The most urgent problem in the design of democratic institutions today is how best to design such institutions in the midst of seemingly profound internal heterogeneity, conflict, and group differences. In different parts of the world, the relevant differences can be religious, racial, linguistic, tribal, cultural, regional, or perhaps of other forms (as a shorthand, “ethnic differences”). This problem is central not just to newly forming democracies over the last generation, but also to more established democracies, as various groups more assertively press claims for political recognition, representation, and influence. We ought to understand this issue, better than we have thus far, as lying at the intersection of democratic theory and democratic institutional design, on the one hand, and questions about the nature of individual rationality and rational choice concerning ethnic group “identities,” on the other.

The argument of this chapter is that academic thought and, for the most part, practical institutional design, has thus far taken too static an approach to this fundamental problem. In our first phase of confrontation with this issue, theorists and institutional designers have been overwhelmed with the problem as it appears at particularly critical political moments: the moment of state formation, or the moment at which societies emerge from conflict, or the moment at which groups demands for inclusion, recognition, and power first become powerfully enough expressed to require an institutional response. These are the moments at which ethnic identities are likely to seem most fixed, most entrenched, most essential to conceptions of self, and most potentially divisive or explosive. Dominated by the urgency of these tensions at the moment of institutional formation, constitutional framers often respond to the problem as it presents itself at that moment. As a result, the implicit view embodied in the institutions they create is frequently a static one: it takes for granted the nature of these ethnic identities and conflicts as they exist at the moment a state’s democratic institutions are forged. In contemporary contexts, the emerging democratic structures often attempt to accommodate these ethnic differences through explicit devices, which can range from guaranteed minority political representation, minority vetoes, consociational executive branches, and the like. Overwhelmed as theory and practice is by the magnitude of these problems at the moment of institutional formation, however, we neglect to recognize the extent to which ethnic differences can be fluid, capable of changing over time in response to shifting circumstances. In particular, we do not take adequate account of the extent to which the design of democratic institutions can both shape the ways in which ethnic identities are expressed or not, and the extent to which these institutions, if not well designed, can entrench these identities and actually
make it more difficult for the inherently contingent nature of these identities to be manifested. Moreover, once democratic institutions are constitutionally built along premises that assume particular ethnic identities, those institutions themselves can become impermeable to change, even as changes in social circumstances undermine these original premises.

Thus, the very institutional structures perceived as necessary to address ethnic difference synchronically, at the moment of original democratic institutional formation, often undermine the dynamic possibilities for how these identities might shift and become more muted over time. The United States Senate affords a stark example. It is now the least democratically structured representative institution among Western democracies, as measured by the one-vote, one-person principle. 34 million Californians have the same representation as 500,000 residents of Wyoming (a population disparity of 68:1). When originally formed, state-based cultural and political identities were strong, but the original population disparity was only 13:1.² Were the representative institutions of the United States being created on a clean slate today, it is difficult to believe a Senate designed as is the current one would emerge. State-based identities are thinner today, but even if such difference were to continue to be taken into account to some extent, it is hard to imagine there would be consensus on accommodating these differences to the extent of a 68:1 departure from political equality. Yet the fundamental structure of the Senate is not a subject of discussion in the United States. That it would be changed today is inconceivable. Overwhelmed by the sectional differences at the moment the United States was created, the framers of the Constitution neglected to build enough capacity for the basic democratic institutions of the state to be modified over time as the sense of ethnic difference itself changed. Perhaps understandably, the framers of the United States’ Constitution missed the essential, but complex logic of this situation: how to both address existing sectional differences while designing a system that did not entrench those differences beyond their “natural” life.³

If it was understandable that the Constitution’s framers, not even sure of the sustainability of democratic self-governance, missed this dynamic perspective on the design of democratic institutions, it is less forgivable today. As the overview essay to this volume attests, the question how democratic institutions should deal with ethnic difference in various societies is often cast as a debate between integrationists and accommodationists.⁴ The former focus primarily on the long-term normative vision of the state; they believe that the risk of long-term entrenchment and solidification of ethnic identities is so great, when political institutions are designed to accommodate group differences, that such accommodations should be avoid. Accommodationists, on the other hand, focus strongly on the immediate, short-term pressures the


³For a superb account of these issues, see MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (Cambridge Univ. Press 2006).

⁴McGarry, O’Leary and Simeon, Integration of Accommodation? The Enduring Debate in Conflict-Regulation.
state faces; viewing accommodation as a practical necessity to ensure widespread support for and stability of democratic institutions, accommodationists insist that realism requires that acknowledgment of ethnic differences be built into democratic institutions. If anything, there is growing support today for accommodationist approaches. But integrationist approaches often founder at the moment of state formation for lack of sufficiently widespread political support at this particularly risk-averse moment. At the same time, if accommodationist approaches are not designed with great care, they risk precluding the rise of more integrationist politics over time. With another generation of experience, the task, I will argue, it not to choose between integration or accommodation writ large. To the extent accommodation is necessary or desirable at the moment of state formation, there is a great deal of difference among the devices and institutional structures through which accommodation is operationalized. The choice of specific structures should be made in a way that builds in the greatest capacity possible for changes in the nature and intensity of ethnic differences over time. If accommodation is necessary, it should be designed, to the extent possible, not to preclude the emergence of more integrationist politics over time. Put in other terms, the task is not to choose between integration and accommodation but to design institutions that enable societies to reach different balances between the two over time.

We need a comparative and pragmatic assessment of the different institutional devices democracy has for addressing ethnic difference. That assessment should take a more dynamic perspective on the mutual interaction over time between ethnic identities and ethnic differences and the design of the institutions and processes through which democratic political competition is channeled. The succeeding sections develop these themes, while the chapters in this book provide rich empirical experience from recently created democracies out of which we can try to reach general insights about how best to design democratic institutions to manage ethnic difference.

I.

Let me begin with the issues concerning the nature of ethnic group identity. The general question is how to understand the relationship between democratic institutional design and the formation, mobilization, maintenance, and dynamics of the ways in which individuals come to identify and forge (or not) particular groups affiliations. These processes of identity formation, expression, mobilization, and the like fuel the group conflicts to which modern democratic institutional design is meant to respond. Without understanding this underlying dynamic, institutional designers lack a sufficiently deep grasp of the essential problem which they are attempting to address.

Academic work has been substantially ahead of practical political action, as well as more journalistic and popular accounts, when it comes to understanding the dynamics of ethnic group conflict in democratic states. I want to stress four points that emerge from this work. I will present them first abstractly, then illuminate with concrete examples.

First, ethnic identities are less a matter of fixed, profound, fundamental psychological and affective attachment than fluid and contingent possibilities that become mobilized by

\[Id. \text{ at 28.}\]
specific circumstances. Indeed, in many contexts, there is not one single “ethnic identity” that citizens of a state simply “have,” but several different potential ethnic identities that can become mobilized. In such contexts, the question is not one of “ethnic difference,” but which of several potential “ethnic differences” actually become salient. To be sure, background cultural and historical circumstances determine and limit the range of potential ethnic identities that might become mobilized. Moreover, once certain identities have become powerfully mobilized, they can become substantially more hardened and less fluid in the short-term. At the moment of most acute group conflict, such as the aftermath of a civil war, the relevant dimensions of group difference are likely to seem the most enduring and refractory.

Nonetheless, ethnic identity has been the subject of a great deal of academic work in recent years, both theoretical and empirical, and this work consistently reveals a dynamic process behind the formation, maintenance, and diminishment of these identities. Identities that policymakers take as given have instead been constructed through specific circumstances and processes. In the years since democratization in India, for example, the level of Hindu-Muslim conflict, according to one major study, “has varied so much over time and across locations that an alleged general propensity to ethnic hatred cannot explain much.” As a great deal of work documenting similar facts in various societies suggests, these identities are more fluid than often assumed. This fact can be particularly difficult for Americans to recognize, because the most incendiary group difference in American history – the racial one – appears particularly primordial and enduring. Yet even this “difference” is more fluid and less deterministic, historically, than most Americans recognize, as I will illustrate in a moment.

