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YOU DON'T HAVE TO BE LIBERAL TO HATE THE RACIAL GERRYMANDERING CASES

Daniel Hays Lowenstein

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This paper will be presented Sunday at 8:45 a.m.

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YOU DON'T HAVE TO BE LIBERAL TO HATE THE RACIAL GERRYMANDERING CASES

Daniel Hays Lowenstein[1]

I. INTRODUCTION

It was one of Jack Benny's best-known gags. The master comic was confronted at gunpoint with the demand, "Your money or your life!" After some moments of silence, the robber repeated the demand. "Don't rush me," Benny said. "I'm thinking."

The gag could be extended. Suppose that after due consideration, Benny decides to hand over his money. Some time later, Benny is prosecuted for aiding and abetting the robbery, on the theory that it would not have succeeded if he had refused to comply. Benny's lawyer argues that Benny's action was justified, because the robber had threatened to kill him. The judge rejects this justification, because the robber's threat was unlawful. If Benny had gone to court, he could have obtained an injunction ordering the robber to leave him alone. The fact that Benny

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1. Professor of law, University of California, Los Angeles. Lino Graglia and Eugene Volokh gave me useful leads to writings by conservatives pertinent to my subject. I have had the opportunity to make oral presentations on the subject matter of this paper to a conference on the judiciary sponsored by the Federalist Society and the Goldwater Institute, and to a faculty colloquium at the McGeorge Law School. I received helpful comments and suggestions on both occasions. A transcript of my remarks at the Federalist Society/Goldwater Institute Conference is published in Transcript, The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates, 28 **Arizona State Law Journal** 17, ___ (1996).

would have been shot dead before he had any time to seek legal recourse is of no consequence. Benny goes to jail.

But I am afraid we have long since left the realm of Bennyesque humor and arrived at the point of absurdity. Which is to say, we have reached an excellent point from which to begin our consideration of the Supreme Court's racial gerrymandering cases.

The racial gerrymandering cases arose in response to the emphasis--what some would call overweening emphasis--on creation of "majority-minority districts" (MMD's) following the 1990 census. States that were "covered" by Section 5 of the Voting Rights Act (VRA) and therefore required to obtain preclearance before their districting plans could be put into effect, were often forced by the Justice Department to create a specified number of MMD's. Even states that were not covered by Section 5 felt compelled to create MMD's lest their plans be struck down in an action brought under Section 2 of the VRA. Some of the new MMD's had fantastic shapes, not only to satisfy federal authorities that black or Hispanic voters would control elections in the districts, but also to reconcile the creation of the MMD's with other political objectives of members of the state legislatures. The perceived overemphasis on race and, especially, the fantastic shapes, generated heated political opposition from ideological conservatives.[2]

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2. The editorial columns of the Wall Street Journal provided a particularly conspicuous locus for such opposition. See, e.g., Editorial, "Monster Map," Wall Street Journal, October 18, 1991, at A14; Editorial, "America's 'Segremanders'," Wall Street Journal, April 2, 1992, at A14.

The first of the racial gerrymandering cases, Shaw v. Reno (Shaw I),[3] was a challenge to North Carolina's 12th congressional district. The Court ruled in 1993 that a plaintiff states an equal protection claim by alleging that a districting plan "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."[4] The case was remanded for trial, and racial gerrymandering cases were filed in several other states.

In the second case, Miller v. Johnson,[5] the Court in 1995 ruled that Georgia's eleventh congressional district was an unconstitutional racial gerrymander. Last term, in Shaw v. Hunt (Shaw II)[6] the Court struck down the North Carolina congressional district it had first considered in Shaw I, and in Bush v. Vera[7] it struck down three Texas congressional districts.

The racial gerrymandering decisions are supposed to be conservative. In each of the cases in which the Court has issued opinions reaching the merits, the bare five-member majority consisted of the members of the Court generally regarded as the most

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3. 509 U.S. 630, 113 S.Ct. 2816 (1993).

4. 113 S.Ct. at 2828.

5. 515 U.S. ___, 115 S.Ct. 2475 (1995). In a companion case, United States v. Hays, 515 U.S. ___, 115 S.Ct. 2431 (1995), a racial gerrymandering challenge to Louisiana's 4th congressional district was dismissed for lack of standing.

6. 116 S.Ct. 1894 (1996).

7. 116 S.Ct. 1941 (1996).

conservative--Kennedy, O'Connor, Rehnquist, Scalia, and Thomas. In popular commentary, conservatives have praised the decisions[8] while liberals have bewailed them.[9] Similarly, ever since Shaw I, the law journals have been crammed with criticism from liberals[10] and praise from conservatives.[11]

In this paper, I shall argue that the racial gerrymandering cases are not conservative. Liberals are correct to be unhappy about the decisions, though a qualified sigh of relief is the most appropriate liberal reaction to the 1996 decisions. More to my present purpose, there is nothing at all in these decisions

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8. See, e.g., Editorial, "No More Racial Gerrymandering," Wall Street Journal, June 19, 1996, at A20 (praising Shaw II and Bush).

9. See, e.g., Paul M. Barrett, "Minority Voting Districts Struck By High Court for Lack of 'Compactness'," Wall Street Journal, June 14, 1996, at ___ (quoting ACLU attorney Laughlin McDonald as criticizing Bush and Shaw II as causing a "bleaching of the Congress" and predicting the decisions will lead to "ethnic and racial polarization.")

10. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno, 92 **Michigan Law Review** 588 (1993); Pamela S. Karlan, Still Hazy After All These Years: Voting Rights in the Post-Shaw Era, 26 **Cumberland Law Review** 287 (1996); J. Morgan Kousser, Shaw v. Reno and the Real World of Redistricting and Representation, 26 **Rutgers Law Journal** 625 (1995).

11. See, e.g., James F. Blumstein, Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context, 26 **Rutgers Law Journal** 517 (1995); Katharine Inglis Butler, Affirmative Racial Gerrymandering: Fair Represention for Minorities or a Dangerous Recognition of Group Rights?, 26 **Rutgers Law Journal** 595 (1995); Abigail Thernstrom, More Notes from a Political Thicket, 44 **Emory Law Journal** 911 (1995).

that ought to cheer conservatives.[12] This is not because conservatives are wrong to oppose districting dominated by considerations of race. To the contrary, this paper is written on the assumption, which I shall not attempt either to defend or to question, that such dominance ought to be opposed.

