism encourages popular political engagement across ideological difference directly in connection with electioneering. In order to achieve and retain office (to win elections) candidates and officials must craft electoral majorities in constituencies, brought together by nothing more than geography, in which nearly the full range of popular political opinion is represented. This familiarly encourages moderation in candidates, who

(Contd.) _____

within them). See, e.g., Nathaniel Persily and Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of the Competing Paradigms*, 100 COLUM. L. REV. 775, 787 (2000).

²⁹ The degree of direct popular political engagement across partisan difference may well be lower under proportional representation, while the degree of engagement across difference among elites may (in view of the importance of coalition-building) be greater. Moreover, this pattern plausibly accounts for the appeal of proportional representation to those who are skeptical of too much direct popular politics.

³⁰ See, e.g., DENNIS C. MEULLER, CONSTITUTIONAL DEMOCRACY 105 (1996). Note that, at least under closed list proportional representation, party control over the membership and order of the lists from which officeholders are elected provides a powerful method for enforcing party discipline. See VERNON BOGDANOR, WHAT IS PROPORTIONAL REPRESENTATION? A GUIDE TO THE ISSUES 136 (1984).

³¹ DOUGLAS J. AMY, REACH CHOICES/NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE AMERICAN DEMOCRACY 79 (2d ed. 2002).

³² Indeed, it has even been suggested that officeholders elected under proportional representation serve not as delegates entitled to vote their consciences but rather as trustees, obligated to pursue the platform that their party has communicated to its supporters. See, e.g., DAVID M. FARRELL, ELECTORAL SYSTEMS: A COMPARATIVE INTRODUCTION 170-71 (2001).

must court median voters in order to win elections.³³ Less familiarly, this moderation is accompanied by broad-ranging political engagement both between candidates and constituents and among constituents. The geographic rather than ideological nature of constituencies requires candidates to represent the interests of all voters in their districts and not just their supporters. Accordingly, the nature of elections in such systems causes citizens of all political persuasions to elect their representatives across their disagreements. This form of popular politics may be combined, at the official level, with parliamentary government as in Great Britain or with a presidential system, as in the United States. The character of official political engagement under first-past-the-post electioneering depends on the structure of government. American presidentialism reduces the importance of party discipline in the legislature (by removing the risk of a vote of no-confidence) and thus tends towards abandoning the ideologically cohesive, internally disciplined political party as a matrix for official political engagement. At the same time, the American emphasis on the separation of powers (and also on federalism³⁴) fragments officialdom, creating bottlenecks in the process of governing that encourage political engagement directly among office holders, who must compromise across the branches of government in order effectively to govern. British parliamentarianism, by contrast, retains incentives to party discipline, and so internal party-politics remains a significant source of official political engagement in Britain. The British also foster official politics (including in the generic rather than party-partisan sense) through their non-elective government institutions, including the House of Lords (pending its reform) and the highly elaborate civil service, and through civil society institutions (labor unions, an official press, an established church, and any number of expert and evaluative guilds, societies, and commissions) that constitute free-standing centers of power and hence also politics.

This *Anglo-American* model of democracy thus encourages and indeed prioritizes direct popular political engagements, which it makes the centerpiece of democratic politics and legitimation. The Anglo-American model encourages official political engagements in a piecemeal fashion only.

One might summarize the difference between the European and the Anglo-American models of democratic sovereignty in the following way. Political solidarity arises indirectly on the European model, as the mass-citizenry engages across its deepest political disagreements only through the official negotiations among agents whose ideological principals elect separately. By contrast, political solidarity on the Anglo-American model arises directly, as the mass-citizenry of each district elects its official representative together.³⁵

These accounts of the two ideal types merely introduce special cases of the generic republican approach to sustaining democratic legitimacy. Fully to understand any particular species of democratic legitimacy of course requires much more institutional (and also cultural and historical) detail. But the rough sketches of ideal types suffice to show that the various patterns of engagement used to sustain

³³ This result, first established by Hotelling, is now one of the mainstays of positive political science. See, e.g., DENNIS C. MUELLER, *PUBLIC CHOICE* 98-105 (1979); see also JAMES M. ENELow & MELVIN J. HINICH, *THE SPATIAL THEORY OF VOTING: AN INTRODUCTION* 12-13 (1984).