Second, the most powerful and effective incentives for mobilizing identities along one dimension or another are generated by the competition over political power. Such power is an exceptionally effective vehicle for distributing material resources, whether in the form of patronage, rents, licenses, subsidies, general policies with beneficial distributional effects, or other state-created benefits. Formal political power is also an essential vehicle for distributing

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6The analysis in the following pages draws centrally on works such as Rogers Brubaker, ETHNICITY WITHOUT GROUPS (Harvard Univ. Press 2004); DAVID D. LAITIN, IDENTITY IN FORMATION: THE RUSSIAN-SPEAKING POPULATIONS IN THE NEAR ABROAD (Cornell Univ. Press 1998); David D. Laitin, Marginality: A Microperspective, 7 RATIONALITY AND SOCIETY 31 (1995). See also Shaheen Mozaffar et. al., Electoral Institutions, Ethnopolitical Cleavages, and Party Systems in Africa’s Emerging Democracies, 97 AM. POLI. SCI. REV. 379, 379 (2003) (noting “the accumulated findings of over three decades of comparative research on ethnopolitics” attests that “ethnopolitical groups and associated ethnopolitical cleavages are not primordially fixed but constructed in the courts of social, economic, and political interactions . . . .”).

7JACK SNYDER, FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT 289 (W.W. Norton & Co. 2000). This work views “inherent” ethnic conflict to be less significant than the ways in which “the political context has varied in ways that sometimes fan the flames of ethnic rivalries and other times dampen them.” Id. at 290.
the expressive resources Charles Taylor famously denominated “the politics of recognition.”8 Particularly for ethnic groups that perceive themselves to have been previously exploited or excluded from participation under prior regimes, this kind of formal recognition through explicit representation in the institutions of governance can be a fundamental demand.9

The third point is a more specific application of the second. There are numerous ways the institutional structures and processes of democratic political competition can be organized, all of them consistent with general principles of democracy. But the particular way in which the structures for democratic competition are designed generates distinct incentives for mobilizing coalitions and identities in one way rather than another. Hence, one of the most powerful forces for constructing and shaping ethnic “difference” are the structures through which political competition is channeled in a democratic state. That is, democratic institutions cannot be viewed only as responses to pre-existing ethnic differences. They must be designed with an awareness of the extent to which, and the ways in which, they also construct the very ethnic differences at issue.

Fourth, the design of political institutions can dominate “culture” in accounting for a society’s ethnic differences. This is an intentionally tendentious statement, given that proving dominant causal relationships is no easy task for phenomena as complexly caused as ethnic identity formation and mobilization. I offer it partly based on my own direct study of the American experience, but also because, by putting the point in such strong terms, I aim to call attention, at least, to how much more powerful the design of political competition is than often realized in the shaping of ethnic identities. To be sure, background conditions (themselves, at times, the outcome of previous modes of “politics” in earlier regimes, including non-democratic ones), influence the latent identities capable of being mobilized through democratic politics. But formal politics, particularly in democracies, creates one of the most shared and visible public spaces and platforms. Nowhere are more resources devoted to the mobilization of coalitions and group affiliations than in the pursuit of political power. As political elites and entrepreneurs mobilize various identities, including ethnic identities, in efforts to forge winning coalitions, these efforts radiate into other arenas, including more general cultural and social understandings.10 The structure of political competition both creates incentives to mobilize

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9Note the following observation regarding democratic politics in India: “But it is no accident that arguably all the potent mobilizations that independent India has seen, in some respects, involve an appeal to self-respect. Most of our politics has been a politics of recognition.” PRATAP BHANU MEHTA, THE BURDEN OF DEMOCRACY 49 (Penguin Press 2003).

10A detailed insider’s account of these issues in South Africa makes this point regarding ethnic differences there. See HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 113 (Cambridge Univ. Press 2000) (“Claims of cultural diversity and difference have come to reflect a complex interaction between real cultural and ethnic identities on the one hand and the claims of political leaders on the other. These leaders’ assertions of cultural and ethnic particularities are intertwined with their own attempts
identities along certain lines rather than others and provides a focal point for the coordination of citizens’ strategic choices about how they self-identify. As the political domain mobilizes certain identities and more firmly entrenches them, these identities become more culturally powerful as well. That outbreaks of ethnic violence coincide with the electoral cycle in countries like India, for example, is no accident; political competition in India is a principle vehicle for politicizing latent cultural and ethnic cleavages. Over time, the role of political institutions in shaping these identities can fade into the background and be forgotten. The identities come to seem matters of deep attachment and essential cultural difference.

Let me offer a few concrete studies that inform these four general points. One of the best comes from a recent, superb study of ethnic politics in Africa by Daniel Posner, where the country of Zambia, in particular, provides an ideal social-scientific experiment in the relationship between the design of political institutions and the nature of ethnic identity. With respect to ethnic identities, Zambia has four broad linguistic groups, regionally clustered, and 72 tribal groupings, more locally concentrated. With respect to the institutional design of political competition, Zambia has alternated, since independence, between a multi-party and a one-party system of political competition: multi-party from 1964-72; one-party from 1973-91; and then multi-party again since 1991. The ethnic differences that became politically and hence culturally most salient – linguistic or tribal differences – were profoundly shaped by which of these institutional systems for political competition was in place.

During the eras of multi-party democratic politics, control of the executive was part of the competitive political process, which also involved competition for representation in the parliament. The effective focus for elections was the national level, because the Presidency was the most powerful office and party labels down the line ensured that parliamentary candidates were representatives of national coalitions; that is, the effect of competition over the Presidency was to ensure that parliamentary elections were also nationalized through party identification.

See also Kanchan Chandra, WHY ETHNIC PARTIES SUCCEED: PATRONAGE AND ETHNIC HEAD COUNTS IN INDIA 290-94 (Cambridge Univ. Press 2004) (providing an instrumental theory of ethnic voting in “patronage democracies” and observing capacity of political elites successfully to choose whether to mobilize identities around religion, caste, or regional bases).

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For this point about India, see Jack Snyder, supra note 7, at 294. As the resource for this finding, Snyder draws on DENNIS AUSTIN, DEMOCRACY AND VIOLENCE IN INDIA AND SRI LANKA (Council on Foreign Relations Press 1995).

Daniel Posner, INSTITUTIONS AND ETHNIC POLITICS IN AFRICA (Cambridge Univ. Press 2005). The material on Zambia in the following paragraphs is taken from this book.
With an electoral design that encouraged the building of nationwide coalitions to gain effective power, political campaigns, candidates, and coalitions became organized around Zambia’s linguistic differences. Both the large size of the four groups and their regional distribution created rational incentives for candidates and parties to calculate that mobilizing potential supporters along linguistic lines would enable effective winning coalitions. On the other hand, the more locally-based tribal differences were not politically mobilized and did not find meaningful expression in these nationally-oriented election campaigns.

The shift to one-party elections involved nothing more than a single change in the Constitution. According to Posner’s detailed study, there was no difference in political freedom or in any other way associated with the formal, constitutional change to a one-party system. But in the era of one-party elections, effective political competition between candidates – which did occur – took place at the local, not national, level. Under this structure, the President was chosen by the central committee of the ruling party; voters then had the option only of voting for or against this candidate in the general election. As a result, there was no need for parties and leaders to compete for voting support with respect to the presidency. There was, however, substantial competition within individual constituencies for seats in the parliament; indeed, on average more than four candidates ran for each seat during the era in which the law permitted only one-party (indeed, this contrasted with only slightly more than two candidates running per district, on average, when the law permitted multi-party competition). These individual election districts tended to be homogenous by language, but heterogenous by tribe; 80% of them were rural. With the meaningful electoral arena being these local districts, rather than the national level, political competition responded to the rational incentive structure generated by becoming organized around tribal differences, not language ones.