My argument is based entirely on one simple proposition whose correctness seems to me to be manifest and whose consequences are far-reaching: The racial gerrymandering cases are aimed at the wrong targets. If the reliance on race in 1990s redistricting has been unconstitutional, the sole responsibility belongs to the federal government. The state legislatures, whose districting plans have been undone by the federal judiciary, were victims, not perpetrators of unconstitutional actions.

The analogy to the variant on Jack Benny's joke with which I began this paper is apparent. The mugger was the federal

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12. This is not the first time that conservatives have been taken in by liberals expressing anguish over decisions that do more to preserve race-conscious policy than to end it.

> When the Supreme Court decided the Bakke case, there was much weeping and gnashing of teeth on the part of affirmative action supporters. New York City's Amsterdam News declared in a headline, "Bakke--We Lost." Columnist Tom Wicker of the New York Times wrote that "the validity and potential of affirmative-action programs may have been seriously, if not fatally, undermined." The national field director for the Southern Christian Leadership Conference was even more morbid, declaring that "the incentive to carry out affirmative action" had been "killed."

Terry Eastland, **Ending Affirmative Action: The Case for Colorblind Justice** 68 (1996). If anyone reading this believes that Bakke put an end to race-based admissions in public universities, please call me. There's a bridge connecting Manhattan and Brooklyn that I'd like to sell you.

government, which instead of demanding money demanded that the state legislature satisfy a quota of MMD's.[13] The "life" that would be taken if the demand was not satisfied was that the legislature would have no control over the design of the state's legislative districts. Control over districting is a matter of considerable importance to state legislators, perhaps as much so as Jack Benny's life was to him in the joke. The federal mugger, acting in the person of the Justice Department, made this threat in the form of withholding Section 5 preclearance from any plan that did not satisfy the quota. The federal mugger acting in the person of the federal courts threatened to strike down under Section 2 of the VRA any plan that did not meet the quota. The states gave in.

The federal courts have responded by punishing, not the mugger, but the victim. As punishment for the crime of <u>complying</u> with the Constitution, which requires new, equally populated districts after each census, in the <u>only</u> way permitted by the federal government, the federal courts have carried out the mugger's original threat by divesting the states of their constitutionally guaranteed control over their own redistricting. In Texas the

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13. Of course, to analogize the federal government to the mugger is to assume that the government was acting wrongfully and unlawfully when it required the states to meet racial quotas for districting. Liberals believe that the federal actions not only are not wrongful but are morally and perhaps even constitutionally required. For them, analogizing voting rights enforcement to robbery is no doubt highly offensive. But, as stated above in the text, I am assuming in this paper that racially-dominated districting is wrong and therefore that the federal government is wrong to require such districting.

punishment went even further, as federal judges not only expropriated to themselves the power to design congressional districts but also threw out the results of a primary election and replaced the Texas system of elections with a novel one of the judges' invention (to be implemented, of course, at the state's expense).[14]

Once it is recognized that the racial gerrymandering cases punish the victims rather than the perpetrators of unconstitutional action, it can be seen that the cases are profoundly unjust. But there are many other consequences that follow as well.

The craftsmanship in the racial gerrymandering decisions is abysmal. Jeffrey Rosen hardly exaggerates when he describes them as "analytically unintelligible."[15] It is unlikely that the Justices themselves believe that they have either set forth a well-grounded rationale for the racial gerrymandering cause of action or a workable explanation of its content.[16] Most of the Court's difficulties result from the decisions being aimed at the wrong targets. If the Court were to leave the states alone and hold

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14. See Vera v. Bush, 1996 WL 442314 (S.D.Tex., 1996).

15. Jeffrey Rosen, "Sandramandered," **The New Republic**, July 8, 1996, at 6.

16. Justice O'Connor, writing for a plurality in the Texas case, admitted that the Justices "are aware of the difficulties faced by the States, and by the district courts, in confronting new constitutional precedents, and we also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available." Bush v. Vera, 116 S.Ct. 1941 (1996).

the federal government responsible for the unconstitutionally race-based districting it has imposed on the states, most of the technical and conceptual difficulties, including all of the most important ones, would disappear.

For conservatives, the misplaced focus of the racial gerrymandering cases turns what might have been a welcome development into a disaster. The least important reason, but one that is still worth noting, is that most conservatives profess to believe in judicial restraint and to oppose judicial activism. The most common conception of these terms holds that activist judges are those who are too willing to overrule the actions of the political branches and therefore to impose their own views on the society as a whole.[17] It takes no argument to see that the racial gerrymandering cases are highly activist in that sense.

An alternative conception is that judicial restraint means honest following of the law wherever it leads. Thomas Sowell writes:

> Judicial activism cannot be quantified according to how many laws or lower court decisions are overturned, since it is the grounds on which they are overturned that defines judicial activism or judicial restraint....

17. For a typical expression of this view by a well-known conservative, see Wm. F. Buckley Jr., "Standing Athwart," **National Review**, December 11, 1995, at 46, 48 ("It is by now a cliché that the enthusiasm for an activist Court shown by liberals in the past generation has to do with their recognition that they cannot activate their agenda by legislation. Accordingly, they rely on the Court to transform their program into law.")

> Those who today advocate "judicial restraint" define it as judges interpreting laws, including the Constitution, according to the meanings that the words in those laws had when they were written. Judge Robert H. Bork, for example, has said that judges should render decisions "according to the historical Constitution."[18]

When Justice Harlan, whose scholarship is widely admired, especially by conservatives, inquired into what the "historical Constitution" had to say about redistricting, he came to this conclusion:

> Since it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const., Art. IV, § 4), the Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.[19]

Of course, in Reynolds v. Sims, the very case in which Harlan wrote these words, the majority on the Court brought state districting within the Equal Protection Clause, and I am not arguing that conservative Justices should reverse that precedent. But no one on or off the Court has attempted to show how the "his-

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18. Thomas Sowell, **The Vision of the Anointed** 226-27 (1995) (quoting Robert H. Bork, **Tradition and Morality in Constitutional Law** (1984)).