³⁴ The structure of American officialdom also encourages official political engagement in another way. The most important offices are structured to draw different characters of officials to them: the Senate's longer terms and fixed, state-wide districts were designed to make Senators more patrician and less partisan than Representatives, who are elected to the House for shorter terms and from narrower and regularly redrawn districts (and thus tend towards populism and partisanship).

³⁵ This formulation tracks Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 619 (1991) ("In the system of proportional representation, this bargain [when a compromise is formed to produce an effective majority] is struck *after* the elections, when the parties must agree to form a government or pass new legislation. In the majoritarian system, by contrast, the key compromises are made *before* the election, when various social interests must come together around a party program that can gain a majority of the popular vote.") (italics in original). For a further general treatment that also borrows from Rapaczynski, see ISACHAROFF, KARLAN & PILDES, *THE LAW OF DEMOCRACY* 1162 (rev. 2d ed. 2002).

legitimacy in particular democratic systems each possess distinctive immanent logics. A democratic society may fall foul of the peculiar logic of democratic legitimation that its species of democracy adopts. The next two sections speculate that this has happened, straightforwardly in Europe and, less straightforwardly, in the United States as well.

3

The stylized distinction between European and Anglo-American models of democratic legitimation returns the argument to the crisis of democratic legitimacy from which it set out. Democratic politics structured on the Anglo-American model is well-suited to sustaining the democratic legitimacy of constitutional politics (in the loose sense). Democratic politics structured on the European model is less well-suited to that task.

Begin with the Anglo-American model. Mass democratic politics on this model unifies the citizenry, integrating it into a single political agent. To begin with, successful candidates under the Anglo-American model tend to style their campaigns as a single political conversation among all the voters in their districts. They address every voter in their districts, as all and only these voters matter for their chances at electoral victory. As observed earlier, candidates will along the way tend towards political moderation, characterized in terms of the views of the median voter. This adds to political integration by reducing the extent to which substantive differences between a citizen and her representative become so great that no process values can bridge them. Finally, each official, under this system, becomes the *only* person to represent her constituents in connection with the election that she has won. This entails that the integrative powers of Anglo-American elections are reinforced by the integrative powers of Anglo-American governance. Elected officials, in the Anglo-American system, conduct an ongoing political engagement (concerning both constituent services and the common good) not just with their core supporters, nor even just with those constituents who voted for them, but in principle with all constituents.

This model of political integration applies naturally not just to incremental but also to constitutional politics. The stakes may be higher in this case, but the legitimating patterns of democratic politics continue to engage citizens in the ordinary way. Quite possibly the *quantity* of democratic engagement must increase in order for the Anglo-American model to legitimate democratic decisions on constitutional questions. As political decisions become weightier, the unified political conversation that this model promotes must go on for longer, engage citizens more intensely, and perhaps even engage more publicly-minded motivations in order to sustain shared authorship of the collective decisions that it produces.³⁶ But once the quantity has adjusted, the *quality* or *form* of the political engagement on the Anglo-American model remains suited to the legitimate resolution of constitutional questions. Citizens, after all continue to decide together. And quantitative increases in their political engagements cause their democratic integration to grow commensurately to the greater weight of the decisions that their constitutional politics involves.

Democratic political engagement and integration function differently on the European model. Politics does not produce mass integration, among ordinary citizens, on this model at all. Campaigns do not address citizens together, across partisan disagreements. Rather, candidates principally address their supporters, and mass politics is principally limited to disputes within the party, about which platform planks will best promote the party's core principles and grow its constituency. And officials do not represent citizens together, across partisan disagreements; rather, each official represents primarily her parties' supporters.³⁷ Political integration across partisan difference occurs directly, on

³⁶ Bruce Ackerman's distinction between *ordinary politics* and *higher lawmaking* develops one model of this quantitative difference. See BRUCE ACKERMAN, *WE THE PEOPLE*, VOLUME I: FOUNDATIONS 230-294 (1993).