Posner’s careful and detailed study qualitatively and quantitatively documents specifically the ways in which politics became organized around linguistic differences during multi-party competition but tribal differences during one-party campaigning. Most remarkable is not just that the election structure shaped the relevant ethnic differences mobilized, but that these changes took place so rapidly – strong evidence for the force with which political incentives can encourage mobilization of one or another ethnic identity. I will highlight only a few of the specific differences Posner chronicles. First, candidates viewed the importance of their identities, tribal and linguistic, differently under the two systems. In the one-party system, where competition was based at the local district level, candidates self-selected to ensure that their tribal “identity” matched that of the district in which they ran. In multi-party competition, where competition was structured through the incentives created by the national focus of elections, candidates were willing to run outside their “own” tribal constituencies. Thus, in a particularly telling finding, 83% of the candidates who shifted districts between the two systems moved from outside their tribal district to inside their tribal district when the election system shifted from multi-party to one-party.\footnote{\textit{Id.} at 208.} Second, politicians made different kinds of ethnic appeals under the two systems: tribal appeals under one-party competition, linguistic appeals under multi-party competition. Third, in multi-party competition (but only then), political elites sought to build civic associations that united multiple tribes, often along provincial or linguistic lines. Finally,
So is Zambia divided by tribal differences? Or by linguistic ones? The answer is that it depends, to a considerable extent, on the institutional structures of political competition. Note that the mechanism at work is that voters do use some form of “ethnicity” as a proxy for gauging the extent to which those seeking power through elections will protect or enhance the voter’s interests; ethnicity does become a credible commitment device for promises, explicit or implicit, that candidates and parties make with regard to both material and expressive resources. Indeed, the less information voters have and the more risk averse they are – factors likely to be at their height in the initial stages of democratic transition and early elections – the more likely voters are to use ethnicity as a proxy in these ways. Nonetheless, even with this strong, general sense of ethnic affiliation, the design of democratic institutions and processes dramatically conditions which ethnic identities are mobilized in the public sphere.

This striking example from Africa is more extensively documented than most but is hardly aberrational. In India, for example, during the 1920s and 1930s, voting was limited to those able to meet high property-holding requirements; as a result, political competition was organized around issues that divided the property-holding upper-caste elites. In contrast, when the franchise was broadly expanded in the 1950s, the prior political parties shifted to appeals based on Hindu-Muslim identity differences. Similarly, in then Zaire (now the Democratic Republic of Congo), the first competitive elections were confined to seven major cities; in those elections, the dominant cleavages were tribal ones. Three years later, when national elections began for national and provincial representative institutions, political elites began “defining region rather than [tribe] as the political building block” and essential ethnic cleavage. Again, what makes these changes all the more notable is how quickly they emerged when the structure of political competition was changed. On the one hand, this might seem obvious: shift the way the electorate is constituted and the dynamics of political competition – including the nature and extent of the group conflicts that will be mobilized – will change. On the other hand, we do not appreciate this insight deeply enough when it comes to ethnic identities, which are often viewed as far less fluid and less responsive to the incentives created by the design of political competition than is frequently the case.

A particularly powerful example is offered by the American experience with race. A common misperception is that the black-white racial divide in the American South had an essentially fixed, rigid structure from the end of the Civil War (1865), or the end of Reconstruction (1876), until the civil-rights revolution of the 1960s. This divide is thought to be the quintessential example of a deep, primordial identity attachment that fueled an ideology of white supremacy, segregation, and related state-sanctioned racial practices throughout the long era after the formal end of slavery. But the historical experience with racial “difference” in the

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15Crawford Young and Thomas Turner, The Rise and Decline of the Zairian State 150 (Univ. of Wisconsin Press 1985).
American context is more complex, as my own research and that of others on this issue demonstrates. Even with respect to a group difference thought to be so deeply entrenched in American culture, the structure of democratic elections profoundly altered the extent to which racial identities were made salient and were mobilized. For more than a generation in the late 19th century, from roughly 1867-1890, blacks were legally entitled to vote in the American South. Despite how strongly held racial identities might have been in some sense, the extent to which those identities found public expression depended on the incentives that the structures of political competition generated. In the era in which black men were legally entitled to vote, the nature of political coalition formation – and the resulting effect on officeholding and public policy – was dramatically affected, in ways that most Americans today surely do not realize. In North Carolina, for example, a fusion coalition of Republicans and Populists, with black and white political support, controlled the state legislature from 1894-1898. Numerous black officials were elected to local offices such as justice of the peace, alderman, county commissioner, register of deeds, city attorney and the like. To be sure, interracial coalitions like this, which existed in other parts of the South as well, did not mean that whites and blacks were living in racial harmony. But the incentives created by the pursuit of political power has a stunningly powerful effect on the kind of coalitions that get mobilized, and the payoffs those coalitions must make to their constituent members – powerful enough to overcome even “ethnic differences” seemingly as deep rooted as that of race in the American context.

This era of interracial coalitions ended when, not surprisingly, the institutional structure for elections was intentionally changed and hence when the political incentives for electoral competition were altered. Starting in the 1890s, southern state legislatures enacted a series of changes designed to remove most blacks and many poor whites from political participation: literacy tests, poll taxes, grandfather clauses, felon disfranchisement provisions, increased registration barriers, and the like. These successful change in the electoral rules to disfranchise these voters was not, or not merely, an expression of a cultural ideology of racial supremacy. It was an intentional effort to change the dynamics of partisan political competition – an effort that was extremely successful. Proponents of these changes sought to ensure their own political dominance by destroying the conditions that fueled the kind of coalitions that had challenged their authority, including the kind of interracial coalitions that had controlled state politics in a place like North Carolina. The highly visible cultural expressions of white racial supremacy,


18See Kousser, supra note 15.
such as segregation, did not become legally enacted until black voters had been removed through these legal changes from political participation. Another specific example: When Congress in 1867 first enfranchised black residents in the District of Columbia, for example, the political parties paraded “for the first time in living memory” \textit{without} banners “in regard to niggers, miscegenation and similar matters.” In other words, changes in the structure of political competition enabled or diminished the full flowering of the most powerful symbols of “racial difference.”

The American experience with race is particularly telling because once the late 19th century changes in elections in the South were put into place, they remained largely intact until the Voting Rights Act of 1965. As a result, they faded into the background. Instead, the cultural expressions of racial difference, such as segregation, remained highly visible and publicly displayed on a day-to-day basis. The history of black-white political cooperation from 1867-1890 was largely forgotten. Policies and practices of racial conflict and subordination came be seen as “natural” expressions of essential, refractory racial “differences.” Comparative perspective is also illuminating on the extent to which racial differences are, instead, shaped by the structure of democratic political competition. Like the United States, Cuba was one of the last countries in the world to retain a system of racialized slavery; indeed, Cuba abolished slavery even later than the United States did. Despite emerging from a culture of racialized slavery, Cuba after independence did not, unlike the American South, create an election structure that disfranchised blacks. As a result, blacks were more fully appealed to in politics (and hence culture) and integrated into the structures of political competition and governance. To be sure, race relations in Cuba had their own complexity in the years after independence. But Cuba did not have the comparable history of a strong system of state-sanctioned racial hierarchy and subordination that the American South, once the electoral rules had changed, did. To the extent one believes “cultural” attitudes toward race are likely to be rigid and deterministic in societies emerging from longstanding systems of racialized slavery, both comparative perspective, detailed appreciation for the fluidity of American history, and recognition of the way structures of political competition shape cultural attitudes undermine any simplistic notion of “essential”

