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Achieving Equality, Balance, and Democracy: Racial Redistricting throughout the Civil Rights Era to the Present

Michael Nelson Bailey

Achieving Equality, Balance and Democracy:
Racial Redistricting Throughout the Civil Rights Era to the Present

by
Michael Nelson Bailey

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Approved by

Advisor: Professor John Winkle

Reader: Professor Holly Reynolds

Reader: Professor Susan Wolcott

ABSTRACT

MICHAEL NELSON BAILEY: Achieving Equality, Balance and Democracy: Racial Redistricting Throughout the Civil Rights Era to the Present
(Under the Direction of Professor John W. Winkle)

Redistricting is inherently invidious and when coupled with racial considerations, the stakes become much higher. Legislative representation is at the core of the governmental process in the United States. Any changes to this process affect every citizen and their influence in our government and electoral system.

This paper approaches this topic from a philosophical standpoint, evaluating the theories and ideas of the Constitution, the Supreme Court, and constitutional scholars. The issue is so complex and divisive that a full understanding of the controlling forces at work is a difficult concept to grasp. In this research the Voting Rights Act and the Equal Protection Clause are squared against one another in order to arrive at possible solutions and approaches for this problem.

The research focuses primarily on the Constitutional ideas that relate to issues such as redistricting and race. Therefore, the Supreme Court cases themselves, which dealt with these topics during the Civil Rights Era, are a primary source for this paper. Additionally, a diverse group of constitutional theoreticians and legal scholars are cited for the broad range of ideas that they provide in order to evaluate these issues.

These articles and cases have provided several interesting insights. Each resource highlights the sensitivity and importance of racial redistricting and all seem to emphasize the level of contention that such topics spur among various, competing

groups. These groups are traditionally torn along racial and political lines. The constitutional scholars adopt two different theories. One tends to stress the importance of majority-minority districts, although it violates the Equal Protection Clause. However, proponents of the "democratic citizenship" theory argue that such districts do not enhance minority voter efficacy, and simultaneously cause others to suffer vote dilution.

In accordance with the findings of this research, the conclusion reached provides for greater minority representation and reduced voter dilution. Additionally, this conclusion prevents the extended political and racial polarization propagated by majority-minority districts. Essentially, the findings and theories in this paper lead me to conclude that majority-minority districts serve no one's interests and are divisive to a unified, color-blind and democratic society.

PREFACE

It is the aim of this research project to study the role our United States Supreme Court plays in policy making as the ultimate authority in questions of national importance. Perhaps its most important decisions are those concerning our structure and function as a democracy and what degree of representation each citizen is to be granted under our Constitution. This most fundamental quality is essential to the very notions and principles under which the States were united.

For the purpose of understanding how our judiciary steered us through a time characterized by social injustice and abuses of redistricting before, during and after the Civil Rights movement, the research focuses on Supreme Court cases from the 1960's to the present. Specifically, the cases, commentaries and critiques concern questions related to the Fourteenth Amendment, district drawing, and other representation topics. The authors selected were chosen for their reputation, and for the reputation of the journals in which their work is published. Most importantly, articles were chosen for their relationship to the topic of this paper. In some instances, journal articles in this research often refer to one another, and agree and disagree on different points. This helps establish the tone of the academic world with regard to redistricting and gives the reader insight into our nation's foremost legal minds. Through these expositions, the attitudes and role of the Court can also be discovered. The research focuses on the interplay between law and race, topics synonymous with conflicts posed in redistricting. As will be demonstrated the controversy lies in the argument of how much minority representation is suitable when compared to the often skewed and awkward districts drawn to fulfill those needs. The research aims to fully examine these issues so as to illuminate the most important aspects of the judicial decision making process. I believe that this research is particularly important to the State of Mississippi, as its legislature prepares to consolidate the current five-district grid into four.

The bulk of the research includes re-districting cases stemming from disputes in the Carolinas, Georgia, Alabama and Tennessee. These cases illustrate the evolution in the judicial position during a tumultuous period roughly defined by the Civil Rights Movement. In them, we see the Court as sensitive to issues under the surface of the law and we observe this branch of our government as the ultimate authority in these matters. Studying the history of these cases and decisions is important to the comprehensive understanding of our Constitutional legacy and the struggle for true equality and democracy.

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A. What is Democracy

Democracy is an elusive ideal. Since its origins many centuries ago in the Greek city-states, democracy has largely remained a conceptual goal rather than a standard for governance. Throughout the centuries, democracy has waxed and waned. The Greek and Roman periods of classical democratic greatness eroded into a state of virtual disappearance during the dark ages. However, the Renaissance promised the resurrection of certain democratic ideals and the most forward thinking scholars of the day revived them. While there have been many forms of democracy over time, we know it best today as it exists in various countries, and specifically as the governmental system of the United States.

Despite its different applications and meanings, democracy retains certain fundamental aspects. The most basic attribute of a democracy is its representational scheme. Direct democracies are governed directly by the people and not through their elected representatives. The best representation of this type of democracy occurred in the early Greek and Roman systems. However, these "direct" systems were largely imperfect and ideologically flawed as only the elite were involved in this system. These elites made political decisions independently, simply voting on each issue as it arose. A vestige of direct democracy survived in the town meetings and general assemblies of early New England towns. Despite the appeal of direct governance, its inefficiencies and flaws rendered it an impractical solution for larger, more complex societies.

Instead, the most prevalent and successful democratic model is the indirect form. Indirect models are based on the concept of representation in which public officials are elected through popular elections to make decisions for their constituents. The framers of our Constitution chose the indirect model as a way to safeguard the infant United States. Fortunately, they were aware of the dangers associated with a fickle citizenry and were wise enough to create a system that would endure the various short-term hardships that had so terribly plagued democracies in the past.

The classic essence of democracy is simply that of "consent of the governed". While this fundamental ideal appears to be the most pure and unobstructed, it did not satisfy our forefathers to the extent that it would protect the people from themselves, or from the tyrannical governments from which they had escaped. They knew a democratic-republic would much better serve the purposes and needs of the fledgling nation. They devised a unique system by which the political leaders of the government would be elected. These men also devised a tripartite governmental system in order to balance power and check those leaders in the various positions. Their labor resulted in the development of the Constitution, which provided for its people a workable, practicable democracy. This document embodied the democratic ideals that inspired our country to break free from the rule of Great Britain. Additionally, the Constitution provided a safeguard against oppression. To protect the people against the tyranny of its own government, the Bill of Rights valued freedom as the fundamental accent of American Democracy. Combining this concept with the notion of a democratic system of government was a radical development and a difficult task. Its maintenance over its two hundred years has proved equally as difficult.

B. Freedom and Equality

Although we usually associate the values of freedom and equality with democratic ideals, they are not necessarily supported by the classical notion of democracy. There typically exists an inverse relationship, at a certain point, between democracy and these counter values. Democracy and freedom require a delicate balance of one another to ensure stability. Freedom is the absence of rules, boundaries and regulations. With absolute freedom, you alone are in complete control of your decisions, actions and thoughts. Given this, we know that a democracy requires compliance to facilitate its operation. Although a democracy can be structured to allow a minimally invasive government, it still consumes a portion of our personal liberty order to ensure that our freedoms will not be threatened or completely lost. While we all may want the freedom to do as we choose, we must relinquish a small amount of the freedom to provide for a system that protects it. Therefore, democracy and freedom are inversely proportional in that the tensions between the two forces counterbalance one another.

Equality is treated much the same under a system of democracy. Subject to a purely democratic system, all decisions are made in favor of the voting majority, hence the phrase "majority rule". However, under a system of pure equality, every citizen would be treated identically and would be equally represented. These are clearly opposed values. The more truly democratic a system, the less equitable the system becomes for minorities, as the majority controls all political power.

Liberty and equality are not compatible values. They are instead competing forces. For example, a person who is truly free is free to become unequal, and if all are truly equal then none can become free. Thus, we are presented with a problem of balance for which there is no clear answer. Our democratic values must be maintained, but we must not ignore the rights of minorities in our free and equal, yet democratic system.

The system of democracy that our forefathers forged for us some two and a quarter centuries ago has evolved into a complex system of checks and balances, rights and liberties. In 2002 we have a transformed concept of what it means to be democratic. However, one basic element of democracy still exists, and more than ever, is one of the most contested aspects of our day.

The main challenge facing our nation and particularly our state with regard to our democratic values and belief in equality is the problem of legislative representation. Currently, Mississippi is struggling to redraw its Congressional districts following the loss of a seat due to census returns depicting a relatively slow population growth. This topic is particularly controversial due to the compelling interests that are at stake on each side of the issue. There is much debate about the majority and minority interests involved in such decisions as redistricting and re-apportionment. Great pressure is placed upon our judiciary to make decisions that square with the Department of Justice and the Constitution, while still providing concessions to each side. Therefore, minority politics and considerations of civil rights are in the forefront of jurisprudence issues.

In our discussion of the balance between democracy and equality there exist two different approaches in determining whether an individual or group is treated fairly under our system. The difference in these criteria lies between the equality of opportunity and equality of result. Equality of opportunity provides the right to treatment as an equal. Equality of result provides the right to equal treatment. Each of these approaches has its positive and negative features. One approach is content to stop when all have an equal chance; the other goes further and expects equal outcomes for all, which is characteristic of socialist policy rather than that of a democracy. While this provides a formal understanding of the relative nature of the two, the phenomenon can best be understood when one examines the interaction between race and law.

Ronald Dworkin in A Matter of Principle illustrates the fundamental problem with a purely majoritarian, or utilitarian system. He describes a scenario in which extreme racial prejudice is the order of the electorate. Dworkin proposes that laws could be passed that place the minority at a distinct disadvantage, yet would remain legitimate under principles of utilitarianism. The laws would be valid because a legislature, measuring equally all votes regardless of their origin or nature, would be compelled to follow the will of the people (Dworkin 65). It is not the type, either process or outcome, of democratic system that presents a problem. The real issue is determining what level of credence should be paid to the origins and character of each cast vote, i.e., voter race and political affiliation. The source and nature of these political inputs are typically demarcated on the basis of race, especially in legislation or elections in which the interest of one group are better represented by a particular choice. Although the current demographics of the United States are changing dramatically, this

comparison has traditionally pitted the majority against the minority. In our studies, that essentially equates to white interests versus black interests. It is for this reason that, since the advent of the Fourteenth Amendment in 1868, our ideals and laws must be checked for political and social equality. This has essentially embedded the issue of the interplay between law and race so deeply into our political system that it is a permanent fixture of our society and legal system. While our nation has made the transition to a more equitable representational system, the issues entangled with the topics of law and race are timely and inherently divisive. It is important to know what should be provided under an equitable, democratic system in order to understand how to guarantee such provisions. Dworkin assesses that these requirements consist of equal political power and include equal political influence, voting opportunities, as well as the freedom to write about, petition or speak on political issues (Dworkin 63).

