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Voting Rights

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Professor Eric Lane

Honorable Leon D. Lazer:

Our final speaker will discuss the issues of federalism and voting rights. He has a distinguished background in this area. Professor Eric Lane of Hofstra is the Eric J. Schmertz Distinguished Professor of Public Law and Public Service. He teaches governmental law and is the co-author of two books, "The Legislative Process"¹ and "An Introduction to Statutory Interpretation and Legislative Process."² He served as counsel to the New York State Temporary Commission on Constitutional Revision, a commission established by Governor Cuomo, the from 1993 to 1995. He served as Chair of the New York City Task Force on Charter Implementation in 1990, and from 1986 to 1989 has served as Executive Director and counsel to the New York City Charter Revision Commission. Also for six years served as Chief Counsel to the New York State Senate Minority. He has an excellent background, which we always demand for the subjects that he is going to cover. It is my pleasure to introduce to you Professor Eric Lane.

Professor Eric Lane:

I am going to try to approach this in a different manner. I will not go through every one of these cases in detail. Two hundred years ago, almost to this moment, in the midst of one of the most intense political battles ever fought, James Madison, in an attempt to convince people to ratify the newly proposed Constitution, wrote, in Federalist No. 39,³ "In this relation, the proposed government cannot be deemed a national one since its jurisdiction extends to certain enumerated objects only and leaves to the

¹ ABNER J. MIKVA & ERIC LANE, THE LEGISLATIVE PROCESS (1995).

² ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS (1997).

³ THE FEDERALIST No. 39 (James Madison) (Clinton Rossiter ed., 1961).

several states a residuary inviolable sovereignty over all other subjects,"⁴ and then he continued, "it is true that the controversies relating to the boundaries between the two jurisdictions, the tribunal which is ultimately to decide is to be established by the general government, but this does not change the principles of the case,"⁵ thereby laying the groundwork for a two hundred year old debate. The debate began almost immediately. In 1819 in *McCulloch v. Maryland*,⁶ Justice Marshall allowed banks to be set up by the federal government under the necessary and proper clause.⁷ For two hundred years, we have debated the question of what federalism means and how it is to be defined. During this two hundred year period of the nation's history, the federal government has expanded its power. This expansion has been in response to the demand by the people. I think the great Willard Hurst, the legal historian, is accurate when he says, "Judicial review has had its drama. This may exaggerate its long-run influence most strikingly shown between 1934 and 1937. In that period the Supreme Court first asserted and then renounced the greatest control over legislative policy the judges had ever claimed in the United States."⁸

I would like start by trying to define the term "federalism." What is federalism? There are a number of definitions. The "federalists" were the ones that were supporting the new government, and the so-called "anti-federalists" were the ones opposing it. In truth, the anti-federalists were more federalistic than the federalists were. The anti-federalists feared the central

⁴ *Id.*

⁵ THE FEDERALIST No. 39 at 245 (James Madison) (Clinton Rossiter ed., 1961).

⁶ 17 U.S. (4 Wheat) 316 (1819). In *McCulloch*, Maryland imposed a tax on banks that were not chartered by the state. *Id.* at 317. The Supreme Court held that the imposition of the tax was invalid. *Id.* at 360. The Court reasoned that the state did not have the power to impose a tax on the federal government. *Id.*

⁷ *Id.* at 353-54 (upholding congress' establishment of a national bank under its "necessary and proper" powers).

⁸ J. WILLIARD HURST, THE GROWTH OF AMERICAN LAW, THE LAWMAKERS, 28 (1950).

power of the government, and the federalists were pushing for some level of support I like to use federalism to define the allocation of power in our scheme of government between states, localities and the federal government, and not as an identification for a point of view that discusses what the appropriate allocation should be. A couple of questions I will focus on with respect to these cases, including the voting rights cases, are as follows: first, what do the cases of the last two terms of the court mean for the allocation of power between the federal, state and local government? Second, what do they predict for the future?