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\textbf{20}This is the theme of Van Woodward’s \textit{The Strange Career of Jim Crow}, \textit{supra} note 15. \par
\textbf{21}For the process by which this happened, see Rebecca J. Scott, \textit{Slave Emancipation in Cuba: The Transition to Free Labor}, 1860-1899 (Princeton Univ. Press 1985). \par
\textbf{22}For a superb study of these issues, see Alejandro De la Fuente, \textit{A Nation for All: Race, Inequality, and Politics in Twentieth-Century Cuba} (Univ. of North Carolina Press 2001). For a more focused study during the immediate post-slavery period, see Ada Ferrer, \textit{Insurgent Cuba: Race, Nation, and Revolution}, 1868-1898 (Univ. of North Carolina Press 1999). For a comparative perspective on the role of black political participation in Cuba and the United States following the end of slavery, see Rebecca J. Scott, \textit{Degrees of Freedom} (Harvard Univ. Press 2005).
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cultural differences – even with respect to the “ethnic divide” thought to be most rigid and refractory in American political history.

At the outset, I observed that academic work was considerably ahead of practical politics with regard to how fluid and contingent ethnic differences and identities are capable of being. But scholarship itself has been less attentive to how much the structures of political competition, as opposed to a more vaguely attributed “cultural construction of identity,” is a driving force in mobilizing and encourage these identity formations. Academic culture over the last generation has seen a diminished interest in the humanities in formal political and questions of electoral politics, and a much greater focus on issues of culture.\textsuperscript{23} If we are to understand ethnic identity formation and mobilization, this is a mistake. It is also a mistake if we are to think soundly about the design of democratic institutions in the midst of ethnic conflict.

II.

I now want to turn from ethnic identity analysis to issues of constitutional and democratic institutional design. At the outset, it is helpful to be precise about the nature of the institutional design problem in societies potentially divided deeply along lines of ethnic difference.

The structural nature of the problem is that potentially vulnerable minority “groups” need credible institutional design commitments that they will not be exploited in an overly majoritarian democratic system. This need is particularly acute for societies emerging out of conflict and forming democratic regimes for the first time. Lawyers tend to think of Bill of Rights and Constitutional Courts as the primary institutional solution to this need. But these are relatively weak institutional solutions. Judicial review operates at best as an ex post check or negative veto on the exercise of political power. It can afford, perhaps, a defensive shield. But judicial review rarely is capable of ensuring fair distributional allocation of goods or providing affirmative benefits to minority groups. It also does not respond fully to the expressive demands for recognition that are so often central to ethnic minorities and to the legitimacy and stability of democratic institutions across ethnic groups.

Minority groups today typically recognize these limitations on Bill of Rights-style protections and demand greater ex ante forms of security and recognition devices. They also seek to have credible institutional commitments built directly into the structures of political governance, within either or both the legislative and executive branches. At the same time, the risk is that locking in these commitments through the design of political institutions hazards the two consequences noted earlier: the creation of even greater incentives to mobilize politics around these identities and thus to increase their broader cultural salience, and the freezing of institutional structures into a mold that reflects the circumstances at the moment of democratic formation but that makes it difficult for these institutions at adapt or be adapted down the road as ethnic identifications change. Paradoxically, it is precisely when democratic institutions are

\textsuperscript{23}As Rogers Brubaker, a leading scholar on these issues, puts this point: “Much social analysis today is informed by what might be called an overethnicized conception of history, politics, and social interaction. The ethnic categories deployed by political and cultural entrepreneurs are often uncritically adopted by social analysts.” Brubaker, \textit{supra} note 6, at 151-52.
most successful at stabilizing and compromising among conflictual groups that this problem becomes most acute. The more that experience under democratic institutions convinces potentially vulnerable minorities that majorities will not exploit these minorities, the more support there will be for more integrationist institutions. But the structure of democratic institutions tends to be self-perpetuating, as ideological, as well as more self-interestedly political, interests crystallize around existing institutional structures. In particular, those who hold political power have a strong stake in preserving the structures and modes of competition through which they have attained that power.\footnote{One of the consistent findings in political science is how little change there tends to be in the basic structure of electoral systems once established. \textit{See} J. COLOMER, \textsc{Handbook of Electoral System Choice} 57 (Palgrave McMillan 2004). Uncertainty about the effects of change appears to play a major role. \textit{Id.} at 6.}

Given an ethnically divided society that is forming or re-forming its democratic institutions, and in which the fully integrationist approach is not an option (because of practical political constraints or, perhaps, because such an approach ought to be rejected for more normative reasons), the question is \textit{which} strategies, devices, and institutional structures are the best means for accommodating ethnic conflict? In particular, we want to frame this question in dynamic, not static terms. My aim is to identify techniques of accommodation that nonetheless leave the democratic system with the greatest capacity to respond to shifting conceptions of ethnic identity as that system develops.

I highlight five of these approaches here, given constraints of space. I have chosen these particular ones partly because some are more novel and partly because we have some concrete experience with each:

\textit{1. Multi-stage Democratic Processes.} One strategy is to design the democratic regime so that it comes into full being only in multiple stages. The moment of state formation, that is, expressly entails a commitment to a sequencing of stages in the way the state’s democratic institutions will be structured.

In the initial stage, the institutional structures of democracy can be accommodationist. They can, for example, have strong consociational features. At the moment of state formation, the need to ensure inclusive structures of representation is often at its height, as is the risk aversion regarding democracy of relevant minority groups. But the constitutional design also commits to treating this initial stage as transitional. At a later stage, which is itself built into the original constitutional structure, the structures of democracy expressly become integrationist. Rather than choosing once and for all between accommodation and integration in dealing with ethnic difference, a constitutional system designed in this way negotiates between the two alternatives: accommodationist at the outset, but integrationist as the evolutionary steady state of the democratic system.

South Africa provides a model of this particular technique, as it does more generally for a managed, multi-stage transition to democracy. As the chapter by Richard Simeon and Christina Murray documents, there were strongly conflicting views among leading players as to whether a democratic South African should adopt a power-sharing or a Westminster-style majoritarian
system of democratic institutions. Instead of choosing one option or the other at the outset, the compromise underlying the 1993 Interim Constitution required that a power-sharing, consociational structure of accommodation be established for the first five years. The first elected government was designed to be a government of national unity. Any party winning 20 per cent of the seats in the National Assembly was entitled to appoint a Deputy President; any party with more than 5 per cent was entitled to cabinet representation. Thus, former National Party President F.W. DeKlerk became Deputy President and Mangosuthu Buthelezi, head of the Inkatha Freedom Party, became part of the cabinet, one of nine minor party politicians to do so. As Simeon and Murray note, this was “pure Lijphart:” a consociational structure designed to ensure stability and buy-in from the major ethnic and party groups in South Africa by ensuring recognition of these groups in the formal political governance structures. Acceptance by the leaders of the African National Congress of this interim, consociational executive branch, along with the National Party’s acceptance of the right to an elected representative parliament, were “the key elements of agreement in South Africa’s democratic transition.”

But this was consociationalism structured to be limited in time. The Interim Constitution contained the five-year “sunset clause.” After that time, the democratically elected national parliament was given the power to write a new constitution. That constitution could keep or reject this power sharing, consociational structure. Once this period was over, South Africa’s parliament abandoned the power-sharing arrangement and moved to a Westminster style, majoritarian system. Thus, an accommodationist structure enabled the evolution to a more integrationist one. As Simeon and Murray conclude, “majority rule has won out over a power-sharing model of South Africa democracy.” To date, the South African system is considered essentially a success in generating the stability of democratic institutions in a post-conflict society filled with a variety of potential ethnic conflicts.