In order to promote the opportunity for all individuals to enjoy these measures of equality, the Constitution has adapted to many periods of turbulent political action, and a changing society. The first of these changes were a set of ten amendments to be guaranteed under the Constitution before it would be ratified by the states. These amendments, known as the Bill of Rights, provide the basis for our freedom in the United States. The Civil War brought about the Thirteenth Amendment, which abolished slavery. The Fourteenth Amendment brought the Equal Protection Clause, which has served our judiciary as a tool for articulating justice and has particular importance for this paper and research. Each of these and others were devised to promote equality and opportunity within the democratic construct of the Constitution.

C. The Role of the Court

The republic-democracy that is the United States faces constant challenges to its equity, fairness and the distribution of power. The United States has survived affronts to the Constitution in the form of political disagreements and social conflicts since its adoption. The Supreme Court has been charged with meeting this challenge. It accomplishes its purpose by protecting the Constitution, its amendments, and, through them, the people for whom the Constitution was written. The Court decides all aspects of Constitutional questions. Historically, the Court's power has significantly increased since its inception by demonstrating its ability to govern the actions and limit the powers of the legislative and executive branches through judicial review. Conversely, this manipulation of powers results in relative power gains for the bench, making it arguably the most powerful and autonomous branch of government, free from direct political pressure. However, this is not to say that the Court remains insensitive to the political climate of the day, nor does the bench forget the rights of the people they are charged to protect. Additionally, it is important to note that the justices are human beings, who hold biases on issues that face them in litigation. These are important variables that are not readily definable, but play an important part in the behavior of each justice. Therefore, such factors must be considered when examining controversial cases such as those used in this research.

The simple fact that the Constitution establishes the United States as a democracy gives rise to the justification for judicial review and its opposition. Democracy, in the Constitutional sense, must be conducted in such a way as to have

elected representatives make policy decisions rather than have them made by appointed justices. This is to say that political issues of substance should, under an ideal democratic system, be made by an extension of the people. If the case were otherwise, judges would use personal opinion in the resolution of their decision-making (Dworkin 57). In this way, judicial review serves to satisfy the expectation of popular sovereignty.

In Democracy and Distrust, John Ely, states that if the Court is restricted by democracy to act in no other way than in the interests of the people, then the Court conversely and effectively defends the ideal of democracy. Justice Harlan Fiske Stone, in his famous opinion in the Carolene Products Case, once remarked that the Court had the responsibility of preventing that 'which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,' and that 'prejudice against discrete and insular minorities' should not be permitted 'to curtail the operation of those political processes ordinarily to be relied upon to protect minorities' (U.S. v. Carolene Prods. Co. 153). Ely concludes that the Court must actively pursue its role as guardian of such liberties as free speech, and that it must be sympathetic to the effects of prejudices in our laws.

Ronald Dworkin proposes a different idea about how justices should approach issues with regard to process and substantive values. Of these, process favors democracy and substance favors the interests of the individual. Dworkin says that Ely equates process-based review in keeping with the tenets of democracy, while substantive review is purely opposed to those values. The difference here is distinct and subtle, but Ely argues that process should be employed to circumvent questions of

substance. On the contrary, Dworkin says the proper role of process-oriented review is in determining what the proper answers to substantive questions should be under our Constitution. Hence, we return to the question of what democracy really is and we must conclude that it has become the responsibility of the judiciary to determine the proper balance between the competing interests and theories and to formulate the best composition possible. Dworkin postulates that there exist two basic decisional models which are closely related to the previously discussed equality of opportunity and equality of result. These decision-making parameters are termed as 'input' and 'outcome' with regard to the nature of their relevance to the democratic ideal. Input cases are generally associated with theories concerned with the distribution of political influence. This is applicable to the relationships between the electorate and its representatives as well as the division of power among the people who comprise that electorate. The drawback to this approach is that it does not examine the nature of the law itself, rather it merely accepts them as valid and true based on the preponderance of the power exercised.

Conversely, outcome-type cases are based partially in the realm of prediction, deduction and inference as to what their consequences will bring. These cases typically require that the results of a law, or decision be carefully weighed against Constitutional rights and civil liberties. Such topics as suffrage, voting districts and other inherent issues in a modern democracy fall under this category (Dworkin 58).

Dworkin asserts that the Supreme Court must develop its own perception and definition of what democracy is if they are left without an exacting answer. Essentially, in defining democracy for itself, the Court effectively endorses the validity, to some

extent, of outcome cases as good reason to adopt one view of democracy as proper versus another. This corroborates the notion that justices can examine substantive issues within the context of the Constitution as a legitimate method of resolving cases. However, this does not free them from their responsibility to process under the Constitution.

In the course of the judiciary's existence, there have been cases in which clear decisions could be made using the process-based, input approach. However, in cases where individual interests are at risk, the approach has not been as clear. Especially in those cases pertaining to race, or some other defining group or personal factor, the outcome approach is necessary in order to determine the true equity and fairness of the law (Dworkin 60).

Racial redistricting, gerrymandering, and vote dilution cases all require the Supreme Court to consider both process and substance based issues as part of the judicial responsibility to make authoritative decisions. The judicial approach in these cases is clear. Judges simply take data reflecting the true level of representation being experienced and measure that against a parameter of proper levels of representation determined through empirical methods. Therefore, the more difficult question lies in what level of representation is substantially satisfactory and how does one proceed to make a ruling in keeping with the charge of process? The members of the Court have been able to make decisions concerning substantive issues with process-based means through the use of the Equal Protection Clause of the Fourteenth Amendment. This, along with other changes to our Constitution, has freed the bench to determine for itself what democracy is and should be.

II. LEGISLATIVE REAPPORTIONMENT

A. Representation and The Voting Rights Act

The value of representation lies at the core of the fundamental challenges associated with reapportionment. To better understand its complexity, we must first identify the different types of representational models that have been advanced to satisfy constituencies. Perhaps the earliest form of representation was practiced as the representative acting as a trustee for his constituency. In this particular model, eligible voters would elect the voting member of the governing body from his own district. However, the representative, as a trustee, does not necessarily act in accordance with the wishes of his constituency. Rather he votes in a manner that he sees best fit, often falling in line with his political ideology or what may be best for the greater good, instead of the immediate wishes of those by whom he was elected. Hence, this is the origin of the term *trustee*, as the people placed men into office that they deemed to be competent in decision-making. The trustee model assumes that a representative will better serve the people if that official is allowed to make choices based on his opinion, expertise or experience. Often referred to as the *Edmund Burke Model*, as Edmund Burke practiced this theory in British Parliament in the 1700's, trustee-oriented representation gives the representative the ability to make judgment calls on various policy issues. Its operation is very similar to that of Electoral College in that the college takes into account the desire of the public, but ultimately may vote in a way other than proscribed by the popular opinion.

The next type of representation directly opposes the trustee model. This representational theory is often referred to as the *delegate* model, a system in which the elected officials act in accordance with the wishes of their constituents, regardless of their personal persuasions and opinions. Those legislators who feel that it is their duty to represent the interests of those that elected them and not their own political agenda typically practice this approach.

The third type of representational basis, which is the focus of this paper and the problem associated with racial redistricting, is that of *descriptive* representation (Janda 391). Historically, the legislative bodies of our state and national governments have not accurately reflected the race, gender, culture or socioeconomic composition of our population. With the extension of the Voting Rights Act in 1982, Congress supported the theory of descriptive representation. This new legislation directed the states to form majority-minority districts in which certain seats would be guaranteed the equality of result, rather than the equality of opportunity. This paved the way for district drawing that grouped large numbers of minorities into single districts in an effort to provide them with more effective representation. The assumption was that a sizeable majority of Africa-Americans, for example, would elect an African-American. Simply put, minorities would represent minorities. At the core of the problems associated with racial re-districting is the creation of contorted districts whose sole purpose is to disproportionately enhance minority influence beyond the level of equality. This imbalance poses many problems for the Supreme Court, the Department of Justice and the States.

The key to the problem of descriptive representation is determining what amount of representation is appropriate for the various groups that comprise our diverse society. To address this issue, the Voting Rights Act of 1965 was passed in the beginning of the Civil Rights Movement. The Voting Rights Act ensures more than the Equal Protection Clause under the Fourteenth Amendment. In addition to supporting the right to vote and access to means by which to vote, the Voting Rights Act provided for claims against vote dilution of minorities. In this sense, it contradicts the spirit, if not the letter, of the Equal Protection Clause due to its inherently group-focused nature (Peacock 5). This particular aspect encompasses an entirely different dynamic and presents multiple complex problems of reconciliation for the judiciary.

This is clearly illustrated by Anthony Peacock in Affirmative Action and Representation. He states that this conflict arises in cases of vote dilution, where minority group interests are clearly at stake. In order to study this phenomenon, the judiciary must examine the political effectiveness of a current plan in order to determine whether or not a case of vote dilution is present. However, a natural interpretative tension arises. The Court cannot achieve the requirements of the Voting Rights Act without violation of the Fourteenth Amendment because political empowerment can only be ascertained through the study of groups, not individuals. The task of our Supreme Court is to make decisions that fall between the two, or to find ways to maneuver through the conflicting laws and find a practicable solution. With regard to the concept of representation, the responsibility of the judiciary is to fairly and effectively determine the proper balance between models of political distribution based on race and those based on geographical and population considerations. The ideal

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representational model will be one in which representation is based upon population, providing for voter equality, while being combined with considerations of minority interests and characteristics. The major problem with arriving at this ideal is the inaccuracy with which we can determine the proper influence of these characteristics and what their true values really are. Bernard Grofman, in the 1990's, argued that this conflict of representation could be explained by the difference in representing people as individuals and the representation of people's interests as groups (Peacock 153).