19. Reynolds v. Sims, 377 U.S. 533, 589, 591 (Harlan, J., dissenting).

torical" Equal Protection Clause, which was not intended to apply to voting rights in the first place, can be extended beyond the reach of precedent to significantly displace state control over legislative districting, without engaging in "an exercise of the amending power."[20]

A foolish consistency on the question of judicial restraint has never been a hobgoblin that afflicts the minds of American conservatives, as their enthusiasm for the racial gerrymandering cases illustrates. Accordingly, I shall not press the point further in this paper, other than to point out that the Court could have acted in a far more restrained manner by limiting or eliminating the federal <u>imposition</u> of racial gerrymandering on the states. The constitutional question then would be, not whether the Constitution <u>restricts</u> districting by the states but whether it <u>authorizes</u> federal regulation of districting. Given the Court's view, expressed in the racial gerrymandering cases, that rather than advancing the purposes of the Equal Protection Clause, racially-motivated districting runs counter to those purposes, a federal mandate could hardly be upheld as an exercise of Congress' power to enforce the Fourteenth Amendment, and there is no other apparent source of the power in the Constitution.[21]

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20. See Jeffrey Rosen, <u>Kiryas Joel and Shaw v. Reno: A Text-Bound Interpretivist Approach</u>, 26 **Cumberland Law Review** 387, 402-03 (1996) (arguing that the original intent behind the 14th and 15th Amendments do not prohibit racially-motivated districting).

21. Admittedly, the racial gerrymandering cases that have come before the Supreme Court to date have involved congressional districts, which Congress can regulate under Art. I, § 4. However, Congress did not purport to be acting under Art. I, § 4, when it adopted the Voting Rights Act, and nothing in any of the racial gerrymandering opinions suggests that the fact that the districts under challenge were congressional districts was relevant.

This is by no means a complete analysis, but it suffices to show that the Court would have a much stronger claim to be exercising restraint in the sense of "following the law," if its targets were the federal perpetrators rather than the state victims of mandatory racial gerrymandering. In the more general sense of judicial restraint, it would be hard to characterize any decision striking down or curtailing the operation of the VRA as restrained. However, the Court's activism in that sense would at least be ameliorated by the fact that to a great extent it would be undoing its own handiwork. Furthermore, a significant element in considerations of judicial restraint is the extent to which a doctrine entangles the judiciary in political or governmental operations. Limiting or eliminating the federal mandate for the creation of MMD's would limit or eliminate judicial supervision of redistricting. In contrast, the approach of the racial gerrymandering cases amounts to a partial takeover of districting by the federal courts.

Far more important than the question of judicial restraint are two additional ways in which the racial gerrymandering cases run contrary to conservative ideas. First, the decisions run directly counter to conservative conceptions of federalism. A constitutional doctrine that permits the federal government to severely regulate functions that are central to the self-government of the states and then, on the theory that it is unconstitutional for the states to comply with such regulation,

takes additional important powers away from the states, is not a doctrine that is friendly to state government.

Second, the racial gerrymandering cases also run exactly contrary to conservative ideas on race. The Court in the racial gerrymandering cases regards it as constitutionally suspect that race should be the "predominant factor" in designing districts.[22] In fact, race will be more of a controlling factor in districting under the racial gerrymandering cases than it was before. But these decisions are inconsistent with conservative ideas in much more fundamental ways. If there is a bedrock conservative idea on race, it is that all groups are entitled to equality of opportunity, while results by and large should be left to take care of themselves.[23] The racial gerrymandering cases assure the opposite. Black and Hispanic politicians will receive "equal results" in the form of a federally guaranteed number of MMD's (though not enough to constitute what liberals would regard as "equal results"), but they are denied the opportunity to compete within the political system for the kinds of districts, MMD's or otherwise, that they believe are in their own or their constituents' best interest. By permitting federally guaranteed results but denying competitive opportunity, the racial gerrymandering cases encourage what conservatives sometimes call the whining variety of racial and ethnic politics and discourage

22. E.g., Miller v. Johnson, 115 S.Ct. at 2488.

23. See, e.g., Thernstrom, supra note 11, at 913.

traditional, competitive, ethnic politics. This, too, is a result contrary to the usual conservative preference.

Virtually without exception,[24] debate on and off the Court has ignored the complication that the racial gerrymandering cases target the victims, and therefore debate has treated the cases as pure disputes over race policy, more or less similar to other constitutional disputes over affirmative action. As one scholar writes, "[t]he correctness of Shaw and Miller turns primarily on whether, and to what extent, the government must be 'color-blind'

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24. But there have been a few partial exceptions. To their credit, a few conservative writers have expressed at least an inkling that the racial gerrymandering cases are less than conservatives might have hoped for. Dinesh D'Souza, though apparently approving of the racial gerrymandering cases as far as they go, says that in general the Court's approach to race is "that it is permissible to subvert liberal procedures such as equality of rights and majority rule as long as the subversion does not reach the point of public embarrassment." Dinesh D'Souza, **The End of Racism** 229 (1995). Abigail Thernstrom notes that Shaw I preserves the long-standing view that only "unreasonable" racial classifications are unconstitutional, in contrast to the idea, which Thernstrom evidently prefers, that the government should never be able to make racial distinctions. See Abigail Thernstrom, Shaw v. Reno: Notes from a Political Thicket," 1994 Public Interest Law Review 35, 42. Clint Bolick probably comes closest to the view I take in this paper when he writes that the Court in Shaw I

> refused to confront the fact that the problem is largely one of its own making, through 25 years of Voting Rights Act decisions that strongly encouraged racially proportionate political representation. As is the case with so many recent Supreme Court decisions, Shaw addressed the perverse consequences of its own jurisprudence while leaving the intact the underlying precedents.

Clint Bolick, **The Affirmative Action Fraud** 84 (1996).

in its actions."[25] The racial gerrymandering cases are thus perceived to be controversial, with the liberals lined up on one side and the conservatives on the other.[26] ~~And~~ no doubt, Justices Kennedy, O'Connor, Rehnquist, Scalia, and Thomas sleep comfortably in their beds, satisfied that they are on the right side of that controversy.

One purpose of this article is to show that the so-called conservative justices have no right to the comfort of that sleep. The racial gerrymandering cases should not regarded as controversial, but as bad. Very bad. Shoddy in their craftsmanship, unfair to the states, destructive in their effects on institutions of federalism and of democratic self-governance, and bad as race policy. Bad from any imaginable perspective on race, but worst of all from a conservative perspective.