The current Iraqi constitution makes use of a similar set of devices. Given the intensity of current ethnic divides in Iraq, a majoritarian structure for governance would not have been accepted by the non-Shiite minorities. But as in South Africa, the current Iraqi constitution creates a staged transition process, in which the first stage is more consociational, but with a sunset clause, while the permanent stage is more majoritarian. Thus, most executive authority is in the hands of a Council of Ministers, which is headed by a prime minister. But the prime minister cannot be appointed until the election of a Presidential Council. During the four-year transitional period, this is a three-person body that then charges the leader of the largest party in the legislature with forming the Council of Ministers, which the legislature must then approve in a majority vote. The Presidential Council is elected by a two-thirds majority in the legislature. The Constitution does not set seats aside on the Presidential Council on the basis of religion or

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25Simeon and Murray, Recognition Without Empowerment: Minorities in a Democratic South Africa.

26Id. at 27.

27See Klug, supra note 9, at 105.

ethnicity, but the two-thirds vote requirement is designed to encourage coalition building, as it has. The current Presidential Council consists of a Kurdish president, a Sunni vice-president, and a Shi’a Arab vice-president. After the four-year transition, the Presidential Council is to be replaced by a single-person presidency, which can be established by a majority vote of the legislature. Thus, the vision behind this structure is consociational power sharing in the first phase of democracy, but with a built-in shift to a more majoritarian, more integrationist political system. In their chapter on Iraq, John McGarry and Brendan O’Leary call this and other features of the Iraqi constitution a form of “liberal consociationalism.” Consistent with the perspective I am urging, this is an emerging form of constitutional design that recognizes practical needs to accommodate ethnic differences at the moment of state formation, but that also attempts to devise structures that do not lock those differences into place indefinitely.

Of course, the question is why ethnic minority political elites would agree at the outset to a staged sequence in which the ultimate end state is majoritarian democracy, if they are not willing to accept such a system at the outset. Perhaps they believe the accommodationist phase will give they and their constituents time enough to judge whether they can trust in a more majoritarian system; if not, perhaps they will seek to escape, including their violence, the terms of the original deal. Perhaps, in some contexts, the alternative of a delayed transition to a full majoritarian system might be better than the alternative options (indeed, De Klerk sought to have the power sharing provisions of the interim constitution inserted as one of the “core” constitutional principles that would be binding for the drafting of the permanent constitution, but he failed in this effort). More generally, we also know little about the time horizons on which political elites function.

There are many ways in which temporal sequencing instruments might be used, with the initial democratic stage tacking to the side of greater inclusiveness and broader formal representation of ethnic differences, while later stages seek to diminish the intensity of these differences in the political arena. For example, PR systems can be designed with low thresholds at the outset, to address the risk averseness of small minority groups and parties. But instead of taking a static approach to this question, which might lock a 1 per cent threshold into place in the constitution indefinitely, the constitution can specify raising that threshold by specific amounts over time. Again, the contexts in which potentially vulnerable minorities might accept such a two-stage process are hard to specify in general terms. Alternatively, in some systems, electoral thresholds are initially set at a high level, to minimize fragmentation, but could be designed in the original constitution to ratchet down in a pre-set way over time. But institutional designers and political negotiators should at least be aware of these kinds of options, ones that build greater dynamic flexibility into constitutional systems.

29James Hamill, A Disguised Surrender? South Africa’s Negotiated Settlement and the Politics of Conflict Resolution, 14 DIPLOMACY & STATECRAFT 1, 9 (2003). Hamill suggests three specific contextual factors account for De Klerk’s willingness to accept a delayed transition to majoritarian government: lack of international support for minority-protecting provisions to benefit whites in the South African context; the ability of the ANC to destabilize South Africa if its demands were not met; and a young generation of NP politicians who viewed the transition to majoritarianism as inevitable. Id. at 16-19.
2. Novel Voting Systems. The conventional choice between voting systems is between proportional representation (PR) and districted elections with plurality or majority elections (single-member districting, or SMD). There are particular risks to both systems in ethnically divided societies. The effect of SMD elections will depend heavily on the geographic distribution of the relevant ethnic groups. One risk is when an ethnic minority which is relatively dispersed, so that it might make up 25% in most election districts. In SMD elections, that minority will be outvoted in all of these districts, if voting it heavily polarized along ethnic lines. A second risk is that SMD elections require the creation of individual election districts, which will have to be revised regularly to keep up with population changes. Not only does this introduce the risk of gerrymandering, depending on who is given the power to draw the lines. In Malaysia, for example, election districts were originally designed to include many that were balanced between Malay and Chinese parties. But by 1974, these boundaries had been so heavily gerrymandered by the Malay majority that a vast number of districts were Malay majority, while the Chinese were overwhelmingly packed into a few districts in which most of their votes were therefore wasted.30

But even under the best of circumstances, with a non-partisan, independent body assigned this power, the way district lines are mapped out will constantly entail a direct confrontation of ethnically-charged issues. Line drawing can affect the distribution of political power; those in charge must decide whether, for example, to create two districts in which a particular ethnic group constitutes 30% in each district – in which case, with polarized voting, those groups will always be on the losing side – or one district in which that group constitutes a 69% majority. Each time issues of this sort are confronted can be divisive and further polarizing. South Africa reportedly chose to avoid using SMDs, for example, because that would force decisions to be made, and re-made, about the racial composition of districts – a process that political leaders believed would be explosive.31

PR systems can avoid some of these problems through nationwide elections. PR systems can ensure formal representation of less-than-majority groups. For this reason, they are often favored by ethnic minorities in divided societies. If political parties have a strong ethnic cast, the society’s ethnic differences will be fully represented in a parliament that “mirrors” those differences. If no party manages a majority, coalitions will have to be made across ethnic lines to have a functioning government. One standard objection to PR in ethnically divided societies is that it assumes political leaders will have the incentive to exercise a kind of “statesmanship” and construct coalitions across ethnic divides. But as a leading critic points out, there are a number of reasons experience offers to question that assumption.32 Leaders are not necessarily


31This is based on private communications from an ANC leader in the negotiation process over constitutional design in South Africa.

less ethnically divisive than their supporters; even if leaders are inclined to be, they can face a high price from competitors prepared to punish them; in bipolar ethnically divided states, where conflicts are often the most intense, PR will give one party complete dominance. Put in other terms, “[c]oalitions that are created after elections merely to form a government of 50 percent plus one of the seats in parliament may prove to be fragile when divisive ethnic issues arise.”

But there is one further limitation of PR that is inherent to it as a solution to ethnic conflict that is particularly deep, even if insufficiently appreciated. PR is a top-down solution to ethnic conflict. Indeed, it might exacerbate these conflicts among the mass of voters, even as it seeks to give incentives to political elites to overcome these conflicts. PR encourages the formation of smaller, more ideologically coherent parties – including ethnic-based parties – because any party gets representation in proportion to its votes, as long as it surmounts the election threshold (rarely higher than 5%). PR encourages coalitions and compromises to form after the election, among political leaders, not before, among voters. PR generates no incentive for voters to vote outside their “natural” affinity groups; it does not require voters to take into account the different views and preferences of voters outside the former’s natural group. PR seeks to represent faithfully in the parliament the differences that exist among groups in society; it does not seek to overcome those differences at the level of individual citizens.

A third option other than SMDs or PR is greater use of what are called vote-pooling systems or alternative voting (AV) systems. These have different forms and go under different names (single-transferrable voting, preference voting, instant runoff voting). The core concept is that voters spread their votes out among more than one candidate. As a rough illustration, the system starts with voters ranking candidates in order of preference, rather than voting for just one candidate. The first choices of voters are then tabulated; if no candidate gets enough votes to be elected, the last place candidate is eliminated, and the votes of all the voters who voted for that last place candidate are now transferred to their second choice candidate. This process continues until one candidate emerges with an outright majority (50% +1).

