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NO “THERE” THERE: STATE AUTONOMY AND VOTING RIGHTS REGULATION

KATHRYN ABRAMS*

This response will compare two frameworks for looking at state power over internal political processes: Professor Merritt’s approach to the Guarantee Clause, and a framework arising from voting rights jurisprudence. Voting rights regulation and judicial interpretation of the Guarantee Clause have at times been positioned as antagonists. Before Baker v. Carr, for example, the Court’s longstanding reluctance to use the Guarantee Clause as a sword stood as a primary barrier to the Court’s entry into the arena of reapportionment. But the relationship I hope to sketch is not so much one of antagonism as one of tension or contrast. I will start by viewing voting rights regulation as a central, rather than an incidental, part of the picture Professor Merritt draws of states’ power over their own political processes. By doing so, I will arrive at different conclusions about the descriptive and normative importance of state autonomy over internal political processes, and at a different vision of the imperatives that should guide the reconsideration of the Guarantee Clause.

Professor Merritt’s approach is practical, synthetic, and operational. She surveys a range of historical and doctrinal materials to answer the question: what distinguishing features of “republican government” within states might courts be willing to enforce under the Guarantee Clause? She concludes that courts have protected, and might protect through the Guarantee Clause, states’ autonomy over their internal political processes, and she specifies four elements of those processes. I want to be clear that Professor Merritt’s analysis does take account of voting rights regulation. She notes that “the areas of state autonomy described above . . . are subject to some constitutional limits,” and cites as examples the Fifteenth and Nineteenth Amendments. But the relationship she describes between this area and her premise of state autonomy is not one of antagonism as much as one of tension or contrast.

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2. 369 U.S. 186 (1962).
4. Id. at 831.
autonomy is one of exception to rule, or as social theorists would have it, accident to essence. I intend to show that when one looks beyond the Fifteenth and Nineteenth Amendments to the range of ways that state political processes have been regulated to insure equal participation, this relationship does not hold: the influence of voting rights regulation on her vision of state control over internal political processes cannot be so easily cabined. The voting rights cases reflect a legal world in which state control over internal political processes has become increasingly rare. These cases suggest, moreover, that the legacy of such control and the issues that must be blinked in order to secure it make Professor Merritt's normative project dubious at best.

Let us begin by looking at the first two areas of state autonomy Professor Merritt identifies: definition of the franchise for state and local elections, and governmental structure, mechanics, and processes of election. I would like to ask not about state autonomy over these areas, but about the ways in which voting rights jurisprudence has imposed constraints. While states are theoretically free to establish voter qualifications for state and local elections, their power has in fact been constrained in many ways. The prohibition on racial qualifications in voting has been extended to include the political process, so as to encompass primaries and nominating conventions held by state political parties, as well as actual elections.\(^5\) Moreover, the equal protection limits on voter qualifications have been interpreted to bar a range of qualifications which have nothing to do with gender or race. Since voting began to be framed in the sixties as a fundamental right, states have faced a heavy burden of justifying restrictions on the franchise in state and local elections—a burden they have often failed to carry. Property and family restrictions on school board elections have been struck down as violating the Fourteenth Amendment,\(^6\) as have durational residency requirements.\(^7\) Property ownership has even been deemed an illegitimate restriction on eligibility to vote in general obligation bond elections.\(^8\) States have simply not been free to fashion their own strong requirements of citizenship for purposes of state and local elections.

Equality-based voting rights regulation has exerted an even stronger influence over the second area identified by Professor Merritt: state

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power over governmental structure, mechanics, and processes of election. The reapportionment cases made the first significant inroad on this power when they resulted in removal of the states’ power to determine their own bases of representation. With *Reynolds v. Sims*,9 population-based representation came to be federally mandated over representation of geographic, economic, or other units, even in state and local elections—and even when the citizens of a state used their own referendum process to legislate otherwise.10 Yet to the extent that Professor Merritt focuses less on the substantive basis of representation, and more on governmental structures or electoral mechanics, we should consider regulation designed to prevent minority vote dilution—not simply the Constitution, but the procedurally innovative, and exceptionally context-alert Voting Rights Act.11 Section 5 of the Voting Rights Act is the most systematic inroad on states’ control over their electoral processes.12 In covered jurisdictions, states may not enact or change any procedure affecting voting—including changes as small as altering registration hours or the location of a polling place—without advance clearance from either the Department of Justice or the District of Columbia federal district court. Even in jurisdictions where the presumption of state control has not been so strikingly reversed, Section 2 imposes limitations on state autonomy in a variety of ways. Section 2 has been consistently interpreted to limit state discretion over the structure of electoral districting, affecting not only the choice between multi-member and single-member districting, but also the choice among different single-member districting schemes.13 But as advocates and judges have come to recognize that minority votes can be diluted by mechanisms that extend beyond the structure of districts, other matters of electoral and governmental structure have come under federal supervision as well. The staffing or locations of polling places may be subject to federal review under Section 2,14 as may the structure of certain governmental offices. This year the Supreme Court heard *Hall v. Holder*, a case in which the Eleventh Circuit held that the state's