³⁷ Not every system that employs proportional representation hews narrowly to the ideal type, in this respect. For example, the German electoral system—with the express aim of dispensing with party-intermediation and connecting

the European model, only at the official level, through the parliamentary bargaining that this model encourages and practically requires. The masses become integrated only indirectly, by proxy, in the manner in which principles might become bound to a contract negotiated by their agents.

The European model of political integration is largely unproblematic when applied to incremental, non-constitutional politics. An agent may bind her principal to a contract, after all; indeed, for ordinary contracts made by agents, the principal becomes bound just as if she had contracted directly herself. But this model faces great challenges when applied to constitutional politics. Constitutional politics, recall, concerns the basic character of the political order: the boundary between members and non-members; and, among members, the boundaries between their political associations and other features of their lives (religious, social, and economic, for example) that endure beyond the direct reach of the state. These matters are at once unusually weighty and have the character that they tend to develop organically, so that the outcomes of constitutional choices cannot be fully cabined *ex ante*, by the terms of constitutional compromises, fixed at the moments when they are struck. Constitutional arrangements are in this respect less like ordinary contracts and more like joint ventures or other fiduciary relationships.³⁸ The analogy between European style democratic representation and the ordinary agency relation is once again instructive here. Ordinary agents cannot bind their principals to fiduciary arrangements as readily or completely as they can bind them to mere contracts. Instead, the law (for example through mechanisms of informed consent) requires that certain agreements, in order to be valid, must be made immediately by the principals whom they would bind. Similarly, European style democratic representatives cannot bind their constituents to new constitutional arrangements as readily or completely—with the same democratic legitimacy—as they might enjoy with respect to ordinary, incremental political choices. Constitutional democratic politics can be legitimate only insofar as it is carried out immediately among citizens themselves.

4

This analysis applies straightforwardly to Europe's current crisis of democratic legitimacy. Insofar as the argument is correct, the European model of democratic legitimation is inadequate to the constitutional choices to which the interactions between the current financial crisis and the dynamics of European Union integration are putting member states. Indeed, certain European nations' marginal departures from ideal-typical proportional representation further undermine the democratic legitimacy of their current constitutional politics. Greece is an example. For perfectly understandable reasons—connected to an interest in avoiding intractable parliamentary gridlock—Greece's voting system "reinforces" proportional representation by giving a 50 seat parliamentary "bonus" to the party that wins the plurality of votes in parliamentary elections.³⁹ But for the very reason why the bonus increases parliamentary decisiveness, it decreases parliamentary bargaining and coalition-building. And that diminishes both the quantity of bargaining and the fairness (or quality) of the circumstances in which bargains are struck. The Greek variation on the European model thus reduces the extent even of citizens' indirect political connection to policies whose adoption depends on the plurality party's parliamentary bonus. In such cases, the parliamentary agents of citizens who voted for non-plurality

(Contd.) _____

representatives directly to voters—follows a complicated mechanism that ensures that even as the aggregate numbers of parliamentary seats each party holds are fixed through proportional representation, half of the individual seats are held by representatives who have won specific geographic districts. See Bundeswahlgesetz [BWG] [Federal Election Law] July 23, 1993, BGBl I at 1594, §§ 4-6.

³⁸ The idea that ordinary contracts fix the terms of the parties' shared project *ex ante*, whereas more intimate joint projects allow the terms of sharing to develop organically *ex post*, follows Daniel Markovits, *Promise as an Arm's Length Relation*, in H. SHEINMAN, ed. PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS (2011) and Daniel Markovits and Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VIRGINIA LAW REVIEW 1939 (2011).

³⁹ The law is Law 3636/2008, which amended Law 3231/2004 by extending the number of bonus seats from 40 to 50. The Greek text of the amendment can be found at http://www.dsnet.gr/Epikairothta/Nomothesia/n3636_08.htm.

parties (even if they remain faithful) have been rendered incapable of effectively representing their supporters in official negotiations. And the supporters remain commensurately unbound to the settlements that these negotiations reach.

