IV. Race-Dependent Decisions in Structuring the Political System

A. The Basic Legal and Political Framework

The Supreme Court in Baker v. Carr, 389 U.S. 186 (1962), for the first time held that issues involving the fairness of state legislative districts were "justiciable," i.e., appropriate for judicial resolution; two years later, in Reynolds v. Sims, 377 U.S. 533 (1964), the court adopted the "one-person-one vote standard" as the test for assessing the constitutional adequacy of such districts. Writing for the Court, Chief Justice Warren declared that "representative government is in essence self-government through the medium of elected representation of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies…. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature."[1] The ambiguity of these notions, plus the constitutional requirement, Article I, § 2, that a census (or "enumeration") be conducted every ten years, which, because of inevitable shifts in population, means that all legislative districts have to be redrawn, has assured that this is a source of constant litigation. Many of the specific issues raised by redistricting are beyond the scope of this Casebook,[2] but we examine one issue insofar that concerns the central subject of this chapter--the legitimacy of taking race into account in the making of public policy.

To understand the issues in redistricting litigation, it is essential to recognize, as Jonathan Still puts it, that "political equality is not a single concept, but a group of distinct, though related criteria."[3] Still notes that "fair and effective representation," the

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[1]Though Reynolds dealt with state legislatures, the Court had applied the same standards to districting for the House of Representatives in Wesberry v. Sanders, 376 U.S. 1 (1964). In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), a divided Court held that Wesberry v. Sanders, 376 U.S. 1 (1964), ``requires that the State make a good-faith effort to achieve precise mathematical equality" in apportioning congressional districts. The Court has not applied the same standard to state legislative districts, where greater deviation from "precise mathematical equality" is allowed. See, e.g., Mahan v. Howell, 410 U.S. 315 (1973), which approved a Virginia legislature's redistricting plan that produced an average percentage variance of 3.89 percent from equal apportionment and a maximum variance of 16.4 percent. Justice Rehnquist distinguished *Kirkpatrick* and reaffirmed the statements in *Reynolds* that ``[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." One rational policy was ``that of insuring some voice to political subdivisions, as political subdivisions."

[2]See, e.g., Samuel Issacharoff, Pamela Karlan, and Richard Pildes, The Law of Democracy: Legal Regulation of the Political Process (1998).

[3]Jonathan Still, Political Equality and Election Systems, 91 Ethics 375 (1981).

ostensible criteria set out by the majority in *Reynolds*, requires far more than the possession by each individual of an equal number of votes (presumably one). Instead, Still draws attention to the consequences of how those votes are distributed within the separate election districts that comprise most election systems. (Compare elections for the House of Representatives, for example, with those for the Senate, which occur statewide. It is a valuable exercise to determine if the political views of a state's senators differ in interesting ways from the views of the majority of the representative selected on a district-by-district basis.)

Still suggests that one criterion for the existence of genuine equality is what he calls "anonymity" i.e., "Voters may trade places with each other in any possible manner, and the election result will not change." He offers as an example of non-unanimity the following A five-member city council, each member of whom is elected from districts with 20,000 voters. However, the overall population of 100,000 includes two groups of 36,000 members each. Group A is dispersed throughout the city, while the 36,000 members of group B are concentrated, 12,000 apiece, in three of the five districts. This means, obviously, that if B's vote as a bloc in each district, they will capture three of the five seats, a majority of the council even though they obviously do not have a majority of the population. Depending on the demographics of the remaining two districts, it is possible that members of group A will be unable to elect even a single candidate they prefer. I.e., the result depends on where they live; they cannot simply "trade places" with any other voter and still achieve the same outcomes. Ultimately, Still argues, the only fair solution is proportional representation, whereby "each group of voters receives the same proportion of the seats in the legislative body as the number of voters in the group is of the total electorate." It is an obvious truth about the American political system that it is not organized on such a basis (except for Cambridge, Massachusetts, and a few other localities), and the Court has gone out of its way to insist that the Equal Protection Clause does not require proportional representation. The problem, then, is to define "equality" of the vote within the constraints of territorially-based elections. (We return to the issue of territoriality at the conclusion of this chapter.)

In *Reynolds*, Chief Justice Warren spoke of "fair and effective representation for all citizens [as] concededly the basic aim of legislative apportionment." What does this mean in a country with the particular racial history of the United States? To what extent, for example, can those charged with drawing political boundary lines consciously take the race of the voters into account in drawing boundary lines?

The attempt to draw boundary lines to maximize particular political outcomes is often called "gerrymandering." The most familiar example occurs when an incumbent political party designs legislative districts to maximize the number of seats it can win in a general election. Gerrymandering is an old American practice. The term is derived from the 1812 Massachusetts election, where the Federalists, while winning a majority of popular votes, were able to gain only 37 percent of the seats in the legislature because of the district-drawing skills of the Massachusetts Democrats led by Eldridge Gerry, the governor. As Alexander Aleinikoff and Samuel Issacharoff have suggested,

gerrymandering renders naive the traditional presumption that voters choose their leaders; instead, "[t]hrough the process of redistricting, incumbent office holders and their political agents choose what configuration of voters best suits their political agenda." T. Alexander Aleinikoff and Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno, 92 Mich. L. Rev. 588, 588 (1993).

B. Racially Conscious Redistricting

In a series of cases beginning in 1993, the Supreme Court explored the degree to which race can be taken into account in legislative redistricting.[4]

In Shaw v Reno, 509 U.S. 630 (1993), the Supreme Court examined North Carolina's redistricting plan. As a result of the 1990 census, North Carolina became entitled to an additional seat in the House of Representatives. The North Carolina General Assembly initially passed a reapportionment plan that included one majority-black congressional district.[5] Under the Voting Rights Act of 1965 and subsequent amendments, the plan had to be submitted to the Attorney General of the United States for approval, which was not given on the grounds that it did not adequately take into account the electoral interests of African-Americans. In response, the General Assembly enacted a second plan with a second majority-black district. This plan was challenged on the grounds that it constituted "an unconstitutional racial gerrymander." A bitterly divided Court, through Justice O'Connor, upheld the challenge in a 5-4 decision. The opinion emphasized the "irregular shape" of the districts. Thus, "The first of the two majority-black districts contained in the revised plan, District 1, is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border." Justice O'Connor quoted a judge below who compared District 1 to a "Rorschach ink- blot test" and the Wall Street Journal, which had suggested the image of a "bug splattered on a windshield."

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[4]There are also important cases dealing with the question whether linedrawers *must* take race into account. In Whitcomb v. Chavis, 403 U.S. 124 (1971), the Supreme Court held that it was permissible for Indiana to adopt a multi-member scheme of legislative districting even though that would, as a practical matter, foreseeably lessen the probability of electing blacks to the legislature. There are also many cases interpreting the various voting rights statutes relevant to the issue, which are discussed in Issacharoff et al., The Law of Democracy. We focus here on a relatively small, though extremely important and controversial, subset of the litigated cases.

[5] According to the Court,

> The voting age population of North Carolina is approximately 78% white, 20% black, and 1% Native American; the remaining 1% is predominantly Asian. The black population is relatively dispersed; blacks constitute a majority of the general population in only 5 of the State's 100 counties. Geographically, the State divides into three regions: the eastern Coastal Plain, the central Piedmont Plateau, and the western mountains. The largest concentrations of black citizens live in the Coastal Plain, primarily in the northern part.