The logic behind these systems is that both candidates and voters are given incentives to think beyond their “natural” affinity groups. For candidates, instead of appealing only to their natural base, which in ethnically divided societies with PR might well be their fellow ethnics, candidates know they can benefit from being the second or third or even later choice of other groups of voters. Thus, these systems encourage candidates to appeal across ethnic lines. The system can also encourage parties to form and announce pre-election coalitions, so that their supporters get clear cues about which candidates and parties to rank second, third, and the like. Similarly, for voters the vote that actually counts might not be their first choice, but their second or later. Voters are thus encouraged to think more broadly than for their favorite candidate; there is an ex ante effect that might moderate ethnic divides among voters. In theory, these vote-pooling systems thus encourage a bottom-up and top-down mode of political action that encourages surmounting ethnic differences at the same time they recognize the reality of current ethnic divides. These systems also are inherently responsive to changes in ethnic identity over time; voters can choose in each election what their strongest voting identities ought to be.

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In the recent constitutional redesigns for South Africa, Bosnia, and Fiji, proponents urged adoption of AV. Fiji was the first country to adopt AV for nationwide legislative elections for the intended purpose of minimizing ethnic conflict. Since independence, Fiji has had ongoing tension between the 52% indigenous Fijian and 44% Indian communities. Following a military coup in the late 1980s, an agreement on a new constitution was created in 1997. Donald Horowitz, a leading AV proponent, directly influenced this constitution. And Horowitz has claimed the election results in the years since as at least a mixed success. In the first election after this system went into effect, two multi-ethnic coalitions emerged; both made arrangements for sharing seats and exchanging preference votes; for the first time, a prime minister from the smaller, Indian community was chosen; and Indian-led coalition parties won seats even in districts with only 20-30% registered Indian voters.

Unfortunately, matters are not so simple regarding this important first experiment. The elected coalition quickly fell apart. A year later, this government was overthrown in a coup.

More specifically, a careful study of how voters and parties used the AV system showed that it had not worked as assumed; in fact, “far more preference votes were transferred from moderate parties to the more radical parties than vice versa.” The reason is that the moderating effects of AV will emerge only if voters rank candidates (or parties, to the extent voting is based on party affiliation) from more to less ethnically extreme. The assumption that voters will do so is critical to the ethnic moderating justification for AV. In many contexts, that assumption, which is prima facie plausible in societies polarized along ethnic lines, will no doubt be warranted. But that political preferences will have this structure cannot be taken for granted. In Fiji, for reasons perhaps having to do with a peculiar feature of the unique AV system created, the second choice of voters was not the more moderate party of their ethnic group, but a party chosen for purely tactical reasons. This particular instance does not indict the theory of AV, nor undermine the

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35It should be noted that the circumstances in which AV can be effective in encouraging vote pooling require ethnic heterogeneity in the relevant electoral constituencies and multiple political parties. These circumstances did exist in Fiji.

36Id. at 633-34.

37Id. at 647.

38Fiji’s system allowed voters to rank order candidates “above” or “below” the line on the ballot. Below the line, voters simply rank ordered candidates. But the (moderate) parties that designed the system feared that Fijian would only give preferences to Fijian candidates, and Indian voters to Indian candidates. Thus, political parties were required pre-election to file preference lists ranking all candidates in each district. Voters were given the option of just voting for a single candidate, which was called voting “above” the line. If they did so, they would automatically be assigned the preference rankings below their express first choice based on the list the party they had voted for had filed. 92% of voters voted above the line. Thus, the
vote transfer was not the product of individual voter choice, but of the coalitions the parties had selected in advance. The parties formed these coalitions based not on policy, including policy on ethnic issues, but on purely tactical bases – whatever coalition was most likely to defeat the incumbent officeholders. Thus, as soon as they won office, the coalition, lacking any policy coherence, fragmented. See id. at 632, 635, and 635 n.13.

Vote pooling structures do remain promising as a means of ensuring minority representation and influence in divided societies, while building in enough flexibility so that the system will not entrench ethnic identities needlessly nor be unable to adapt should ethnic differences diminish. In the United States, there has been a good deal of success at the local government level with cumulative voting systems, which are systems closely related to AV. In addition, there are other electoral structures that draw on ideas similar to those that underlie vote pooling. Nigeria’s distributional requirements for election of its President, in a presidential system of government, can be viewed as an example. As described in John Boye Ejobowah’s chapter, Nigeria has long been divided by three major, geographically concentrated groups. After civil war in the late 1960s, Nigeria moved to a presidential system, to promote nation building and political integration through a unified executive. But to promote cross-ethnic political competition, the constitution required that the president obtain both a majority of national votes and 25 percent of the vote in at least two-thirds of all the states. According to Ejobowah, this vote pooling structure for the presidency has required major parties to court and award office to minority politicians.

This distributional requirement for the presidency is similar to America’s much despised Electoral College for presidential elections. But if the Electoral College is considered antiquated, it is partly because the previous state and sectional divisions that once seemed so divisive no longer seem nearly as meaningful. The Electoral College, that is, might be a victim of its own success (as well as the success of other factors that have diminished the power of earlier state and sectional based identities). In Nigeria, it is easy to understand why regionally based distributional requirements would continue to be means of accommodating ethnic divides.

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41Ejobowah, The Success and Failure of Nigeria’s Constitutional Engineering.

42Id. at 13.
while minimizing the entrenchment of ethnic identities. As my discussion of federalism will note, geographically based structures of dealing with ethnic conflict can be particularly adaptable because they leave open the possibility that mobility will erode the meaningfulness of these differences over time. Structures like the American Electoral College can recognize the need to take account of certain powerful dimensions of difference without entrenching those differences in the way formal consociational structures do. The problem with America’s Electoral College is not that it lacked a plausible, integrative justification when first created. It is that the Constitution failed to create an effective mechanism by which the Electoral College could be modified or abolished over time if state-based identities became, as they have, far less divisive and meaningful than they were originally. As I noted at the beginning of this chapter, the Electoral College is a prime example of how institutions designed to deal with “ethnic differences” can endure long beyond the point at which the differences that originally motivated them have diminished. That is why institutional designers and negotiators must be attentive to this risk at the outset and search for devices and structures that retain as much flexibility as possible, given the need at the moment of state formation to accommodate ethnic differences, to some extent, in the design of political institutions.

3. Integrationist Political Spheres, Accommodationist Cultural Spheres. Minority groups often seek recognition of their cultural distinctiveness, as well as some assurance of control over the institutions of control reproduction, such as schools, and recognition of their right to use their own language in various contexts, including, perhaps, in interacting with the government. Cultural and recognition interests of these sorts often underlie demands for power-sharing arrangements in the design of political institutions. Ethnic groups fear that their cultural interests will be overridden unless the structures of the society are built to reflect “their” communities. This fear can generate undifferentiated general demands for accommodationist institutions and policies across the board.

One strategy for addressing these conflicts that does not entrench ethnic identities into the processes of democratic political competition, with all the attendant consequences, is for the constitutional system to differentiate the political and cultural spheres. The constitution can guarantee specific cultural rights, both negative and positive ones, in a way that accommodates these particular concerns. But doing so need not require the same structures of accommodation in the design of the processes of electoral competition and representation itself; instead, the formal political institutions of the state can rest on a more integrationist foundation. Indeed, the very fact that constitutional negotiators are willing to recognize ethnic group cultural claims in spheres like education might make it easier to find agreement to design electoral processes and political institutions in this more integrationist manner.