Aside from inflicting insomnia on Supreme Court justices and trying to make conservatives see that they have been sold a bill of goods, this paper has two more constructive purposes. The first is to clarify how the problem of racial gerrymandering ought to be resolved, given various views of race, federalism, and the appropriate judicial role, that justices of the Supreme Court might plausibly hold. Once it is recognized that judicial controls on racial gerrymandering, if any, ought to be aimed at the federal perpetrators rather than the state victims, the prob-

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25. Thomas C. Berg, Religion, Race, Segregation and Districting: Comparing Kiryas Joel with Shaw/Miller, 26 **Cumberland Law Review** 365, 366 (1996).

26. See supra, notes 10-11 and accompanying text.

lem turns out to be a rather simple one, but this paper will provide a bit of elaboration.[27]

The second purpose is to speak for that most despised group in our society, party politicians and state legislators. Traditional politicians are often astonishingly inarticulate,[28] and certainly their interests have been ignored in most of the debate over racial gerrymandering. I write in support of pluralist, democratic, party politics and in the belief that an unregulated process of districting by competition and negotiation in state legislatures contributes significantly to the proper functioning of those politics. Reasonable people can and do differ strenuously over the degree to which the goal of assuring meaningful political participation to racial and ethnic minority groups requires certain infringements on the autonomy of the states' districting processes. That disagreement is legitimately

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27. By referring to the problem as "simple," I do not mean that it is easy or that there is no ground for strenuous disagreement. I mean that once an individual has resolved the hard questions of racial policy and how racial policy should be balanced against concerns for federalism and judicial restraint, the question of how to proceed is straightforward so long as the federal perpetrators and not the state victims are targeted.

28. An important and remarkable example is the silence and almost complete ineffectiveness of traditional politicians in the face of efforts from 1968 to 1972 to reform the presidential nominating process. For an account that demonstrates the impotence of traditional party leaders during that period, see Byron Shafer, **Quiet Revolution** (1983). For argument that the reforms adopted in large part because of the weakness of the traditional politicians had harmful consequences to the nation, see, e.g., Nelson W. Polsby, **Consequences of Party Reform** (1983); Austin Ranney, **Curing the Mischiefs of Faction** (1975).

one of the central debates between contemporary liberals and conservatives.

Those who take a conservative position on questions of race and electoral representation are fortunate in one respect, that those positions and the federalist policy supporting state autonomy in districting are mutually reinforcing. Both lead to the conclusion that there should be little or no federal intervention into redistricting. Those who take a more liberal position on race and representation but who believe in the federal system must reconcile conflicting values. But a decent regard for the role of the states and for the free functioning of democratic politics demands at least that federal intrusions into districting be confined to the minimum that is believed to be required to achieve racial justice. What is fundamentally wrong with the racial gerrymandering cases is that they gratuitously intrude into state representational systems and in the process do nothing to promote conservative race policies, but rather set them back.

In Part II of this paper, I describe the background to the racial gerrymandering cases and the cases themselves, with emphasis on the problems the majority has had in defining the cause of action. I show how these problems can easily be resolved by treating the <u>privileging</u> of race in redistricting, rather than the <u>predominance</u> of race, as creating the suspect classification. In Part III, I elaborate on how the racial gerrymandering cases are serious depredations on the role of the states in the federal system. In Part IV, I show why districting as an unregulated

process of competition and negotiation is far more consistent with conservative ideas about race than the heavy-handed federal regulation of districting brought about initially by the VRA and greatly aggravated by the racial gerrymandering cases.

In this Introduction, I have bandied about words like "liberal" and "conservative," that have varied meanings. A note on terminology will be useful, before we proceed. Let us use the following terms to denote a rough left-to-right spectrum with respect to views on race and redistricting.

> A Radical is one who believes that racial justice is impractical within the framework of the traditional Anglo-American electoral system of single-member districts, and who therefore favors replacing it with some other system, usually some variant of proportional representation.[29]
>
> A Liberal is one who favors retention of the single-member-district system but who favors the mandatory creation of as many MMD's as feasible, at least up to the point that MMD's exist in roughly the same proportion as the minority

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29. Lani Guinier is the best known proponent of the Radical position. See, e.g., Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 **Michigan Law Review** 1077 (1991); Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 **Virginia Law Review** 1413 (1991); Lani Guinier, Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes, 71 **Texas Law Review** 1589 (1993). See also Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 **Harvard Civil Rights-Civil Liberties Law Review** 173 (1989). Radicals such as Guinier and Karlan favor the deliberate creation of MMD's so long as the single-member district system is preserved, so they may be classified as Liberals as well as Radicals, within my terminology.

community bears to the overall population of a jurisdiction.[30]

A Moderate is one who favors the mandatory creation of MMD's, but not necessarily the maximum number feasible.[31]

A Conservative is one who opposes mandatory creation of MMD's.[32]

A Reactionary is one who opposes the creation of MMD's because of an affirmative desire to minimize the political influence of racial and ethnic minorities.[33]

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30. By many accounts, the Justice Department assumed a Liberal position in granting and withholding preclearance of districting plans following the 1990 census. See, e.g., Johnson v. Miller, 864 F.Supp. 1354, 1360-68 (S.D.Ga. 1994), aff'd 115 S.Ct. 2475 (1995) (describing Justice Department's insistence on "max-black" plan for Georgia's congressional redistricting).

31. Moderates with a Liberal leaning might support the interpretation of Section 2 of the Voting Rights Act in Justice Brennan's opinion in Thornburg v. Gingles, 478 U.S. 30 (1986) (opinion for the Court in part, for a plurality in part). Bernard Grofman and his collaborators are representative of this view. See Bernard Grofman, Lisa Handley & Richard G. Niemi, **Minority Representation and the Quest for Voting Equality** 129-37 (1992). Moderates with a more Conservative leaning might support an interpretation of Section 2 as it was understood prior to the Supreme Court's decision in Mobile v. Bolden, 446 U.S. 55 (1980). This appears to be the view of Abigail Thernstrom. See Thernstrom, supra note 11, at 926-30. However, I refer to Thernstrom as a Conservative, because she has been a leading critic of what she regards as excessive mandatory districting.

32. This position was forcefully put forth by Justice Clarence Thomas in Holder v. Hall, 114 S.Ct. 2581, ____ (1994) (concurring opinion, joined by Scalia, J.).