> The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" ....

The Court described this as a "racial gerrymander," forbidden by the Fourteenth Amendment. Justice O'Connor evoked 1870-era Mississippi (following the Fifteenth Amendment and before blacks were, as a practical matter, excluded from in the electorate), where

> opponents of Reconstruction in Mississippi concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities." E. Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, p. 590 (1988). Some 90 years later, Alabama redefined the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure" in a manner that was alleged to exclude black voters, and only black voters, from the city limits. Gomillion v. Lightfoot, 364 U. S. 339, 340 (1960).
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> Alabama's exercise in geometry was but one example of the racial discrimination in voting that persisted in parts of this country nearly a century after ratification of the Fifteenth Amendment. In some States, registration of eligible black voters ran 50% behind that of whites. Congress enacted the Voting Rights Act of 1965 as a dramatic and severe response to the situation. The Act proved immediately successful in ensuring racial minorities access to the voting booth; by the early 1970's, the spread between black and white registration in several of the targeted Southern States had fallen to well below 10%.
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> But it soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices. Drawing on the "one person, one vote" principle, this Court recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[6] Where members of a racial minority

[6] As one commentator has noted:

> Broadly speaking, there are two kinds of vote dilution. 'Quantitative' vote dilution cases are 'based solely on a mathematical analysis' that shows that the votes of persons in one district are devalued relative to the votes of persons in a less-populated district. The one-person, one-vote cases involve claims of quantitative dilution.

> group vote as a cohesive unit, practices such as multimember or at-large electoral systems can reduce or nullify minority voters' ability, as a group, "to elect the candidate of their choice." Accordingly, the Court held that such schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength. Congress, too, responded to the problem of vote dilution. In 1982, it amended § 2 of the Voting Rights Act to prohibit legislation that results in the dilution of a minority group's voting strength, regardless of the legislature's intent.

Justice O'Connor argued that "[i]t is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past." Nevertheless, Justice O'Connor pointed out, "appellants did not claim that the General Assembly's reapportionment plan unconstitutionally "diluted" white voting strength. They did not even claim to be white." Instead, the appellants "alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a "color-blind" electoral process."

> Despite their invocation of the ideal of a "color-blind" Constitution, appellants appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise: This Court never has held that race-conscious state decisionmaking is impermissible in all circumstances. What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification. [Hence], we conclude that appellants have stated a claim upon which relief can be granted under the Equal Protection Clause.
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> Apportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group-- regardless of

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> Even in cases where there is absolute population equality, however, vote dilution may occur if the election method impairs the political effectiveness of an identifiable subgroup of the electorate. This latter form of dilution may be termed 'qualitative,' because 'the quality of representation' the affected group receives is adversely affected by its relative political impotence.
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> Any theory of qualitative vote dilution [or of quantitative dilution, for that matter] necessarily requires some notion of what the 'undiluted' voting strength of the plaintiff class should be. There must be some baseline of expected outcomes against which to measure the observed results.

Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv. C.R.-C.L.L. Rev. 173, 176 (1989). See also Chandler Davidson, Minority Vote Dilution (1984)

> their age, education, economic status, or the community in which they live--think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.
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> The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.
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> ....
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> [Racial] classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters-- a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

There were four dissenters. Justice White, joined by Justices Blackmun and Stevens, stated that appellants did not present "a cognizable claim, because they have not alleged a cognizable injury." More particularly, they did not "demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process." Although this is a "severe burden" to meet, "it was adopted for sound reasons."

> The central explanation has to do with the nature of the redistricting process.... [I]t hardly can be doubted that legislators routinely engage in the business of making electoral predictions based on group characteristics racial, ethnic, and the like. "[L]ike bloc-voting by race, [the racial composition of geographic area] too is a fact of life, well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district." As we have said, "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." Because extirpating such considerations from the redistricting process is unrealistic, the Court has not invalidated all plans that consciously use race, but rather has looked at their impact.

> Redistricting plans also reflect group interests and inevitably are conceived with partisan aims in mind. To allow judicial interference whenever this occurs would be to invite constant and unmanageable intrusion. Moreover, a group's power to affect the political process does not automatically dissipate by virtue of an electoral loss. Accordingly, we have asked that an identifiable group demonstrate more than mere lack of success at the polls to make out a successful gerrymandering claim.
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> With these considerations in mind, we have limited such claims by insisting upon a showing that "the political processes . . . were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Indeed, as a brief survey of decisions illustrates, the Court's gerrymandering cases all carry this theme--that it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned....
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> [T]he issue is whether the classification based on race discriminates against anyone by denying equal access to the political process....
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> [I]t strains credulity to suggest that North Carolina's purpose in creating a second majority-minority district was to discriminate against members of the majority group by "impair[ing] or burden [ing their] opportunity ... to participate in the political process." The State has made no mystery of its intent, which was to respond to the Attorney General's objections by improving the minority group's prospects of electing a candidate of its choice. I doubt that this constitutes a discriminatory purpose as defined in the Court's equal protection cases--i.e., an intent to aggravate "the unequal distribution of electoral power." But even assuming that it does, there is no question that appellants have not alleged the requisite discriminatory effects. Whites constitute roughly 76 percent of the total population and 79 percent of the voting age population in North Carolina. Yet, under the State's plan, they still constitute a voting majority in 10 (or 83 percent) of the 12 congressional districts. Though they might be dissatisfied at the prospect of casting a vote for a losing candidate--a lot shared by many, including a disproportionate number of minority voters--surely they cannot complain of discriminatory treatment ...

In his dissenting opinion, Justice Stevens asked

> whether otherwise permissible redistricting to benefit an underrepresented minority group becomes impermissible when the minority group is defined by its race. The Court today answers this question in the affirmative, and its answer is wrong. If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave

> birth to the Equal Protection Clause. A contrary conclusion could only be described as perverse.

Justice Souter also wrote a separate dissenting opinion:

> The Court says its new cause of action is justified by what I understand to be some ingredients of stigmatic harm and by a "threa[t] ... to our system of representative democracy," both caused by the mere adoption of [North Carolina's] districting plan . To begin with, the complaint nowhere alleges any type of stigmatic harm. Putting that to one side, it seems utterly implausible to me to presume, as the Court does, that North Carolina's creation of this strangely-shaped majority-minority district "generates" within the white plaintiffs here anything comparable to "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Brown v. Board of Education, 347 U. S. 483, 494 (1954). As for representative democracy, I have difficulty seeing how it is threatened (indeed why it is not, rather, enhanced) by districts that are not even alleged to dilute anyone's vote.

Discussion

1. Consider Justice O'Connor's arguments against race-based redistricting. Are they consistent with her dissent in *Georgia v. McCollum*, in which she argued that it is important that minorities be able to strike whites from juries because whites may be biased against black defendants? Does her argument in *McCollum* involve an "impermissible racial stereotype" concerning how whites are likely to think? Might legislatures also assume that white majority districts could unfairly discount the interests of black citizens? Are judges permitted to engage in such stereotypes in deciding constitutional cases while legislatures are not?