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12. Id. § 5.
decision to authorize a sole commissioner form of county government may itself violate Section 2 of the Voting Rights Act.\textsuperscript{15}

What does all of this suggest about the enterprise of using the Guarantee Clause to protect state control over internal political processes? First, it modifies Professor Merritt's descriptive account of state control over internal political processes. I do not challenge any of her examples—in fact, Professor Merritt is quite punctilious in her reading of cases, and prudent in describing what the courts have done or are willing to do. My point is that when her cases are read in conjunction with the points I have laid out, the categories of state control she describes cease to have the same significance or to cohere in the way that she suggests. What does it mean for a state to be free to set the retirement age of judges, but not the kind of districts from which they may be elected? Or, for a state to be free to establish the location of its state capital, but not the basis of representation, or the shape of the districts for electing those who serve there?

Professor Merritt would probably agree that the exceptions to her categories of state autonomy have become increasingly numerous over the past several decades, that instead of undisturbed areas of state control, there is more of a patchwork of areas of state power and areas of state constraint under federal equality-based voting rights norms. But I would argue further that it is not simply a question of rule and exception (no matter how large the category of exceptions). Rather, state autonomy and equality-based voting rights limitations are mutually-constructing categories: the recognition of voting rights-based limitations has changed the significance which states, courts, and the public ascribe to state control over internal processes. State power over internal political processes is no longer viewed as uncontroversial, presumptive, or even the norm to be vindicated in many state electoral and governmental settings.

A fine illustration of this change comes from \textit{Gomillion v. Lightfoot}.\textsuperscript{16} \textit{Gomillion} was a constitutional challenge to a state legislative enactment that changed the boundaries of Tuskegee, Alabama, so as to exclude all but a handful of black citizens. As originally framed, this case concerned the power of the state to establish the boundaries of a municipality within its territory. Alabama did not contest the plaintiffs' characterization of the facts; the state instead argued that its power over

\textsuperscript{15} 955 F.2d 1563 (11th Cir. 1992), \textit{cert. granted}, 113 S. Ct. 1382 (1993).

\textsuperscript{16} 364 U.S. 339 (1960).
this area deprived the plaintiffs of a claim and the court of jurisdiction.\textsuperscript{17} With the Supreme Court's decision, however, what was once a federally-insulated state decision about political structure was reconstructed as a justiciable Fourteenth Amendment violation. But this decision did not simply subtract one category of action from the sum total of state power over municipal boundaries. It altered the judicial notion—and consequently, the state notion—of how remaining powers operated. The existence of state powers in relation to boundary changes ceased to be the only or even the primary question to be asked in boundary or annexation cases. After \textit{Gomillion} the question was not, "did the state have the power?" but "what were the effects of the change?"\textsuperscript{18} By requiring that federal judges—and therefore state officials—ask the latter question first, the Supreme Court changed its view of the significance of state authority over municipal boundaries. That authority was no longer a factor that precluded federal intervention, or a factor that could be raised in justification if inculpatory effects were found. It became a sort of residual category—to be respected if no civil rights-based problems arose.

Voting Rights Act scrutiny has become sufficiently pervasive as to make "discriminatory results" the first question in any state decision about the structure of the political process. It mechanically becomes the first question if the state is a "pre-clearance" jurisdiction, because any change has to be approved in Washington. But it becomes the first question in other jurisdictions as well, because of states' desire to avoid Section 2 litigation. In fact, this constraint continues to exist, even after \textit{Shaw v. Reno},\textsuperscript{19} a decision that some have characterized as restricting the remedial scope of the Voting Rights Act. In early March 1994, a Georgia state official told the \textit{New York Times} that \textit{Shaw} had created even greater constraints for states because it meant they were subject to two sets of potentially conflicting directions: one from the Department of Justice in Washington, and another from the federal judiciary.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 342.
\item \textsuperscript{18} As Justice Frankfurter eloquently put it, "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." \textit{Id.} at 347.
\item \textsuperscript{19} 113 S. Ct. 2816 (1993) (voters may raise Equal Protection claim where configuration of district is so irregular as to suggest it was created for purpose of separating voters by race).
\item \textsuperscript{20} Ronald Smothers, \textit{Court Overturns Georgia Accord on New Judges}, \textit{N.Y. Times}, Mar. 9, 1994, at A12 (quoting Georgia Attorney General Michael Bowers).
\end{itemize}
So this revised topography of state power in relation to internal political processes presents a different descriptive picture than the thematically unified bodies of state prerogatives that emerge from Professor Merritt's paper. Instead, it is a series of equality-based federal restrictions that has not only limited state control under many circumstances, but has made state control problematic in the eyes of the courts and of the states themselves.