Here again we return to the problem of reconciling the Fourteenth Amendment with the Voting Rights Act. In the next section, we will see how the judiciary uses individually centered methods to derive decisions that are group applicable.

B. The Fourteenth Amendment and the Equal Protection Clause

The Fourteenth Amendment was adopted and added to the Constitution in 1868. Section 1 includes the Equal Protection Clause, which has been effectively developed into a tool of jurisprudence throughout the Civil Rights Era for the purposes of making substantive judgments through process-based methods. According to Owen Fiss in 1975, the interpretive liberty associated with the reading of the Equal Protection Clause rests in the concept of the anti-discrimination principle. There exist two distinct modes of interpretation when reading the Equal Protection Clause (Cohen 84). One is the literal interpretation in which the text of the Constitution is taken verbatim. However, this interpretation provides little more than an unclear and ambiguous guideline for judicial decision making. This interpretation only serves to the extent that the concept of equality is effectively established by its mention as a purpose of the amendment. In order for the Clause to serve some real purpose, other than that of stating the obviousness of the importance the state places on equality, a different approach must be utilized. This second method for deciphering the meaning of the clause is based on the anti-discrimination principle. In effect, the source for judicial flexibility and power with regard to issues related to the Equal Protection Clause stems from its own ambiguity. This gives rise to the need for reconciliation between judicial interpretation and the literal reading of the Amendment.

Fiss argues that the anti-discrimination principle serves as the bridge between literal interpretation and purpose only in those cases focused on the individual. Another

principle is required to understand the nature of equality in cases regarding the interests of groups, what he calls the group-disadvantaging principle. Fiss argues that the anti-discrimination principle overlooks the important issues regarding equality and states that a group approach would be more suitable to rectifying the injustices that exist in our social reality. However, he concedes that the anti-discrimination principle is more readily definable and thus is more practicable due to its process-associated delineation. He states that while the ideal might be that of group related equality, the anti-discrimination principle functions best under our judiciary system because it is in keeping with several tenants of the Court and its role in policy decision (Cohen 95). Essentially, the Court is blinded to varying factors that might otherwise inhibit the execution of justice, much the same way Lady Justice is depicted as being blindfolded. This frees the judiciary from making biased decisions, as it would be forced to do under the group-based model. Another important reason to use the anti-discrimination model is based on the precise nature of the application of this principle. This gives the judiciary a more clear-cut rule to apply in cases regarding the Equal Protection Clause, helping to facilitate a more objective application. Essentially, the judiciary uses what appears to be an individual protection under the Constitution as a social guideline to protect, not only those individuals, but also the groups to which those individuals belong in an effort to more effectively tailor the laws, especially with respect to representation and other cases of discrimination.

The most important aspect of this anti-discriminatory approach to the administration of the Equal Protection Clause, with respect to race, is that of the *Strict Scrutiny Test.* This operates as the highest level of scrutiny implemented in judicial review, due to the

inherently suspect nature of any legal matter regarding race, or other factors that are associated with discrimination. The three levels of scrutiny, all developed by the judiciary itself, are that of *rational basis, intermediate and strict.* The rational basis test is used in cases in which personal characteristics are not affected by the law. For example, this test is applied in instances in which race or some other individual factor could not possibly play a role in the intent of the law, such as speed limits. In these decisions, the Court must only make a judgment as to whether the law in question serves a legitimate state purpose. In other words, the burden of proof for such legislation is low in such instances, whereas the level of justification increases when race or gender is an important factor.

Cases involving alleged gender discrimination are subject to intermediate scrutiny in which the justices ascertain whether or not the law is significantly attuned to a crucial interest of the state. Basically, if it is important for the state to use gender as a defining criterion in legislation for the good of its people, the law will stand. However, if it is found to be not necessary to the state to make distinctions based on a particular gender, the law will not withstand the intermediate scrutiny test.

The most strenuous level of judicial review is the strict scrutiny test. This test is applied against laws in which the subject matter is categorized as suspect in the eyes of the Court. Suspect categories include any legislation or case involving the criterion of race, alienation, and national origin. Whereas laws evaluated under the rational basis test must only exhibit a logical connection to a valid interest of the state, those subject to the strict scrutiny test are treated much more harshly. They must be *necessarily related* to a *compelling government interest.* These laws must therefore be *narrowly*

tailored in order to withstand judicial review. In the cases dealing with racial re-districting, the Supreme Court is forced to use this test as its yardstick when determining the validity and acceptability of the law under the requirements of Equal Protection.

All of this strife and discussion did not arise out of judicial foresight or leading scholars in the field of political science. The ideas of representation and the Equal Protection Clause were spurred by past injustices. The beginnings of Legislative Apportionment can be attributed to a handful of landmark cases that our Supreme Court has handled during the Civil Rights Era. Examining rulings in these cases will help us to understand more thoroughly the problems associated with race and law to possibly provide us with insights into the more favorable solutions.

C. Origins of Legislative Reapportionment:

Baker v. Carr and *Reynolds v. Sims*

In October of 1961, the United States Supreme Court embarked on a treacherous, journey with its application of the Equal Protection Clause to the issue of representation. Before such decisions could be made, the Court had to first establish its jurisdiction. *Baker v. Carr* is a landmark case because it established, for the federal courts, the justiciability of state legislative reapportionment. The case involved the claims of citizens from Shelby County Tennessee regarding the violation of the Equal Protection Clause by the State's 1901 apportionment law. The claimants stated that they had suffered vote dilution. Justice William Brennan delivered the opinion of the Court and stated that the Federal District Court erred in that it did not find the case to be under its jurisdiction. Brennan suggested instead that the issue was not that of a political question, rather a political right, therefore bringing the case under the jurisdiction of the Supreme Court. The difference between this opinion and the three judge panel's statement in a Middle Tennessee Court hinged on the phrasing of political question versus political right. The action that Brennan took gave the Supreme Court probable jurisdiction, and set precedent to grant federal jurisdiction in future cases of this type. Brennan says that the 1901 Apportionment plan of Tennessee is a large contributor to the controversy. He then states that the matter, due to its association with the 1901 Apportionment, is justiciable as it falls under the broad jurisdiction of Article

III Sec. 2. Brennan says that the 1901 statute violates the Fourteenth Amendment rights of the citizens and that the Federal Court erred in that it ruled on the matter, giving it merit. Had they been unwilling to hear the case, their opinion might have stood. However, because they made a decision to try the case and then issue a ruling, the three judges effectively gave credence to its justiciability. Brennan affirmed that citizens seeking protection of a political right should not have that protection diminished simply because of a political association. The reason for ignoring cases involving political questions is to enhance the effect of the separation of powers and to protect it from encroachment. The integrity of this separation is not threatened in the eyes of Justice Brennan within the facts of this case.

Brennan makes another interesting move affecting the outcome of this case. He steers the appellants to seek protection under the Equal Protection Clause, because it is the more easily malleable than is the Guaranty Clause for the purpose of granting relief in this case. Brennan states that the Guaranty Clause would not have been successful in its application due to the nature of its historical relationship between the courts and the Federal Government, not between the Federal courts and the States. In an attempt to deflect a counter argument to his opinion, Brennan addresses the appellant's incorrect reliance on *Colegrove v. Green 1946*, which would have placed their claim under the Guaranty Clause, rather than the Equal Protection Clause. He states that the Court's jurisdiction and right to elevate this case out of the political ring and into the jurisdiction of the Court lies in the reasoning of the Court found in *Gomillion v. Lightfoot 1960*. In *Gomillion*, the appellant's claim was elevated to another level because the circumstances of the case were intentional and divisive in nature,

necessarily depriving him and other members of his class rights granted under the Fifteenth Amendment. Brennan draws a parallel between *Baker* and *Gomillion* in that in both instances, certain groups have been deprived of their Constitutional rights due to divisive and intentional action. Brennan concedes, in order to buttress his reasoning against criticism, that the Equal Protection Clause is not intended to control the apportionment of state legislatures. However, he makes it clear that this point is irrelevant based upon the nature of the facts of the case and that the real issue is that the appellants were denied this right, therefore lifting it out of the political sphere of influence and placing it squarely in the hands of the Court.

Brennan's reasoning is further supported by the concurring opinion of Justice Tom Clark, which flatly states that no other alternative was available to the appellants. Clark claims that there existed no practical remedies and that he sees no other suitable 'opportunity' than that of the Court. Clark's reasoning is defensible in that the legislature of the State of Tennessee would never change the apportionment of the state because it will disrupt their favorable distribution of power. This is understandable, as voluntarily relinquishment of seats in the state legislature would be voting oneself out of a job. The likelihood of this occurring would be nearly impossible. Therefore, he concludes that the only course of action is intervention by the Court, based on the state's denial to its citizens of Equal Protection, not its nature as a political case.

Both Justices Frankfurter and Harlan dissent in this case. Justice Frankfurter's opinion rests on the reasoning that establishing vote dilution and political debasement is such an imperfect science that it in no way can be readily determined as to distinguish the difference between cases that violate the Constitution and those that do not. He

emphatically states that it is for this reason that the Court errs in disassociating itself from precedent. He scolds the Court for abandoning years of precedent and 'dozens' of well-established cases that speak to these matters. Frankfurter accuses the majority of breaking from the traditional role of the Court by bringing a case under its jurisdiction which is clearly politically contaminated. This dissent is important because it establishes the need for an articulated standard to use when judging vote dilution. Frankfurter says that the real problem here is that the people of Tennessee adopted an inferior system by which to apportion their state and now there is little that can be done about it. He goes on to say that the appellants have no logical claim to vote dilution because they do not even know how much their votes should be worth. He also invalidates the majority opinion because he postulates that they do not know how much a vote should be worth and that without that standard, no judgment can be made as to the level of dilution and violation that has occurred, if at all.