33. I know of no one who embraces the Reactionary view.

Readers may assume that my analysis in this paper is influenced by where my own views place me on this spectrum. I find both the Radical and the Reactionary views repugnant, though the Radical view, unlike the Reactionary view, is certainly respectable. As between the Liberal, Moderate, and Conservative

From here on, when I use these terms with their stipulated meanings, I shall capitalize them. At times I will use some of them in their more general senses, without capitalization.[34]

II. THE RACIAL GERRYMANDERING CASES

A. Background

When the Voting Rights Act[35] was passed in 1965, it was recognized to be strong medicine. Section 5, in particular, which requires that before a "covered" state can implement any change in its voting laws it must otain "preclearance" from either the United States Attorney General or the United States District Court for the District of Columbia, was an unprecedented

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views I am ambivalent, but leaning to the Conservative. Eliminating federally imposed race-conscious districting prospectively, after having given blacks and Hispanic politicians a jump start in the districting of the 1980's and, especially, the 1990's, seems to me at least a satisfactory way and perhaps the best way for this country to have dealt with the problem. My purpose here is not to defend that view but to argue that given a Conservative view on race and redistricting, the prospective elimination of the federal mandate for MMD's is the approach the Court ought to be taking.

34. I hope that the sense in which I have used these terms in the Introduction is reasonably clear in each instance, especially when I have characterized individuals. Some individuals may be sensitive about such characterizations, so I should say that many of the writers referred to in this paper are unknown to me personally and, in many cases, even when I know the individuals I know nothing of their political views. The characterizations that I use are based on their writings, and are used for convenience, certainly not with an intent to cause offense or embarrassment.

35. 42 U.S.C. § 1973 et seq.

federal intrusion into the governing processes of states. When the Supreme Court upheld the preclearance requirement it did so with the recognition that "exceptional conditions can justify measures not otherwise appropriate."[36] Despite the exceptional conditions, Justice Black dissented in the belief that Section 5 "conflict[ed] with the most basic principles of the Constitution."[37] Justice Black wrote that

> Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.[38]

The strong medicine worked. Within a few years, the right to vote free of racial discrimination had become a reality throughout the country.[39] The judgment of history, surely, is that the strong medicine was worth it.

That might have been about the end of the story of the VRA, had it not been for the Supreme Court's 1969 decision in Allen v.

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36. South Carolina v. Katzenbach, 383 U.S. 301, 334 (1965).

37. Id. at 355, 358.

38. Id.

39. See, e.g., Chandler Davidson, The Voting Rights Act: A Brief History, in **Controversies in Minority Voting** 7, 21 (Bernard Grofman & Chandler Davidson, eds., 1992).

State Board of Elections.[40] In Allen, the Court ruled that the preclearance requirement was applicable not only to legal changes affecting the right to register, cast a ballot, and have one's vote counted. Changes to the system of representation were also subject to preclearance, and it followed that all subsequent districting plans in covered states had to receive advance federal approval.[41]

In order to obtain preclearance, a state must persuade the Attorney General (or the District Court) that the legal change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or membership in a specified language minority]."[42] The creation of an equipopulous districting plan does not deny or abridge anyone's right to vote. To the contrary, the districts make voting possible, by giving candidates a defined area in which to run and voters a defined choice. A political jurisdiction is redistricted each decade in order to prevent the abridgement of votes that would otherwise be caused by malapportionment.

To apply Section 5 to redistricting plans, the Court had to assume that not simply the representational structure but the racial and other factional politics that occurred within that structure were to be taken into account. In other words, the Justice Department and federal courts were to determine the

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40. 393 U.S. 544 (1969).

41. The Court so held in Georgia v. United States, 411 U.S. 526 (1973).

42. 42 U.S.C. § 1973c (1988).

abridgement of voting rights not only by scrutinizing rules and procedures, but by becoming political analysts. Given an empirical analysis of local politics, the Court then had to determine what structure (i.e., what distribution of racial groups across districts) was beneficial or harmful to the racial and language groups in question. That determination would permit a comparative judgment between two proposed districting plans, but would not decide whether either or both plans constituted an "abridgement" of the right to vote. To make that ultimate determination, some benchmark of "normality" would be needed.

These questions are anything but straightforward, and the Court came up with a somewhat evasive but workable solution. It accepted the view, popular among civil rights activists but far from self-evident,[43] that the racial and language groups were better off with more MMD's rather than fewer. For a benchmark, it developed the "nonretrogression" test. As Justice White explained:

> Beer [v. United States, 425 U.S. 130 (1976),] established that the Voting Rights Act does not permit the implementation of a reapportionment that "would lead to a retrogression in the position of racial minorities with

43. See, e.g., Charles Cameron, David Epstein & Sharyn O'Halloran, "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?" unpublished paper, April, 1996 (concluding that to maximize "substantive representation," defined as votes in Congress supporting positions favored by blacks, districts with just under 50 percent black populations should be created in the south, and blacks should be spread evenly across districts in the rest of the country).

respect to their effective exercise of the electoral franchise." This test was satisfied where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority.[44]

The nonretrogression test was superficial, in that it accepted the assumption that maximizing MMD's was the desideratum for minority groups with little serious consideration. It was evasive because instead of providing a substantive solution to the benchmark problem, it settled on the status quo as a benchmark. But given Section 5's application to changes in election law, this focus was reasonable as a general matter. Unfortunately, it is not as reasonable when applied to redistricting, in which change is compulsory. Most importantly for the Court at the time, the nonretrogression test was workable. In the 1970s and 1980s, and even coming into the 1990s, there were not enough MMD's in existence for nonretrogression to be a practical possibility, especially in light of the pressure on jurisdictions to create new MMD's because of legal developments under the Fifteenth Amendment and Section 2 of the VRA, to which we now turn.

In cases brought under the Fifteenth Amendment and Section 2--which, until 1982, were regarded as equivalents--the courts required plaintiffs to show that the representational system, considered under the "totality of circumstances," served "to can-

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44. United Jewish Organizations v. Carey, 430 U.S. 144, 159 (1977) (plurality opinion).

cel out or minimize the voting strength of racial groups."[45] On its face the standard looks like a hard one to meet, but plaintiffs enjoyed excellent success, for two reasons. First, many of the cases were brought in the southern states that were still temporally close to the days of segregation and disenfranchisement. Second, most of the cases were challenges to at-large elections at the local level, which had resulted in permanent hundred-percent white membership on local councils and boards, even in jurisdictions with substantial minority populations.