The American case is more surprising, because the United States does not as a formal matter employ proportional representation. Nevertheless, several recent developments in American electoral politics have inserted a close cousin of proportional representation into the American political system. Indeed, there is a sense in which, precisely because of this unnatural grafting, the pathological relation between proportional representation and constitutional politics reveals itself most plainly in the American context.

The first such development concerns the constitution of the electoral districts into which voters are collected in order to elect members of the United States House of Representatives. These have changed, in recent decades, in response both to population migrations and to direct manipulation of their boundaries.

Begin by considering district boundaries and the gerrymanders through which they have changed. These can serve many purposes. Some may seek to undermine political equality;⁴⁰ to diminish the electoral opportunity of certain groups of voters, including most prominently racial groups;⁴¹ to increase a party's legislative delegation in excess of the party's popular support;⁴² or even to ensure or prevent that particular persons secure elective office.⁴³ But gerrymanders may also serve another and very different purpose also. Especially when control over government is divided between two parties, the parties may collude, in *bipartisan* or *sweetheart* gerrymanders, to reallocate voters to concentrate them into safe districts that protect incumbents from each party against challengers from the other.⁴⁴

Next add migrations. The collusive efforts in bipartisan gerrymanders may be further re-enforced by partisan migrations, in which supporters of each party spontaneously concentrate themselves to further segregate electoral districts. An especially important case of this self-sorting, in the United States, has been the growing partisan divide between increasingly Democratic urban America and

⁴⁰ The wrongs in these types of gerrymanders—insofar as they are wrong—can be explained by instrumental accounts of democracy, including prominently by the liberal egalitarian account. Most straightforwardly, gerrymanders that achieve these ends by creating differences in the numerical sizes of voting districts violate the egalitarian ideal of one-person, one-vote. See generally *Reynolds v. Sims*, 377 U.S. 533 (1964), *Baker v. Carr*, 369 U.S. 186 (1962). And these types of gerrymanders may violate equality even though they maintain equally sized districts, for example because (roughly) they apportion certain classes of voters to districts with the intent of concentrating or dispersing their votes to render their preferences less influential over the selection of representatives than the preferences of their fellow citizens. See generally Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

⁴¹ White Southerners thus drew outlandish districts in order to reduce the influence of black voters after Reconstruction. See, e.g., J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING* 135 (1992).

⁴² Alan I. Abramowitz finds evidence of Democratic redistricting for political advantage in the 1982 election of the United States House of Representatives, in *Partisan Redistricting and the 1982 Congressional Elections*, 45 J. POLITICS 767 (1983).

⁴³ Gerrymanders designed to keep specific people out of office have a long history in American politics. In 1789, for example, Patrick Henry allegedly designed a misshapen district in order to assist James Monroe's run against James Madison in Virginia's first congressional elections (the only instance in which two future presidents competed for a congressional seat). Madison won the seat nevertheless. See Thomas Rogers Hunter, *The First Gerrymander*, 9 EARLY AMERICAN STUDIES 781 (2011).

⁴⁴ Examples of this practice are reported in Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 598 (2002) and David Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts in Reapportionment in the 1970s* at 249, 279 (Nelson W. Polsby, ed. 1971). It is not clear how prominent such gerrymanders are in practice. See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002); David Mahew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295 (1974); GARY JACOBSON, *THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946-1998*, at 133 (1990).

increasingly Republican rural America. Between the 1996 and 2000 elections, for example, 2 rural counties changed from Republican to Democratic majorities and 854 changed from Democratic to Republican.⁴⁵

Some combination of bipartisan gerrymanders, partisan migrations, and other phenomena has caused partisan competition for seats in the United States House of Representatives to decline more or less steadily over the past half-century. To be sure, there exist local departures from longer trends (including most recently in the Tea-Party influenced 2010 congressional elections). But secular trends have been towards increased re-election rates for incumbents and increased margins of decision in races generally.⁴⁶ This development need not promote a particular party's political platform or otherwise shift the partisan balance of political power. Indeed, the development may cause the party-balance in the legislature roughly (especially over time) to reflect the balance of support that the parties have in the population. The political composition of legislatures constituted through bipartisan gerrymanders and partisan migrations will in this case be more or less the same as it would be were the legislatures constituted through more competitive elections in more evenly balanced districts.