Frankfurter further chides the majority by painting this case as a parallel to *Gomillion* because there is no evidence that the actions of the State of Tennessee were divisive and that they were intended to discriminate based upon individual characteristics. Instead he believes that the Court has effectively sought to invalidate the basis of apportionment that was adopted legally by the State of Tennessee. This argument is addressed by Dworkin's utilitarian example. Frankfurter addresses the implications of this decision in that the Supreme Court has directly interfered with a State matter and in doing so has set a precedent for all of the other states in the Union to follow. Essentially, the Court sidestepped states rights and endorsed an apportionment system based on factors other than geographical divisions and boundaries. This

particular aspect of his opinion is exceedingly important, as the Court effectively has established its right to assert itself in matters of geographical distribution, in addition to race and other factors. The questions raised in this opinion lead the judiciary to formulate a standard for what a vote should be worth. While Frankfurter found himself frustrated in *Baker*, his opinion became the legal reasoning relied upon by Justice Warren as he addressed the questions raised by Frankfurter with respect to what the benchmark for representation would become for deciding these cases. However, while Frankfurter's questions may have been answered, the application of the standard would have, as Harlan demonstrates, been exceeding displeasing to him in *Reynolds v. Sims 1964*. Earlier that year, the Court heard arguments in *Wesberry v. Sanders 1964*, in which the Court concludes what the standard of representation should be. In *Wesberry*, the Court establishes the "as nearly as practicable" standard with regard to the "one person, one vote" principle as the proper approach to these questions. This gave the judiciary a basis for their reasoning in *Reynolds*.

In 1964, the Court heard arguments relating to a dispute in Alabama regarding three apportionment plans. Appellants from Jefferson County and others in surrounding areas filed suit on a claim that the State of Alabama's apportionment remained based upon the census of 1900, much the same as the problems identified in *Baker*. This was apparently a violation of the constitution of the State of Alabama, as it proscribes for the process to be repeated decennially. The appellants claimed that, due to irregular growth patterns within the state from 1900 to 1960, they had been effectively discriminated against in accordance with the representation or lack thereof. The District Court that heard the case before it reached the Supreme Court characterized the proposed plans as

"invidiously discriminatory and completely lacking in rationality." This claim was based on the fact that only about a quarter of the state's population resided in districts that were represented by the majority of the legislature. Justice Warren restated Brennan's holding in *Baker*, in that a claim based upon the right to vote being debased is justiciable under the Equal Protection Clause. Warren then addressed the problems that the lack of direction the Court offered in *Baker* caused. Warren said:

> We intimated no view as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme. Nor did we give any consideration to the question of appropriate remedies (Reynolds 377 U.S. 566).

Warren ascribes responsibility to the Court for making the decisions of the lower courts invariably difficult. By giving no direction to be followed, the Court created a multitude of cases which had no clear answers and could only be decided upon by the Supreme Court, since they had not provided guidance to the execution of their decision.

While Warren admits inconsistency in the actions of the Court and avoidance of the responsibility to guide the states' Departments of Justice in these matters, he asserts that the Court did establish an exceedingly important criterion for the deciding of future cases with regard to vote dilution. Looking to the Fifteenth and Nineteenth Amendments, Warren states that no one can have their votes diluted upon the basis of race or gender. Warren then draws a parallel to the fact that improper apportionment effectively discriminates against people who live in particular geographical areas in the same way. He establishes this by stating:

> How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or

> because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. The concept of 'we the people' visualizes no preferred class of voters...the idea is that every voter is equal to every other voter in his state. The conception of political equality forms the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—*one person, one vote* (Reynolds 377 U.S. 557-558).

With this, Warren re-affirmed the application of the Emancipation Proclamation's standard as to what a vote should be worth. Most importantly, in *Reynolds*, the Court specifies that all three of the proposed plans were invalid under the Constitution because both houses under a bicameral system of legislation must comply with the standard associated with the keeping of the Equal Protection Clause. This distinct and important aspect of *Reynolds* makes it a landmark case in that it effectively invalidated most of the states' apportionment systems. Such widespread and unilateral changes promised to materialize in the form of hurdles and challenges for the various Departments of Justice throughout the states. While it appears simple and logical, its implications proved to be complex and difficult to administer.

In section III of his opinion, Warren states that the rights claimed to have been diminished must be experienced on the individual level in order to fall under the justiciability of the Equal Protection Clause. To counter possible arguments to the idea

that these plans merely discriminate against groups within certain geographical areas, Warren points out that legislators are elected to represent people, not the area or characteristics of that area from which they come. Therefore, Warren concludes that these actions must be, in fact, discriminatory at the individual level. He establishes that this type of discrimination is as invidious as those found in *Brown*. Warren justifies the judicial intervention in this case as well as in *Baker* by stating that where constitutional rights are violated or denied, judicial protection is required.

The issue of the Electoral College also presented a problem for the majority, but Warren quickly dispelled its relevance to this and other cases dealing with State affairs. He made it clear that arguments based upon this claim would fail in that the Electoral College, while clearly violating principles of numerical equality, had been established under the Constitution as necessary due to prior evidence in previous democracies. There is no evidence, as Warren highlighted, that the employment of a similar system for the states had ever been intended, therefore invalidating systems that adopted or promoted effectively similar numerical inequalities with each state. And because states are not sovereign units, no decision can be made as such and stand that violate the Constitution.

Warren closes his argument by commending the lower Court with the proper use of judicial power in determining that the plans developed by the Alabama legislature were all flawed and in violation of the Equal Protection Clause.

Justice Clark further supports Warren in his opinion, albeit with a different approach. While Clark recognizes the necessity of the one person, one vote standard, he implies that the real test of whether or not an apportionment plan is invidiously

discriminatory is what he refers to judging it against 'a crazy quilt'. He assesses that the Court only need look at the obviously distorted districts to see that a violation of Equal Protection has occurred (Reynolds 377 U.S. 588).

The establishment of the principles set forth in Justice Warren and Clark's arguments garnered frustrated responses from the minority, especially from Justice Harlan. In his historical dissent, Harlan writes one of the fieriest and lengthy opinions in the Court's history. Harlan claims that the majority has placed the state political systems in the hands of the "pervasive overlordship of the federal judiciary" and says that the majority's opinion will force every state to adopt inherently flawed plans of apportionment. Harlan states that, void of any disguising language; the majority rests its conclusion on the "constitutionally frail tautology that 'equal' means 'equal'." (Reynolds 377 U.S. 590) He makes it very clear that due to this measure's inherent inaccuracy, no system will ever perfectly serve its purpose under the one person, one vote ideology. He advocates the position that every other system in use at the time, whether it be straight area, minimum area, or various complex schemes is no less perfect than that of the one person, one vote system, but will be struck down at the cost of federal intervention to state affairs, with no foreseeable benefit. In this instance, he is uncertain how the Court intends to arrive at the one to one ratio and even if they could, he doubts whether or not such a system is proper at the state and local level. In his conclusion, Harlan re-asserts himself in that he finds this case to have far reaching implications and to not be an area in which the Court should delve. He scolds the Court for attempting to correct the social problems of the country and says that such action will leave the Court as the center for 'reform movements' and not as the protector of the

Constitution. If there is the need for reform, Harlan thought that it should be addressed through the legislative process of amendment, rather than through the pronouncement of case law, which he said should not be its substitute. Finally, Harlan makes his famous statement with regard to this case and those related to it, such as *Baker* as *an experiment in venturesome constitutionalism* (Reynolds 377 U.S. 624-625).

D. Post-Reynolds

The period of time following the *Reynolds* decision proved to be tumultuous for the Court, legislatures, and executive departments involved in the apportionment process. To fuel the problem further, the Civil Rights Era was in full swing and this political climate complicated not only district lines based upon geographical location, but those dealing with the issue of race as well. The tenets established in this case and in *Baker* muddled the apportionment process in such a way as to force the various Departments of Justice to ask questions for which there were no answers. This phenomenon challenged the Supreme Court to develop a series of tests throughout present history. In 1969, the Court found itself being forced to further refine its definition of the "as nearly as practicable" standard in *Kirkpatrick v. Preisler.* The situation with which the Court was presented hinged on the fact that the State of Missouri had deemed the variance between estimated population numbers and actual values to be insignificant enough to ignore. The Court disallowed this claim of *de minimis*, on the grounds that the standard "requires that the state make a good-faith effort to achieve precise mathematical equality." While an apparent clarification, the statement is no less vague and just as difficult to properly ascertain. However, in 1973, as the Court dealt with *Mahan v. Howell*, other factors were considered in the apportionment process and the *Kirkpatrick* standard was not applied because of its inherently impractical nature. Justice William Rehnquist, in his majority opinion, stated that the *Kirkpatrick* standard would only, "impair the normal function of state and local

governments." Although the *Kirkpatrick* standard was ignored in *Mahan*, the Court made it explicitly clear in *Karcher v. Daggett 1983* that the deviation from the standard in no way deemed it as invalid. The Court explained that its avoidance of the standard in *Mahan* was mitigated by the effort of the Virginia legislature to preserve its traditional political structure and that this action was not judged to be an invidious act against the Constitution. In *Karcher*, Justice Brennan, along with the majority, deemed that New Jersey's variance from largest to smallest districts of less than one-percent to not show a good-faith effort (Barker 591). This clear discrepancy between the rulings of the Court proved to convolute the opinions of the Court well into the *Shaw v. Reno* era. In addition to these problems, the United States Department of Justice began to make strong, coercive pressure felt by the states to institute majority-minority districts. This further complicated the standards and various tests developed to determine the relative value of a vote because it forced states to value, through affirmative action, minority votes more highly and to shift the balance to equality of result rather than that of opportunity. Adding this factor to the equation increased the complexity of an already difficult situation.

III. Racial Redistricting

A. The Attorney General and the States

The 1964 Civil Rights Act promised to make sweeping changes in the lives of the minorities it was intended to elevate and protect. However, following the election in that year, it became evident that the effectiveness of the Act had been limited, particularly in the South. This was, in effect, a result of the voting and registration machinery still being controlled locally in that area. To rectify this situation, Congress passed the Voting Rights Act of 1965, in which it was made illegal to inhibit otherwise eligible voters from doing so on the basis of their race, socioeconomic status or ability to pass arbitrary tests often used at polling locations. In the landmark cases of *South Carolina v. Katzenbach (1966) and Katzenbach v. Morgan (1966)*, the Supreme Court validated Congress as having the power to enact legislation to protect the effectiveness of the Fifteenth Amendment. In *Katzenbach v. Morgan*, the Court specifically upheld the authority of the Department of Justice and the Attorney General to approve all state apportionment and electoral plans within the coverage area before they could be instituted. Many states tried to maneuver around these rulings; however, the Court continued to cut off these attempts to circumvent the Voting Rights Act. Such schemes as at-large election for officials and pairing large groups of white voters with relatively small numbers of black voters all faced similar fates under the scrutiny of the Court. The at-large elections were attempted in Mississippi in *Fairley v. Patterson (1969)*, but Chief

Justice Warren effectively argued for the majority that the intent of the plan was to dilute black voter efficacy in the state. In 1973, the Court made a ruling in *White v. Register*, in which blacks and Mexican-Americans, under the Texas apportionment plan, would be purposefully discriminated against based on Texas's electoral process and history (Barker 568).

