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Voting Rights Debate

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Hon. George C. Pratt:

Thank you, Professor Shaw. That brings to a conclusion the first two segments of the program. For the next segment, I turn matters back to Judge Lazer.

Judge Leon D. Lazer:

The next portion of today's session is going to be a debate relative to minority districts. The question of creating districts especially constituted according to proportion of residents or racial minority voters, in order to assure the election of a minority person as a legislator, is a controversial one. The Supreme Court has decided two cases this year that are closely related to this issue,¹ and we have two very distinguished speakers who will disagree, as to the decisions, as well as to the implications of the Constitution, the Voting Rights Act,² and

1. *See Shaw v. Reno*, 113 S. Ct. 2816 (1993). In *Shaw*, the Court found that an Equal Protection claim was stated where the state legislature created two majority-black districts in such a way that the reapportionment scheme can only be seen as an effort to racially segregate voters into "separate voting districts." *Id.* at 2832; *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993). The Court noted that the Voting Rights Act does not prohibit the formation of majority-black districts *per se*, but merely focuses on the results of apportionment. *Id.* at 1152.

2. 42 U.S.C. § 1973(a) (1986). Subsection (a) states in relevant part: No voting qualification . . . or standard, practice, or procedure shall be imposed by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . ; (b) A violation of subsection (a) . . . is established if, . . . shown that the political processes leading to . . . election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)

Id.; 42 U.S.C. § 1973(c). Subsection (c) states in relevant part:

Whenever a State or political subdivision . . . shall enact . . . any voting qualification . . . , or standard, practice, or procedure with respect to voting different from that in force . . . on November 1, 1964, . . . such State or subdivision may institute an action for a declaratory judgment

other like statutes³ as they relate to this issue. I am going to set certain ground rules here. Each speaker will speak for twenty minutes, and will be followed by a ten-minute rebuttal. Mr. Ralston shall speak first, followed by Mr. Carvin.

Mr. Carvin, whom I just mentioned, was an important member of the United States Attorney General's office during the Reagan Administration. He is presently a partner in the law firm of Shaw, Pitman, Potts & Trawbridge in Washington, D.C.. Starting from 1983, and up to 1988, he worked for the federal government, and for two of those years, he was the Deputy Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice, serving under Bradford Reynolds,⁴ who was then in charge of that division. Many controversial decisions were made and positions taken during that time, and Mr. Carvin played an important role in the running of that department.

Apart from his position in the Civil Rights Division, he also played a role in the Department of Justice, by working in the Office of Legal Counsel, which was responsible for advising all of the litigating divisions of the Department of Justice on how to handle legal matters. Indeed, he is a very distinguished lawyer, with a very distinguished background, having graduated from George Washington University Law Center, which is called the National Law Center. He is affiliated with many organizations, including the Washington, D.C. Chapter of the Federalist Society. I could say a lot more about him, but I think time is a factor for us.

Taking what I am sure will be a different position, is Charles Stephen Ralston, who has spent a very long and distinguished

that such . . . practice, or procedure does not have the . . . effect of denying . . . the right to vote on account of race or color

Id.

3. See, e.g., 42 U.S.C. § 1971(a)(1) (1986). Subsection (a)(1) states in relevant part: "All citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote . . . without distinction of race, color" *Id.*

4. William Bradford Reynolds was the Assistant Attorney General of the Justice Department during the Reagan Administration.

career, spanning almost thirty years, in working with the NAACP Legal Defense and Educational Fund (LDF). Indeed, he has risen in that office, from Assistant Counsel, way back in 1964, to Deputy Director Counsel. He was a director of the LDF San Francisco office, and then, First Assistant Counsel. He is presently a senior staff attorney in that office. He has lectured and written a great deal,⁵ and he has argued, of course, before the Supreme Court. At our first conference, in 1989, during which year, several decisions of major civil rights importance came down, we had the pleasure of hearing from Mr. Ralston. Thus, we now have before us two very important and knowledgeable lawyers in the civil rights area. Based on the toss of coin, I am going to ask Mr. Ralston to speak first.

Mr. Charles Stephen Ralston, Esq.:

Thank you, Judge Lazer. I am pleased to be here again. The last time I was here, I had the chance to talk about the Supreme Court disasters which occurred in the spring of 1989.⁶ At that time, I mentioned that a bill to overturn those decisions was circulating in Congress. Since then, Congress has passed the Civil Rights Act of 1991.⁷ Today, I will talk about another decision that, from the LDF's point of view, was something of a Supreme Court disaster. I live in the hope that I may come here someday, to speak about United States Supreme Court decisions with which we, at the LDF, actually agree. In the mean time, the main case we are going to discuss today is the Supreme Court case, *Shaw v. Reno*,⁸ which has already had a major impact.⁹ I

5. See, e.g., Charles Stephen Ralston, *Court vs. Congress: Judicial Interpretation of the Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205 (1991) (discussing the struggle between the Supreme Court and Congress over interpretation and enforcement of Civil Rights Acts of 1866 and 1964).

6. See Charles Stephen Ralston, Symposium, *Employment Discrimination*, 6 TOURO L. REV. 55 (1989).

7. 12 U.S.C. § 1981 (1991).

8. 113 S. Ct. 2816 (1993).

9. *Id.*; see also Peter Applebome, *Suits Challenging Redrawn Districts that Help Blacks*, N.Y. TIMES, Feb. 14, 1994, at A1 ("[N]ewly created black

will also talk about some other Supreme Court cases from last Term which deal with voting rights issues.¹⁰

In the interest of full disclosure, I have to mention the fact that the LDF filed an amicus brief in support of the district in *Shaw*. Since the case has been remanded to the District Court in North Carolina, we have intervened in the case on behalf of both white and black voters. I am one of the attorneys representing defendant interveners in the case, trying to defend the district which was developed, and which was the subject matter of the Supreme Court's decision.¹¹ So, in today's debate, I am going to give you the perspective of a litigator on one side of the case, discuss how that case should go, and exactly what the Supreme Court's goal seems to be, which, I might add, is not clear at this point. I will do this, hopefully, without giving away any secrets of how we hope to win the case.

Again, I should explain that the Supreme Court decided three voting rights cases last Term. The first two cases were noncontroversial in outcome, and not particularly upsetting to those of us who do civil rights litigation. The first one was a case called *Grove v. Emerson*,¹² which held that a federal court should allow state, and, in appropriate cases, local courts,

congressional districts face a rising tide of court challenges," stemming from *Shaw v. Reno*.); Susan B. Glasser, *Members Mobilize to Fight Map Suits*, ROLL CALL, Feb. 24, 1994. Congressional Black Caucus "launching an unprecedented effort to head off lawsuits" started in the wake of *Shaw v. Reno*'s challenge to new majority-black districts. *Id.*

10. See, e.g., *Grove v. Emison*, 113 S. Ct. 1075, 1085 (1993) (holding that district court erred in not deferring to state court's efforts to redraw Minnesota's state legislative and federal congressional districts); *Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993) (holding section 2 of the Voting Rights Act of 1965 contains no per se prohibitions against particular types of districts).

11. *Shaw*, 113 S. Ct. at 2833. The Appendix to the majority opinion in this case is a map of all electoral districts within North Carolina. This map indicates that the central focus of this case is a district which begins in the southwest portion of the state, and continues, passing through ten other districts, in a seemingly arbitrary, winding stretch towards the North Central portion of the state. The district seems to be anything but compact in a geographical manner. *Id.*

12. 113 S. Ct. 1075 (1993).

officials and redistricting commissions, the first opportunity to try to redistrict and correct the problems that might exist, rather than to jump in prematurely with its own plan.¹³ Basically, this holding is consistent with previous Supreme Court decisions,¹⁴ and seems to make particularly good sense. *Grove* was a unanimous decision written by Justice Scalia. Although I do not often agree with Justice Scalia, I found myself in agreement with this decision.

The second case was *Voinovich v. Quilter*,¹⁵ which was a challenge to redistricting in Ohio, and in which, an amicus brief was filed by the Defense Fund.¹⁶ In *Voinovich*, the Supreme Court again clarified the role of the federal court in striking down redistricting carried out by Ohio,¹⁷ and declared that, under the Voting Rights Act, the state could voluntarily create majority-minority districts. Therefore, a federal court should not substitute its judgment as to appropriate districting, without first establishing that a violation of the act has occurred.¹⁸ However,

13. *Id.* at 1081. In reaching this holding, the *Grove* Court reiterated the Illinois events of 1965-66 that gave rise to the litigation of the same issue in *Scott v. Germano*, 381 U.S. 407 (1965) (*per curiam*). The *Scott* decision clearly indicated that state governments should have a primary and fair opportunity to validly redistrict their electoral districts, and that federal courts should stay themselves from proceeding in such cases, due to the uniquely political nature of the issues involved in redistricting plans. *Scott*, 381 U.S. at 409. The *Grove* Court also reasoned that the Federal Constitution provides that states retain the right to control their own apportionment plans for federal, state and local elections, and that unless there is reason to believe a state will fail to fairly provide its citizens an opportunity to participate in elections, there is no reason for a federal court to interfere with the state court's and legislature's proceedings. *Grove*, 113 S. Ct. at 1080-81.

14. *See, e.g.*, *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (finding that state branches are responsible for reapportionment); *Scott*, 381 U.S. at 409 (stating that the federal court must defer to a state's legislative and judicial branches).

15. 113 S. Ct. 1149 (1993).

16. *Id.* at 1157 (holding that to prevail on a dilution claim under section 2 of Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the state's apportionment plan must adversely affect the protected class' voting strength).

17. *Id.* (stating that federal courts may act to reapportion if violation of federal law exists).

18. *Id.*

the Supreme Court noted that there was no claim in that case that the Voting Rights Act was unconstitutional. We found this a little sinister because there were potentially four Justices on the Court ready to hold that at least a part of the Voting Rights Act may be unconstitutional. *Shaw* then came along, and that was the blockbuster of the Term.