Consider *Shaw* and *McCollum* in the light of Professor Gotanda's conceptions of race. In *Shaw*, Justice O'Connor uses a formal notion of race-- she argues that it is inappropriate to make legislative redistricting decisions based on "the color of one's skin." In *McCollum* her argument is based on culture-race: i.e., that being white or black involves a set of shared behavioral practices and cultural attitudes. She assumes that being white is likely to carry with it a shared set of perspectives, even if all whites may not harbor identical prejudices against blacks. Which conception of race do you think is most relevant in the case of rules that construct voting districts? In the case of rules that construct voting juries?

2. Justice O'Connor argues that racially conscious redistricting tends to balkanize society. From this perspective why are blacks different from Italians, Hasidic Jews or Republicans? Do the creation of safe seats for Democrats and Republicans balkanize the country politically? Consider the 1998 impeachment of President Clinton, in which congressmen from "safe" Republican seats were instrumental in obtaining a House

majority for Clinton's impeachment, even though a large majority of Americans opposed this move. Is this an argument for or against such safe districts?

3. In *Shaw* Justice O'Connor made much of the bizarre shape of the North Carolina's District 12, and the importance of "traditional districting principles like compactness, contiguity and respect for political subdivisions." Whatever the ostensible importance of "irregularly shaped" districts to the decision in *Shaw*, it largely vanished when the Supreme Court decided its next racial gerrymandering case.

MILLER V. JOHNSON, 115 S.Ct. 2475 (1995) [*Miller* involved a challenge to Georgia's congressional redistricting that had resulted in the creation of three majority-black districts. As in *Shaw*, the Court was split 5-4.]

KENNEDY, J.,: [W]e make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness. [Instead, the plaintiff's burden is to] show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines." These principles inform the plaintiff's burden of proof at trial....

The [district] court found that [the Justice Department] would accept nothing less than the abject surrender to its ... agenda [of maximizing the number of majority black districts]. It further found that the [Georgia] General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands.

O'CONNOR, J., concurring: [Justice O'Connor provided the crucial fifth vote in *Miller*]
[To] invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. The standard would be no different if a legislature had drawn the boundaries to favor some other ethnic group; certainly the standard does not treat efforts to create majority-minority districts less favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.

Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even

though race may well have been considered in the redistricting process. But application of the Court's standard helps achieve *Shaw*'s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review. I therefore join the Court's opinion.

[In dissent, Justice Stevens continued to criticize the majority's comparison of the Georgia districting with the segregationist practices struck down in *Brown* and successor cases.]

GINSBURG, J., with whom JUSTICES STEVENS and BREYER join, and with whom JUSTICE SOUTER joins except as to Part III-B, dissenting: At the outset, it may be useful to note points on which the Court does not divide. First, we agree that federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures. Second, for most of our Nation's history, the franchise has not been enjoyed equally by black citizens and white voters. To redress past wrongs and to avert any recurrence of exclusion of blacks from political processes, federal courts now respond to Equal Protection Clause and Voting Rights Act complaints of state action that dilutes minority voting strength. Third, to meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines. Finally, state legislatures may recognize communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together.

Therefore, the fact that the Georgia General Assembly took account of race in drawing district lines--a fact not in dispute--does not render the State's plan invalid. To offend the Equal Protection Clause, all agree, the legislature had to do more than consider race. How much more, is the issue that divides the Court today.

.... District lines are drawn to accommodate a myriad of factors--geographic, economic, historical, and political--and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims; courts, with a mandate to adjudicate, are ill equipped for the task.

Federal courts have ventured into the political thicket of apportionment when necessary to secure to members of racial minorities equal voting rights--rights denied in many States, including Georgia, until not long ago.

The Fifteenth Amendment, ratified in 1870, declares that the right to vote "shall not be denied ... by any State on account of race." That declaration, for generations, was often honored in the breach; it was greeted by a near century of "unremitting and ingenious defiance" in several States, including Georgia....

Court decisions and congressional directions significantly reduced voting discrimination against minorities. In the 1972 election, Georgia gained its first black Member of Congress since Reconstruction, and the 1981 apportionment created the State's first majority-minority district. This voting district, however, was not gained

easily. Georgia created it only after the United States District Court for the District of Columbia refused to preclear a predecessor apportionment plan that included no such district--an omission due in part to the influence of Joe Mack Wilson, then Chairman of the Georgia House Reapportionment Committee. As Wilson put it only 14 years ago, "'I don't want to draw nigger districts.'" Busbee v. Smith, 549 F. Supp. 494, 501 (DC 1982).[7]

II

A

Before *Shaw*, this Court invoked the Equal Protection Clause to justify intervention in the quintessentially political task of legislative districting in two circumstances: to enforce the one-person-one-vote requirement; and to prevent dilution of a minority group's voting strength.

In *Shaw*, the Court recognized a third basis for an equal protection challenge to a State's apportionment plan[: "the virtual exclusion of other factors" than race from the calculus of factors entering into political districting]. Traditional districting practices were cast aside, the Court concluded, with race alone steering placement of district lines....

The dissenters disagreed with the majority as to whether the record demonstrated that race played a dominant role in the districting process.

D

Along with attention to size, shape, and political subdivisions, the Court recognizes as an appropriate districting principle, "respect for ... communities defined by actual shared interests." The Court finds no community here, however, because a report in the record showed "fractured political, social, and economic interests within the Eleventh District's black population."

But ethnicity itself can tie people together, as volumes of social science literature have documented-even people with divergent economic interests. For this reason, ethnicity is a significant force in political life....

To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation's cities are full of districts identified by their ethnic character-Chinese, Irish, Italian, Jewish, Polish, Russian, for example. See, e.g. Stone, Goode: Bad and Indifferent, Washington Monthly, July-August 1986, pp. 27, 28 (discussing "The Law of Ethnic Loyalty-... a universal law of politics," and identifying "predominantly Italian wards of South Philadelphia," a "Jewish Los Angeles district," and a "Polish district in Chicago"). The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation.

III

[7]One must assume that Justice Ginsburg thought long and hard before quoting this passage in full (without, for example, using asterisks), as did we in editing it for this casebook. Was she (or were we) wrong to do so?

.... The controlling idea, the Court says, is "'the simple command [at the heart of the Constitution's guarantee of equal protection] that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'"

In adopting districting plans, however, States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement, standards States might use in hiring employees or engaging contractors. Rather, legislators classify voters in groups--by economic, geographical, political, or social characteristics--and then "reconcile the competing claims of [these] groups."

That ethnicity defines some of these groups is a political reality. Until now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history in the United States gave birth to the Equal Protection Clause."

B

.... Special circumstances justify vigilant judicial inspection to protect minority voters-circumstances that do not apply to majority voters. A history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum. The equal protection rights of minority voters thus could have remained unrealized absent the Judiciary's close surveillance. Cf. United States v. Carolene Products Co., 304 U.S. 144, 153, n. 4 (1938). The majority, by definition, encounters no such blockage. White voters in Georgia do not lack means to exert strong pressure on their state legislators. The force of their numbers is itself a powerful determiner of what the legislature will do that does not coincide with perceived majority interests.

State legislatures like Georgia's today operate under federal constraints imposed by the Voting Rights Act--constraints justified by history and designed by Congress to make once-subordinated people free and equal citizens. But these federal constraints do not leave majority voters in need of extraordinary judicial solicitude. The Attorney General, who administers the Voting Rights Act's preclearance requirements, is herself a political actor. She has a duty to enforce the law Congress passed, and she is no doubt aware of the political cost of venturing too far to the detriment of majority voters. Majority voters, furthermore, can press the State to seek judicial review if the Attorney General refuses to preclear a plan that the voters favor. Finally, the Act is itself a political measure, subject to modification in the political process.