Nevertheless, these developments remain intuitively troubling. It is not easy to give this intuition a theoretically articulate defense, even for the case in which the lack of competition is intentionally engineered by through sweetheart gerrymanders. The difficulty is particularly acute from within the liberal model of democracy as political equality. As Samuel Issacharoff has said, if a gerrymander "were to provide . . . political parties with reasonable prospects of achieving . . . their appropriate shares of representation, . . . [f]rom the vantage point of equal protection law, neither party should be considered a victim of discrimination."⁴⁷ The observation applies all the more if the safe districts arise spontaneously from partisan migrations. Moreover, insofar as the bipartisan gerrymanders adjust (at least over time) to keep the party-balance that they establish in line with the balance of the parties' popular support, individual citizens also continue equally to influence the makeup of the legislature, only now indirectly through influencing the balance of safe districts rather than by directly influencing the outcomes of competitive elections. Accordingly, the natural categories in which the liberal approach to democracy proceeds do not readily apply to such cases. In the words of the Supreme Court, redistricting pursued with the "conscious intent to . . . achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties," satisfies the "spirit of fairness."⁴⁸ Indeed, bipartisan gerrymanders may even increase the accuracy with which the composition of the legislature tracks the popular political balance, at least compared to what the Supreme Court called "a politically mindless approach" that ignores the electoral consequences of drawing district lines.⁴⁹

The republican theory of democracy better explains the intuitive discomfort that bipartisan gerrymanders and other forms of partisan voter concentration engender. Observe a relationship between such developments and proportional representation.⁵⁰ Under proportional representation, each

⁴⁵ See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 269 (2008).

⁴⁶ See, e.g., Alan I. Abramowitz, Brad Alexander, and Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75 (2006).

⁴⁷ Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 598 (2002).

⁴⁸ *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973). The Gaffney Court added that judicial scrutiny over district lines should be "at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Id.* at 754.

⁴⁹ *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973). The effect of such reasoning is so powerful that the Supreme Court has insulated districts whose lines are based on incumbent protection from challenges invoking the race-based theories adopted in *Shaw* and its progeny. See *Easley v. Cromartie*, 532 U.S. 234 (2001).

⁵⁰ Others have noticed that gerrymanders can have the effect of allocating representatives to political parties in proportion to the parties' popular support. See Persily, *supra* at 668 ("[B]ipartisan gerrymanders often produce proportional representation."); DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF THE ELECTION LAWS 96-97* (1967) (observing that

representative is elected from a constituency that has no physical form but instead consists of an equal number of geographically dispersed and isolated voters who have all voted for her. And all representatives save those at the very bottoms of their parties' lists have safe seats. In both respects, proportional representation is just the perfect accomplishment of the political concentration that bipartisan gerrymanders and partisan migrations both tend towards.

These developments might thus (at least in an ideal world) share in the fairness that explains proportional representation's appeal in ordinary politics. But they also share in proportional representation's infirmities with respect to sustaining the democratic legitimacy of constitutional politics. Political concentration renders mass political engagement across ideological divides unnecessary for winning elections, because candidates in their custom-made constituencies can rely on majorities that they have acquired by the selection of their voters rather than by engaging them. Partisan voter concentration is therefore engagement-defeating, so that it reduces the connection between democratic politics and reciprocal recognition on which the appeal and authority of democratic government—especially with respect to constitutional politics—is built.⁵¹