Shaw arose in North Carolina, a state that is covered by section 5 of the Voting Rights Act.¹⁹ Because a large number of counties are under the jurisdiction of section 5, statewide redistricting has to go to the Department of Justice for approval.²⁰ In light of the 1990 Census, the entire country had to be redistricted.²¹ The issue in *Shaw* was the redrawing of the line for the North Carolina congressional delegations.²²

After the 1990 Census, North Carolina had twelve members in the House of Representatives. The voting age population of North Carolina was 78% white and 20% African-American.²³ Since Reconstruction, the state had not sent an African-American to Congress. As the General Assembly set out to redistrict the state for upcoming elections, it had to contend with the Voting

19. Section 5 of the Voting Rights Act, officially known as 42 U.S.C. § 1973(c), provides that states and political subdivisions that have been found to be subject to the provisions of section 4, also known as 42 U.S.C. § 1973(b), must submit any plans to alter voter qualifications, standards and all voting procedures to the United States District Court for the District of Columbia, and receive a declaratory judgment from that court, which states that the submitted plan does not deny or abridge voting rights on the basis of color or race. 42 U.S.C. § 1973(c) (1986).

20. 42 U.S.C. § 1973(c), or section 5 of the Voting Rights Act, alternatively provides that an appropriate state official might submit proposed voting procedure changes to the Attorney General, and obtain approval of such plans within sixty days of submission. Because many states and political subdivisions fall under the control of 42 U.S.C. § 1973(b), or section 4 of the Voting Rights Act, a large number of states may opt for the faster approval of the Department of Justice, of which the Attorney General is the head.

21. *Cf. Shaw*, 113 S. Ct. at 2819.

22. *Id.* at 2824. Specifically at issue was the redrawing of two controversial majority-minority districts, at least one of which was so contorted in shape that there could be no possible justification for its formation, other than to unite the votes of those who were contained within it. *Id.*

23. *Id.* at 2820.

Rights Act, and the concepts of fairness in voting that this act underscores.²⁴ A major case on this issue that defined the 1982 amendments to the Voting Rights Act, was *Thornburg v. Gingles*,²⁵ which my office also handled, and which involved the redistricting of the North Carolina State Legislature.²⁶ *Gingles* held that the Voting Rights Act had been violated, and required redistricting which would result in a significant number of African-American representatives in the state legislature.²⁷ The congressional plan with which North Carolina came up with in 1991, and which, interestingly enough, was developed with the

24. *Id.* The *Shaw* Court referred to section 5 of the Voting Rights Act of 1965, which is actually an amendment to the original 1965 statute, enacted to require that those jurisdictions which are subject to its regulation obtain federal permission prior to changing their voting "standard, practice or procedure." 42 U.S.C. § 1973(c) (1986).

25. 478 U.S. 30 (1986). *Gingles* only examined the statutory issues involved with this Voting Rights Act claim. The *Gingles* Court affirmed the district court's finding that the legacy of racial discrimination manifest in voting procedures, requires that the Voting Rights Act properly apply to North Carolina, and must be utilized to remedy wrongs committed. *Id.* at 80. In reaching this conclusion, the *Gingles* Court explained that the purpose of the Voting Rights Act is to allow mere discriminatory effect of voting procedures, and not to require a showing of intent, prior to the application of a remedy for such discrimination. *Id.* at 35, 74.

26. *Id.* at 38. Specifically, the *Gingles* case was an action brought by black citizens, in which they alleged that six multi-member, and one single-member North Carolina electoral districts were redistricted in such a way as to dilute their voting power within those districts. *Id.* The plaintiff-appellees claimed that sufficient black populations existed within the districts, and contended that redistricting could have been accomplished in a way that provided for several black majority districts, while still respecting the requirement that districts be contiguous. *Id.* Therefore, the contention was that the failure of the North Carolina legislature to draw districts in this manner was proof of that state government's violation of the Voting Rights Act. *Id.* at 35.

27. *Id.* at 80. Pointing to a history of discrimination in the state, consistent appeals to racial prejudice within political campaigns, and multi-member districting schemes that appear to impede black citizens in those districts from electing their preferred representatives, the *Gingles* Court held that the limited and recent success of black political candidates cannot overcome the obvious dilution of black voting power that the districting plan at issue perpetrated. *Id.* Thus, the *Gingles* Court upheld the district court's conclusion that the multi-member districts at issue violated the Voting Rights Act. *Id.*

assistance of one of the lead attorneys of the *Thornburg* case, created one majority African-American district in one corner of the state. That plan was submitted to the Department of Justice. The Department of Justice rejected it on the grounds that, in its view, it was possible to create a second majority-minority district in another corner of the state - a district, which it said, was viable because there could be a coalition between African-Americans and Native-Americans. Therefore, the Department of Justice sent the plan back to North Carolina.

The question then was: What was North Carolina to do in light of, number one, a finding of a violation of section 5,²⁸ and, number two, the distinct possibility that if it did not do something, there would be a lawsuit brought under section 2 of the Act. North Carolina, therefore, created a second majority-minority district,²⁹ which, if you look in the appendix of the Supreme Court decision in *Shaw*, you will see is very long, and very skinny.³⁰ It had been said in the newspapers that if you drove down the highway that passes through this district, with both doors opened, you would kill half of the voters in the district.³¹ This, of course, is a slight exaggeration.

What this district did accomplish was to connect the main urban centers in North Carolina, and by doing so, create a district that was primarily, African-American. The result of creating these two districts was to allow African-Americans to elect representatives to Congress, for the first time in many years. The delegation, however, was still predominantly white.

28. Section 5 of the Voting Rights Act gives district courts the power to pass on the redistricting plans of specific states and political subdivisions determined in section 4. The purpose of such a review is to insure that no denial or abridgment of voting rights is being perpetrated upon portions of the populations of these electoral units. 42 U.S.C. § 1973(b), (c).

29. *Shaw*, 113 S. Ct. at 2819-20. Despite North Carolina's efforts to avoid a section 2 claim by creating a second majority-black district, suit was brought on the equal protection ground that the irregular shape of the district was an unconstitutional racial gerrymander. *Id.*

30. *Id.* at 2833.

31. *Id.* at 2821 (citing Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting; White Voters Challenge Black-Majority Map*, WASH. POST, Apr. 20, 1993, at A4).

In fact, whites would be over-represented in the delegation, since they had ten out of the twelve members of the House of Representatives.³²

Everything seemed fine as far as the Voting Rights Act was concerned, but then, an action was filed by a group of white voters. Although they did not identify themselves as that in the complaint, but, they were, in fact, white, and the district court took judicial notice of that fact.³³ Some of these white voters lived in one of these districts, and some of them did not, but all of them claimed that their rights under the Fourteenth Amendment had been violated because race had been taken into account in creating this district, and that race was the cause of its “bizarre” shape.³⁴

The case was dismissed by the district court, so no evidence whatsoever was presented, and no answer was filed. The case reached the Supreme Court purely on the legal question as to whether the complaint stated a claim under the Equal Protection Clause of the Fourteenth Amendment.³⁵ Justice O'Connor, writing for the majority, in a five-four decision, with some very strong dissents by Justices White, Souter, Blackmun, and

32. *Id.* at 2838 (White, J., dissenting) (stating that white voters cannot complain of discriminatory treatment since they constitute a voting majority in 10 of the 12 districts).

33. *Id.* at 2824. In *Shaw*, since the appellants did not claim that the “reapportionment plan unconstitutionally diluted white voter strength,” it was not necessary to identify their race as white. *Id.*

34. *Id.* at 2821. White voters alleged that the districts were created to constitute a black majority “without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions with the purpose to create . . . [d]istricts along racial lines and to assure the election of two black representatives.” *Id.*

35. *Id.* Plaintiffs’ claim was that the strangely configured electoral district was formed by the state legislature to provide African-American voters with a stronger vote in that district, and that such an action violates the Equal Protection Clause of the Fourteenth Amendment by drawing distinctions based on race, without a compelling state interest for so doing, and without providing the most narrowly tailored solution to an identified problem. *Id.* Specifically, the plaintiffs “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.” *Id.* at 2824.

Stevens,³⁶ found that the complaint did state a claim under the Fourteenth Amendment.³⁷

Now, one very interesting question concerning this case, which still puzzles me, is exactly what harm did the plaintiffs suffer? They had not been denied the right to vote. Nor had they been denied representation as whites, since whites were still over-represented in the congressional delegation. So, what was the injury here? Justice O'Connor, in her opinion, slid quickly past this question of exactly what injury these folks have suffered, and held that they can raise these constitutional questions, and challenge the legitimacy of what the legislature had done.³⁸

36. *Id.* at 2843 (White, J., dissenting). Justice White stated that there was no cognizable constitutional claim, because no cognizable injury was alleged. *Id.* at 2843 (Blackmun, J., dissenting). Justice Blackmun agreed with Justice White's dissenting opinion, in stating that "the conscious use of race in redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly." *Id.* at 2845 (Stevens, J., dissenting). Justice Stevens found no violation of the Equal Protection Clause occurs when the "majority acts to facilitate the election of a member of a group that lacks . . . power because it remains under-represented in the state legislature." *Id.* at 2845 (Souter, J., dissenting). Justice Souter found no justification for Court's decision to apply strict scrutiny to this narrow category of bizarre-shaped district claims, where electoral districting decision always calls for some consideration of race for legitimate reasons.