C

.... Only after litigation . . . will States now be assured that plans conscious of race are safe. Federal judges in large numbers may be drawn into the fray. This enlargement of the judicial role is unwarranted....

Discussion

1. The Justice Department that so vigorously fought for the third majority-Black district was under the direction of the Bush Administration, which, like its predecessor Reagan administration, pronounced itself quite vigorously against "affirmative action" and other race-based decisionmaking. (President Bush, for example, was the first President since Andrew Johnson, in 1866, to veto a "civil rights" bill, though it was overridden by Congress.) Like many other administrations, both Democrat and Republican, the Bush Administration did not feel particularly inhibited from exerting its influence on positions taken by the Solicitor General and the Justice Department.[8] What then explains the strong support offered by the Bush Justice Department for race-conscious districting?

Several political commentators have noted that maximizing the election of African-Americans through the creation of "majority-minority" districts is actually advantageous to the Republican Party. Indeed, in many states Republican state legislators happily joined with African-American Democrats to create "safe" African-American districts packed 100 percent with predictably Democratic voters. Thus the New York Times noted that Cynthia McKinney, then in the Georgia legislature and later elected to Congress from the Eleventh District, "and other black Democrats in [Georgia] allied themselves with white, suburban Republicans in seeking the reapportionment that created three black-majority districts" at issue in *Miller*.[9] Furthermore, wrote a second *Times* reporter, "The strategy of drawing districts to maximize black representation in the cities and leave suburban districts largely white was developed largely by the Republican National Committee and the Bush Administration after the 1990 census."[10]

This strategy has a dual effect. First, it "packs" a large number of predictably Democratic voters into particular districts--thus strengthening Republican prospects in many of the remaining districts. Second, it also leads, as a practical matter, to the increased perception by many white voters of the Democratic Party as especially

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[8]Consider the extent to which this possibility reflects reality: For example, during the *Fordice* litigation, President Bush ordered the Solicitor General to change the Government's position and support increased state aid to black public colleges. Linda Greenhouse, "Bush Reverses U.S. Stance Against Black College Aid," The New York Times, Oct. 22, 1991, at B6. Indeed, the Government filed a new brief in the case explicitly renouncing its former position. *Fordice*, however is only the most overt example of more general forms of influence on the Solicitor General and the Justice Department.

[9]Ronald Smothers, "G.O.P. Anxiously Awaits Redistricting," The New York times, June 30, 1995, at A13 (nat'l ed.).

[10]Linda Greenhouse, "Justices, in 5-4 Vote, Reject Districts Drawn with Race the 'Dominant Factor,'"The N.Y. Times, June 30, 1995, at 13 (nat'l ed.)

beholden to African-American political interests, with concomitant attraction by many of these voters to the particular racial policies articulated by the current Republican Party. As David Lublin has written, in The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress 97 (1997) increasing the number of black representatives in this way also leads to more strongly conservative white representatives, particularly in the South:

> In the South, racial redistricting packs black liberal voters into districts and makes the surrounding districts more white and conservative. White Democrats [elected in such districts] must vote conservatively or risk losing their seats. Racial redistricting results in the election of Republicans if the shift is large enough to alter the partisan balance of the district. In the North, large numbers of white Democrats live in close proximity to blacks, so racial redistricting does not usually make surrounding districts more likely to elect Republicans.
>
> Creating new black majority districts consequently results in the election of more African Americans but congressional delegations as a whole are less likely to support policies favored by blacks in the South. . . . [Thus,] the creation of new black majority districts in the South in the 1990s[, though it] increased the number of African Americans[, also resulted in more] Republicans elected at the expense of white Democrats and [a reduced amount of] aggregate black substantive representation[, i.e., the number of representatives who had sufficient numbers of African-Americans in their districts to feel electoral pressures to take their interests into account].

Justice Kennedy notes the "success" of the Georgia plan in leading to the election of three African-American representatives, all Democrats. Justice Kennedy does not note (should he have?) that only one white Democrat was elected by Georgians in the 1994 elections, and in April 1995 he switched to the Republican Party and joined his seven other white Republican colleagues in the Georgia congressional delegation. Potentially, at least, these changes may have bolstered the Republican Party's ability to regain control of the House of Representatives in 1994 and maintain control thereafter. For whom, then, was the Georgia plan a "success?"[11]

Assume, as Lublin suggests, that the demise of racial gerrymandering would both result in fewer African-Americans elected to Congress *and* that maximizing the number of African-American representatives is not the same thing, and may even work against, maximizing the effective political power of African-Americans generally. See Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy (1994). Is any of this relevant to deciding on the constitutional propriety of race-sensitive districting or is it "merely" an argument especially interesting to political operatives and political scientists?

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[11]Even so, what explains the Clinton administration's continued support of race-conscious redistricting? Consider the possibility that the presidential wing of the Democratic Party has different interests than the congressional wing.

2. As noted earlier, gerrymandering is a long-established part of American politics, and the Supreme Court has made it clear, Davis v. Bandemer, 478 U.S. 109 (1986), that, as a practical matter, it will not intervene in the standard-form gerrymander by which one political party skillfully draws boundary lines to deprive their opponents of the representatives they would attain under some other lines. "Line drawers invariably know who stands to gain or lose when pencil meets map, and winners, not surprisingly, use their power to [assure the election] of representatives responsive to their concerns."[12] What makes the present different from Massachusetts in 1812 is not so much the political desires of line-drawers to maximize their electoral power as the development of technology that allows far more precision in line-drawing than used to be the case, when politicians had to rely more on general assumptions about the likely voting preferences of "farmers," "manufacturers," "Italian-Americans," or other groups. Consider, for example, a description of the primary tool used in redrawing district lines in Texas after the 1990 census (which is the subject of Bush v. Vera below), a computer program called "REDAPPL," which "permitted redistricters to manipulate district lines on computer maps, on which [politically relevant] data were superimposed. At each change in configuration of the district lines being drafted, REDAPPL displayed [relevant] statistics for the district as drawn...." It is now literally possible to know precisely how the voters on one street differ from their neighbors a block away, let alone how persons living in rural areas of a county might differ from their urban or suburban counterparts. Precinct-level voting data is especially useful, given that a strong majority of voters will vote for the same party in successive elections (party-switchers are a small minority of voters, though they have extremely great influence in elections in which the "party loyalist" electorate is closely divided). In any event, one can quite easily draw districts whose basic outcome, in terms of the likely winning party and the winning percentage, is readily predictable.

One way of achieving such a goal, of course, is to place *only* people sharing the preferred characteristic in a district, but this is wildly inefficient, from the perspective of the power-maximizing linedrawer. One can, after all, capture a single-member district with only 51% of the vote; there is no advantage, strictly speaking, to having a larger percentage. Even if one desires a 65-70% majority, in order to be "safe" against potential contenders, there is no reason at all--in fact, it is stupid--to try to achieve a 100% level of support. Indeed, creation of a 100 percent X district, where X can refer to any given attribute, is often described as "packing," the product of a decision by persons antagonistic to X to cordon them off, as much as possible, from other districts by "overconcentrating" them in a given district. They are thus deprived of the political power that their numbers might generate with a different configuration of districts. Any district consisting 100% of persons with some attribute X is highly likely to be the result of the political power of some group with attribute Y group that can successfully place the X's in their place, both literally and metaphorically.