Indeed, the democratic infirmities of constitutional politics carried out following bipartisan gerrymanders and partisan migrations may be still greater than in proportional representation. The stealth version of proportional representation will legitimate even less effectively than the open version, for at least two reasons. First, a political system that implements proportional representation by stealth will likely not have adjusted the structure of its democracy at the official level to ensure bargaining among representatives of the sort that legitimates ideal-typical proportional representation. And second, the political system will likely not have adjusted the structure of its political parties to ensure that representatives remain faithful agents of their partisan constituents in the manner that the legitimacy of proportional representation requires.⁵² Both phenomena might plausibly be at play in the United States today. The government's enduring presidential structure discourages productive cross

(Contd.)

the 1957 election to the US House of Representatives produced very nearly perfect proportional representation: "on average, each party's share of the seats deviated by only [0.57] percent from its share of the popular vote.") I believe that it has not been noticed that proportional representation is the formal equivalent of a partisan voter concentration—that partisan voter concentration does not just produce the balance among elected officials that proportional representation produces, but in fact *is* proportional representation, at least in the limiting case.

⁵¹ Bipartisan gerrymanders and partisan migrations are not the only innovation of modern politics to have this feature. Instead, they are of a piece with a series of other electioneering techniques that have been developed or improved in recent years—focus groups, opinion polls, narrowly differentiated political advertising, and focused get-out-the-vote efforts—all of which share that they allow candidates to segregate and to choose their voters rather than allowing voters to choose their candidates. (Bipartisan gerrymanders are only the most literal way of doing this.) None of these techniques can naturally be said to violate liberal equality. But they all reduce the degree to which mass democratic politics constitutes a genuine engagement among citizens across ideological difference. And they therefore all reduce the democratic legitimacy, at least on the republican model.

⁵² It may be that, especially over time, bipartisan gerrymanders partisan migrations encourage the development of party discipline resembling that which arises under proportional representation. Certainly the increased importance of party primaries would make it natural to divert political energies to promoting ideological development and purity within the party. But even if this process is real and does increase within-party political engagement in American politics, it will not be enough to secure the democratic legitimacy of the elections on the republican model of democracy. The enduring dominance of the two big parties means that (especially when one party controls all three branches of government) the negotiation and coalition building among many small parties at the official level associated with true proportional representation remains absent from the American political scene. Thus, although increasingly ideological and disciplined parties might integrate their own members (across whatever political differences these members have), the second level of integrating engagements, *across* parties, that proportional representation provides will remain absent from American politics. Indeed, this combination may be especially threatening to democratic legitimacy, as within party engagements (producing partisan blocks of citizens) shift the burdens of democratic legitimation from the popular to the official level of democracy even as the interactions at the official level remain wholly unsuited to carrying this burden. And indeed, something like this seems, at least on casual observation, to be happening in American politics today.

party bargaining at the representative level. And the relative lack of intra-party discipline leaves ideologically committed constituents feeling that their representatives are unfaithful agents.⁵³

Similarly, although perhaps less pronounced, stealth shifts towards proportional representation have occurred in elections for the United States Senate. Senate districts are of course constitutionally fixed to match state boundaries. They thus cannot be gerrymandered. Nevertheless, an arrangement analogous to that plaguing House districts may be produced by partisan migrations working alone. And indeed, something very like this is occurring, as citizens who affiliate with the Democratic Party concentrate themselves in the Northeast and on the West Coast, and citizens who affiliate with the Republican Party concentrate themselves in the Midwest and the South. Thus, although higher percentage of seats remains genuinely competitive in the Senate than in the House, the percentage of competitive Senate seats has also been shrinking in recent years.⁵⁴ And Senators have become less moderate and more partisan⁵⁵—more like officials who have been elected under proportional representation and whose constituents are drawn less from their districts and more from their parties' supporters.