While the strict standard of discrimination proved to be somewhat effective, the United States Congress passed legislation in 1982 that lessened the burden of proof required to determine apportionment and electoral acts discriminatory under the Fifteenth Amendment and Equal Protection Clause. This new standard allowed the Department of Justice to apply a results-based test and to consider all of the circumstances that were related to a particular plan, which more easily facilitated the invalidation of most plans.

Thornburg v. Gingles (1986) serves as the most prominent example of the Court's promotion of affirmative action. In this particular case, the Court provided relief in an objective form for subjective hardships and social suffering of historical significance. This case was decided in 1986, during the thick of the Justice Department's push for majority-minority districts. The Supreme Court ruled that a North Carolina plan calling for a multimember district election process was unconstitutional under Section 2 of the Voting Rights Act of 1965. Under the new legislation of the extension to the Voting Rights Act in 1982, the plaintiffs' only burden was to prove discrimination under any and all circumstances present. This discrimination needs only to have, in some way, deprived of them of equal participation in the election process. A sympathetic Court found the ruling of the

lower three-judge panel to be correct. Justice Brennan delivered the controversial majority opinion to the Court by outlining four elements and conditions that made the proposed apportionment plan, coupled with the circumstances in North Carolina, unconstitutional. He decided this on the basis that it failed to protect the rights of African-Americans in that state. Justice Brennan said that the vestiges of discrimination, racially polarized voting, appeals to racial biases in campaigns and racial bloc voting in the state of North Carolina were the totality of the circumstances. He believed that these, coupled with the proposed plan, deprived the African-American citizens of that state to elect the candidates of their choice. Naturally, this statement caused much disturbance and bitter disagreement, because the Court now exercised its power to ensure not only access, but also results. Most interestingly, the Court placed an arbitrary value on the circumstances and political climate of North Carolina in order to gauge how much political imbalance should be granted to the minorities of that state. Undoubtedly, the African-American population of North Carolina had and would have continued to suffer politically under such circumstances. It is for this reason that the Court found justification in its reasoning for this case and others in which there was no clearly determinable rule.

Throughout the era, from 1976 until the late 1980s, the Department of Justice continued to field Section 5 pre-clearance requests. Section 5 was leveraged by the Justice Department during those years in order to promote and effectively require the development of majority-minority districts throughout the Voting Rights Act coverage area. This practice would be continued into the end of the decade

until racial gerrymandering was confronted in one of the most influential and controversial cases of Supreme Court history: *Shaw v. Reno*.

B. 1990's Racial Redistricting:

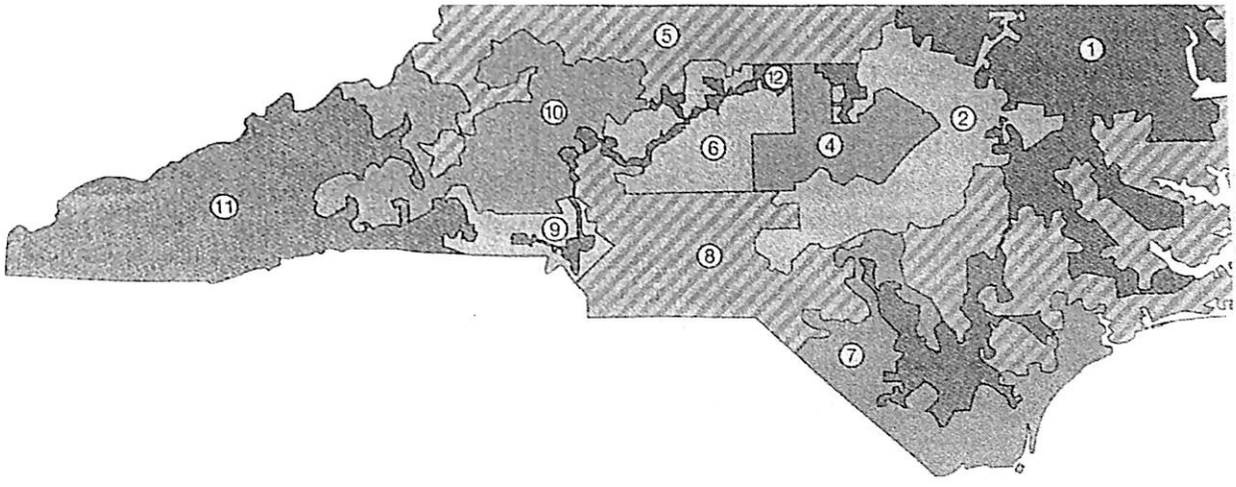
Shaw v. Reno, Miller v. Johnson & Shaw v. Hunt

1. Shaw v. Reno

The scar carved into the rock of jurisprudence by apportionment uncertainty was further deepened when the Court issued certiorari for *Shaw v. Reno*. In 1993, the United States Supreme Court changed course with its policy, much to the dismay of the Department of Justice and multitudes of state legislatures. The Court ruled against a plan that was devised to include a second majority-minority district within the state of North Carolina. Following the 1990 Census, the State was afforded an additional seat in the United States House of Representatives. The state submitted a plan to the Attorney General under the pre-clearance statute of Section 5 of the Voting Rights Act. This single majority-minority district was not approved for utilization by the state under the direction of the Attorney General. This forced the General Assembly to revise its plan, creating a second majority-minority district. These two districts were both created for the sole purpose of empowering minority voters within the state to elect officials of their choice. As erratically shaped as these districts were, the Attorney General granted this revised plan pre-clearance status and approved it for implementation.

(See Figure III.1 on page 36)

Figure III.1 *Plan attacked in Shaw v. Reno*



Adapted from: Mason, Alpheus T., and Donald Grier Stephenson, Jr. American Constitutional Law. Upper Saddle River: Prentice-Hall, 2002. Page 202

The first district appears in shape to resemble that of a disjointed hook and inkblot. The second majority-minority district stretched for almost 160 miles through the state, essentially following Interstate 85 in an effort to include as many minority voters from urban areas in the district as possible. This action seriously disturbed many citizens of North Carolina and they brought suit in the District Court. They claimed that the state had intentionally instituted a racial gerrymander and that the plan was unconstitutional. After this claim failed, as the plan was deemed constitutional under the Voting Rights Act, the appellants sought relief in the form of claiming that the Voting Rights Act itself was unconstitutional. Their argument that racial redistricting constituted a violation of the Constitution was determined to be unfounded simply on the basis that it promoted minority representation without significantly impairing white-voter representation. The Court simply cited that the purpose of the plan was to comply with the demands of the Department of Justice and therefore, in accordance with the Voting Rights Act, the plan remained constitutionally valid.

The next attempt, *Reno v.* Shaw, proved to be more successful, as the question posed to the Court hinged not on black versus white, but rather what it means to take part in an electoral process that is indifferent to race and color. Justice Sandra Day O'Connor, in her opinion to the Court, states that this is distinctly different from the previous claims. She says that this claim simply seeks a remedy for what can only be observed as an attempt to segregate the districts to such a degree that race is the only factor taken into account, regardless of other factors previously employed in the

apportionment process. Her opinion is summarized below and is necessary to understand how she and the majority derive the justification for their reasoning.

Justice O'Connor states that the Equal Protection Clause's primary purpose is to preclude states from discriminating on the basis of race. Citing *Personnel Administrator of Massachusetts v. Feeney (1979)*, she states that understanding the legislative intent of laws that deal with race is irrelevant to the subject matter, as determining what regulations dealing with race are innocent and which are fueled by prejudice is necessarily impossible. Additionally, O'Connor makes the reason for the subject of race being unacceptable as a determinate in any legislation by referring to *Richmond v. J. A. Croson Co. (1989)*. This case established that distinctions founded on race are deleterious to the notion of a free and equal society.

In the next section, O'Connor concedes that the claimants' position is justified in that, if held to the same standard of strict scrutiny, the districts drawn for this reapportionment plan can in no other way be interpreted than as based solely upon race, invalidating their constitutionality. She then offers her critics an important counter-argument in that she cites *Wright v. Rockefeller (1964)* wherein it was judged that members of a particular racial group, comprising the population of an entire community or area have a legal right to not have their votes diluted by being placed into a multiple districts. This is not the case, as Justice O'Connor points out with *Shaw*, as the state has take a deliberate action to include people into a district that have nothing else in common except the color of their skin. This, in the eyes of the Court, propagates a concept deleterious to the aim of the Fifteenth and Fourteenth Amendments. Such

racial separation promotes the ionization of racial groups and attitudes, causing further rifts among the people of our nation.

Justice White dissented from the majority and stated that the Court has placed too much emphasis on the shape of a district and that they have overlooked the state's intention: to comply with the goals of the Voting Rights Act. He disputes O'Connor's claim that the plan did not pursue a compelling government interest in that it promoted the voting and participatory rights of minorities within the state. White also attempts to discredit the argument employed by O'Connor from *Richmond.* White says that the traditional political subdivisions and historical electoral processes are the root of the problem and that they are in fact the very mechanisms that have suppressed minority political effectiveness for years.

In addition to attacking the judicial reasoning employed by the majority, the minority makes it clear that North Carolina was simply acting in response to the failed pre-clearance of the Attorney General. Finally, the dissenters balk at the use of the "narrowly tailored" standard and say that nothing could be more narrowly tailored than a district that is designed specifically for a compelling state interest.