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[12]T. Alexander Aleinikoff and Samuel Issacharoff, Race and Redistricing: Drawing Constitutional Lines After Shaw v. Reno, 92 Mich. L. Rev. 588, 633 (1993).

Thus the skilled linedrawer will attempt to place just enough of the preferred category of persons in the district to assure a comfortable victory. This group of dependable allies will then be supplemented by other persons, who do not share the sought-for attribute. Their principal function is simply to count numerically as part of the electorate and to satisfy the equipopulation requirements generated by Reynolds v. Sims. Alexander Aleinikoff and Samuel Issacharoff describe the latter group as "filler people," and note that their use as "filler" is a reality of any politically self-conscious process of political districting. Although Aleinikoff and Issacharoff developed their theory in regard to the issue of so-called "racial gerrymandering," their general notion is obviously applicable to any process of self-conscious political districting. In the selection below, simply substitute "Democrat" and "Republican" for "race" and ask yourself if you react differently to the general argument:[13]

> [F]or the state to create viable minority districts . . . , the state must create two groups of voters [who are defined] on the basis of their race or ethnicity [or political party membership]. First, the state must assign black voters to compact majority-black districts on the basis of their race. Second, the state must assign some group of voters to [these] districts to balance out the numerical mandates of one person, one vote. These additional individuals . . . should not be expected to compete in any genuine sense for electoral representation in the district to which they are assigned.... It is the status of this precarious group--the *filler people*--that raises extraordinarily troubling problems....
>
> Filler people are by their very nature electoral fodder, means to others' ends.... Whenever districts are drawn to create a designated group beneficiary, the nonpreferred group is . . . denied their dignitary right to equal treatment and respect by having their welfare discounted.
>
> The Court's apparent response [in a number of unsuccessful challenges to gerrymanders] is that there is no reason to assume that a representative will not represent all residents of the district. That is, once an election is held, "filler people" become "constituents" and command the same attention from their representatives as other members of the district. But this view seems mere wishful thinking [in many contexts. T]here is little reason to believe that a representative will not pay primary attention to the majority group in the district--a group expressly brought together to elect the representative of its choice.

As Aleinikoff and Issacharoff demonstrate, the only way, within a structure of geographically based, single-member districts, to avoid the dilemma of the "filler people" is to adopt a mode of districting that is devoid of any self-conscious political goals at all. A computer could be programmed, for example, to start at a geographical point on a map and then construct a set of districts that complies with equipopulation but otherwise is "ignorant" of the status of the voters themselves. The problem of filler people could also be eliminated by moving from geographically-based single-member districts to one or

[13]Aleinikoff and Issacharoff, at 630-33.

another scheme of proportional representation. Should either "mindless" computerized line-drawing or proportional representation be regarded as a constitutional necessity if nothing else can in fact eliminate the presence of filler people? Or are filler people simply subject to the vagaries of the political process, except, of course, for the specific kinds of gerrymanders prohibited by *Shaw* and *Miller*?

Assume that the particular districts in those cases had been constructed out of a forthright desire to maximize the power of the dominant political party and that blacks were simply assumed, at the present time, to be strong Democrats and Southern whites far more likely to support the Republicans? Would *that* set of motivations, focusing on likely party identity, have served to protect North Carolina or Georgia against judicial intervention?

The Court returned to the issue yet again in Bush v. Vera, 116 S.Ct. 1941 (1996), which involved Texas's legislative redistricting. Although there was no majority opinion, the five members of the *Shaw-Miller* majority struck down the redistricting, while the four dissenters continued to protest. The plurality opinion, written by Justice O'Connor, emphasized, citing *Miller*, "that race must be 'the predominant factor motivating the legislature's [redistricting] decision.' We thus differ from Justice Thomas, who would apparently hold that it suffices that racial considerations be a motivation for the drawing of a majority-minority district."

The plurality admitted the presence of "mixed motives" in the case. One of Texas's goals in creating the three particular districts at issue "was to produce majority-minority districts"; another, though, was to protect incumbent members of Congress, "including protection of 'functional incumbents,' i.e., sitting members of the Texas Legislature who had declared an intention to run for open congressional seats." However,

> review of the District Court's findings of primary fact and the record convinces us that the District Court's determination that race was the "predominant factor" in the drawing of each of the districts must be sustained.
>
> [T]he decision to create a majority-minority district objectionable in and of itself.... Nor do we "condemn state legislation merely because it was based on accurate information." The use of sophisticated technology and detailed information in the drawing of majority-minority districts is no more objectionable than it is in the drawing of majority-majority districts. But, as the District Court explained, the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria here.
>
> In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines. And the fact that, "[a]s it happens, ... many of the voters being fought over [by the

neighboring Democratic incumbents] were African-American," would not, in and of itself, convert a political gerrymander into a racial gerrymander, no matter how conscious redistricters were of the correlation between race and party affiliation. If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime.

If the State's goal is otherwise constitutional political gerrymandering, it is free to use the kind of political data on which Justice Stevens focuses--precinct general election voting patterns, precinct primary voting patterns, and legislators' experience--to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district. To the extent that the District Court suggested the contrary, it erred. But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation .

It is true that District 30 does not evince a consistent, single-minded effort to "segregate" voters on the basis of race, and does not represent "apartheid." But the fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations. The record discloses intensive and pervasive use of race both as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles. District 30's combination of a bizarre, noncompact shape and overwhelming evidence that that shape was essentially dictated by racial considerations of one form or another is exceptional.... That combination of characteristics leads us to conclude that District 30 is subject to strict scrutiny.

The United States and the State . . . contend that the district lines at issue are justified by the State's compelling interest in "ameliorating the effects of racially polarized voting attributable to past and present racial discrimination." In support of that contention, they cite Texas' long history of discrimination against minorities in electoral processes, stretching from the Reconstruction to modern times, including violations of the Constitution and of the VRA. Appellants attempt to link that history to evidence that in recent elections in majority- minority districts, "Anglos usually bloc voted against" Hispanic and African-American candidates.

A State's interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, "identified discrimination"; second, the State "must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative action program.'" Here, the only current problem

> that appellants cite as in need of remediation is alleged vote dilution as a consequence of racial bloc voting, which we have assumed to be valid for purposes of this opinion. We have indicated that such problems will not justify race-based districting unless "the State employ[s] sound districting principles, and ... the affected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority." Once that standard is applied, our agreement with the District Court's finding that these districts are not narrowly tailored . . . forecloses this line of defense.

Justice Kennedy wrote a short concurrence distancing himself from a statement in the plurality opinion "that strict scrutiny would not apply to all cases of intentional creation of majority-minority districts." Similarly, Justice Thomas, joined by Justice Scalia, reiterated their view that "[s]trict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting."