The second, and more important, consequence of focusing on this body of law is normative. It leads me to ask whether protecting state autonomy over internal political processes is the most valuable use of the Guarantee Clause. My reservations here are two-fold. First, the voting rights cases raise the question whether protecting state autonomy over internal political processes is always, or even predictably, a good thing. I do not mean to suggest that the states are always the villains when it comes to minority voting rights or equality of participation. A case like Shaw v. Reno, where state and federal governments each play restrictive and inclusive roles toward minority participants within the history of a single case, should be a sufficient reminder that predicting which branch of government is going to be the most hospitable to minority rights has become a complicated business. This case and others like it suggest that the hope of finding uncontroversially protectable ground by looking to the mechanics of the internal political process may be illusive. Just as the cases following National League of Cities v. Usery21 showed it is hard to find something uncontroversially internal or state-like,22 the voting rights cases show that it is hard to find something uncontroversially structural or mechanical. Even matters such as the structure of offices or the location of polling places can be crucial instruments for creating relationships of power between, or disparate senses of belonging among, the different groups who form the state's citizenry. These mechanical matters can be, have been, and frequently still are the means of denying full political participation to racial and language-based minorities. Why should shielding state power over these areas be a priority when it is not clear ex ante what kind of political relationships state power would be creating?

This leads to my second reservation. Professor Merritt's interpretation of the Guarantee Clause is not designed simply to protect the structural choices that public officials make, but also to preserve the accountability between the state, as embodied by elected officials, and the people that they govern. She seeks to protect this value in proscribing federal commandeering of state legislative processes. One point that Voting Rights Act jurisprudence makes clear is the particularity and differentiation of those who go under the heading of a state's "people." The voting rights cases suggest that any unitary description of the people a government represents achieves that unity at the expense of subversion—the subversion of the interests of those to whom the government does not, in fact, respond. This subversion may be a matter of passing concern when the political "ins" and "outs" rotate on a predictable basis; but the Voting Rights Act cases reveal that political "turns" are not always so evenly allocated among groups. Under circumstances of historic disenfranchisement and racial or ethnic polarization, one group may remain persistently outside avenues of power or influence. In such cases, arguments that depict unity in the political constituency to which a state is accountable can obscure the character and stakes of many political contests.

I have no doubt that Professor Merritt shares many of these concerns; they are not inconsistent with her theory. The problem is that her approach does not foreground such difficulties in deciding how and to which citizens a state is accountable. It requires, in fact, that we abstract from them. By focusing on the federal government as the potential adversary, it assumes, rather than searches for, a relationship of accountability between the state and its various "people" that we would want to protect. Professor Merritt's concern about shielding state processes seems to me premature when we have not considered the kind of accountability to a diverse and often polarized constituency that we want to encourage.

The differences between Professor Merritt's view of the Guarantee Clause and my own may ultimately boil down to this: Professor Merritt has placed a priority on interpreting the Guarantee Clause in a way that can be operationalized; she has looked for a meaning that courts might be willing to enforce. What the voting rights cases tell me, however, is that the imperative to operationalize may distract us from more important questions that could be asked under the rubric of the Guarantee Clause, questions about how the state structures its internal political processes in a strongly differentiated and frequently polarized political world. Lani Guinier argues that to
permit bare numerical majorities to exercise sustained political power under circumstances where their interests are in persistent tension with those of a minority is to perpetuate a tyranny of the majority that violates important norms of our political system.23 This type of question ought to be at the center of the agenda when we come together to discuss the Guarantee Clause. I do not suggest that the Supreme Court can be expected to impose schemes of cumulative voting on the states under the rubric of this clause. As Professor Guinier’s nomination controversy showed, it will be a long struggle to persuade the courts to take such action,24 and it is not likely to be achieved under the banner of a provision whose language has become synonymous with failure of jurisdiction. But if we view the challenge of the Guarantee Clause as a challenge not to operationalize, but to reconsider our political arrangements—perhaps to contrast, as Publius once did, a republican form of government with the demands of raw majoritarianism—then ideas like Professor Guinier’s are the place to begin.

24. But see Stephen Buckley, Unusual Ruling in Rights Case; Maryland County Must Use “Cumulative” Voting, WASH. POST, Apr. 6, 1994, at A1 (federal judge orders Maryland County to implement cumulative voting to remedy § 2 violation arising from use of at-large electoral district).