This state of affairs was disturbed by Mobile v. Bolden,[46] in which the Court required a showing that a representational system challenged under either the Fifteenth Amendment or Section 2 was intentionally discriminatory. Mobile was widely regarded as a great setback by civil rights activists,[47] who were able to persuade Congress to amend Section 2 to prohibit a voting procedure that "results in a denial or abridgement" of the right to vote. The amended Section 2 included the phrase "totality of circum-

45. White v. Regester, 412 U.S. 755 (1973). The other leading cases were Whitcomb v. Chavis, 403 U.S. 124 (1971), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (per curiam).

46. 446 U.S. 55 (1980).

47. Whether it was as much of a setback as they thought became doubtful in light of Rodgers v. Lodge, 458 U.S. 613 (1982), in which an at-large system was struck down on the basis of an "intent" analysis that bore a strong resemblance to the old "totality of circumstances" approach.

stances," taken from the court decisions of the 1970s, and listed as one of the ways in which the right to vote could be abridged the fact that a racial or language group had "less opportunity than other members of the electorate ... to elect representatives of their choice."

The amended Section 2 first came before the Supreme Court in 1986 in Thornburg v. Gingles.[48] Instead of interpreting the amendments as effecting a return to the pre-Mobile totality of circumstances test, the Thornburg majority attempted to make the application of Section 2 more precise by setting forth a three-pronged test that Section 2 plaintiffs would have to satisfy:[49]

> 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 suffi-

48. 478 U.S. 30 (1986). Thornburg was a challenge to multi-member state legislative seats. The Court specifically left open the question whether its analysis would be applicable in a challenge to a single-member districting plan. Id. at ___, n.12. This question was answered more or less in the affirmative in Growe v. Emison, 113 S.Ct. 1075, 1084 (1993). See also Johnson v. DeGrandy, 114 S.Ct. 2647, 2654-55 (1994).

49. One controversy following Thornburg was whether it was sufficient for a plaintiff to demonstrate that the three prongs were present, or it was also necessary to satisfy the "totality of circumstances" test. In Johnson v. DeGrandy, 114 S.Ct. 2647, 2657 (1994), the Court held that satisfying the Thornburg test was necessary but not sufficient to establish a claim under Section 2.

ciently as a bloc to enable it ... usually to defeat the minority's preferred candidate.[50]

After Thornburg, Section 2 plaintiffs were successful at a high enough rate to impress legislatures and other redistrictors with the desirability of creating MMD's to the extent they were able to do so. Much is at stake for politicians and the interests they represent in a districting plan, and enacting a plan is typically a difficult and contentious process. Once they strike a deal they want it to stay struck, and therefore they tend to be risk-averse with respect to possible legal vulnerabilities in a plan.

Furthermore, the Justice Department exercised its Section 5 preclearance power extremely aggressively after the 1990 census. It sought to evade the constraint of the nonretrogression rule in two ways. First, it adopted a regulation suggesting that it would deny preclearance to any plan that in its opinion violated Section 2.[51] Second, even when a minority large enough to constitute a majority in a district was not compactly situated, the Justice Department took the position that the failure to create

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50. 478 U.S. at ____. For a persuasive argument that these three prongs can be reduced to the one underlying concept that the minority voting group should have the opportunity to elect its favored candidate, see J. Morgan Kousser, Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law, 27 **University of San Francisco Law Review** 551 (1993).

51. 28 C.F.R. § 51.55. This regulation was ruled invalid in Georgia v. Reno, 881 F.Supp. 7 (D.D.C. 1995). The question is now pending before the Supreme Court in Bossier Parish School Board v. Reno, 907 F.Supp. 434 (D.D.C. 1995), cert. granted 116 S.Ct. 1874 (1996).

as many MMD's as could be created constituted intentional discrimination, for which preclearance could be denied even when the maximum number of MMD's was required by neither the nonretrogression principle nor Section 2.[52]

The combined effect of the posture in which these developments left Sections 2 and 5 was a great increase in the number of MMD's created at all levels of government following the 1990 census and a correspondingly great increase in the number of blacks and Hispanics elected to office.[53] But, as we have seen, the forced preoccupation with race in developing the 1990s districting plans and the fantastic shapes of some of the districts generated political opposition and led to the racial gerrymandering cases.[54]

B. The Racial Gerrymandering Cases

The racial gerrymandering cases are long and have been picked apart by many able commentators--not least, by the dissenters--who have questioned, for example, the standing of the plaintiffs

52. The Supreme Court has rejected this use of Section 5 in the racial gerrymandering cases. See Miller, 115 S.Ct. at 2492; Shaw II, 116 S.Ct. at 1904.

53. Get cite.

54. This short account (though perhaps not so short as the reader would wish it) of a long story has necessarily been sketchy. More detail can be found in Abigail Thernstrom, **Whose Votes Count?: Affirmative Action and Minority Voting Rights** (1987); Davidson, supra note 39; Grofman et al., supra note 31. Readers who prefer the format of a law school casebook (if there be any readers with tastes so perverse) may consult Daniel Hays Lowenstein, **Election Law: Cases and Materials** 143-257 (1995).

to bring these cases[55] and their (mis)use of precedent.[56] Here it will not be necessary to explore these and other byways in the various opinions of the justices. Our emphasis in this section will be on the Court's definition of the basic racial gerrymandering cause of action and of the classification that gives rise to a presumptive violation of the Equal Protection Clause, thus requiring the state to defend its districting plan under strict scrutiny.

The Court's difficulty in defining the racial gerrymandering cause of action is caused in part by its effort to reconcile two ideas that are in considerable tension with each other. The first is, as the Court stated in Shaw I, that "race-conscious" redistricting is not always unconstitutional.[57] The second is that districting "unexplainable on grounds other than race" creates a suspect classification under the Equal Protection

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55. See, e.g., Miller v. Johnson, 115 S.Ct. at 2497-99 (Stevens, J., dissenting); Samuel Issacharoff & Thomas C. Goldstein, Identifying the Harm in Racial Gerrymandering Claims, 1 **Michigan Journal of Race & Law** 47 (1996); Karlan, supra note 10, at 289-99; Frank R. Parker, The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno, 3 **District of Columbia Law Review** 1, 9-22 (1995); Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 **Michigan Law Review** 483, 513-16 (1993).