Justice Stevens dissented, joined by Justices Ginsburg and Breyer:

> First, I believe that the Court has misapplied its own tests for racial gerrymandering, both by applying strict scrutiny to all three of these districts, and then by concluding that none can meet that scrutiny. In asking whether strict scrutiny should apply, the Court improperly ignores the "complex interplay" of political and geographical considerations that went into the creation of Texas' new congressional districts and focuses exclusively on the role that race played in the State's decisions to adjust the shape of its districts. A quick comparison of the unconstitutional majority-minority districts with three equally bizarre majority-Anglo districts demonstrates that race was not necessarily the predominant factor contorting the district lines. I would follow the fair implications of the District Court's findings, and conclude that Texas' entire map is a political, not a racial, gerrymander.[14]
>
> Even if strict scrutiny applies, I would find these districts constitutional, for each considers race only to the extent necessary to comply with the State's responsibilities under the Voting Rights Act while achieving other race-neutral political and geographical requirements. The plurality's finding to the contrary unnecessarily restricts the ability of States to conform their behavior to the Voting Rights Act while simultaneously complying with other race-neutral goals.

[14]Because I believe that political gerrymanders are more objectionable than the "racial gerrymanders" perceived by the Court in recent cases, I am not entirely unsympathetic to the Court's holding. I believe, however, that the evils of political gerrymandering should be confronted directly, rather than through the race-specific approach that the Court has taken in recent years.

> Second, even if I concluded that these districts failed an appropriate application of this still-developing law to appropriately read facts, I would not uphold the District Court decision. The decisions issued today serve merely to reinforce my conviction that the Court has . . . struck out into a jurisprudential wilderness that lacks a definable constitutional core and threatens to create harms more significant than any suffered by the individual plaintiffs challenging these districts ...

Justice Stevens emphasized the role that incumbent protection played in the drafting of the district boundary lines, though "[i]t is clear that race also played a role in Texas' redistricting decisions." He would have upheld the use of racial criteria as a means of overcoming discrimination.

> The history of race relations in Texas and throughout the South demonstrates overt evidence of discriminatory voting practices lasting through the 1970's. Even in recent years, Texans have elected only two black candidates to statewide office; majority-white Texas districts have never elected a minority to either the State Senate or the United States Congress. One recent study suggests that majority-white districts throughout the South remain suspiciously unlikely to elect black representatives. And nationwide, fewer than 15 of the hundreds of legislators that have passed through Congress since 1950 have been black legislators elected from majority-white districts. In 1994, for example, 36 of the Nation's 39 black Representatives were elected from majority-minority districts, while only three were elected from majority-white districts.
>
> Perhaps the state of race relations in Texas and, for that matter, the Nation, is more optimistic than might be expected in light of these facts. If so, it may be that the plurality's exercise in redistricting will be successful. Perhaps minority candidates, forced to run in majority-white districts, will be able to overcome the long history of stereotyping and discrimination that has heretofore led the vast majority of majority-white districts to reject minority candidacies. Perhaps not. I am certain only that bodies of elected federal and state officials are in a far better position than anyone on this Court to assess whether the Nation's long history of discrimination has been overcome, and that nothing in the Constitution requires this unnecessary intrusion into the ability of States to negotiate solutions to political differences while providing long-excluded groups the opportunity to participate effectively in the democratic process. I respectfully dissent.

Justice Souter, joined by Justices Ginsburg and Breyer, also dissented. He argued that the theory of voting rights created in *Shaw* had no clear injury associated with it:

Whereas malapportionment measurably reduces the influence of voters in more populous districts, and vote dilution predestines members of a racial minority to perpetual frustration as political losers, what *Shaw I* spoke of as harm is not confined to any identifiable class singled out for disadvantage. ... The Court in *Shaw I* explained this conception of injury by saying that the forbidden use of race "reinforces the perception that members of the same racial group ... think alike, share the same political interests, and will prefer the same candidates at the polls," and that it leads elected officials "to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." This injury is probably best understood as an "expressive harm," that is, one that "results from the idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about." To the extent that racial considerations do express such notions, their shadows fall on majorities as well as minorities, whites as well as blacks, the politically dominant as well as the politically impotent....

.... Although the Court used the metaphor of "political apartheid" as if to refer to the segregation of a minority group to eliminate its association with a majority that opposed integration, talk of this sort of racial separation is not on point here. The de jure segregation that the term "political apartheid" brings to mind is unconstitutional because it emphatically implies the inferiority of one race. *Shaw I*, in contrast, vindicated the complaint of a white voter who objected not to segregation but to the particular racial proportions of the district. Whatever this district may have symbolized, it was not "apartheid." Nor did the proportion of its racial mixture reflect any purpose of racial subjugation, the district in question having been created in an effort to give a racial minority the same opportunity to achieve a measure of political power that voters in general, and white voters and members of ethnic minorities in particular, have enjoyed as a matter of course. In light of a majority-minority district's purpose to allow previously submerged members of racial minorities into the active political process, this use of race cannot plausibly be said to affect any individual or group in any sense comparable to the injury inflicted by de jure segregation. It obviously conveys no message about the inferiority or outsider status of members of the white majority excluded from a district. And because the condition addressed by creating such a district is a function of numbers, the plan implies nothing about the capacity or value of the minority to which it gives the chance of electoral success.

... *Shaw I* ... defines injury as the reinforcement of the notion that members of a racial group will prefer the same candidates at the polls, the immediate object of the constitutional prohibition against the intentional dilution of minority voting strength is to protect the right of minority voters to make just such a preference effective. There would, for example, be no vote dilution by virtue of racial bloc voting unless voters of a racial minority would themselves tend to stick together in voting for a given candidate (perhaps, though not

> necessarily, of their own race, as well). Indeed, if there were no correlation between race and candidate preference, it would make no sense to say that minority voters had less opportunity than others to elect whom they would; they would be part of the mainstream and the winners would be their own choices. When voting is thus racially polarized, it is just because of this polarization that majority-minority districts provide the only practical means of avoiding dilution or remedying the dilution injury that has occurred already. *Shaw I* has thus placed those who choose to avoid the long-recognized constitutional harm of vote dilution at risk by casting doubt on the legitimacy of its classic remedy; the creation of a majority-minority district "reinforces" the notion that there is a correlation between race and voting...

Justice Souter also argued that the Court had been unable to "provide any manageable standard to distinguish forbidden districting conduct from the application of traditional state districting principles and the plans that they produce." If the Court was committed to the notion of expressive harm, Justice Souter said, it might have concentrated on "the expressive character of a district's shape." There could have been "a safe harbor" for "a compact district objectively quantified in terms of dispersion, perimeter, and population." Only "the districts whose grotesque shapes provoke the sharpest reaction would have been eliminated in racially mixed States, which would have known how to avoid *Shaw* violations and, thus, federal judicial intrusion. *Shaw* would have been left a doctrinal incongruity, but not an unmanageable one. The Court, however, rejected this opportunity last Term in Miller v. Johnson."

"As a standard addressed to the untidy world of politics," Justice Souter argued, "neither "predominant factor" nor "substantial disregard" inspires much hope."