This decision sparked intense political debate and serious commentary about the state of our judicial system and the status of affirmative action in our nation. Some of the nation's leading scholars presented their critiques and commentary on the case. A selected portion of this extensive commentary is discussed in the following section. However, it is necessary to follow *Shaw* with other cases of relative importance in order to understand the significance of this decision and the perspective of the scholars who

took it upon themselves to comment on the situation. The case that most appropriately follows *Shaw* is *Miller v. Johnson.*

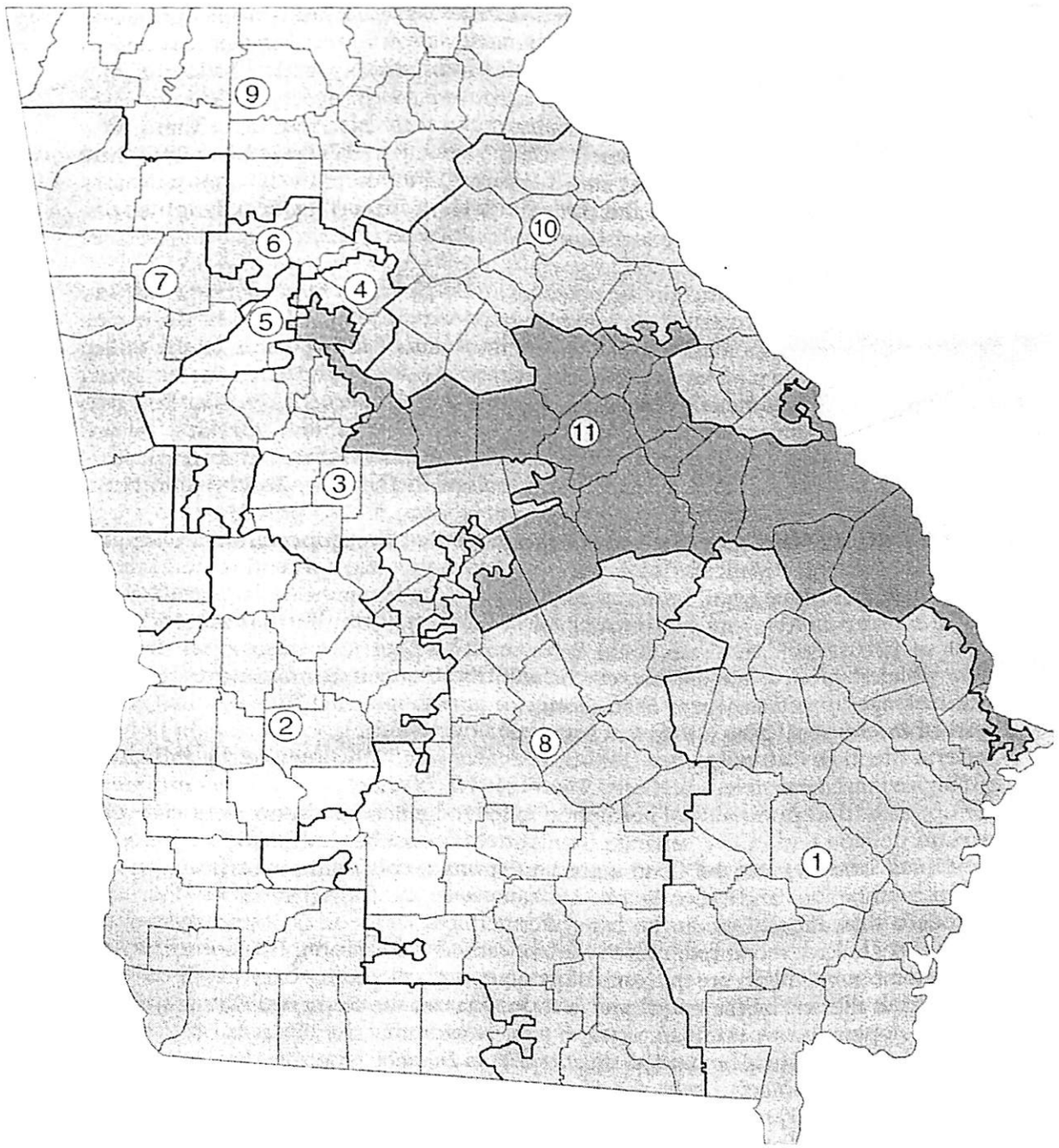
2. *Miller v. Johnson*

The Court heard arguments of *Miller* on April 19, 1995 and on June 6; the Supreme Court ruled that the "max-black" plan developed by the American Civil Liberties Union violated the Equal Protection Clause. This case served as the precursor to *Abrams v. Johnson*, which was simply a continuation of the controversy at hand. In *Miller*, the Attorney General, under the Clinton administration, had refused to grant pre-clearance to a Georgia plan, which provided for "only two" majority-minority districts. The Attorney General approved the "max-black" plan even though the 11th district, a majority-minority district, included areas of the state over 260 miles apart.

Justice Kennedy delivered the opinion of the 5-person, in which he relied heavily upon the decision and reasoning set forth in *Shaw v. Reno.* Kennedy is straight to the point and states that the 11th district appears to violate Equal Protection Clause in that its sole motivating factor is that of race. However, he concedes that the plan may be found valid if the Court is given reason to believe that such a plan is narrowly tailored in such as way as to fulfill a compelling government interest. Essentially, Kennedy is saying the plans reliance on race does not automatically invalidate it, only that it must be thoroughly tested under the principles of strict scrutiny.

(See Figure III.2 on page 41)

Figure III.2 *Plan Attacked in Miller v. Johnson*



Adapted from: Mason, Alpheus T., and Donald Grier Stephenson, Jr. American Constitutional Law. Upper Saddle River: Prentice-Hall, 2002. Page 203

Throughout the introduction of his opinion, Kennedy hints at the obvious bias and reluctance to cooperate on the part of the Justice Department. He uses this in his counter-argument defense to say that the objection to the 11th district is not purely based on the fact that it is bizarrely shaped. Rather, he insists, that the District Court had multitudes of other compelling evidence before it by which to ascertain that the prime motivation for the drawing of this district was solely based on race. This evidence also helped to establish that the necessity of a third majority-minority district did not better serve to fulfill a compelling state interest, rather the interests of specific political groups and the Department of Justice. Kennedy further asserts the status of the Court by explaining that a compelling state interest is not determined by the Department of Justice, rather by a proper interpretation of the Constitution. If the Court were to blindly accept the Department of Justice as the definitive authority on compelling state interests, then the Supreme Court would be effectively shifting the balance of power in favor of the Executive Branch, one that is partisan and inherently biased.

Kennedy concludes by saying that the plans rejected by the Department served the purposes of Section 5 of the Voting Rights Act and that in doing so they should have received pre-clearance. Section 5 was never intended to empower the Department to develop majority-minority districts at any given opportunity. Its purpose was rather to ensure no retrogression and that a proportional measure of districts be allocated in order to provide an adequate level of amelioration. In demanding that there be a third district created, the majority establishes that the Department overstepped its boundaries and the intent of the Act. Since there was a substantial lack of evidence purported by

the Department concerning discrimination in the previously proposed plans, their intent had obviously been to maximize minority representation, rather than to protect the rights of the citizens of that state. Finally, the majority accuses the Department of Justice for being so nearly sighted as to segregate our nation's people in such a way as to cause the type of tribulations the Act was intended to prevent.

This case was clearly divided among partisan and ideological lines, as is evidenced by the majority-minority split. Justices Stevens, Ginsburg, Souter and Breyer dissented. Justice Stevens argues that the majority has contrived the facts of the case, ignored historical significances and abandoned the cause and intent of the Equal Protection Clause. He seems to think that the fact that the case predominately involves blacks and whites should have some bearing in the legal determination of the case. This is an interesting approach to the case, as Stevens bases his reasoning on the subject matter to derive his conclusion, rather than the process-oriented approach of the majority. The problem with this scenario is that the minority is considering the intent and origin of the Amendments and Acts in question. This may be in fact necessary in order to provide satisfactory protection to those minorities. However, this approach embraces a purely results oriented test in which equality of opportunity is given little value. Justice Ruth Ginsburg attempts to undermine the validity of the argument that the 11th district is bizarre and highly irregular. She writes that the district was conceived in keeping with traditional boundaries and other considerations in mind. According to her examinations, the painstaking construction of such a district could have been no more "narrowly tailored" to suit the requirements of Act and the Equal Protection Clause. Ginsburg also effectively addressed the fact that the "max-black"

plan had not been directly adopted, but that it had been altered to comply with considerations other than that of race. She states that this should make it constitutionally valid under the Court's present reasoning.

Obviously, the disputes and problems of this case were not settled in the minds of the justices. They would no doubt carry over into the next case, *Shaw v. Hunt.* Unfortunately, an ample measure of disagreement and dissention was to be unearthed as the Court tried to deal with yet another variation of the apportionment issue.

3. Shaw v. Hunt

The very next year, the Court heard arguments in *Shaw v. Hunt.* This is essentially *Reno* revisited as this case is on appeal from the District Court in North Carolina, which decided that the districts were drawn with race as a primary consideration, the plan served a compelling state interest and therefore did not violate the Constitution. Chief Justice William Rehnquist and the remaining members of the majority felt quite differently about the decision of the lower Court, bluntly stating that the North Carolina apportionment plan does not meet a compelling state interest as it is not narrowly tailored to a satisfactory degree. The districts in question are the same as those deliberated in *Shaw I* and they receive much the same resistance upon their return to the Supreme Court. Rehnquist draws reasoning for his opinion from the *Miller* decision and standards that arose from it. While in disagreement with the District Court, Rehnquist allows the District Court a gracious exit by expressing that the *Miller* standard was not available to them at the time of their decision. It is unlikely that this would have affected the outcome of the District Court's opinion, but it was offered as a

logical explanation as to why the courts disagreed on this particular subject. The key issue here is much the same as that in *Miller*, whether or not apportionment schemes based solely on race are of a compelling state interest and how to evaluate those claims. Rehnquist says that because of the racially motivated nature of the plan, the state must prove that it serves a compelling interest and that it is narrowly tailored to meet that goal. If both of these requirements are not met, the plan is deemed unconstitutional. Next, the majority address the three arguments purported to validate the existence of District 12. These include past discrimination, and compliance with Sections 2 and 5 of the Voting Rights Act.

Rehnquist cited *Wygant v. Jackson Board of Education (1986)* to dismiss the argument. In this case, the Court established that states can take remedial action when the extent of the injury is readily determinable and that the ameliorative action will serve to alleviate that injury. Rehnquist, along with the rest of the majority and the District Court established that the past discrimination in North Carolina did not necessitate the use of race as a legitimate factor in apportionment of the state. To counter the arguments of the appellees, Rehnquist pointed out that the documents claimed to have influenced the drawing of the districts based on past discrimination were published almost two years after the plan was submitted. This most definitely put holes in the argument that the North Carolina legislature was compelled by academic documentation, as it claimed, rather than by pressure from the Department of Justice.