56. See, e.g., Shaw I, 113 S.Ct. at 2834, 2838-40 (White, J., dissenting); Richard Briffault, Race and Representation After Miller v. Johnson, 1995 **University of Chicago Legal Forum** 23, 36.

57. 113 S.Ct. at 2824.

Clause.[58] If "race-conscious" means "race-motivated,"[59] then an accurate "explanation" of the resulting districts will at least include race. In Shaw I, the Court attempted to reconcile these two ideas by emphasizing that race must be the sole explanation for the district in question[60] and that the basis for concluding that race was the sole explanation must be the shape of the district.[61] Justice O'Connor, writing for the majority, emphasized that the cause of action depended on the racial basis of the plan being evident "on its face." She therefore expressly declined to decide whether a plan known to be racially based would give rise to a cause of action if the racial basis did not appear on the face of the plan.[62]

There were problems with this approach. For one thing, whereas the Court's opinion was based on the premise that it was apparent from the face of North Carolina's plan that the 12th

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58. 113 S.Ct. at 2825 (quoting from Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977).

59. As the 1996 cases revealed, this is a point of contention among the members of the racial gerrymandering majority.

60. See J. Morgan Kousser, supra note 10, at 653-54 (1995) (citing fifteen instances in Shaw I in which the Court stated race must be the sole reason for a district's shape).

61. The majority summarized plaintiffs' claim as an objection to "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." 113 S.Ct. at 2824.

62. 113 S.Ct. at 2828.

congressional district had its bizarre configuration solely because of race, it was well known that in fact the configuration resulted from the determination of the North Carolina legislature to comply with the Justice Department's insistence on a second MMD at the expense of the Republicans rather than at the expense of the Democrats.[63] It is virtually impossible that race or any other single consideration could be the sole cause of a district's configuration, especially if the districting plan is enacted through a political process. The unrealistic but repeated reference to race as a sole cause was undoubtedly caused by Justice O'Connor's awareness of the difficulty of answering this question: If a plan only partially explainable by race can be unconstitutional, and yet race-conscious districting is not always unconstitutional, how can a line be drawn?

A second problem was why the conjunction of two features of a districting plan that, taken separately, have not been held to be unconstitutional, should render the plan unconstitutional when they are combined. Justice O'Connor conceded that "principles such as compactness, contiguity, and respect for political subdivisions" were not constitutionally required.[64] Yet so far as the holding of Shaw I goes, a racially-motivated district is presumptively unconstitutional if and only if it lacks such qualities. If the racial motivation is what offends the Equal

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63. See, e.g., Michael Barone & Grant Ujifusa, **The Almanac of American Politics 1994**, at 942 (1993). Justice White made this point in dissent, 113 S.Ct. at 2841-42 n.10, but did not elicit a response from the majority.

64. 113 S.Ct. at 2827.

Protection Clause, then why should the presence or absence of compactness, etc., be relevant? And if racial motivation does not by itself offend the Equal Protection Clause, how can the presence or absence of districting features about which the Constitution is indifferent make the racial motivation offensive? The best attempt to answer these questions was the suggestion that the Court was attempting to prevent an "expressive harm." According to this explanation, districts that on their face are evidently race-based create an apparent governmental endorsement of race as the most salient political characteristic of citizens.[65] Normatively, the expressive harm explanation is vulnerable to the charge that law based on "appearances"[66] rather than reality can have no firm grounding and, more generally, is bound to be morally and intellectually degenerate and in conflict with the greatest ethical truths in the western tradition.[67] In addition, the empirical assumptions on which the expressive harm explanation is based are implausible and, certainly,

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65. This explanation of Shaw I is developed and elaborated in Pildes & Niemi, supra note 55, at 506-16. Pildes & Niemi are extraordinarily careful and ingenious in attempting to make sense of Shaw I. The fact that ultimately they are unable to do so is strong supporting evidence that Shaw I does not make sense.

66. Perhaps the most quoted passage from Shaw I is Justice O'Connor's assertion that "we believe reapportionment is one area in which appearances do matter." 113 S.Ct. at 2827.

67. Plato and William Shakespeare are examples of writers, sometimes regarded as having modestly contributed to western civilization, who had an abiding interest in the problem of separating appearance from reality. For a more contemporary statement of considerable force, see Daniel Boorstin, **The Image** (19__).

undemonstrated.[68]

In Miller v. Johnson, the Court shifted its ground.[69] One reason was that Georgia's 11th congressional district, unlike the North Carolina district in Shaw I and II and the Texas districts that would be struck down in Bush v. Vera, was not extremely irregular in shape, as districts go. But perhaps another reason was an awareness of some of Shaw I's weaknesses. In any event, district shape--the requirement that the racial basis appear "on the face" of the plan--was lowered from its status as an element of the constitutional claim:

> Our observation in Shaw of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in Shaw that in certain instances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim a holding that bizarreness was a threshold showing.... Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the

68. See Aleinikoff & Issacharoff, supra note 10, at 612-613; Kousser, supra note 10, at 647-49.

69. See Briffault, supra note 56, at 45 (arguing that the emphasis on shape in Shaw I was merely a way station on the way to Miller and motive).

> legislature's dominant and controlling rationale in drawing its district lines.[70]

The first major change from Shaw I to Miller, then, was the Court's fixing on the racial purpose, as opposed to any particular indicator of that purpose, as the basis for the constitutional claim. If nothing else, this is a welcome victory for reality over appearance.[71] The second change was from Shaw I's repeated statement that race had to be the sole explanation for a district's configuration. In Miller, Justice Kennedy wrote for the Court:

> The plaintiff's burden is to show ... that race was the predominant factor motivating the legislature's decision to place a signficant number of voters within or without a particular district.

There is no need here to give full consideration to the problems inherent in discerning a "predominant" factor in a districting plan.[72] But we must consider Justice Kennedy's next sentence, in which he elaborates on the "predominance" standard:

> To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral dis-

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70. 115 S.Ct. at 2486.

71. Or, rather, it appears to be such a victory. As we shall see, the "expressive harm" idea is not nearly as dead as admirers of Plato, Shakespeare and Boorstin might hope.