> [T]he very nature of districting decisions makes it difficult to identify whether any particular consideration, racial or otherwise, was the "predominant motive".... Searching for 'the reason' or 'the dominant reason' behind a particular district's shape is often like asking why one year's federal budget is at one level rather than another....
>
> [I]n the political environment in which race can affect election results, many of these traditional districting principles cannot be applied without taking race into account and are thus, as a practical matter, inseparable from the supposedly illegitimate racial considerations. See Pildes & Niemi, [Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno, 92 *Mich. L. Rev*. 483,] 578 [(1993)]("[R]ace frequently correlates with other socioeconomic factors. In evaluating oddly shaped districts, this correlation will require courts to attempt to untangle legitimate communities of interest from the now-illegitimate one of race. If blacks as blacks cannot be grouped into a 'highly irregular' district, but urban

> residents or the poor can, how will courts distinguish these contexts, and under what mixed-motive standard?")....
>
> If, for example, a legislature may draw district lines to preserve the integrity of a given community, leaving it intact so that all of its members are served by one representative, this objective is inseparable from preserving the community's racial identity when the community is characterized, or even self-defined, by the race of the majority of those who live there. This is an old truth, having been recognized every time the political process produced an Irish or Italian or Polish ward....
>
> Or take the traditional principle of providing protection for incumbents. The plurality seems to assume that incumbents may always be protected by drawing lines on the basis of data about political parties. But what if the incumbent has drawn support largely for racial reasons?...

"The necessary consequence of these shortcomings," Justice Souter argued, "is arbitrariness; it is impossible to distinguish what is valid from what is not, or to decide how far members of racial minorities may engage "in the same sort of pluralist electoral politics that every other bloc of voters enjoys.""...Moreover, States no longer have "any clear incentive... to take action to avoid vote dilution."

> Before *Shaw*, state politicians who recognized that minority vote dilution had occurred, or was likely to occur without redistricting aimed at preventing it, could not only urge their colleagues to do the right thing under the Fourteenth Amendment, but counsel them in terrorem that losing a dilution case would bring liability for counsel fees... But this argument is blunted now, perhaps eliminated in practice, by the risk of counsel fees in a *Shaw I* action.... The States, in short, have been told to get things just right, no dilution and no predominant consideration of race short of dilution, without being told how to do it. The tendency of these conflicting incentives is toward a stalemate, and neither the moral force of the Constitution nor the mercenary threat of liability can operate effectively in this obscurity.
>
> [A] State, like an individual, can hardly be blamed for failing to fulfill an obligation that has never been explained. It is true, of course, that a State may suffer consequences if the ultimate arbiter decides on a result different from the one the State has put in place, but that bad luck does not change the fact that a State cannot be said to be obliged to apply a standard that has not been revealed. Because the responsibility for the result can only be said to rest with the final arbiter, the practical responsibility over districting has simply shifted from the political branches of the States with mixed populations to the courts, and to this Court in particular....

Justice Souter concluded that the line of cases beginning with *Shaw* left only two plausible alternatives. The Court could create a test in terms of objective shape "defin[ing] the limits of tolerance for unorthodox district shape by imposing a measurable limitation on the bizarre.... and calculated on the basis of a district's dispersion, perimeter, and population." The only other alternative would be to eliminate traditional districting practices entirely, because "racial considerations are inseparable from many traditional districting objectives," This would mean either eliminating individual Congressional districts or "districting on some principle of randomness that would not account for race in any way."

The latter alternative would be ironic, Justice Souter remarked, because

> the price of imposing a principle of colorblindness in the name of the Fourteenth Amendment would be submerging the votes of those whom the Fourteenth and Fifteenth Amendments were adopted to protect, precisely the problem that necessitated our recognition of vote dilution as a constitutional violation in the first place. Eliminating districting in the name of colorblindness would produce total submersion; random submersion (or packing) would result from districting by some computerized process of colorblind randomness. Thus, unless the attitudes that produce racial bloc voting were eliminated along with traditional districting principles, dilution would once again become the norm. While dilution as an intentional constitutional violation would be eliminated by a randomly districted system, this theoretical nicety would be overshadowed by the concrete reality that the result of such a decision would almost inevitably be a so-called "representative" Congress with something like 17 black members.

Decided the same day as Bush v. Vera was a later stage of the original *Shaw* litigation, Shaw v. Hunt, 116 S.Ct.__ (1996)("Shaw II"). The Court, through Chief Justice Rehnquist, "held that the North Carolina plan does violate the Equal Protection Clause because the State's reapportionment scheme is not narrowly tailored to serve a compelling state interest." Although the majority conceded that validity of the point made by the dissenters, Justices Stevens, Ginsburg, and Breyer, that factors other than race, including incumbency protection and maintaining traditional rural-urban divisions, played a role in the districting decisions, it nonetheless found "that race was the legislature's predominant consideration. Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made." Under the doctrine announced in *Miller* and applied in *Bush*, the North Carolina districts could not stand. Justice Stevens wrote an extensive dissenting opinion. Justice Souter, joined by Justices Ginsburg and Breyer, wrote a one-sentence dissent reaffirming his dissenting views in Bush v. Vera.

North Carolina's redistricting was the subject of a third case, Hunt v. Cromartie, 119 S.Ct. ___ (1999). Although there was unanimous agreement on the outcome, the

court was still divided 5-4: Justice Thomas delivered the opinion for the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. Justice Stevens filed an opinion concurring in the judgment, joined by Justices Souter, Ginsburg, and Breyer.

As described by Justice Thomas,

> The State's 1997 plan altered [one of the contested districts] District 12 in several respects. By any measure, blacks no longer constitute a majority of District 12: blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. The new District 12 splits 6 counties as opposed to 10. With these changes, the district retains only 41.6% of its previous area, and the distance between its farthest points has been reduced to approximately 95 miles. But while District 12 is wider and shorter than it was before, it retains its basic "snakelike" shape and continues to track Interstate-85...
>
> Viewed in toto, appellees' evidence tends to support an inference that the State drew its district lines with an impermissible racial motive--even though they presented no direct evidence of intent. Summary judgment, however, is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. To be sure, appellants did not contest the evidence of District 12's shape (which hardly could be contested), nor did they claim that appellees' statistical and demographic evidence, most if not all of which appears to have been obtained from the State's own data banks, was untrue.
>
> The District Court nevertheless was only partially correct in stating that the material facts before it were uncontroverted. The legislature's motivation is itself a factual question. Appellants asserted that the General Assembly drew its district lines with the intent to make District 12 a strong Democratic district. In support, they presented the after-the-fact affidavit testimony of the two members of the General Assembly responsible for developing the State's 1997 plan. Those legislators further stated that, in crafting their districting law, they attempted to protect incumbents, to adhere to traditional districting criteria, and to preserve the existing partisan balance in the State's congressional delegation, which in 1997 was composed of six Republicans and six Democrats.
>
> More important, we think, was the affidavit of an expert, Dr. David W. Peterson. He reviewed racial demographics, party registration, and election result data (the number of people voting for Democratic candidates) gleaned from the State's 1998 Court of Appeals election, 1998 Lieutenant Governor election, and 1990 United States Senate election for the precincts included within District 12 and those surrounding it.... He recognized "a strong correlation between racial composition and party preference" so that "in precincts with high

> black representation, there is a correspondingly high tendency for voters to favor the Democratic Party" but that "[i]n precincts with low black representation, there is much more variation in party preference, and the fraction of registered voters favoring Democrats is substantially lower." Because of this significant correlation, the data tended to support both a political and racial hypothesis... [but] that the data as a whole supported a political explanation at least as well as, and somewhat better than, a racial explanation.
>
> Peterson's analysis of District 12's divergent boundary segments and his affidavit testimony that District 12 displays a high correlation between race and partisanship support an inference that the General Assembly did no more than create a district of strong partisan Democrats.
>
> Accepting appellants' political motivation explanation as true, as the District Court was required to do in ruling on appellees' motion for summary judgment, appellees were not entitled to judgment as a matter of law. Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact. Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.[15]