I am sure, you are familiar with the current debate over federalism. The Republican majority that swept the House of Representatives in 1994 focused, as part of its Contract with America⁹ on state and local government and Congress, in general, in recent years has been stressing the importance of state and local governmental decision making. Similarly, President Bill Clinton has emphasized more local power and more power in the state legislatures – more policy making closer to home. In some areas they have actually succeeded to push down decision making, in others, they have actually centralized more power, particularly in the criminal area. It is not surprising that this new federalism does not seem as applicable in the criminal context as it does on the social slate. It remains politically valuable to continue and to increase the federal role in the regulation of criminal behavior. It is not surprising that the courts have also started to reflect many of the debates that are occurring in public life and political life. I am going to look at some of the cases from this perspective.

In *Seminole Tribe v. Florida*,¹⁰ the issue for the Court was whether a provision of the Indian Gaming Regulatory Act was unconstitutional.¹¹ The casinos have benefited a number of tribes,

⁹ JAMES A. THURBER & ROGER DAVIDSON, *REMAKING CONGRESS: CHANGE AND STABILITY IN THE 1990s* (1995). The Contract with America was a series of proposals by Republican Congressional candidates during the 1994 Congressional election.

¹⁰ 517 U.S. 44 (1996).

¹¹ 25 U.S.C. § 2710 (d) (1988).

enabling them to generate a great source of revenue. States, feeling economic pressures in recent years, looked at casinos as a possible area from which funds for the state treasuries could be generated. There has been a lot of contention about Indian gambling, and it was as a result of this that Congress enacted the Indian Gaming Regulatory Act. The Indian Gaming Act set forth regulatory guidelines that must be followed by the Indian tribes proposing to operate casinos within a given state. The tribe and the state are required to negotiate in "good faith" to come to an agreement in regards to the operation and maintenance of the particular casino.

During negotiations concerning the Indian Gaming Regulatory Act many Indian tribes were wary of the legislation. They feared what would happen if a given governor of a state negotiating on behalf of the state, attempted to delay negotiations. In response, Congress created this right to have the formation of a compact negotiated in good faith.¹² Additionally, Congress further allowed the state to be sued in federal court on the basis that the governors were not negotiating in good faith.¹³

¹² 25 U.S.C. § 2710 (d)(3)(A) (1988). Section (d)(3)(A) provides:

Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal/State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in *good faith* to enter into such a compact.

Id. (emphasis added).

¹³ 25 U.S.C. § 2710 (d) (1988). This Act provides in pertinent part: (7)(A) The United States district courts shall have jurisdiction over:

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal/State compact under paragraph (3) or to conduct such negotiations in good faith. . . .

Id.

In *Seminole Tribe*,¹⁴ plaintiffs claimed that the governor refused to negotiate in good faith. In the first instance, he claimed he was not trying to delay negotiations.¹⁵ He claimed it was difficult to reach a common ground between what the Seminole Indians were proposing and what the state was willing to accept.¹⁶ Furthermore, he indicated that the provision that allows the states to be sued by citizens of their own state violated the Eleventh Amendment.¹⁷ The Eleventh Amendment of the Constitution gives states sovereign immunity.¹⁸ Its literal language is identical to the diversity language in Article 3 of the Constitution.¹⁹ It does not textually prohibit citizens suing their own states, but it has been expanded to cover such situations.²⁰ The question presented to the court in *Seminole Tribe* was whether Congress had the power to allow Indian tribes to sue the government of the states in which they resided.²¹ The asserted bases for the statute was the Fourteenth Amendment and the Indian Commerce Clause.

Under the Fourteenth Amendment, Congress authorization of actions against states had been ruled constitutional. In *Fitzpatrick*

¹⁴ 116 S. Ct. 1114 (1996)

¹⁵ *Id.* at 1121.

¹⁶ *Id.* at 1123.

¹⁷ *Id.*

¹⁸ U.S. CONST. amend. XI. The Eleventh Amendment provides in pertinent part: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or subjects of any foreign state." *Id.*

¹⁹ U.S. CONST. art. III, § 2. Article III, section 2 provides:

The judicial power shall extend to all cases, in law and equity . . . to controversies between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Id.