37. *Id.* at 2825. According to the majority opinion, under the Equal Protection Clause, state legislation that distinguishes citizens on the basis of race, must further a compelling state interest. *Id.* Therefore, a redistricting plan intentionally created to separate voters into different districts on the basis of race, without sufficient justification is a violation of the Equal Protection Clause. *Id.* at 2828. Consequently, the *Shaw* majority found that North Carolina's redistricting scheme is so irrational on its face, because it can be understood only as a racial gerrymander which lacks sufficient justification. *Id.* at 2832. Justice O'Connor, who was joined in her opinion by Justices Scalia, Kennedy, and Thomas, and Chief Justice Rehnquist, asserted: "We hold only that, on the facts of this case, plaintiffs have stated a claim sufficient to defeat the state appellees' motion to dismiss." *Id.* at 2828.

38. *Id.* at 2828. Justice O'Connor stated that the harm to the challengers was the reinforcement of racial stereotypes, and the threat of undermining "our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. *Id.*

This is another case following what we may, perhaps somewhat cynically, term as “the universal white standing doctrine,” that the Supreme Court seemed to be developing last Term. Under this “doctrine,” persons who are offended by the fact that race has been taken into account, seem to have standing to challenge the districting scheme, simply because they want to live in a society that is color-blind. We all agree that such would be a wonderful society to have. Hopefully, some day, all racism will end, and we will have a color-blind society, in which all of us shall treat each other the way we should, with no discrimination of any sort. But to believe that we have already gotten there, or are even very close, is unrealistic.

The Court sent the case back for trial, with many of these questions still open. The basic question continues to be: To what extent can, and should, race be taken into account in constructing districts - legislative districts, in particular - at all levels of government,³⁹ since this case implicates not just congressional delegations, but also state and local legislative bodies. For example, right after this case came down, a gentleman, who has been very much involved in litigation involving New York State, asserted that, under this decision, every governmental body in the entire State of New York would have to be reapportioned, since there was a ripple effect from the redistricting under the Voting Rights Act in New York City. In other words, we would have to tear everything up, and start all over again. Well, that is a nightmare for state and local governments, and it puts all governments in a very difficult position. This dilemma is similar to the issues behind affirmative action, as well as that in *City of Richmond v. J. A. Croson Co.*,⁴⁰ a case we discussed when I was

39. *Id.* at 2832; see also *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3026 (1990) (stating that use of racial classifications by federal government in creating redistricting plans need only be substantially related to an important government interest); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (finding that all state local redistricting plans based on racial classifications are subject to strict scrutiny).

40. 488 U.S. 469, 493 (1989). The *Croson* Court held that legislative action, which seeks to aid minorities, is subject to the very same strict scrutiny as are actions that seek to discriminate against minorities, because all

here four years ago. Justice O'Connor has effectively "Crosonized" redistricting by saying that if you are going to take race into account, you have to have a basis for doing it; that is, you have to show a compelling state interest.⁴¹

And here is North Carolina, faced, on the one hand, with the Department of Justice saying its first plan was illegal under section 5 of the Voting Rights Act, and on the other hand, with a very real threat of being found in violation of section 2, in light of the history of the state in the *Gingles* decision. The Supreme Court now says that North Carolina may have chosen wrongly, and that this lawsuit can proceed. One of the ironies of the situation is, that after the census, the LDF and other organizations actually worked with particular states which had been in violation of the Voting Rights Act in the eighties, including North Carolina, to see if, instead of having to be sued all over again, these states could come up with plans that met the requirements of the Voting Rights Act, and could avoid a multitude of new litigation.

That whole process was reasonably successful, and now, there are thirty-nine African-American members of Congress, which is more than there has ever been. The great majority of these Congress persons are from majority-minority districts, and all of them are now going to be open to challenge. Already, there is a case in Louisiana, involving this issue, which had been filed before *Shaw*,⁴² and another recent challenge in Georgia.⁴³ I

classifications based on race should be equally held to the test of compelling state interest served by a narrowly-tailored law. *Id.*

41. See *Shaw*, 113 S. Ct. at 2832 ("Race-based districting by our state legislatures demands close judicial scrutiny.").

42. *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993). The issue in this case was whether or not a state has the right to establish a "racial majority-minority congressional district by racial gerrymandering." *Id.* at 1191. The court agreed with the Supreme Court's decision in *Shaw v. Reno*, that a state is allowed to do so, but "only if the state does it right." *Id.* But, in a memorandum decision, the district court held that Louisiana's effort to redistrict so as to increase the number of black delegates to the House of Representatives was in contravention of the Voting Rights Act and the Constitution. *Id.* at 1199. The court found that Louisiana's redistricting plan was the product of racial gerrymandering, was not "narrowly tailored to

submit that the election and presence of the two African-Americans in Congress, from North Carolina is good for North Carolina. Furthermore, the presence of members of Congress who are African-American is good for the country, the democratic process, and the body politic, because it deals with the reality of voting in a pluralistic society. Likewise, their presence also deals with the reality of historic exclusion of minorities from the political process, and the destabilizing effect of such exclusion on the political system.

Quite frankly, it seems to me, that the Supreme Court is functioning in a type of "never-never land," where "color-blind society" really means one can go to Congress, look around, and once again, see no person of color. I do not think that that is a good result, and is one that is not required by the Constitution. Unfortunately, a hint was dropped like a ton of bricks in the middle of the *Shaw* opinion, that if the Voting Rights Act requires the consideration of race in drawing districts, perhaps the Voting Rights Act itself is unconstitutional.

If you count up the votes of members of the Court who have expressed doubts about the constitutionality of parts of the Voting Rights Act, there are three who have done so: Chief Justice Rehnquist, in *City of Rome v. United States*,⁴⁴ and Justices

further any compelling governmental interest," and was therefore, "null and void." *Id.* at 1199.

43. *Johnson v. Miller*, No. CIV. 194-003 (S.D. Ga. Jan. 7, 1994).

44. 446 U.S. 156 (1980), *reh'g denied*, 447 U.S. 916 (1980). In *City of Rome*, the Supreme Court held that the Voting Rights Act of 1965 was an extension of Congress' power to remedy violations of the Fifteenth Amendment, and that these laws rightfully included the power to ban a city's proposed changes in voting structure, even where that city proved their proposal to be free from discriminatory intent, if the city was located in a state where there was a history of racially discriminatory voting practices. *Id.* at 176-77. Chief Justice Rehnquist dissented, claiming that the plaintiff, City of Rome, should be able to go forward with its proposed voting structure changes, because it had proved that the city had not previously discriminated against blacks, and the suggested changes also would not produce discriminatory effects. *Id.* at 218 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist took issue with the Voting Rights Act, in that he felt the Court's interpretation of this act conferred far too broad power upon Congress in interfering with the inner workings of municipal governments, and not enough

Kennedy and Scalia, in a dissent in *Houston Lawyers' Association v. The Attorney General of Texas*.⁴⁵ Since Justice Thomas basically votes however Justice Scalia and Chief Justice Rehnquist vote, there are four people who have already either explicitly or implicitly expressed doubts about the constitutionality of the Voting Rights Act. How this is all going to turn out is going to depend, literally, on Justice O'Connor. Justice White, who has been very good on voting rights issues, and who dissented in *Shaw*, has been replaced by Justice Ginsburg, who, with very few exceptions, has no track record as a judge in these cases, because these issues do not arise in the District of Columbia.

So what comes out of all this for a state or local legislative body, trying to balance concerns about the Voting Rights Act with what the Supreme Court has now said? The Supreme Court does not say that you cannot consider race at all.⁴⁶ It acknowledged that in its prior decisions, but not with any great enthusiasm, I must say. Justice O'Connor is clearly concerned with this issue, because she keeps coming back to the "bizarreness" of this district.⁴⁷ Her view is that it is so bizarre, that it can *only* be accounted for by race.

power to the "bailout" provisions that the law provides upon proof of lack of discriminatory effect. *Id.* at 221 (Rehnquist, C.J., dissenting).

45. 111 S. Ct. 2376 (1991) (Scalia, J., dissenting). The Court "would not apply Section 2 of the Voting Rights Act to vote dilution claims in judicial elections." *Id.* at 2382.

46. *Shaw*, 113 S. Ct. at 2825. The Court stated that it had previously held that "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race, to be narrowly tailored to further a compelling governmental interest. *Id.* The *Shaw* Court also pointed out that apportionment itself is a procedure in which legislatures necessarily take factors such as race, and socio-economic and religious diversity of their constituent populations into consideration. *Id.* at 2826-27. Therefore, the majority contends that race is a permissible consideration in voting rights issues, as it is in other legislation. *Id.* However, discriminatory apportioning is not tolerable. *Id.* It is the difference between providing a fair opportunity to elect representatives to all, and having a disenfranchising effect on some, which the majority in *Shaw* seeks to discern. *Id.*

47. *Id.* at 2820-21. In *Shaw*, Justice O'Connor's opinion for the Court, focused much attention on the extremely irregular shape of at least one of the

Well, that obviously suggests that when a state legislature is constructing districts, other reasons besides race must be taken into account. The Supreme Court itself acknowledged that race is, in fact, taken into account, since it is common knowledge that census track data contains race data. When districts are being put together, everyone knows that African-Americans overwhelmingly vote Democrat. Accordingly, the Republicans try to stuff as many African-Americans into each district, and the Democrats try to split them between districts. Indeed, we believe this happened in North Carolina. In other words, assuming that *Shaw* stands for the proposition that if the only harm is race, it is bad, you have to see what other reasons exist for a district besides just race. Number one, incumbent protection and partisan politics are critical as to how districts actually come out. Number two, aside from race, there does exist a community of interest among the voters in a district. In fact, one of the things that will be litigated in *Shaw*, is whether, in the urban areas that make up this district, a community of interest exists among the voters. Ultimately, one may have to challenge Justice O'Connor's fundamental idea that geographic neatness is what is most important. It is archaic to equate geography with community of interest in this day and age. That is, what does neatness have to do at all with whether voters have similar interests in a district which is either long, skinny, fat, round, square, a hexagon, or who knows what, in shape? Given modern communication, there are a lot of things that go into community of interest that have absolutely nothing to do with geography. On a parting note, I

two districts at issue. *Id.* The *Shaw* majority recalled Justice Stevens' concurring opinion in *Karcher v. Daggett*, where Justice Stevens suggested that "one need not use Justice Stewart's classic definition of obscenity - 'I know it when I see it' - as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." *Id.* at 2827. (quoting *Karcher v. Daggett*, 462 U.S. 725, 755 (1983)). Finding "that reapportionment is one area in which appearances do matter," Justice O'Connor stated in her opinion 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, . . . bears an uncomfortable resemblance to political apartheid." *Id.*

would like you to consider that my former colleague, Professor Lani Guinier has suggested alternative remedies to basing electoral systems on districts.⁴⁸

If I have time later today, I will talk in greater detail about devices like limited voting and preferential voting. Where nine city councilmen are to be elected, for example, such devices allow every voter to get nine votes that can be used to vote for nine different people, or for one person.⁴⁹ These methods allow people to develop their own coalitions, and likewise help to avoid artificial division by race, which Professor Guinier has said, may not be the best thing to do. Alternatives exist that can be used to further the goal of the Voting Rights Act, to allow everyone a fair opportunity to elect persons of their choice, without running into what seems to be the new constitutional right to "feel nice," and to have what is called a "color-blind society." Thank you.

48. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1136-37 (1989) (proposing proportionate interest representation as a different approach to the reform of voting rights mainly for remedial purposes).

49. Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993). In this article, Professor Guinier stated:

I use the term 'one-vote, one value' to describe the principle . . . that as many votes as possible should count in the election of representatives. One-vote, one value is realized when everyone's vote counts for someone's election. The only system with the potential to realize this principle for all voters is one in which the unit of representation is political rather than regional, and the aggregating rule is proportionality rather than winner-take-all Cumulative voting, can approximate the one-vote, one-value principle by minimizing the problem of wasted votes [Under this system,] each vote has an equal worth independent of decisions made by those who drew district lines. Votes are allocated . . . by the voters themselves Candidates are elected in proportion to the intensity of their political support within the electorate itself rather than as a result of decisions made by incumbent politicians or federal courts once every ten years.

Id. at 1594.

Mr. Michael A. Carvin, Esq.:

Thank you. I think the debate we are having today, which is obviously very much in play these days on the proper interpretation of the Voting Rights Act, is the debate that has been played out in a number of areas of civil rights laws. Namely, it is the question of how do you balance the rights of minorities that have been traditionally discriminated against versus those of non-minorities? Some people phrase that debate as whether we are guaranteeing a system of equal opportunity,⁵⁰ or whether we are focusing more on equality of results.⁵¹ In the voting context, are we seeking to assure proportional representation or a system of fair procedures? Should these results be accomplished through racially preferential treatment to traditionally disadvantaged minorities, as Mr. Ralston mentioned, or through a color-blind approach of nondiscrimination?

I think this debate has taken on special urgency in the voting rights context because, even more so than in other areas of affirmative action, there is a tremendous amount of confusion and evolution occurring in this area.⁵² I do not want to begin the

50. See Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1816 (1992) ("Under the Voting Rights Act, courts and the Department of Justice now have begun to require that districting plans afford groups an equal opportunity to participate effectively, through the use of safe districting."); Laughlin McDonald, *The Voting Rights Act and Vote Dilution*, 19 GA. L. REV. 459, 468 (1985) (book review) ("Majority black voting districts . . . merely provide the equal opportunity for black office holding, a right that section 2 makes explicit.").

51. See Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 882 (1985). The author stated that under the Voting Rights Act individuals are given "one and no more than one vote, thus leading to equality of results." *Id.* at 884; Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 943 (1993) (book review) ("[A]ffirmative action programs are constitutional because they set the stage for an equality of results, rather than an equality of process.").

52. See ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 6 (1987) ("The myth of moral simplicity has largely insulated the voting rights issue from debate, yet perhaps no other affirmative action question is more significant."); William N. Eskridge Jr., *Reneging on History? Playing the Court/Congress/President Civil*

debate by agreeing with Mr. Ralston, but it is true that there is an enormous amount of confusion in this area. State and local governments, who are attempting to engage in even-handed redistricting, are confronted with a real dilemma in trying to reconcile the various Supreme Court pronouncements that have come down.⁵³ I will briefly outline that dilemma for you in some detail, and then respond to Mr. Ralston, in terms of why I think

Rights Game, 79 CAL. L. REV. 613, 674 (1991) (discussing the confusion and bewilderment in the voting rights area); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1681 (1993) (stating that the 1982 Amendments to the Voting Rights Act coupled with *Gingles* indicate the trend toward the evolution of a clearly focused empirical test of vote dilution); Allen J. Lichtman & J. Gerald Hebert, *The Voting Rights Act and the Politics of Redistricting: Changing Boundaries, Changing Voices, America's Political Future*, 6 LA RAZA L.J. 1 (discussing how the Supreme Court's misconstruction of the 'results test' has sown confusion in the literature and the courts).

53. See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993) (holding that white voters could challenge irregularly-shaped majority-black congressional districts as unconstitutional); *Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993) (holding state legislatures may create super-majority districts in an effort to enhance minority representation without being required to prove a past violation of section 2 of the Voting Rights Act); *Grove v. Emison* 113 S. Ct. 1075, 1085 (1993) (holding that criteria established in *Gingles* applies in assessing validity of an allegation of minority vote fragmentation in the drawing of single member districts under the vote dilution provisions of section 2 of the Voting Rights Act); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (establishing three preconditions to a vote-dilution claim); *Rogers v. Lodge*, 458 U.S. 613 (1982) (at-large elections in Burke County Georgia unconstitutionally diluted the vote of minority residents); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (holding that in order to establish a Fourteenth Amendment Equal Protection claim, plaintiff would have to prove an invidious purpose "to minimize or cancel out the voting potential of racial or ethnic minorities"); *White v. Regester*, 412 U.S. 755 (1973) (Texas legislative redistricting case). The Supreme Court held that in order to successfully challenge a state's districting plan, minority plaintiffs would have to show that the plan did not give them an equal opportunity to dominate and elect candidates of their choice, as compared to other residents in their district. *Id.* at 766.

the way the Court seems to push the envelope in *Shaw v. Reno*⁵⁴ is a step in the right direction.

I think the 1982 amendments to section 2 of the Voting Rights Act were the most important development in the voting rights area.⁵⁵ That section applies not only to just southern jurisdictions, but to all jurisdictions throughout the United States. The essential command of section 2 was to direct courts to analyze minority vote dilution claims without regard to what the individual legislators' motives were in enacting voting practices.⁵⁶ According to section 2, we must focus more on the results. Even if the motives are pure, if the result is to deny minorities a fair opportunity to participate in the political and electoral process, the law should be struck down.⁵⁷

54. 113 S. Ct. 2816 (1993). The Court stated that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation . . . rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Id.* at 2828. The Supreme Court held that white voters may challenge, on equal protection grounds, state legislative plans that create districts designed to elect minority congressional representatives. *Id.*

55. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973(b) (1988)). Section 2 establishes that a violation of the right of any citizen to vote occurs if "it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a protected class of citizens." *Id.*

56. Congress amended section 2 of the Act to clarify that discriminatory intent was not a necessary element of a minority vote dilution claim rather, proof of discriminatory result is now sufficient. This test, which was taken from *White v. Regester*, 412 U.S. 755, 766 (1973) defines the violation as a denial of equal opportunity to "participate in the political process and to elect representatives of choice." 42 U.S.C. § 1973(b) (1988). See Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What is the Intent of the Results Test?*, 36 EMORY L.J. 1, 74 (1987). The authors claimed that under section 2 of the Voting Rights Act, "Congress meant to enable plaintiffs to prevail on legitimate claims of dilution in the absence of direct evidence of discriminatory motive." *Id.*

57. See April D. Dulaney, *A Judicial Exception for Judicial Elections: "A Burning Scar on the Flesh of the Voting Rights Act,"* 65 TUL. L. REV. 1223, 1226 n.20 (1991). The "results" test removes the difficult burden of proving discriminatory purposes and the court looks to objective factors behind election scheme. *Id.*; see also Note, *To Infer or Not to Infer a Discriminatory Purpose:*

Now, I think the current debate focuses on what constitutes a fair result in this situation. During the enactment of the Voting Rights Act, all civil rights groups, and all the sponsors of the legislation, assured their colleagues and Congress that such enactment would not result in any sort of mandate for proportional representation or race-conscious gerrymandering⁵⁸ of districts.⁵⁹ This is similar to Hubert Humphrey and the sponsors of the Civil Rights Act, who had assured those who were suspicious of that Act that it could not permit, and certainly could not require, any use of racial quotas or preferential treatment in the employment and educational contexts.⁶⁰ But, just

Rethinking Equal Protection Doctrine, 61 N.Y.U. L. REV. 334, 345 (1986) ("In rejecting the purpose standard, Congress substituted a "results" test that considers whether, based on the "totality of the circumstances," the right of minority voters to participate equally in the political process and to elect candidates of their choice has been violated.").

58. BLACK'S LAW DICTIONARY 687 (6th ed. 1990). "Gerrymander" is defined as:

a name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines.

Id.

59. See 42 U.S.C. § 1973(b) (1988). Incorporated into the statute, it states that "[t]he extent to which members of a protected class have been elected to office" is relevant, "provided [t]hat nothing in this section establishes a right to have a protected class elected in numbers equal to their proportion in the population." *Id.*; see also Note, *At-Large Elections and Vote Dilution: An Empirical Study*, 19 U. MICH. J.L. REF. 1221, 1230 (1986) (discussing how section 1973(b) was added to the Voting Rights Act in 1982 to disclaim any notion of proportional representation).