Justice Stevens, concurring in the judgment, noted that

> "bizarre configuration is the traditional hallmark of the political gerrymander.... Thus, the shape of the congressional district at issue in this case provides strong evidence that either political or racial factors motivated its architects, but sheds no light on the question of which set of factors was more responsible for subordinating any of the State's "traditional" districting principles....
>
> The record supports the conclusion that the most loyal Democrats living near the borders of District 12 "happen to be black Democrats," and I have no doubt that the legislature was conscious of that fact when it enacted this apportionment plan. But everyone agrees that that fact is not sufficient to invalidate the district. That fact would not even be enough, under this Court's decisions, to invalidate a governmental action, that, unlike the action at issue here, actually has an adverse impact on a particular racial group. See, e.g., Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979)(holding that the Equal Protection Clause is implicated only when "a state legislatur[e]

[15][Court's note] This Court has recognized, however, that political gerrymandering claims are justiciable under the Equal Protection Clause although we were not in agreement as to the standards that would govern such a claim. See Davis v. Bandemer, 478 U.S. 109 (1986).

> selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group")...
>
> Because we do not have before us the question whether the District Court [would have] erred in denying the State's motion for summary judgment [based on the evidence presented], I need not decide whether that circumstantial evidence even raises an inference of improper motive. It is sufficient at this stage of the proceedings to join in the Court's judgment of reversal, which I do.

Discussion

1. There will, no doubt, be many other similar cases filed after the 2000 census and the consequent redrawing of political boundary lines. After *Cromartie*, wouldn't legislatures be strongly advised to explain their line drawing decisions based on expected political consequences-- i.e., making sure that Democrats get their most loyal voters, who "happen" to be African-American? What becomes of *Shaw* and its progeny if legislatures can do this with relative impunity? Note that this strategy depends on the predictability of racially polarized voting, particularly in the South. Put another way, this strategy depends on being able to predict what people will do based on their race. And this sort of prediction is precisely what Court insists is a deep affront to the Equal Protection Clause. To what extent, then, does the formalist logic of *Davis* and *Feeney* ultimately undermine the formalist logic of *Shaw* and *Miller*?

2. All of the cases from *Shaw* to *Cromartie* assume, without discussion, that the "American way" of conducting elections is by the exclusive use of territorially-divided districts and the predominant use (exclusive at the level of the national legislature) of single-member districts. This latter phenomenon is not required by the Constitution, but, rather, by the Reapportionment Act of 1842, which was passed "after a lengthy struggle."[16]

Prior to 1842, "states experimented, some switching back and forth between" at-large and district systems. Thus a "majority of states held at-large congressional elections initially," one of whose consequences was the election of eight eastern Pennsylvanians in that state. In any event, the pattern was that large states used district systems, while small states preferred at-large elections.

> A fascinating set of strategic interactions eventually led to Congress's actions in 1842. Because small states used at-large elections, they tended to elect unified congressional delegations. Within a small state, the representatives tended to come from the same party. But the large-state delegations, elected through individual districts, were more fractured, reflecting the partisan divisions within the state. As a result, congressional delegations from the small states were more effective in the House. As the large states began to recognize this consequence of the different electoral systems, they began to talk about shifting back to at-large elections. This, in turn, prompted to small states to fear that if

[16]See Issacharoff, et al., supra n. at 769-773, from which the following quotations are taken unless otherwise specified.

> large states too went to at-large elections, they would soon dominate the small states. By 1842, 9 of the 26 states used at-large elections[, the largest being Georgia, which elected eight representatives]. But enough of the small states feared the large states switching to at-large elections that there was sufficient support for Congress to step in [and exercise its Article I, § 4 power to] require all states to adopt single-member geographic districts.. [D]espite the Act, New Hampshire, Georgia, Mississippi, and Missouri conducted their 1842 elections under at-large systems; over protests, Congress seated all the members of these states.
>
> [Congress passed repeated Reapportionment Acts, including a 1929 Act that was silent as to at-large districts. Indeed, several states did elect some of their Representatives at large.] In 1967 Congress once again required single-member districts.] Interestingly, a primary motivation for the 1967 legislation reinstating the requirement of single-member districts was the Voting Rights Act of 1965: Congress feared Southern states might resort to multimember congressional districts to dilute minority voting power.

The above excerpt assumes (correctly) that at-large districts tend to lead to minority vote dilution, but this does not necessarily occur if individuals are given one vote per seat and allowed to pool their votes for a single candidate. More generally, many forms of proportional representation are also possible that can avoid minority vote dilution.

As a matter of fact, in the contemporary world only the United States and Great Britain, among major countries, rely so completely on single-member, geographically-based districting.[17] Every other major political system, even if they include a territorial dimension, include a variety of supplementary techniques to alleviate some of the perceived problems with territoriality. (Recall the discussion by Jonathan Still, supra, of what constitutes "genuine" equality in voting systems.) Some modifications easily co-exist with territoriality. Thus Germany's lower house is elected half by territory, half by proportional representation (with the latter seats allocated so that the total number is congruent with the national proportion).[18] As Richard Pildes writes, "Districting itself makes proportional representation of various sorts unlikely along almost any single axis (party, race, religion) unless the relevant divisions perfectly map onto the geographic units that form the basis for districting." Pildes, Principled Limitations on Racial and Partisan Redistricting, 106 Yale L. J. 2505, 2530 (1997). As Bruce Ackerman has noted, the emphasis in so-called "footnote 4" jurisprudence is on "discrete and insular

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[17]Prime Minister Blair's government in Great Britain has pledged to reform the electoral system in order to make it more proportionally based.

[18]. That is, if one of the parties did unusually well in capturing the territorial seats by, say, gaining 51% of the vote in several districts, the opposition party might be allocated more than the strict proportion of its national vote in order that the final distribution in the legislature accord with the national percentages.

minorities," who may in fact do reasonably well in territorially-based elections so long as their numbers are high enough. . See Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985). Most of the discussion of "majority-minority" districts, for example, presuppose patterns of racial demographics that make it relatively easy, especially in America's major cities, to draw "black" or "Hispanic" districts. It is, Ackerman has suggested, the *dispersed* minority, scattered, perhaps in fairly substantial numbers, throughout a state, that may not be able to capture the legislative seats that would be available to them were they in fact "insular." (Consider, among other possible examples, gays and lesbians or members of various religious denominations.)

Might the constitutional requirement of "effective representation" even lead the Court to require modification of exclusive reliance on territoriality (and the use of single-member districts)? Even if, for institutional reasons, one would oppose such a *judicial* mandate, should conscientious members of Congress nonetheless open themselves to the possibility that the 1967 statute is, in a profound sense, "unconstitutional," especially if one understands that there exist additional possibilities other than the stark alternatives of single-member territorial districting and at-large elections? Does fidelity to the Constitution require support of that electoral system thought to guarantee the highest degree of "effective representation" to those whose votes are systematically "diluted" by the adoption and maintenance of the present system?[19] These last questions obviously do not require that one use racial groups as the focus of analysis. Does your answer to them, however, depend on whether your paradigm example is in fact African-Americans or some other ethno-racial group?

[19]See Issacharoff et al., Chapter 11, "Alternative Democratic Structures," pp. 712-784, for an excellent canvass of various possibilities.