²⁰ See *Hans v. Louisiana*, 134 U.S. 1 (1890). Although the literal text of the Eleventh Amendment appears to bar suits from citizens of one state against another state, the Supreme Court has expanded that interpretation to apply to suits between citizens of the state versus their own state. *Id.* at 21.

²¹ *Seminole Tribe*, 116 S. Ct. at 1122.

v. *Bitzer*,²² the Court indicated that the state's Eleventh Amendment rights could be limited by Congress in certain instances.²³

The second basis has been the Commerce Clause.²⁴ In *Seminole Tribe*, the tribe argued that the Court could rely on the Indian Commerce Clause to abrogate the states sovereign immunity.²⁵ The Court disregarded this argument holding, controversially, that the Commerce Clause itself was not a basis for abrogating the Eleventh Amendment and, therefore, it did not have to reach the point of dealing with the distinction between the Commerce Clause and the Indian Commerce Clause.

This decision was 5-4 decisions. It is difficult to determine a trend when you have 5-4 decisions. When you have five-four decisions, it means that the issue is not settled. One new judge can change the constitutional interpretation, particularly, if as the majority in *Seminole Tribe* states, precedent is only policy.²⁶ *Seminole Tribe* places a limitation on Congressional power. If the position taken in *Seminole Tribe* is continued, it may prove to be problematic for Congress. The power that it limits is one of the ways that Congress tries to make the states accountable. By

²² 427 U.S. 445 (1976). In *Fitzpatrick*, male Connecticut employees brought action alleging that the state's statutory retirement benefit plan discriminated against them because of their sex. *Id.* at 448. The Supreme Court held that the Eleventh Amendment and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of the Fourteenth Amendment; and that, accordingly, back pay and attorney fee awards were not precluded under the Eleventh Amendment. *Id.* at 456. If Congress has passed a statute pursuant to the Fourteenth Amendment which gives a private citizen a right to sue, the statute will be enforced and will not be deemed to violate the Eleventh Amendment. *Id.*

²³ *Id.*

²⁴ U.S. CONST. art. I, § 8. Article I, section 8 provides: "The Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with Indian Tribes." *Id.*

²⁵ *Seminole Tribe*, 116 S. Ct. at 1125. Petitioner contended that the Indian Commerce Clause vests the Federal government with the "duty of protecting" the tribes from "ill feeling and the people of the state." *Id.* (citing *United States v. Kagama*, 118 U.S. 375, 383-84 (1886)). Petitioner further contended that abrogation was necessary "to protect the tribes." *Id.*

²⁶ *Seminole Tribe*, 116 S. Ct. at 1119.

allowing private suits against the states, Congress can compel states to abide by statutes passed pursuant to the Commerce Clause and the Fourteenth Amendments. If this limitation is maintained it would certainly be a curtailment of Congressional power and Congressional self-definition of its own authority.

After two hundred years of basically allowing Congress to expand, to define, the Commerce Clause for itself, the Court in *United States v. Lopez*²⁷ limited Congress' authority to set the clause's parameters.²⁸ Some have thought *Lopez* revolutionary.²⁹ *Lopez* involved the Gun-Free School Act of 1990,³⁰ which made it a federal offense for an individual to possess a firearm within a certain distance of a school.³¹ The statute made no reference to interstate commerce, which to some, for some reason, is meaningful.³² The issue before the Court was whether Congress could create a zone of protection around schools and prohibit the possession of a gun within that zone. The Court, again by a five-

²⁷ 514 U.S. 549 (1995).

²⁸ *Id.* at 552. See also Charles Fried, *Forward Revolutions?*, 109 HARV. L. REV. 13 (1995) (arguing that the Court's holding in *Lopez* was startling because "the Supreme Court, for the first time since 1936, found that Congress had exceeded the limits of the interstate Commerce Clause.").