Finally, although now more modestly still, population migrations have perhaps also pushed Presidential elections towards a de facto model of proportional representation. This straightforwardly follows from the developments in the Senate coupled with the fact that delegates to the Electoral College are allocated by state. Partisan migrations subject Presidential campaigns to forces much like those that have shaped Senate campaigns. True first-past-the-post Presidential campaigning occurs principally in the battleground states. And although the data are insufficient to sustain confident conclusions, the number of these appears to be shrinking.⁵⁶

In all these respects, developments taking place outside of the formal system of vote-counting in the United States have pushed the substance of this system in the direction of proportional representation. It seems unlikely, given this convergence, that American democracy is able entirely to resist the infirmities that proportional representation suffers when called on to legitimate constitutional politics. At the same time, the United States faces constitutional choices no less than Europe does, even if the nature of the choices and of their causes differs slightly. American democracy as drawn up and as practiced historically might have been better suited to legitimating constitutional decisions; but the American system is losing this advantage even as the pressures on its legitimacy mount.

⁵³ This phenomenon is illustrated by the Democratic base's disillusionment with moderate or blue dog Democrats and the Republican base's disillusionment with Republican legislators regarded as party members in name only, or RINOs.

⁵⁴ One can see this simply by counting how many Senate elections have been close and how many blowouts over the years. Thus, between 2002 and 2008 only 22% of Senate elections were close (in the sense of being decided by a margin of less than 10%) and 55% of elections were blowouts (decided by more than 20%). In the 1960s and 1970s, by contrast, roughly 40% of Senate elections were close and roughly 40% were blowouts. And in the 1980s and 1990s, these numbers were roughly 30% and 50%, respectively. These counts come from Alan I. Abramowitz, U.S. Senate Elections in a Polarized Era, Table 5, available at <http://www.vanderbilt.edu/csdi/archived/Bicameralism%20papers/abromowitz3.pdf>.

⁵⁵ The prevalence of party-line voting has increased dramatically over the past four decades. See generally Larry Bartels, *Partisanship and Voting Behavior, 1952-1996* 44 AM. J. POL. SCI. 35 (2000). A more recent account of "party unity" – a measure of the "degree to which members of Congress align with their parties on votes that pit a majority of Democrats against a majority of Republicans" – reports an increase from roughly 70% in both chambers of Congress in 1956 to 91% for House and Senate Democrats, 87% for House Republicans, and 85% for Senate Republicans. See Pietro Nivola, *Partisanship in Perspective*, National Affairs (2010), <http://www.nationalaffairs.com/publications/detail/partisanship-in-perspective>.

⁵⁶ 17 states were decided by less than 5% in the 1992 Presidential election; 11 in 1996; 12 in 2000; 11 in 2004; and 6 in 2008. This trend cannot be explained by the closeness of the national electoral counts in the respective races.

5

These pages thus suggest a theoretical connection between the prominence of proportional representation in mature modern democracies and the crisis of legitimacy that these democracies face. The connection is surprising, in some instances twice over. First, proportional representation has received excellent press in contemporary political thought, and so a report of its distinctive shortcomings might for this reason alone be news concerning norms. And second, the stealth insertion of proportional representation into the political order of the United States is underappreciated, so that a report of it states news concerning facts. Both pieces of news are potentially important, as proportional representation is ill-suited to sustaining democratic legitimacy in the face of the constitutional choices that both European and American democracies currently face. The argument developed here speculatively suggests a connection between consequence and cause.

To be sure, lived political legitimacy is a complex phenomenon, and its causes are commensurately elusive. Probably no method exists precisely to apportion fluctuations in lived legitimacy among their several possible causes. Certainly the philosophically informed armchair speculation pursued in this Working Paper cannot do so.

But speculative approaches remain valuable nevertheless. Persons are reflective creatures, and this makes it natural for the experience of political legitimacy to respond to whether or not that experience is *warranted*. (This is especially so where, as in the republican approach to democratic legitimacy pursued in these pages, mechanisms for sustaining the experience of legitimacy are built into the theory of legitimacy's warrant.) Moreover, the question whether or not political legitimacy is warranted remains important even apart from whether the warrant can be translated into lived experience.

Author contacts:

Daniel Markovits

Guido Calabresi Professor of Law

Yale Law School

127, Wall Street

New Haven, CT 06511

USA

Email: daniel.markovits@yale.edu