In addressing the compliance issues of Sections 2 and 5, the Court is quick to point out that satisfying the Department of Justice's interpretation of the Act is not necessarily a compelling state interest, as determined in *Miller*. The Court finds that the

previous plans would have easily complied with correct reading of Sections 2 and 5 and the erroneous, extended version adopted by the Department of Justice once again oversteps their authority. Rehnquist said of this:

> We believe the same conclusion must be drawn here. North Carolina's first plan...indisputably ameliorative, having created the first majority-black district in recent history. Thus, that plan...cannot violate Section 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution (*Shaw v. Hunt 517 U.S. 912).*

Finally, he finds an inconsistency that highlights the ulterior motives of the Department of Justice. As Section 2 properly reads, plaintiffs have standing if they belong to a group within a "geographically compact" area split into various districts for the purpose of diluting their voting power. The state errs in that it assumes once a Section 2 liability is apparent, such as the case of the minorities within the southeastern and central areas of the state, that the legislature may draw another district anywhere it chooses. Since this is the case, the Department of Justice appears readily willing to adopt any district that will favor its political agenda, regardless of whether or not it provides relief to the minorities in diluted areas. With or without District 12, the voters in the aforementioned region still suffer a margin of vote dilution; therefore, District 12 is obviously not narrowly tailored to meet its purported purpose. Additionally, this clearly proves that the Department of Justice was serving an agenda other than the proper application of the law (*Shaw v. Hunt 517 U.S.* 917-918).

For the reasoning delineated above, the Supreme Court reversed the ruling of the District Court claiming that the plan endorsed by the Department of Justice violated the

Constitution. Again, the bench found itself divided along the fissure of partisanship and discovered it impossible to come to any sort of agreement in this 5 to 4 decision. Justice Stevens delivered the dissent for the minority.

Essentially, Stevens accuses the majority of judicial meddling and attempts to expose this decision as a purely partisan effort on the part of the conservative justices. Although he does not actually say that there exists such a conspiracy, his tone and reference to the Republican Party lend itself to such a conclusion. Further, Stevens cites *Palmer v. Thompson 1971*:

> We established that racially-motivated legislation violates the Equal Protection Clause only when the challenged legislation "affect(s) blacks differently from whites (Shaw v. Hunt 517 U.S. 923).

This quote from Stevens' opinion helps us to understand the perspective he and those who joined him have with regard to the original intent and purpose of the Equal Protection Clause. Stevens is taking the historical context of the origins of the Fourteenth Amendment and the Voting Rights Act into account as the minority chose to do in *Miller*. This is not to say that there is not some substantial justification for this approach, only that there exists no determinable standard with which to measure the value of those historical, and societal injustices. Nor is there any Constitutional support for applying the standard only to minorities. This uncertainty, according to the majority, is what makes remedial action so difficult to justify and quantify. Essentially, Stevens feels that the majority has misinterpreted the *Miller* standard as well as its readings of the Equal Protection Clause and Voting Rights Act. He gives these misinterpretations as reasons for the Court's unfavorable conclusions.

This case sent the General Assembly back to the drawing board with a presumably clear idea of how the Court would respond to such a case in the event that it were again appealed. Legal scholars had much to say about the significance of such rulings as in *Shaw I & II and Miller*. Multitudes of journal articles and books were written documenting, critiquing, and questioning these rulings.

C. The Legal World Speaks Out

The academic world proved to be no less in disagreement than the Supreme Court regarding racial redistricting. In the following discussions of the various journal articles utilized in this research, we can catch a glimpse of the real motivating factors behind these cases. The articles focus on the previously discussed cases, primarily focusing on the effects that *Shaw v. Reno* had on the entire subject.

1. Democratic Citizenship vs. Full and Fair Representation

Professor Richard H. Pildes of New York University Law School has coined what has been earlier described as those preferring either equality of opportunity or result as "democratic citizenship" and "full and fair representation" respectively. These concepts run parallel to the ideas discussed earlier by Dworkin and Ely. Rather than terming the particular sides as equality of opportunity or result, Pildes employs a more descriptive terminology by which we can identify the attitudes of the following articles. Professor Pildes is a member of the "full and fair representation" team. His allies criticized the Court for their decisions in the previous three cases, which favored democratic citizenship.

In *The Hybrid Nature of Political Rights*, Professors Amar and Brownstein, both of University of California at Davis, attack the Court for improperly applying the "individual" standard to a minority group that has obviously been disadvantaged collectively. They strongly doubt the application of the color-blind principle and feel as

though such disregard discounts the prevalence of racial bloc voting. Through illustrating the Court's use of the "individual" interpretation and contrasting it with its "vote dilution" in *Shaw & Miller*, Amar and Brownstein say that the Court is "shooting blanks" with respect to its judicial consistency and reasoning. They conclude that this is so because they believe the two concepts, the individual and group vote dilution, to be inherently separate and distinct. This particular argument is extremely effective and poses an apparent contradiction in the ruling of the Court, although it supposes that minority bloc voting is positive while majority bloc voting is negative.

In support of Amar and Brownstein's position are Sam Issacharoff of the University of Texas and Pamela Karlan of the University of Virginia. Their article, *Standing and Misunderstanding in Voting Rights Law*, addresses the complexities associated with re-districting law. Additionally, the article expresses disappointment with the Court's inability to make consistent decisions regarding these cases. Essentially, the article criticizes the Court for granting the standing to sue to those whose injury could not be accurately determined. They claim that without a well-defined measure of injury or harm, it becomes necessarily impossible to consider a claimant as having standing in the Court. Various scenarios of district packing, a phenomenon in which legislatures cram "filler people" into a district in order to preserve the one person, one vote ratio while still ensuring a minority victory are outlined in the text. The authors concede that if one had perfect numbers and proof of such actions, and that specific harm could be determined, that those persons would have legitimate standing in Court. However, due to the complexity and inherently indeterminable nature of such numbers, it is impractical to attempt. The same principle

would apply in which districts were "cracked" or split into in order to achieve the effect of vote dilution. Since this is not the case in *Shaw v. Reno*, the authors conclude that the finding of the Court in this case, as well as those that follow employing the same reasoning, is erroneous. They assert that the very nature of apportionment involves treating people, on some level as groups and therefore, under the Court's present reasoning; the act of dividing the electorate at all would be unconstitutional. Their main point is that the Court simultaneously acknowledges the significance of race while ignoring it altogether; much in the same way the Court treats the group-oriented nature of apportionment. This argument directly supports the position taken by Amar and Brownstein in the previous article regarding the conflicting use of the "individual" standard, as it highlights apparent contradictions within the reasoning of the Court.

2. *The Court Finds Support*

Although the Court did not find itself searching for additional criticism, there did exist a significant amount of support for its rulings in these landmark cases. The proponents of "democratic citizenship" made their case be known as well. The general consensus of the "democratic citizenship" group is that the "full and fair representation" group is only hurting itself.

Darin R. Doak, in *Miller v. Johnson: Drawing the Line on Racial Gerrymandering*, strongly defends the position of the Court and its reasoning. Doak says that the position taken in *Miller* dispelled a stereotype adopted throughout the history of the United States, which had been a barrier to true equality. This disproved myth, Doak states, is that minority groups act and vote the same way. Whether or not

they actually do is not important, dispelling the association to these behaviors based upon race is what Doak feels is important about this case. With this decision the Court moves beyond classifications the Constitution intends to prevent. Doak refutes the claims of other scholars who say that this decision will lead to more judicial interference, as the Court all but proscribed its acceptance of politically gerrymandered districts. Doak suggests that the Court adopted an attitude of "just so long as the predominant factor is not race, anything goes." He says that this creates problems, though not as invidious as those associated with race, which are just as difficult. Doak believes that political gerrymandering is as detrimental to the Equal Protection Clause and our democracy as is racial classification. However, he sees the decision as a victory for Civil Rights Activists who sincerely want equality within the electoral process and for those who seek the ideal race-blind society.

Doak's defense of democratic citizenship is further buttressed by a direct reply to Pam Karlan, written by David Lublin of American University and D. Stephen Voss of The University of Kentucky. They explain why fighting for majority-minority districts may not be in the best interest of the Democratic party, as otherwise balanced districts would find themselves becoming more white while black districts would only become more black. They postulate that this phenomenon could produce stronger, less moderate Republicans in white districts and more liberal Democratic candidates in the other districts. This would cause substantial gridlock, voter apathy and black candidates only from minority districts. The authors also defend the Court by saying that the justices are not confused by the competing theories laid before it, rather they are

attempting to find the best possible compromise for a problem to which there is no clear solution.

Perhaps the most entertaining and thought provoking article selected for the project was writing by John Hart Ely. Again this article aims to dispel the claims made by members of the "fair and full representation party". By articulating the various harms associated with the continuance of such policies as majority-minority districts, Ely illustrates the destructive and problematic nature of such an approach to ensuring minority rights. His article, *Gerrymanders: The Good, the Bad and the Ugly*, attempts to explain the rationale used by the judiciary and the complexities surrounding these cases that restricted the benches ability to produce anything purely consistent and satisfying. Ely explains that the Court found itself in a bind after *Shaw I* because the term "bizarre" was not exactly the most objective criterion to determine the constitutionality of such an important matter. The "Dominant Purpose" test shored up the problems associated with the "bizarre" test, but the "purpose" test remained exceedingly vague. He says that the Court probably would not have suffered as much criticism as it did had it been able to develop the "Dominant Purpose" test for use in *Shaw I*. Additionally, Ely sees *Shaw I* as a safeguard from racial and political polarization within the states. Ely also effectively explains a principle that the other authors have conveyed as an interesting counter-effective result of racial gerrymandering. He points out that not only do Republicans not usually object to the strengthening of majority-minority districts, they even help create them. This is because of the effect of packing black Democrats into a district essentially "bleaches" the surrounding area, shoring up support for white Republicans. Ely says that

Democrats are forced to continue to push for these guaranteed seats, at the risk of losing them entirely even if that means an increase in Republican power. In his next section, he deals with the issue of political gerrymandering. He discredits the Justice Ginsburg's argument that the State of Georgia had obviously taken other factors into account other than race, as it had changed the "Max-Black" plan. This change, to which Ely enlightens us, was a political favor made to accommodate a Congressman's son so as to allow him to serve alongside his father. Ely stipulates that this hardly qualifies as justification for saying that the State based their drawing on factors other than race. Ely offers a series of suggestions, some of them humorous for the judiciary and the legislative branches of our states. He initially suggests that the Court has three alternatives. The first would be to continue to confuse the entire populous with conflicting and contradictory decisions. He makes the point that if everything were literally black and white this solution would eventually work and the problem would go away. However, the expanding Latino population is a factor that must be considered and one that will not halt for the purposes of judicial nicety. Next, he says that the Court could simply deny anyone standing to sue, but this idea is quickly dispelled as *Reynolds* prohibits this type of preclusion. The final piece of advice for the Court is to simply label the districts as justifiable under the auspices of affirmative action. This also does not seem to be a viable solution as it was during the 1970 and 80's because the value of affirmative action and its continuance is currently being highly scrutinized.