²⁹ See Louis H. Pollak, *Forward, Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995). See also Steven G. Calabresi, "A Gov't of Limited And Enumerated Powers": In Defense of U.S. v. Lopez, 94 MICH. L. REV. 752 (1995) (arguing that the *Lopez* decision marks a "revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers.").

³⁰ 18 U.S.C. § 922 (q)(2)(A) (1997). This section provides in pertinent part: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe is a school zone." *Id.*

³¹ *Lopez*, 514 U.S. at 551.

³² *Id.* The legislation contained no requirement that the firearm had moved in interstate commerce, nor was it accompanied by Congressional findings regarding the effects of gun possession in school on interstate commerce. *Id.* See Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 750 (1996) (discussing a statement by officials at the Bureau of Alcohol, Tobacco and Firearms noting that the "Act differs from other federal firearms legislation in its lack of reference to commerce.").

four margin, held that the Act was beyond the scope of Commerce Clause power.³³ The Court's decision seems confusing on this issue, one part of the Court seems to emphasize the fact that there is no statement or finding in the statute itself that says that this type of activity is interstate commerce.³⁴ This would be a doubtful standard, stressing form over substance. Most likely the Court simply viewed the act as beyond the Commerce Clause, that is that the link between the possession of guns in the prohibited school zone and economy simply was too tenuous.³⁵ Although Justice Breyer, in dissent, makes a strong argument to the contrary.³⁶

If this is the sum total of the decision then there is no need for alarm or cheer at this point. There is no evidence yet to determined whether the case is *sui generis* or signals a reexamination of interstate commerce jurisprudence. If of course this case does represent a restriction on the linkage between the

³³ *Id.* at 552. The Court identified three broad categories of activity that Congress may regulate under its commerce power. *Id.* at 558. "First, Congress may regulate the use of channels of interstate commerce." *Id.* "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from interstate activities." *Id.* "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." *Id.* at 588-89.

³⁴ *Id.* at 561. At the outset, Chief Justice Rehnquist noted that the act is [N]ot a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce, nor can 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.

Id. at 559. The Court went on to state that the validity of the Act depended entirely on a showing that the regulated activity substantially affects interstate commerce. *Id.*

³⁵ *Id.* at 557 (stating that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

³⁶ *Id.* at 618-23 (Breyer, J., dissenting) (arguing that violent crimes that occur in school zones substantially affect interstate commerce because violence in schools interferes with the quality of education, which in turn affects the nation's economy and specifically, the job market).

regulation and interstate commerce, that would be an significant assault on Congressional power, throwing into question must of the progressive civil rights legislation from the 1960s onward.

The third case, *Printz v. United States*,³⁷ involved the background check provision of the Brady Handgun Violence Prevention Act [hereinafter the "Brady Bill"].³⁸ The question presented was whether or not the federal government could order chief law enforcement officers of particular to do background checks on potential purchasers of firearms.³⁹ The background check provision was temporary, until the federal computer system went into play.⁴⁰ Several chief law enforcement officers from Montana challenged this interim provision of the Brady Bill.⁴¹ Relying on the principles enunciated in *New York v. United States*,⁴² the Court concluded that the Federal Government may

³⁷ 117 S. Ct. 2365 (1997).

³⁸ 18 U.S.C. § 922 (s)(1) (1998). This section states in pertinent part:

Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun . . . to an individual who is not licensed under section 923, unless . . . (II) within 1 day . . . provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and (IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and (ii) (I) 5 business days . . . have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law. . . .

Id.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 2369.