60. See Kingley R. Brown, *The Civil Rights Act of 1991: A "Quote Bill," a Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287 (1993) (citing 110 CONG. REC. 11,848 (1964)). Senator Humphrey stated that :

[T]itle VII does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact the title would prohibit preferential treatment for any particular group, and any minority group

as those laws have indeed resulted in mandatory affirmative action and racially preferential treatment in the employment and education areas,⁶¹ I think section 2 has come to mean some sort of race-conscious line drawing which guarantees enclaves of minority voting power. The first step in this process was the *Thornburg v. Gingles*⁶² case. In *Gingles*, the Court dealt with an at-large system in North Carolina. That is a system where everybody in the county or the city can vote for all members of the county commission or city council. You do not have any sub-units or single-member districts, where you know a particular representative will run. If you have five members of the city council, every voter in the city can vote for all five members. For example, if you had a 20% representation of blacks in a southern jurisdiction, the 80% white majority would not elect black representatives who are running at large. So, the *Gingles* Court essentially said that if you have a situation in which racially polarized voting exists, and it is possible to create a compact single member district in which one of those districts

would be permitted to file a complaint of discriminatory employment practices.

Id. at 296.

61. *See, e.g.*, *United States v. Paradise*, 480 U.S. 149, 170 (1987) (stating that race-conscious relief was justified in order to remedy discriminatory hiring and promotional practices); *Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 476 (1986) (holding that affirmative action programs to remedy employer's "pervasive and egregious discrimination" were proper and did not violate either Title VII or the Constitution).

62. 478 U.S. 30 (1986). The Court established three pre-conditions to a vote-dilution claim:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district . . . Second, the minority group must be able to show that it is politically cohesive . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority's preferred candidate.

Id. at 50-51. The *Gingles* Court held that vote dilution was shown only if, under the "totality of the circumstances," the challenged electoral mechanisms result in unequal access to the electoral process. *Id.* at 79.

would be a majority-black district, you are, in essence, required to create that district.⁶³

The question that the Court has not answered, and may well answer this Term, is what happens in the single-member redistricting context.⁶⁴ After each census, the state has to redraw all of its state legislative and congressional lines and devise a plan that creates the districts from which the state legislatures and congressmen will run.⁶⁵ If we draw these districts without regard to race, it could create squares or nice compact districts which would preserve political subdivisions and county lines. For example, if you do not want to break the county line between Nassau and Queens, that may have the result of creating a number of districts where Hispanic or black voters would constitute, say 40% of the district. That would result in less minority-majority districts than if you used your racial census data to draw long, skinny districts that essentially focus on picking up Hispanic and black voters in different areas with the avowed intent and effect of creating a district where minorities are the majority of the population in order for them to elect representatives of their choice.

63. See Stuart Taylor, Jr., *Electing By Race*, 13 AM. LAW. 50, 54 (1991). The author stated that *Gingles* can be interpreted as holding that "as many majority-minority districts as possible must be drawn wherever racial bloc voting persists" *Id.*

64. See *Holder v. Hall*, 955 F.2d. 1563 (11th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993). "[T]he issues are whether a single commissioner form of county government is subject to a vote dilution challenge under section 2 of the statute and whether federal courts have authority to order creation of a 5-member commission as a remedy" *Id.* at 1382; *Johnson v. De Grandy*, 794 F. Supp. 1076 (N.D. Fla. 1992), *cert. granted*, 62 U.S.L.W. 3261 (U.S. Oct. 12, 1993) (No. 92-519, 92-593, and 92-767). The issues involved a battle between predominantly Republican Hispanic voters and largely Democratic blacks over redistricted seats in the Florida Senate and House of Representatives from Miami and nearby areas. *Id.* at 1079.

65. The States retain the power to prescribe voter qualifications and electoral systems under the Tenth Amendment. See, e.g., Joseph F. Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 WM & MARY L. REV. 621, 621-40 (1978) (discussing rights of states to determine their own electoral systems).

That is the kind of dilemma that somebody trying to draw up a redistricting plan faces. Do we adhere to traditional redistricting principles without regard to race, or should we inject a measure of race-consciousness into the way we have drawn our districts? Clearly, the experience in every state with any kind of substantial minority population during the 1990 redistricting was the latter situation.⁶⁶ In a majority of states, line drawers would sit down at their computers, draw the minority districts and figure out how to connect pockets of minority voters just as they did in North Carolina. That district ran hundreds of miles down a federal highway to connect people from entirely different jurisdictions for the sole purpose of creating a majority-minority district.⁶⁷

After *Shaw* invalidated that district, such line-drawing has created a dilemma. On the one hand, the Court seems to have said in *Gingles*, that you have to maximize minority voting strength to avoid violating the rights of minority voters,⁶⁸ but on the other hand the Court tells us that if we do engage in that sort of line drawing, that we are violating the rights of non-minority voters who have been excluded from this district. Yet, *Shaw* is not entirely clear. It is just like the pornography cases where the Court says, “we’ll know it when we see it” – when you cross this

66. See, e.g., *Grove v. Emison*, 113 S. Ct. 1075, 1085 (1993). The Court, in *Grove*, stated that federal courts should not interfere with Minnesota’s internal attempt to redistrict in light of the 1990 Census, and that to sustain a claim under section 2 of the Voting Rights Act a plaintiff must satisfy the Court’s three-part test established by *Gingles*. *Id.*; *Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993). The *Voinovich* Court held that section 2 of the Voting Rights Act permits intentional manipulations of electoral districts to get majority-minority districts only where a legislative body is acting to remedy a prior section 2 violation. *Id.*

67. In *Shaw*, the North Carolina General Assembly had created a 160-mile long district (Congressional District 12), winding through ten counties, which linked the urban areas of Durham, Greensboro, Winston-Salem and Charlotte.

68. *Thornburg v. Gingles*, 478 U.S. 30 (1986). The Court found that historical discrimination in voting, coupled with recent and obviously limited success of black politicians, and a multi-member districting plan that tended to dilute the black vote, denied blacks their constitutionally protected right to vote, and thereby participate politically. *Id.* at 80.

line.⁶⁹ So, the impact of *Shaw* has not yet been developed because, I think there are going to have to be subsequent cases in terms of developing exactly when that line is crossed.⁷⁰

The other dilemma, is that, on the one hand, you are seemingly requiring line drawers to engage in this race-conscious line drawing, and on the other hand, you are stating that they are violating the Constitution if they do so. There are some cases now pending Supreme Court review that have already been argued, and I would like to just briefly touch on those. These are the Florida redistricting cases.⁷¹ Without getting into a lot of detail, the federal court struck down Florida's state legislative redistricting plan on essentially the same grounds that we have been talking about; that it was possible to create two more districts in the state house that would be minority controlled, and one more district in the state senate that was minority controlled.⁷² Pursuant to that analysis, the plaintiff said this violates section 2 of the Voting Rights Act.⁷³ Obviously, it is

69. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (Justice Stewart's famous phrase depicting the Supreme Court's frustration in assigning any precise meaning to the concept of unprotected pornography). In *Shaw*, Justice O'Connor mentions that "one need not use Justice Stewart's classic definition of obscenity -- 'I know it when I see it' -- as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." [citations omitted] *Shaw*, 113 U.S. at 2827.

70. Richard G. Niemi & Richard H. Pildes, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election - District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 485 (1993) ("*Shaw* provides no criteria to guide reapportionment bodies or courts in judging when this line has been crossed.").

71. The Court agreed this Term to address challenges to the redistricting of Florida's single member and senate districts. 62 U.S.L.W. 3261 (U.S. Oct. 12, 1993) (summarizing the dispute in *Johnson v. De Grandy*, No. 92-519 *prob. juris. noted*, 113 S. Ct. 2437 (1993)). This case was argued before the Supreme Court on the first day of the 1993-94 Term. *Id.*

72. See 62 U.S.L.W. at 3261-63. "The legislature had drawn district lines so that each of three senate districts was likely to elect an Hispanic senator and two other districts were likely to elect black candidates. *Id.* The [district] court found, however, that each group was sufficiently numerous and geographically compact to justify an additional senate district." *Id.* at 3267.

73. 42 U.S.C. § 1973(b) (1988).

difficult to predict how the Supreme Court is going to react to a case just by viewing the argument. But, in the argument for the Florida redistricting case, the Court expressed a tremendous amount of skepticism about the fact that section 2 did indeed mandate that kind of maximization of the most minority-majority districts that could be created.⁷⁴ Even Justice Ginsburg seemed to be troubled by this notion, particularly since Florida is a state where there are tremendous political differences between the Hispanic voters, which is one of the minorities affected by this plan.⁷⁵ In Tampa, Hispanics are traditionally Democratic voters. In Miami, I think there are a lot of Hispanic voters who traditionally vote Republican, so the Court was skeptical of the notion that even in those circumstances, you have to carve out these districts for the sole purpose of creating these minority-majority districts. So, if I had to predict, which is always a tricky proposition on the basis of an argument, I would think that the Court would be heading in a direction to ease the pressure of creating these minority-majority districts, in order to lessen the dilemma that *Shaw* created. On the one hand, the Court is forcing the creation of these districts, on the other hand, it is saying that those districts might violate the Constitution.⁷⁶

74. See 62 U.S.L.W. at 3263. Justice Scalia questioned the attorney representing Florida as to the definition of the term "maximization," and Justice Kennedy continued this line of inquiry by probing whether such a concept would trigger a section 2 or an equal protection claim. *Id.*

75. *Id.* While the Assistant to the Solicitor General argued that there was evidence showing cohesiveness amongst Florida's Hispanic voters, Chief Justice Rehnquist interjected that the lower court had apparently found disparities between Cuban and non-Cuban Hispanic voters within the county in question itself. *Id.* Justice Ginsburg continued the line of questioning with inquiries as to what defines cohesive voting, partisan voting, or race based voting, etc. *Id.*

76. See Niemi & Pildes, *supra* note 70, at 484. In their introductory remarks, the authors of this article suggest that *Shaw v. Reno* provides an outer boundary of geographical abnormality which will be tolerated by the Supreme Court in the name of remedying racial inequality in the electoral process through creation of majority-minority districts. *Id.* at 485. The dilemma created by such limitation thus seems to be that the Voting Rights Act mandates that legislatures attempt, and courts enforce means which would afford minority voters meaningful opportunity to elect representatives of their choice, free

Whatever the results, whether I am right or wrong in that prediction, I will turn to what I think is the right answer in terms of how people should proceed with redistricting in this situation. In my view, the right answer was given in *Shaw*. I think the Constitution, and the Voting Rights Act, guarantee minority voters equal access to the political and democratic process, but it does not, and certainly should not, guarantee minority voters preferential treatment where the traditional rules and policies of voting and redistricting practices are thrown out so that you are guaranteed a certain level of success by minority voters. Minority voters should not be guaranteed preferential treatment in the redistricting process where the state legislature engages in gerrymandering that is designed to immunize minority candidates from the traditional ups and downs in the democratic process. For example, in the redistricting context, I certainly would not object to the degree of race-consciousness permissible under *Shaw*. For example, assume you have a traditional black community in one alternative which would fragment, by drawing a district line right through it, and you have an equally legitimate alternative which tries to preserve that community. I would think that would be acceptable, and certainly not inconsistent with the purposes of the Fourteenth Amendment⁷⁷ if you were to choose the better alternative.