The advantage of this kind of differentiation is that the powerful incentives provided by the structures of political competition will encourage a less ethnicized politics, even as the cultural sphere does recognize distinct cultural claims. Systems designed in this way retain greater capacity to adapt to changing ethnic self-identifications, since the sphere of formal democratic politics is not built on the basis of the ethnic identities salient at state formation. To the extent constitutional designers believe a constitution must be accommodationist or integrationist across the board, they miss the opportunity for more subtle differentiations of this sort.
Again, the South African constitution provides an example. As noted above, that constitution ensured the possibility, after an interim period, that political institutions would not be structured along ethnic lines. The structure of electoral democracy, in the long-term, was integrationist. But at the same time, the constitution has some of the strongest provisions in any constitution for recognizing language and cultural rights of minority groups. These are not the conventional negative rights of liberal constitutionalism. For example, in a critical provision the constitution protects the right “to receive education in the official language or language of [one’s] choice.” 43 It requires the state to take “positive measures to elevate the status and enhance the use” of 11 officially identified languages. 44 The Constitution also establishes a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities. 45 But though these provisions reflect a high degree of ethnic accommodation in the cultural sphere, none of it spills over into the way the constitution constructs the political sphere.

Professors Simeon and Murray call the overall constitutional system one of “recognition without empowerment.” This is an incisive description of the underlying constitutional vision. Where political circumstances make it a feasible strategy, this differentiation of the political and cultural spheres – rather than an all or nothing approach to accommodation – offers another set of tools for democratic institutional designers to build more flexibility into their systems even as they negotiate amongst ethnically divided groups.

4. Courts as Unwinders of Ethnic Political Bargains. As I noted above, once the framework for democratic elections is designed in ways that create incentives for a more ethnically-oriented form of political competition, it becomes extremely difficult to change that framework down the road, even if the initial conditions that motivated and justified it have changed. This reality is a subset of the larger “iron law” of electoral laws, which is that such laws, once in place, are highly resistant to change. Not only do vested personal and political interests arise around such laws, but to change those laws citizens must appeal to the very political actors who owe their political fortunes to the laws at issue. What is missing are intermediate institutions staffed by actors who stand at some remove from existing electoral laws and who could be trusted with the power to determine when circumstances have changed in ways that justify modifying electoral laws created to deal with earlier, different circumstances.

To describe such a power is to suggest how disquieting it is. Nonetheless, there is one institution that can viewed as playing such a role, at times, in at least some systems. That institution is the courts. The problem is the way the passage of time might make earlier laws, including electoral laws, obsolete in whole or in part. 46 Or if obsolete is too strong a term,

43 South Africa Const. § 29(2).

44 Id. at § 6.

45 Id. at § 185-86.

46 The problem of electoral laws becoming outdated, yet remaining unchanged, is a subset of the larger problem of the difficulty established democracies have in general in modernizing
perhaps a better phrase is that changes over time have made some of the law’s underlying assumptions no longer accurate. Political institutions generally have a difficult time dealing with the problem of obsolete laws, for general reasons of inertia, a problem exacerbated in the context of the laws of democratic competition by the self-interested personal and partisan considerations noted above.

I can provide a few accounts of judicial systems that might be seen to be exercising this kind of “updating” power.\textsuperscript{47} In the American context, the Voting Rights Act was designed to deal with the problem of racially discriminatory voting laws. First enacted in 1965, then amended in major ways in 1982, the Act had been left largely unchanged since then by Congress (until recent 2006 amendments I will discuss). Coming out of era of near complete black exclusion from political participation in the South, the need to ensure black political participation and representation was, at these earlier legislative moments, undoubtedly compelling. There was a substantial, well-justified concern that white voters would not vote for black candidates; thus, in majority-white electorates, black candidates could not be elected, even if the rules for casting a ballot were not discriminatory.

A legislative means of ensuring more black representation which emerged was the creation of what have been called “safe” minority election districts – ones intentionally designed to concentrate minority voters into being the majority, so that they can control election outcomes. This constituted a mild element of consociationalism in the American context: the intentional creation of safe, majority-black election districts (with the concomitant effect of making other districts more white). This technique was effective in its immediate aim; it led to the election of many more minority officeholders.\textsuperscript{48} But by this decade, nearly 25 years after the United States Congress had last re-visited the issue, a variety of questions had arisen about whether various circumstances had changed enough to undermine the need for the continuation of these racially-defined election districts – structures that had always been justified as a “second best” approach, one made necessary by the practical difficulty of more directly breaking down racial differences enough so that white voters would vote for black candidates. Despite the time that had passed since the policy had been adopted, and the intervening changes, Congress evinced no inclination to re-visit these issues. That is not surprising, given that the issues are divisive and all sitting members of the House had been elected under this system.

Faced the absence of any legislative attention to these policies, the Supreme Court in a series of decisions in the 1990s and 2000s cut back a bit on the scope of the consociationalism embedded in these policies. Employing the Constitution’s Equal Protection clause, the Supreme

\textsuperscript{47}I have written about these examples at greater length elsewhere. See Pildes, \textit{Constitutionalization of Democratic Politics}, supra note 2, at 83-101.

Court acknowledged the legality of some degree of ethnic accommodation policy; the Court endorsed the use of race to design election districts when polarized voting was precluding minorities from being elected. But the Court also imposed constitutional limits on the extent to which election districts could be intentionally designed for this purpose. Thus, constitutional boundaries were imposed on the extent of permissible accommodation. Even more interestingly, the Court began to reinterpret the earlier legislation in a way that read more flexibility into it; where earlier decisions had treated the obligation to draw “safe” minority-controlled election districts as a fairly unyielding one, recent decisions permitted these districts to be unwound a bit in the service of recognizing or fostering a more interethnic politics today. These decisions could be viewed as reflecting a judicial recognition that the conditions that warranted more “accommodationist” policies when the United States was emerging from an era of racial exclusion ought to be modified 40 years after the law was first passed and 25 years since Congress last re-visited it.

A similar view might be thought to animate a decision of the constitutional court the Dayton Peace Agreement created for the two Entities created out of the breakup of the former Yugoslavia, the Republika Srpska (where most Serbs live) and the Federation of Bosnia-Herzegovina (where most Croats and Bosniaks live). The original agreement appeared to leave the legal power to define their respective “constituent peoples” to each of these Entities, which had done so in ethnically exclusive ways. Nonetheless, the court rejected this strong form of consociationalism and held that even though these Entities were created to accommodate profound ethnic differences, they did not have the power to constitute themselves in ethnically exclusive terms. This judicial decision is even more striking than the American ones, for not only were the ethnic issues involved more explosive, but far less time had passed between the original political deal that recognized a need for ethnic accommodation and the court’s willingness to unwind at least one element of that deal.

To be sure, there are serious normative and pragmatic concerns with courts playing the role of institutional agents for transitioning away, even modestly, from ethnic accommodation in the design of democratic institutions. Normatively, the legitimacy of courts partially undoing political agreements reflected in legislation is problematic, although perhaps less so the longer the interval between the original agreement and the court’s action. Pragmatically, to the extent judicial interventions of these sorts rest, in part, on the view that circumstances have changed enough to justify moves toward a more integrationist political sphere, they require exquisitely charged judgments. Should a court be wrong about the extent of change, its decision could fuel ethnic conflict.