⁴² 505 U.S. 144 (1992). In *New York*, the Court held that the "take-title" provision of the Low-Level Radioactive Waste Policy Amendments Act 1985,

not force the States to “enact or administer a federal regulatory program.”⁴³ Justice Scalia opined that the Court really could not find explicit textual support for its position, but discovered such prohibition in a location infrequently visited by him--the penumbra of the Constitution.⁴⁴ Somewhere lurking in the various prohibitions, is the right of sheriffs to be excused from the responsibility for following federal orders.⁴⁵

Another case which limits Congressional power is *City of Boerne v. Flores*.⁴⁶ This case challenged the constitutionality of the Religious Freedom Restoration Act of 1993 [hereinafter “RFRA”].⁴⁷ RFRA prohibited the federal government from substantially burdening an individual’s exercise of religious freedom even if the burden is a result of a rule of general applicability unless the government is able to show that the burden is in furtherance of a compelling governmental interest and is the least restrictive way of furthering that interest. The Court concluded (6-3) that the statute exceeded Congressional power, because under the Enforcement Clause of the Fourteenth Amendment, Congress has the power to pass only remedial or preventative legislation.⁴⁸

was unconstitutional. *Id.* at 175-76. The act required States to enact legislation which provided for the disposal of the radioactive waste within their borders, or take title and possession of the waste. *Id.* The Court concluded that the Federal Government “may not compel the States to enact or administer a federal regulatory program.” *Id.* at 188.

⁴³ *Printz*, 117 S. Ct. at 2383.

⁴⁴ *Id.* at 2370

⁴⁵ *Id.* at 2372.

⁴⁶ 117 S.Ct. 2157 (1997). In *Boerne*, a decision by local zoning officials, which denied a church a building permit to enlarge its building, was challenged under the Religious Freedom Restoration Act of 1993. *Id.* at 2160.

⁴⁷ *Id.* at 2160. See 42 U.S.C. § 2000 bb-1 (1995 *Boerne*, 117 S.Ct. at 2162.

⁴⁸ *Id.* at 2160.. *Id.* at 2164. The Court indicated that “while the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.” *Id.* “There must be a congruence and proportionality between the injury to be prevented or remedied and the mean adopted to that end.” *Id.* Without this connection, legislation has the potential to become substantial in both operation and effect. *Id.*

I think that these four cases are different enough, unclear enough and of such narrow majority that they tell us little about the Court's perspective on federalism. If there is a trend toward states' rights, its continuation will depend on the future composition of the Court and hence who the President is. This points to the political nature of the Court with respect to such notions. It also demonstrates, in a sense, how prominent current policy debates can be at the Court and how thin an idea originalism is. I cannot imagine appearing before Chief Justice John Marshall,⁴⁹ sitting there in his wig, without the benefits of modern day society and asking him what his thoughts are on each of these cases. He would not know what an airplane is nor would he know what a car is. It would be pretty hard to think of it from an originalist perspective. What I do think the cases most clearly demonstrate is how shifts in the political debate of the country really do influence the Court, and how the same battles that occur in the country, occur in the Court as well.

I am going to take a couple of minutes now to talk about voting rights cases because you will see the same underlying principles examined in the previous cases, also applicable to the voting right cases. These are all five-four decisions with Justice O'Connor struggling to find the applicable role of race in redistricting.⁵⁰ The analysis of all of these cases begins with *Shaw v. Reno*,⁵¹ in which the Court held that appellants stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. Up until that point, the cases had basically focused on addressing the scope of the 1982 Amendments to the Voting Rights Act after

⁴⁹ John Marshall was appointed by President John Adams in 1801 and served on the bench until his death on July 6, 1835. Charles Warren, *The Supreme Court in United States History*, 286, 797 (1922). For a discussion of Justice Marshall's life and major decisions, see Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955); CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE, JOHN MARSHALL AND THE RULE OF LAW* (1996); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* (1991).

⁵⁰ See *Bush v. Vera*, 517 U.S. 952 (1996).

⁵¹ 509 U.S. 630 (1993). In *Shaw*, appellants alleged that North Carolina deliberately segregated voters by race when it created two majority black congressional districts. *Id.* at 633-34. *Id.* at 658.