But, what I do object to, is subordination of all traditional redistricting principles, preservation of political boundaries, the making of compact districts, and combining communities of interest. In New York, for example, Brooklyn Jewish communities of interest were obviously subordinated and split asunder in order to accomplish what would seem to be the only

from voter dilution which frustrates such an effort. *Id.* However, by holding that there are limitations placed on such seemingly well-intentioned efforts, *Shaw v. Reno* confuses those trying to adhere to the law because there is now a line beyond which, such efforts as mandated by statute, are not only discouraged but rather found to be constitutionally impermissible. *Id.* at 484-85.

77. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

purpose of redistricting throughout the country, which was to guarantee a certain proportion of minority seats, regardless of the legitimate state objectives that were being undermined. I think anyone who tells you that that is not what was going on throughout the Country is not telling you the truth. You do not have to take my word for it. Look at the maps. North Carolina is a good example. This district extended over hundreds of miles and connected people that have had no contact in the past. The North Carolina example was not the exception, rather, it was the rule. That kind of subordination to one, or even to a number of identified groups -- in the political process, cannot be squared with traditional notions of a democracy or with the command of the Fourteenth Amendment.

Mr. Ralston questions what the harm is to the non-minorities? I recognize the harm in this affirmative action context is less tangible than a quota which excludes you from a promotion in employment,⁷⁸ or from an admission to a medical school.⁷⁹ Under those circumstances, the non-minorities have been denied a tangible benefit that they have earned on the merit, and the deprivation to them is great. But, I do not think he is entirely serious when he suggests that they can vote, so it is really not a problem. According to Mr. Ralston, they can show up at the polls and vote, so how can they complain about whether or not their vote is effective? If you really believe that, I think you have to say that the result in the famous case of *Gomillion v.*

78. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The Court held that the affirmative action plan fell within the provisions of Title VII, because the plan was designed to eliminate racial imbalance in the traditionally segregated employment area. *Id.* at 209. The Court reasoned that the plan did not hinder the interest of white employees with regard to promotions, because it did not require the discharge of white employees in order to hire black employees. *Id.* at 208.

79. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). The *Bakke* Court affirmed the invalidation of special admissions program which was designed to admit a certain number of minority students to the medical school of the University of California at Davis. *Id.* at 320. The school could not show that "but for the existence of its unlawful special admissions program, . . . [the white disadvantaged applicant] still would not have been admitted." *Id.*

Lightfoot,⁸⁰ was wrong or that the gerrymandering practices that went on throughout the South in past years were acceptable, because, at least in some circumstances, the black voters, were allowed to vote. Their complaint was not that they could not cast their vote, but that they had been gerrymandered into a district where their vote had been rendered less effective solely because of the color of their skin. To say that there is no real harm, is kind of silly. I think it would mean that once you have achieved chief proportional representation, legislators could embark on a deliberate program of gerrymandering of all of the black communities in the United States. Again, I suspect that is a result that Mr. Ralston would not accept. But, apart from that tangible harm, I really think that the harm to the democratic and political process, while less tangible, is nonetheless important to people who care about the way we are going to engage in racial politics in the future, and whether racial politics are going to subordinate other concerns. I do not want to bore you by reading to you the entire excerpts from *Shaw*, but I think these concerns were very well stated by Justice O'Connor in that opinion. So I will read you some of her comments about the harms that do result from this kind of redistricting. She said that these districts, like the district in North Carolina, have "an uncomfortable resemblance to political apartheid. [They] reinforce . . . the perception that members of the same racial group-regardless of 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."⁸¹ Furthermore, she stated that in a racially gerrymandered district,

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 antiethical

80. 364 U.S. 339 (1960). The Court invalidated and held unconstitutional a Tuskegee, Alabama districting plan that excluded black voters from city limits, by drawing the city limits as "an uncouth twenty-eight-sided figure" municipal boundary line. *Id.* at 340. The Court concluded that the "unlawful segregation of races of citizens" into different voting districts was cognizable under the Equal Protection Clause. *Id.* at 349.

81. *Shaw*, 113 S. Ct. at 2827.

to our system of representative democracy. . . . Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of political system in which race no longer matters -- a goal . . . to which [this] Nation continues to aspire.⁸²

In other words, this extreme interpretation of the Voting Rights Act, in my view, diminishes the transcendent ideal of Martin Luther King Jr. and others of equal treatment, without regard to race. It turns it into another fairly raw system of interest group politicians, and it creates a system of racial politics that guarantees and reinforces racially polarized voting and representation. A minority office holder, who has achieved that office in a system that sets aside certain districts for voters of his race, is dependent on that system for his survival. So, he has no political incentive to reach out to other groups or to engage in a sort of traditional coalition building that is the hallmark of American politics and where voters could come to perceive that this person does indeed represent all of this constituency. What would be the perception of the non-minority voters in the districts that have been created this way? They would obviously perceive that the minority office holder is a representative of another group which is defined by race. This would force, for the first time, that non-minority, to react, and to vote along racial lines, and say that this person does not represent me. Why? Because he is of a different race and he is appealing through a federally-imposed system to a constituency of his own race. In my view, that has got to contribute to the permanent balkinization of American politics.

The other point I would like to make is that there is no end point to this system. Mr. Ralston will not be able to identify when this system will come to an end. This is not a temporary remedial measure designed to correct identified discrimination. It will exist as long as racially polarized voting will exist. It will exist in the next census I suspect, and it will exist in my grandchildren's elections. There is simply no end point in sight.

82. *Id.* at 2832.

I would like to make two final points. The other thing that should bother you about this system is that it depends on ongoing segregation. It absolutely depends on it. This is the only civil rights policy that is not designed to mix the races together to create an integrated group. It insists, or rather, mandates that you separate the races. It insists that you separate black voters from white and Hispanic voters, so they can each have their own district, and is totally dependent on this ongoing segregation. If we reach a point in society where Hispanics and blacks achieve pure residential integration, where they are sprinkled throughout the City of New York, then there will be absolutely no way to create this majority-minority district. There are no black or minority neighborhoods that you can carve out and say, here is our district. As a result, you create a tremendous disincentive among minority political leadership to achieve that integration, and to reach out as representatives of the entire community, and you create a tremendous incentive for them to continue to appeal to a narrowly defined constituency that is segregated where it lives.

Finally, in multi-cultural and ethnic societies like New York City, it is particularly problematic, because it does not just pit minority against non-minority. It pits minorities against each other. You saw this in the congressional and state legislative redistricting in New York where the major conflicts were not between Republicans and Democrats, or whites and minorities, but between Hispanic and black interest groups. So, in my view, *Shaw* was clearly a step in the right direction. I think the Court will, and certainly should help us go further in that direction. Thank you.

Mr. Charles Stephen Ralston, Esq.:

I think the problem with many things Mr. Carvin says, as well as the problem with the decision in *Shaw v. Reno*, is that there is a certain amount of non-reality to it. Courts, in Voting Rights Act cases, have held that these types of districts can be drawn, based on a demonstration of a number of factors. Number one, the minority group is, in fact, politically cohesive. That is, the

notion that a minority group, be it African-American or Hispanic, votes together, is not a notion out of the blue, but is rather a demonstrated fact. An example is easily seen if you look at voting patterns in the South, where African-Americans overwhelmingly vote Democrat, and the Republican party is disproportionately white.

The second factor, which is of equal importance, is the demonstrated existence of racially, polarized voting.⁸³ Very simply and starkly, such voting means that whites will not vote for a black or a Hispanic candidate. If a minority is submerged, one way or another, into a district where whites have the operative majority, the minority cannot build coalitions, because white voters will not coalesce with them.⁸⁴ It is very nice to think or hope that people would not vote with race in mind, but unfortunately, in these cases, and in election after election, racially-polarized voting has been demonstrated to be true. The remedies that are sought are ways to ensure that minority communities are not simply submerged in a predominant culture which will not respond to them, and which will not elect people

83. See *Thornberg v. Gingles*, 478 U.S. 30 (1986). The Court held "it cannot be said that the section of a multimember electoral structure thwarts distinctive minority group interests" unless there is proof of polarized voting. *Id.* at 51. The reason for looking at the "existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote . . . as a bloc . . . to defeat the minority's preferred candidates." *Id.* at 56. *Gingles* established a three-part test which made polarized voting the real measure of vote dilution: 1) minority voters must prove that they are a large and geographically compact group to indicate a minority-dominated single-member district, 2) the minority community must be "Politically cohesive" and 3) they must show that a pattern of bloc voting by the majority has led to the defeat of minority-supported candidates. *Id.* at 50-51.

84. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992). Establishing the final two requirements of the *Gingles* three-part test demonstrates that racial polarization exists because black and white voters vote for different candidates. *Id.* at 1852. If racial polarization is evident, then the minority voters have established that "submergence in a white multi-member district impedes its ability to elect its chosen representatives." *Id.* at 1852-53 (quoting *Gingles*, 478 U.S. at 51).

of that minority, no matter what their qualifications are, but rather that minority voters have a fair opportunity to elect representatives of their choice.

This still would not mean that minority voters have proportional representation. In North Carolina, for example, whites still have more representatives than their proportion in the population, but it does mean that there is an opportunity for people who have been excluded from the political process. And one must remember, that the Voting Rights Act is less than thirty years old. I started working in this field before it was passed, and in areas where the Voting Rights Act is most important, there existed the total and systematic exclusion of blacks from voting in the political process. One does not deal with the harm simply by saying that people can vote. The Voting Rights Act allowed, not only the registration of African Americans in the South, but also, for the first time, allowed them to actually vote, without being subjected to violence, death, or loss of jobs.

However, there is another aspect to voting, and that is the notion of vote dilution, that people can vote, but their vote does not mean anything if you have a system which consistently submerges their vote in a dominant majority vote, that does not pay any attention to them.⁸⁵ It is that kind of harm that I do not see shown in *Shaw v. Reno*, because the fact is that, in *Shaw*, the white voters were able to elect a significant number of whites to the congressional delegation. And, as the Supreme Court pointed out, they did not claim vote dilution.⁸⁶ They did not claim that their right to vote had been diluted by the system. So, the harm

85. Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105 (1992). The notion of vote dilution examines the election structure and looks to the ability of minority voters to elect candidates. *Id.* at 137. Three possible types of vote dilution: 1) "multimember district submergence," 2) "the use of multimember districts to impair the ability of a minority group to influence elections, . . . and 3) "splitting a concentration of minority voters between two or more districts so that the group constituted a majority in neither district." *Id.* at 145 (citing *Gingles* 478 U.S. at 46-47 n.12).

86. *Shaw*, 113 S. Ct. at 2824. Appellants did not claim that the redistricting plan "diluted white voting strength." *Id.*

they claim to have suffered is far different than that demonstrated in *Gomillion v. Lightfoot*.⁸⁷ That case involved one of the few places in Alabama where blacks were even allowed to vote. In *Gomillion*, the state legislature had deliberately redrawn the district to exclude them, and basically, completely wiped out any ability they had to govern.⁸⁸ I found it almost offensive for the Supreme Court to equate what occurred in *Gomillion v. Lightfoot*, to what the North Carolina legislature did in *Shaw*. These two cases are simply not comparable at all, and it is a diminution of the Voting Rights Act to make that comparison.

I think we have to remember a couple of things. As Mr. Carvin acknowledged, the issue is neither like that in affirmative action cases, nor is it like that in *Croson*. In affirmative action cases, the problem is that one person is going to get a job, and another person will not. What is at issue here, and what will ultimately be at issue if the Supreme Court decides to deal with the constitutionality of the Voting Rights Act, is not the Equal Protection Clause at all. Since the Voting Rights Act was passed to enforce the Fifteenth Amendment,⁸⁹ and if it is consistent with the Fifteenth Amendment, then it cannot be invalid under the Fourteenth Amendment, because the Fifteenth Amendment was passed after the Fourteenth Amendment. The Fifteenth

87. 364 U.S. 339 (1960). In *Gomillion*, Black voters sued, claiming that the city redistricting plan was unconstitutional because it deprived them of their right to vote in municipal elections on account of their race. *Id.* at 340.

88. *Id.* at 341. According to the complaint, the act in question transformed the City of Tuskegee from a square-shaped city, "into a strangely irregular twenty-eight-sided figure" *Id.* Additionally, the complaint also charged that:

[t]he essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to discriminatorily deprive the Negro petitioners of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections.

Id.

89. See *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (holding that a private, volunteer affirmative action plan did not violate Title VII of the Civil Rights Act of 1964).

Amendment provides that the rights of citizens of the United States to vote, shall not be denied or abridged on account of race, color or previous condition of servitude, and that Congress has been given the authority to pass legislation that it believes will enforce that provision.⁹⁰ In the Voting Rights Act, Congress made the decision, which was amply supported by history and the evidence before it, that to submerge minority votes in a majority white system, where white voters would simply not vote for a minority candidate, and minority votes were rendered ineffective and meaningless, is, in fact, equal to the abridgment of the minority voters' right to vote.⁹¹

I would just like to leave you with this one thought: That alternative remedies exist to carving up states into districts on a strictly racial basis, and such remedies have been written about extensively.⁹² There is an organization called the Center for Voting and Democracy in Washington, D.C. Those of you who are involved directly in dealing with this problem might want to contact this organization. Because many of the problems come from the single-district, winner-take-all system, this organization has suggested alternative ways for voting to get away from the district, winner-take-all system. Although the United States has held on to this system for historic reasons, most Western democracies have abandoned the two party, you-win-fifty-one-

90. U.S. CONST. amend. XV, § 2. The Fifteenth Amendment states: "The Congress shall have power to enforce this article by appropriate legislation."; *see also* *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (holding that Fifteenth Amendment's declaration is self-executing).

91. *See* *Rogers v. Lodge*, 458 U.S. 613 (1982). The Court stated that "[t]he minority's voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines." *Id.* at 616; *White v. Regester*, 412 U.S. 755, 765 (1973) (upholding district court's finding that one-person-one-vote plan unconstitutionally diluted voting strength of minorities); *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972), *aff'd in part, rev'd in part, sub nom.*, *White v. Regester*, 412 U.S. 755 (1973). "The majority system tends to strengthen the majority's ability to submerge a political or racial minority in a multi-member district." *Id.* at 775.

92. *See* Guinier, *supra* note 49.

percent-of-the-vote-you-get-everything system, and have gone to other forms of electing officials.⁹³

Such alternate electoral systems work particularly well for city councils and small governmental units. In Alabama, for example, as a result of voting rights litigation, a number of jurisdictions have switched to an alternate system. For the first time in a hundred years, minority voters have been able to elect representatives because they were able to coalesce, and pool their votes themselves, without someone else saying, "you are minority, so you belong over here." As a result, people could develop their own coalitions, elect people of their choice and not be excluded entirely, due to the fact that the majority will simply never vote for them. Thank you.

Mr. Michael A. Carvin, Esq.:

In any discussion of affirmative action, the people who oppose affirmative action are always accused of not being realistic about the current state of American society, that their position is based on the Pollyannaish view that discrimination will somehow wither away. Of course, that is not the premise of my position. I know discrimination continues to exist in American society. It is based on the much simpler proposition that two wrongs do not make a right. You do not correct discrimination on the basis of immutable characteristics, such as race and gender, by visiting precisely the same evil on other individuals, who never benefited from, nor engaged in the prior evil. So, I think we should put that suggestion aside. Mr. Ralston seemed to concede that, yes, there was a harm in terms of not being able to elect representatives of choice, but it should not be a problem to these white voters in North Carolina, because, after all, significant numbers of people of the same race in other parts of the state, are presumably going to be representing their interest, even if it is not their own representative. I can only repeat my question from

93. See *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870 (N.D. Ala. 1988) (holding that federal law does not prohibit a cumulative voting system which enables black voters to cumulate votes).

before. Would that be a satisfactory answer to a minority voter who had suffered intentional gerrymandering in his district?

There are indeed a lot of alternative remedies that go beyond redrawing single member districts. All of them scare me a lot more than what has been going on so far. Lani Guinier has identified a lot of them. Her most notable alternative remedy is one in which minority legislators, once elected, would have a veto power in the legislature over any issue that was identified as important to minority voters.⁹⁴ You would need some kind of super-majority for welfare, crime or whatever else some court decided was important to minority voters. The big push in the Voting Rights Act is not simply to empower minority voters to elect a representative of that choice, but rather to empower minority representatives, once they are in the legislature to play by different rules than would any other legislator. They are to be given more votes or more power on issues that are important to them than other legislators have. I do agree that that is where the Voting Rights Act is going. I think that sort of fundamental assault on our democratic system is not guaranteed by our Constitution or the Voting Rights Act.

To avoid being accused of speaking in hyperbole, I just want to point to the other voting rights case that is currently pending in the Supreme Court. The premise of this case is not only that you need to redo the current system of electing your representative, and to shift it in a way that ensures minority voters a certain amount of power, but you have to redo the government structure

94. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) Lani Guinier proposes an interest representation approach. According to Professor Guinier, this approach "emphasizes the importance of voter autonomy divorced from involuntary, fixed territorial constituencies. Using voter patterns, it measures as a politically cohesive group those voters who identify themselves with each other based on their own evaluation of their shared interests. As a statutory approach to vote dilution, interest representation measures the impact of electoral or voting rules on the legislative representation of self-identified minority voters' interests." *Id.* at 1461-62.

itself. In *Holder v. Hall*,⁹⁵ the Eleventh Circuit dealt with a single member county commissioner, where one person ran the county, like a mayor or a governor of New York.⁹⁶ This system had existed since the county had come into existence, and there was no allegation that there was any kind of discriminatory lineage to it. The minority plaintiffs claimed they could not elect the county commissioner, but if you abolish that office and create a five-person commission, they could elect one of those.⁹⁷ So, the Eleventh Circuit said the Voting Rights Act not only requires that you ensure that electoral patterns are designed in a certain way, but you have to abolish a governmental office, and name as many offices as are required for minority voters to be able to elect their own commissioner. So, if one governor of New York prevents minorities from electing a governor, and a five-person commission is created to run the State of New York, presumably, you would have to do that in order to ensure the proportional representation.