At the same time, there is at least one less obvious potential advantage of judicial action. When political institutions address issues at the intersection of ethnic conflict and the design of democratic institutions, it might be that placing these issues in the political arena tends to be more divisive and polarizing than when courts take similar steps. Judicial processes are often less rhetorically charged; court decisions have less visibility; and while the losing side might blame the judges, that can be less inflammatory than blaming “the people.” The main justification for judicial unwinding of the sort described here must be in similarly pragmatic terms, namely, the absence of other institutions likely to take responsibility for this role. But my aim is not to defend the legitimacy of courts doing so. It is to point out that courts have, in several systems.
5. Federalism and Territorially-Based Devolution. Federalism or territorial devolution can take many forms, but it is increasingly becoming among the most important structural and constitutional mechanisms for dealing with ethnically divided societies. Writing in 1984, Daniel J. Elazar observed that the “federalist revolution is one of the hidden revolutions of our times, despite the fact that few have paid attention to it.” What was true then has only become more so since. Federalism increasingly serves as a proxy for enabling minorities to experience some degree of autonomy, security, and recognition. Indeed, while federalism historically arose when prior, autonomous units decided to join together, federalism in recent years has also been used to disaggregate previously centralized regimes – a novel use suggesting the modern appeal of the federal approach. A proper synthesis of experience with federalism (as I will call it, for short) would require at least a chapter of its own. For reasons of space, I will limit myself here to four brief points.

First, from the perspective of the dynamic approach advocated here, federalism is a particularly attractive approach as compared to more overtly consociational features conventionally used often in divided societies. This can be so whether or not the federal units as initially constituted are homogenous or more intermixed with respect to the country’s salient ethnic dimensions. For not only is federalism a form of power sharing or power dividing, it is a form that does not formally design state institutions on the basis of ethnic identities as such – unlike consociational arrangements, such as that in Lebanon’s National Pact from 1943 to the civil war of the mid-1970s, which required that the president be a Maronite, the prime minister a Sunni, the speaker of the House a Shiite, the vice-president a Greek Orthodox, and so on.

Most importantly, not only is federalism only a proxy for ethnic group identity, when it is that, but it is a particularly malleable proxy. Federalism might ensure vulnerable minorities some degree of autonomy and protection at the outset of state formation, but if ethnic identities diminish over time as a source of conflict, individuals will move between units (as long as free movement is guaranteed) in a way that makes territory and identity correspond less and less directly. Movement and changing demographics provide a built in mechanism that enables a democratic system to be responsive to diminished ethnic conflict over time. As a leading modern theorist of federalism, Carl J. Friedrich, noted: “The study of social structure in relation to federalism has, therefore, helped us to understand better the dynamic nature of federal orders, to look upon a federal system as subject to continual change, rather than a static design fixed forever in an immutable distribution of factors.” Indeed, there are nations originally designed as formally federal in structure but that are considered today “non-federal” societies because, despite these federal structures, the relevant political actors (political leaders, interest groups, voters and the like) view politics overwhelmingly in national terms; Austria, Germany, and the United States are the three countries typically classified as formal federations with non-federal


50CARL J. FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE 54 (Praeger, 1968).
It is true that federal systems will entrench geographically-based distinctions long after they have become less meaningful than they initially were, as has been true in the United States. But that is better than entrenching ethnic identities themselves, which are likely to be far more divisive.

Second, to the extent actual political power is devolved from the center to the federal units, there can be at least two particular benefits with respect to defusing potential ethnic conflict. One is that pressure is taken off competition over the control of institutions and policies at the national level. Federalism can be a form of gag rule, in which competing parties agree not to contest certain divisive issues at the national level. By removing those issues from the national level, the stability and acceptance of national institutions can be enhanced. To the extent divisive issues are resolved through competition at the unit level instead, those resolutions are more segmented and confined. In addition, enhanced competition in units differently constituted than the national political arena can have other benefits, as will be noted in a moment.

Third, there is a longstanding debate about whether, from various perspectives, it is better in various contexts that the units in a federal structure be ethnically homogenous or intermixed. As a practical matter, the options are often sharply constrained, including by whether the relevant ethnic groups are geographically concentrated or not. But leaving the broader issue to the side, it is important to recognize that federalism can contribute to democratic legitimacy and stability in divided societies regardless whether the units are ethnically homogenous or not. If the units are homogenous, competition for power at that level often will bring out conflicts within the particular ethnic group along lines other than ethnicity (or the dimension of ethnicity that divides the society more generally). This can help diminish the more profound and potentially more explosive conflicts at the center. As Horowitz puts it, where ethnic groups are geographically concentrated, devolution can diminish ethnic conflict not because it provides group autonomy, but because once power is devolved, the very idea of “the group” can become more difficult to maintain. And homogenous units differently constituted than the nationwide ethnic configuration can provide opportunities for distributional goods, such as jobs, that minorities might fear will not be available to them in a unitary state. Heterogenous units, of course, can generate incentives for inter-ethnic coalitions and accommodations that might not exist at the center.

To be sure, federal structures that address ethnic conflicts can take various forms. The extent to which mobility over time, in particular, is a realistic prospect can vary with the social foundation of the federal units, as well as the nature of their formal powers. Federalism can be based on linguistic divisions, for example, as in Canada, Belgium, and India. To the extent the linguistic basis is merely de facto and not further entrenched in additional policies of the federal units, systems of this sort might retain meaningful capacity for movement between the units, particularly for the second generation. But if the federal units have the additional power to try to

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52 DONALD H. HOROWITZ, ETHNIC GROUPS IN CONFLICT 627 (University of California Press, 1985).
lock-in a dominant language through de jure requirements – by insisting that education be only in that language or through other “official language” policies – then the effective capacity of residents to move between units might be expected to be diminished greatly. We do not have enough comparative data on actual mobility within different federal systems to know how effective mobility varies among differently structured federal regimes.

Fourth and finally, American scholars frequently underappreciate the contribution federalism can make to managing ethnic conflict. Federalism’s tainted history in the United States, linked to slavery and racial segregation, makes it difficult to recognize the extent to which, elsewhere, federalism has been an essential institutional means for bringing about political integration, stability, and accommodation between diverse groups, including in ethnically divided societies. Modern federal systems, however, are more likely to ensure that national institutions, including courts, are given the power to ensure that fundamental rights are protected at all levels. There are no general, acontextual rules for how best to structure federal arrangements in all contexts – how many units to create, with what powers, composed in what ways – and careful examination of which forms have worked best in which contexts cannot be undertaken here. But federalism offers promising particularly promising opportunities for institutionalizing the dynamic approach urged here to designing democratic institutions in ways that accommodate, with needlessly entrenching, ethnic divides.

III.

Designing democratic institutions to address ethnic conflict has become the most pressing problem in modern constitutional design. Several reasons lie behind this fact. In the third wave of democracy that has emerged since 1989, democracy has been viewed as the appropriate institutional solution even for societies previously wracked by violent, internal group conflict. With forced population relocation no longer widely considered legitimate, the aspiration has been to deploy democratic institutions to stabilize heterogenous societies, including post-conflict ones. In addition, the Cold War fueled a state-strengthening dynamic, with the United States and the Soviet Union building up centralized authorities, particularly through military aid. With the end of the Cold War and the softening of central authority, latent ethnic differences are more easily mobilized and given expression. Even more established democracies have seen the rise of ethnic identities and political claims, whether in the United Kingdom, Spain, Latin America, or, with increased demands for group recognition of African-Americans, Hispanics, and others, in the United States.

Thus far, much academic analysis and practical institutional design has taken too static an approach to these issues. Ethnic identities can be fluid, with the incentives the structure of political competition creates being a particularly powerful force for mobilizing those identities along one dimension or another. There is (or can be, in many contexts) a dynamic relationship between the design of democratic institutions and the ethnic identities expressed. To the extent democratic institutions being designed today must, for practical reasons, accommodate ethnic differences, institutional designers must avoid thinking only in terms of the structure of those differences at the immediate moment. The aim should be to accommodate those differences, while building in as much flexibility as possible to enable democratic institutions to be responsive to changes in ethnic identifications over time. In this chapter, I have analyzed some of the most promising means of doing so.