Thornburg v. Gingle.⁵² *Thornburg* was the first case to interpret the 1982 amendments to the Voting Rights Act of 1965, as amended.⁵³ These amendments set forth a clear effects test, which permitted a plaintiff to establish a violation of the Voting Rights Act by showing the discriminatory effect of a voting practice, rather than an intent to discriminate. It is interesting to note that the 1982 Amendments were cast with Republican Ronald Reagan as the president and the Republican Robert Dole as the Senate majority leader.⁵⁴ It was an extraordinary effort by the civil rights movement that this amendment was ever passed. They made it a much tougher bill from a pro-voting-rights perspective and from a pro-central-government perspective than it had been before

⁵² 478 U.S. 30 (1986). In *Thornburg*, the Court identified three conditions that a plaintiff must meet in order to demonstrate a violation of the Voting Rights Act. *Id.* at 50-51. First, the minority group must show that it is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. The minority group must then demonstrate that it is politically cohesive. *Id.* at 51. Finally, the minority group must show that the white majority votes sufficiently impede its ability to elect its chosen candidates. *Id.*

⁵³ Pub. L. No. 97-205, 96 Stat. 13 (codified as amended as 42 U.S.C. § 1973 (1988)). This section provides in pertinent part:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color A violation of subdivision (a) is established if, based on the totality of circumstances, it is shown that the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subdivision (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id.

⁵⁴ 18 Weekly Comp. Pres. Doc. 846 (June 29, 1982). On June 29, 1982, President Reagan signed into law the Voting Rights Act amendments, proclaiming "the right to vote is the crown jewel of American liberties, and we will not see its luster diminished." *Id.*

There are two major parts of Voting Rights Section Two and Section Five.⁵⁵ Section Two, which applies to everybody in the country, basically says that minorities can not be denied the opportunity to participate in the political process.⁵⁶ Section Five, is a unique provision. Under Section Five, changes in law by states or localities effecting voting require preclearance by the Justice Department or a federal court,⁵⁷ if those states or

⁵⁵ See 42 U.S.C. § 1973 (1988).

⁵⁶ 42 U.S.C. § 1973 (1988). Specifically, Section Two of the Voting Rights Act of 1965 provides in pertinent part:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . as provided in subdivision (b) of this section.

A violation of subdivision (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to a nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subdivision (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.

⁵⁷ 42 U.S.C. § 1973 (1982). Specifically, Section Five reads in pertinent part:

[S]uch State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, or practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [42 U.S.C. § 1973(f) (2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such

localities had a voting test or device and fell below a certain standard based on voting registration and voter turn out during a presidential elections.⁵⁸ Section 5 jurisdictions include: three counties located in New York City, the South, Texas, Alaska, and a number of other jurisdictions. By way of example, when I was counsel to the New York City Charter Revision Commission, we made huge changes to the charter, such as, the creation of a larger council consisting of fifty-one members. We sent all of the changes down for pre-clearance because three of New York City's counties were covered under Section Five. It is an enormous federal power. If an objection had been made to one word or provision, even though a referendum of New York City had already been passed, we would have to start all over again. Again, it is an enormous federal power.

In the cases we are discussing, white people charge that districting plans deny them equal protection of the law. In each case, the complaints alleged that a particular district was drawn based on racial preference only. In other words, racial interest dominated the drawing of these lines. In *Shaw v. Reno*,⁵⁹ the parent of all these cases, the district of North Carolina's second redistricting plan resembled the shape of a dumbbell. Justice

qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such state or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.

Id.

⁵⁸ See 42 U.S.C. § 1973b (b) (1994). A jurisdiction is covered under Section 5 of the Voting Rights Act if it has maintained a voting "test or device." *Id.* Moreover, less than 50% of voting-age residents in the jurisdiction must have registered to vote or have actually voted in the presidential elections of 1964, 1968, or 1972. *Id.*

⁵⁹ 630 U.S. 630 (1993)). See Thomas C. Goldstein, *Unpacking & Applying Shaw v. Reno*, 43 AM. U. L. REV. 1135 (1994) (analyzing *Shaw* and discussing future applications of the decision).