We can debate the merits of proportional representation versus winner-take-all. I do not know if the people in South America or Italy think that necessarily giving every group in the particular society a proportionate voice in the legislature, is a great thing. But, my point, of course, is that it is a question for the democratic process to decide what kind of representative government you want. It is not the kind of thing that should be dictated by courts, and certainly not dictated along racial lines. Thank you.

Judge Leon D. Lazer:

Now, we are going to hear from Professor Shaw.

95. 955 F.2d. 1563 (11th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993) (holding that black voters established a violation of section 2 of the voting act under the "totality of circumstances" test).

96. *Id.* at 1566.

97. *Id.*

Professor Gary M. Shaw:

Listening to this debate, it reminded me very much of reading various Supreme Court decisions in which one opinion is written by Chief Justice Rehnquist, and the other opinion is written by Justice Douglas. I sometimes wondered whether the two people are talking about the same thing. Clearly they are, but I think there are problems with both positions here, and the joy of my role here is that I do not have to suggest answers. It seems to me that much of the distinction between Mr. Ralston and Mr. Carvin comes from the extent to which they view the Voting Rights Act as remedial rather than as an implementing problem type of policy.

Mr. Carvin, I guess I disagree with you to some extent when you say we should have this color-blind ideal. Of course, we should, but we cannot ignore the fact that the very choice of a system has an effect on minority voting rights. The question becomes, what kind of system, then, should be implemented, given that there are several possible systems and given the fact that there has been traditional discrimination and disenfranchisement in the past?

I do not think we can say that we have already reached a point where no remedial solution is appropriate. You may disagree with what the remedial solution is, but I think I would be more willing than you to give greater weight to the remedial solution, which would perhaps be closer to Mr. Ralston's position.

On the other hand, Mr. Ralston, I think Mr. Carvin made an excellent point in saying that you cannot simply say white votes or white interests are fungible. In North Carolina, for example, there will be differences in the interests of white voters between the suburbs and the city, between Democrats and Republicans. To say whites have 20 out of 22 seats, even under the new proposal, and therefore, there is no injury, seems to me, to ignore the differences in interests. White interests are not block interests any more than minority interests are block interests, and I do not think you can dispose of the concern of injury to white voters by simply saying that they have 20 out of 22 seats.

I would like to pose a question, for which I do not have an answer, to both Mr. Carvin and Mr. Ralston. I think both of you have recognized the idea that there are other minorities besides African-Americans. Mr. Carvin mentioned, for example, Jewish voters in Brooklyn. Regardless of the position that you take, and your positions are obviously different, how do you deal with the fact that there are several minorities that are entitled to, and should have some degree of representation?

Judge Leon D. Lazer:

I will ask Mr. Carvin to answer first.

Mr. Michael A. Carvin, Esq.:

I will punt a little bit because my basic premise is this: This should not be a zero sum game where you get a bunch of competing ethnic groups trying to get a proportionate share of the pie. I frankly do not know the answer. For example, if you can only create an Hispanic or a black district, which particular group has a greater claim to historical injustice? Certainly, I would think African-Americans generally do, but I suppose you could pick out the different regions of the countries where that might not be true. I do not think the political power should depend upon how strong a claim of historical discrimination a particular group can make. It is an unfortunate by-product and I would think that even Mr. Ralston would agree that one by-product of creating ethnic conscious situations is that in a multicultural environment, there may be winners and losers between those various groups. It is an awfully difficult chore for the Court to figure out which group it is.

Judge Leon D. Lazer:

Mr. Ralston.

Mr. Charles Stephen Ralston, Esq.:

I would certainly agree that the existence of multi-cultural groups presents a very difficult problem with regard to what kind of remedy would be effective, and how much coalition you should allow.⁹⁸ There is a separate issue based on what is called "influence districts," where a number of minorities might have influence over the result, but cannot necessarily control the district. This problem has occurred in New York.⁹⁹ It has arisen in Texas.¹⁰⁰ It is also a very important issue in the Florida cases.¹⁰¹ I again stress that in order to potentially deal with such problems one day, we must think about remedies that do not depend on drawing district lines, but which would rather, through devices such as cumulative voting, allow people to decide for themselves what their interests are, and with whom they want to form coalitions.

Judge Leon D. Lazer:

Judge Pratt, would you like to comment?

Hon. George C. Pratt:

I would just like to comment on how surprised I was with the Supreme Court's decision in *Shaw*. When the New York City Council was reorganized, I was a member of the three-judge

98. See Angelo N. Ancheta and Kathryn K. Imahara, *Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color*, 27 U.S.F. L. REV. 815, 821 (1993) (stating that voting rights laws have to change in order to meet problems posed when multi-ethnic groups in community bring claims).

99. *Mirrione v. Anderson*, 717 F.2d 743, 745 (1983), *cert. denied*, 465 U.S. 1036 (1984) (stating that "absent invidious discrimination, voters . . . are not entitled to be grouped together in a single election unit").

100. *Seamen v. Upham*, 536 F. Supp. 931 (E.D. Tex. 1982) (stating that black voting strength was diluted when Texas created two minority influence districts rather than one majority-black district), *vacated and remanded on other grounds*, 456 U.S. 37 (1982).

101. *De Grandy v. Wetherell*, 794 F. Supp. 1076, 1085-86 (N.D. Fla. 1992). The court stated that creation of influence districts furthers "dilution of minority voting strength . . .").

panel that heard that redistricting plan.¹⁰² The following year, when New York City underwent congressional redistricting, I was unlucky enough to be a member of that panel as well.¹⁰³ In both cases, the issue was minority representation. To the best of my recollection, in neither case, did any of the multiple parties suggest that it was not the proper application of the Voting Rights Act to design districts so as to enhance minority representation as much as possible. Therefore, redistricting plans were developed. No one criticized these plans on the basis that they were unconstitutional. It just seemed to be established law throughout the country; therefore, the voting rights schemes were accepted, and worked fairly well. Then came the Supreme Court's decision in *Shaw*, which concluded that such redistricting cannot be done in extreme situations, such as that in North Carolina. It is almost as if the Supreme Court has upset the apple cart, and we have to turn it right side up.

Judge Leon D. Lazer:

Is there a question from the audience?

Audience Member:

The Supreme Court has applied the Voting Rights Act to judicial elections. What effect do you think that will have on the notion of "one man, one vote," and on the makeup of districts, particularly in New York State?

102. See Daniel Wise, *Residency Rules Lifted for Council Election*, N.Y. L.J., July 31, 1991, at 1 (discussing the three-judge panel's alteration of key provisions of New York State election law which consisted of eliminating existence residency requirements and reducing petitioning requirements in order to make it easier to run in the New York City Council primary election).

103. See *Puerto Rican Legal Defense & Educ. Fund v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992) (*per curiam*) (holding that congressional redistricting plan met constitutional and statutory requirements but would not take effect unless the state redistricting plan failed to get preclearance from the United States Department of Justice).

Mr. Charles Stephen Ralston, Esq.:

I am not that familiar with the New York State situation. However, we just filed a petition for certiorari in what is now, *League of Latin American Citizens v. Attorney General of Texas*, coming out of the Fifth Circuit, dealing with judicial elections. This case is a follow-up on the *HLA* case¹⁰⁴ which held that although the rule of "one person - one vote" does not apply to judicial elections, the Voting Rights Act does.¹⁰⁵

Judge Leon D. Lazer:

Mr. Carvin, would you like to comment?

Mr. Michael A. Carvin, Esq.:

Yes, I have two points. The first point is: however you feel about this sort of race-conscious line drawing, when you are talking about elected representatives who are supposed to be responsive to their constituency, you should be troubled by the fact that such line-drawing is being applied to judges.¹⁰⁶ Judges are not supposed to be responsive to any kind of political concern. Simply, their role is to impartially judge the case in front of them. At least in the northern states, my political opinion is that this has been a good opportunity to end the at-large election or apportionment of judges. That generally means appointing or electing democratic judges. So, in the north, Republican parties have used race-conscious line-drawing in such

104. *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S. Ct. 2376, 2380 (1991) (holding that section 2 of the Voting Rights Act requires election of state trial judges to be in compliance); *see also* *Chisom v. Roemer*, 111 S. Ct. 2354, 2368 (1991) (holding that section 2 of the Voting Rights Act encompasses state judicial elections).

105. *Houston Lawyers' Ass'n*, 111 S. Ct. at 2380.

106. *See* *Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143 (5th Cir. 1993) In applying the *Gingles* factors to judicial elections, the court held that absent evidence of legally significant white bloc voting the election of two black judges was not a violation of the Voting Rights Act. *Id.* at 1149.

a way as to create single member districts, but not withstanding my party affiliation, I do not like that very much.

Judge Leon D. Lazer:

Is there another question?

Audience Member:

The historical reason for the creation of North Carolina's district is effectively due to the lack of judges' representation. What would you recommend as a remedy?

Mr. Charles Stephen Ralston, Esq.:

Very quickly, in litigating *Shaw v. Reno*, in the district court, which we are now in the process of doing, we are going to demonstrate the history of the demographics of that area, and why that "bizarre-looking" district is, in fact, responsive to both the actual interests of the people in it, white and black alike, and to the historical development of the demographics of that area of the state.

Judge Leon D. Lazer:

Mr. Carvin, do you want to comment?

Mr. Michael A. Carvin, Esq.:

Very quickly, I think it is a mistake to equate the election of minority candidates with the notion that any group has a certain amount of political power. I do not accept the idea that in North Carolina, a state where a few years ago a black person almost won a senatorial race against Jesse Helms,¹⁰⁷ does not get significant white crossover voting. Nor do I accept the notion that liberal politicians are not otherwise responsive to the communities' needs, in terms of creating situations where

107. The author is referring to Jesse Helms' successful 1990 Senate race in North Carolina against Harvey Gantt.

minority interests are represented. I am perfectly comfortable with the notion of trying to preserve minority communities of interest, and adopting legitimate redistricting alternatives. However, I do object to making that the only criteria.