Ely's suggestions for the legislative branches would include such strategies as simple as accepting the ruling of the Court to complex metropolitan and rural grid systems. Regardless of the approach, Ely's point is clear: There, at this time, exist no

readily determinable solutions for a problem in which so many racial, social and political interests are at stake. At the end of the article, Ely makes an ominous prediction, that the safeguard provided by *Shaw* has its days numbered (Ely 638-641). On April 18, 2001, the Court made another landmark decision as it turned away from its freshly established precedent.

D. The Tide Changes

Shaw v. Hunt returned to the Supreme Court yet another time, but under a different name and found another fate. On appeal, the District Court, in keeping with the opinion made in *Shaw v. Hunt*, determined the plan under ***Hunt v. Cromartie et al. (2001)***, to be unconstitutional, in that the districts in question were drawn with race as a primary, dominant consideration in its composition. Justice Breyer delivered the opinion of the Court in which the majority determined that politics, not race had been the motivating factor in the creation of the 12th district and that the evidence supporting the District Court's decision was insufficient and invalid. The majority says that the State of North Carolina has the right to draw the lines based upon political lines. The difference here was the evaluation of voter behavior, rather than voter registration. Although these numbers are nearly identical with regard to minorities and vote choice, such analysis remained a valid criterion in the eyes of the Court. The Supreme Court says that in instances such as these, the appellees are to carry the burden in showing that the political objectives could have otherwise been achieved. Since the majority deemed the appellees not to have demonstrated other means for the political objectives to be achieved, they find the District Court in error and reverse the ruling.

IV. Conclusion

A. Real Problems

Where do we now stand with regard to these problems? Have the issues of race, equality, democracy and politics diminished in importance to the extent that there no longer exist conflict between them? Ideally, the answer would be affirmative, and all of us would be treated the same under the Constitution. However, this is sadly not the case, as has been demonstrated by the decisions handed down by the Court, beginning with *Baker* through *Hunt v. Cromartie*.

Throughout this paper, we have examined the interplay between law, race and politics in order to establish two essential points: 1) that these factors are inherently problematic; and, 2) regardless of a color-blind ideal, these factors continue to play an important role in our political process. As evidenced by the rulings of the Court, it is impossible to arrive at an even-handed solution for such a problem due to one basic fact of economics: scarcity.

Because political power is scarce and there exists a clear correlation between politics and race, the different interests will continue to compete under our current political and social arrangement. This competition may serve to further polarize our society, a dreadful consequence that if reached, could scar race-relations irreparably. With little doubt, the Court has been wary of these consequences and the problems associated with such delicate issues.

These consequences serve, in part, to explain the impossible balancing task confronting the bench during the past decade. Melissa Saunders (2000) illustrates this complex judicial problem by expressing general frustration with the standards applied in *Shaw & Miller*. Specifically, she finds herself frustrated with the "predominant factor" standard. She equates the Court's permission of a "limited use of race [in redistricting] to saying one may take a little poison." (Saunders 141) Our Supreme Court, due to a theoretically finite amount of political power available within any given system, has chosen to walk a razor-sharp edge.

Samuel Issacharoff and Pamela Karlan (1998) expose the root of this complex problem well. While law and politics are important factors, the main issue remains: race. All studies regarding voting patterns and election results point to race as a predominant factor. However, in this time of political and social hypersensitivity, few people are willing to acknowledge, as Issacharoff and Karlan do, that race has anything to do with these differences whatsoever.

The problem with acknowledging this issue openly is that it admits the presence of ideological inconsistencies and the flaws associated with a purely race-blind society under our current social structure. In order to avoid such a catastrophic realization, the Court looks to associate other qualities among the electorate in order to effectively identify the different races, without explicitly doing so. This is very much what transpired in the 1990's, as the Court forced our states and its attorneys general to find other criteria by which to define racial interests.

By using alternate criteria, the Court created nothing more than a smokescreen, all for the sake of Constitutional conformity and maintaining the social status quo. To

truly achieve the color-blind ideal, the courts must administer the district drawing process, as legislatures are fully aware of the direct correlation between race and political affiliation. This creates another problem, as assigning such a task to the judicial branch would seem to be a clear violation of the separation of powers and is opposed to the very nature of our constitutional democracy. The Court will continue to experience these problems if it considers and instantaneously ignores race.

While it becomes readily apparent that the Court now finds itself in a precarious position without an identifiable solution, one may lie just over the horizon. Richard Pildes says that the Court is justified in its efforts as they attempt to balance the previously discussed "full and fair representation" with the "democratic citizenship" in order to keep the competing sides temporarily satisfied. He asserts that although both sides have equal weight, there is not necessarily a practical compromise. Pildes says that the reaction of the Court has encouraged an environment of legal gambling, in which various leaders choose between the risk and benefits of passing new legislation or taking a plan to Court.

As a suggestion, Pildes maintains that the Court dismantle the differentiation between racial and political gerrymandering, arguing that they are in fact exactly equal. Such a distinction poses the impossible problem of determining whether or not blacks are placed in districts for their skin color or for their voting preference. Such a discrepancy will invariably lead to these cases being continuously passed around the judicial circuit (Pildes II 137-138).

Our legal, political and social systems cannot function properly if resources are constantly expended on resolving the same issue time and time again. The Court will

only be able to play both sides for a limited period of time. When time expires, the Court must be ready to deliver a definitive solution to this issue, even at the risk of losing its efficacy as the authoritative body of our government.

B. Problems with Racial Redistricting

David Lublin and Stephen Voss concur with Richard Pildes in that the Court appears to be engaging in the practice of perplexing its critics. They also agree with Pamela Karlan in her assessment of the Court's desire for objective decision-making rules. She implies that adherence to such policies results in the Court being viewed as idiosyncratic.

As previously outlined, many of these scholars also agree on one fact: Racial gerrymandering may effectively reduce the power of the Democratic Party and serve to polarize our society along racial lines. Specifically, Lublin and Voss state that the percentage of blacks in majority-minority districts far exceeds the required level usually necessary to ensure a Democratic win. Through this, the authors conclude that Republicans might be able to win more seats and thus negate the effect of the ensured seats created by the majority-minority districts.

In addition to the problems that may surface nationwide, challenges in the already beleaguered South will most likely continue to emerge. As the majority-minority districts become increasingly stronger, with respect to voter unity, neighboring districts could increase in political polarization as well. This poses a problem for the Democratic Party in general, and specifically for blacks within the South. As the majority-minority districts elect relatively liberal candidates into office, the same principle holds true for the remaining districts. Disenfranchised whites that are

traditional Democrats may find themselves more likely to vote Republican (Lublin 766-769).

The problem of district polarization as described above is much more serious than it at first might appear and carries near catastrophic consequences. If this process of redistricting based upon racial preferences continues, we might find ourselves holding a bomb with a very short fuse. We will no longer be faced with a political problem that causes only debate and disagreement. To separate our society on the basis of race polarizes and stereotypes the citizens of our ideal democratic melting pot.

In our nation's past, there have been severe and shameful atrocities committed against various people in our nation. The African-American population, in particular, has suffered the brunt of these transgressions, as the largest minority. Other minorities have also suffered great pain under a flawed and imperfect system. During the Civil Rights Era, the focus fell primarily upon the relationship between the white majority and the black minority, and it continues today.

The affirmative action policies that justified the advent of majority-minority districts were necessary to empower a disadvantaged group to participate effectively in the political process. Today strong arguments project similar and valid effects. However, the changing climate in America's demographic composition will make granting concessions to one particular group virtually impossible.

The growing Hispanic population could eventually create multiple minorities in many states. To continue to follow the process of racial redistricting in a tri-racial society will arguably lead to political, if not social, alienation among the various races. This development carries with it a multitude of social problems and creates conflicts

that the Constitution specifically aims to prevent. Such an environment cultures gridlock and an austere lack of cooperation. Racial tensions would, at the very least, be noticeably heightened. This is a consequence that our diverse nation can ill afford.

While further empowerment of African-American voters may be justifiable through the use of majority-minority districts, legal scholars cited in this paper argue that such a system only creates token seats for this minority without significant influence. Additionally, such a system may lead to political extremism, with white Republican candidates as extreme as black Democratic ones. As the candidates on each side move farther and farther from the moderate middle, the opportunity for bi-partisanship and cooperation decrease, as does the opportunity to elect independent candidates. This result carries no long-term benefit for anyone.

From this research, we have observed that the idea of racial preference undercuts the Equal Protection Clause of the Fourteenth Amendment. The effects minorities and majorities stand to suffer under additional majority-minority districts, moreover; are negative at best. From this, it is reasonable to infer that, although such policies were necessary in the past, legislative gerrymandering may no longer serves the interests of our democratic system.

C. Moving Forward and Looking to the Past

We can be assured that the idea of phasing out the use of majority-minority districts will be met with great opposition, as it should. Now is not the time for a unilateral elimination of such guaranteed minority seats. Existing minority-controlled districts are necessary to ensure a reasonable level of minority representation within an imperfect system. Additionally, the lingering vestiges of discrimination and racism that continue to rear its head justify the perpetuation of these districts. The Court's "no retrogression" standard, which prevents states from eliminating existing majority-minority districts from its redistricting proposals, substantiates this claim.

Although these majority-minority districts serve a specific purpose, their use will eventually become impractical, as multiple minorities will constitute our electorate in many states. To create separate districts for each minority would be necessarily impossible and prove problematic. The key to the proper administration of these districts will be in determining the proper time to institute a policy of full-equality. Multiple minorities of significance and relatively high levels of representation of those minorities would signal the ideal time to implement such a policy.

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