O'Connor basically says that the district is too ugly to be drawn for any reason racial districting. Justice O'Connor is careful to explain that race may play a role in districting, but race must not be the only factor.⁶⁰ But, for her, the district in *Shaw* is drawn entirely on the basis of racial considerations.⁶¹ The case was remanded to allow North Carolina to provide its reasons for the district.⁶² Such reasons might include the joining of urban interests or any other basis which supported the dumbbell shape.⁶³

Shaw introduced for the first time equal protection jurisprudence as an overlay on voting rights jurisprudence. The cases that followed were: *Miller v. Johnson*,⁶⁴ *Bush v. Vera*,⁶⁵ *Shaw v. Hunt*,⁶⁶ which is *Shaw 2*, and *Abrams v. Johnson*,⁶⁷

⁶⁰ *Id.* at 646. According to Justice O'Connor:

[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

Id.

⁶¹ *Id.* at 647. The Court reasoned that: "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." *Id.*

⁶² *Id.* at 658.

⁶³ *Id.* at 654-56.

⁶⁴ 515 U.S. 900 (1995). In *Miller*, Georgia residents challenged the constitutionality of Georgia's congressional redistricting plan. *Id.* at 903. The Court held that the redistricting plan was unconstitutional because it was drawn predominately to benefit minorities and lacked compelling state interest. *Id.* at 917.

⁶⁵ 116 S. Ct. 1941 (1996). In *Bush*, six Texas voters challenged the Texas redistricting plan arguing that the districts constituted racial gerrymanders, violative of the Fourteenth Amendment. *Id.* at 1950. The Court held that the district lines were unconstitutional, reasoning that the district lines were subject to strict scrutiny and were not tailored to further a compelling state interest. *Id.* at 1951.

⁶⁶ 116 S. Ct. 1894 (1996). In *Shaw*, North Carolina residents brought suit seeking to challenge North Carolina's congressional redistricting plan. *Id.* at

which is *Miller v. Johnson* 2. I will not into the details of each of these cases, I will discuss only two points about them. First, after *Abrams v. Johnson*,⁶⁸ it is almost impossible to factor in race, even if we still accept Justice O'Connor's caveat that race can, in fact, be used in the drawing of lines.⁶⁹ If I were a local official doing this kind of work, I would not know how you would do it. I think Justice Breyer is right when he says, that those who draw the lines are clueless as to how race should be applied. All of these cases involved a different variation of districting. Most of these districting lines are compact, contiguous, and do not form the shape of a dumbbell. Yet, it is difficult to understand how race will be factored in when drawing the lines. Second, you have the command of the Voting Rights Act. Under the Voting Rights Act, there is an obligation to construct a districting plan that does not deny minorities the opportunity to participate in the political process.⁷⁰ In other words, the Act commands that race be considered.

I leave you with this final note from Justice O'Connor, notwithstanding what looks like an irresolvable conundrum, she says: "I still believe you can work out some jurisprudential relationship between Section Two and the Equal Protection Clause to allow race to be a factor in drawing."⁷¹ If any of you are interested in changing your position or changing your profession, or would like to get involved in a new area of law, start learning these cases now. It will only be a couple of years before districting will occur all over the country. Thereafter thousands of cases will arise and these cases pay well. In addition, the government will pay part of your fees.

1899. The Court held that the redistricting plan violated the Equal Protection Clause because it was not narrowly tailored to further a compelling state interest. *Id.*

⁶⁷ 117 S. Ct. 1925 (1997) (holding that race cannot be a predominant factor in drawing district lines).

⁶⁸ *Id.*

⁶⁹ See *supra* note 60 and accompanying text.

⁷⁰ 42 U.S.C. § 1973 (1994).

⁷¹ *Shaw v. Reno*, 630 U.S. 630, 646 (1993).

Historically, it is not clear what this is going to mean. Decisions concerning the balance between state, federal, and municipal power will depend upon the politics of the Court. Unquestionably, three members of the Court, Chief Justice Rehnquist and Justices Thomas, and Scalia, who are dedicated federalists, in the anti-federalist meaning of that word, would likely reduce federal power across the board. As for the other six, including Justices O'Connor and Kennedy, I think they are much more in the middle and a lot will depend on what happens with the Court in the future. Thank you.