72. Several scholars have considered these problems, including Briffault, supra note 56, at 51-52; Samuel Issacharoff, The Constitutional Contours of Race and Politics, 1995 **Supreme Court Review** 45, 57-60; Karlan, supra note 10, at 302-06.

tricting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.[73]

It is important to see the hidden assumption in this statement. If the only things legislatures ever considered in redistricting were race and what Justice Kennedy refers to as "traditional race-neutral districting principles," then his statement would make straightforward sense. In that case, race and traditional principles would be like a see-saw--if the relative reliance on one goes up, the other goes down. But as Justice Kennedy, who used to live in Sacramento, ought to know, state legislators left to their own devices to adopt a districting plan do not think much about race or "traditional principles." Mostly, they think about politics, including their own individual prospects for reelection or election to higher office, their party's prospects, the interests of their constituents and other groups with whom they are allied, and a host of similar considerations.[74] That "traditional principles" are not what legislatures traditionally operate under is evidenced by the repeated pleas to the courts from reformers to impose the "tradi-

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73. 115 S.Ct. at 2488.

74. For a good account, see Bruce E. Cain, **The Reapportionment Puzzle** (1984). For a normative defense of political considerations over "traditional principles," see Daniel H. Lowenstein & Jonathan Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?, 33 **UCLA Law Review** 1 (1985).

tional principles" on recalcitrant politicians.[75] Thus, Justice Kennedy's statement rests on the silent and plainly incorrect assumption that deliberations over redistricting are limited to race and "traditional principles."

Justice Kennedy's opinion also includes numerous statements in which he purports to express great solicitude for the need of state legislators for leeway to enact districting plans without excessive judicial supervision. "Federal court review of districting legislation represents a serious intrusion on the most vital of local functions,"[76] and "the States must have discretion to exercise the political judgment necessary to balance competing interests,"[77] are typical examples. But a volume of such homilies would do no good for the states, so long as Justice Kennedy limits the exercise of "political judgment" to non-political "principles." By leaving politics out, Justice Kennedy makes his formulation deceptive, because the word "predominant" has nothing like its usual meaning. "Predominant factor" suggests the most important factor. But in Justice Kennedy's formulation, it means a factor that is merely more important than certain other fac-

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75. See, e.g., Bruce Adams, A Model State Reapportionment Statute Process: The Continuing Quest for Fair and Effective Representation, 14 **Harvard Jounal of Legislation** 825 (1977); Gordon E. Baker, Judicial Determination of Political Gerrymandering: A "Totality of Circumstances" Approach, 3 **Journal of Law & Politics** 1 (1986); Bernard Grofman, Criteria for Districting: A Social Science Perspective, 33 **UCLA Law Review** 77 (1985).

76. 115 S.Ct. at 2488.

77. 115 S.Ct. at 2488.

tors, which themselves may have played no significant role at all.

The insistence on "traditional principles" for a showing that race has not been the "predominant" factor might be regarded as bringing in Shaw I's "expressive harm" through the back door. But there is a big difference. In Shaw I, a plaintiff needed to show both that race was the predominant factor[78] and that the district in question had a bizarre appearance and therefore departed from "traditional principles." The idea (albeit, not a very good idea, in my opinion) was that racial motivation itself is not necessarily harmful, but that conspicuous racial motivation is. Under Miller, a political process of redistricting whose participants have little or no interest in the "traditional principles," becomes tainted if race, in contrast to "traditional principles," receives any consideration at all. Under the "expressive harm" idea, the legislature can get away with making race the predominant factor (in the normal sense of predominant), so long as it its consideration of race is papered over. A modest degree of consideration of race would not invoke review, in that conception, under any circumstances. Under Miller, a legislature that considers race at all presumptively violates the Constitution if it treats redistricting as a political matter.

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78. Actually, as we saw, in the Shaw I formulation the plaintiff had to show that race was the only factor. But if that unrealistic standard had held, there never would be a racial gerrymandering violation. It is reasonable to assume that "sole" had to change to "predominant." But it was not inevitable that "predominant" would be given the strange meaning that Justice Kennedy gives it, rather than its normal meaning.

Shaw II adds little to the nature of the racial gerrymandering cause of action, but in the other 1996 decision, Bush v. Vera, the majority fractured. In a plurality opinion, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, repeated her statement in Shaw I that race-conscious districting does not necessarily require strict scrutiny and added the stronger statement that neither do "all cases of intentional creation of majority districts."[79] Justice Kennedy, having joined Justice O'Connor's opinion, added a separate concurring opinion saying that he regarded this addition as a dictum to which he was not committed.[80] Justice Thomas, joined by Justice Scalia, expressed in his concurring opinion his disagreement with the assertion "that strict scrutiny is not invoked by the intentional creation of majority-minority districts."[81] Apparently, a majority of the majority regards the intentional creation of MMD's as presumptively unconstitutional. However, a majority of the Court, consisting at least of Justice O'Connor and the four dissenters, does not.

The plurality opinion also appears to modify the Miller "predominance" standard. Justice O'Connor characterizes the Texas case as a "mixed motive" case because goals besides race, "particularly incumbency protection..., also played a role in the

79. 116 S.Ct. at 1951.

80. ii6 S.Ct. at 1971.

81. 116 S.Ct. at 1972.

drawing of district lines."[82] At first blush, it may appear that Bush is therefore a big improvement over Miller, because it suggests that the "traditional criteria" that may not be subordinated to race include not merely fatuous foolishness such as compactness, but realistic political considerations such as incumbency protection. Whether Bush does expand the meaning of "traditional criteria" in this manner is hard to say with certainty.[83]

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82. 116 S.Ct. at 1952.

83. In a long and quite muddled paragraph in which Justice O'Connor considers the findings regarding the Texas districts against the "predominance" standard, she refers to the state having "substantially neglected traditional districting criteria such as compactness." 116 S.Ct. at 1953. However, this summarizing paragraph from the plurality opinion needs to be considered:

> Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. We have not subjected political gerrymandering to strict scrutiny.... And we have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal."... Because it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained.

Id. at 1954.

Is "incumbency" then a legitimate districting consideration that can protect a districting plan from strict scrutiny, so long as it is not subordinated to race. The last line suggests so, but the word "incumbency" may include the significant qualification that appears in the middle of the paragraph.

Even if "incumbency" and, perhaps, "political gerrymandering"[84] have been moved by Bush into the category of "traditional districting principles," from a political perspective this development is more a symptom of the Court's fundamental misunderstanding of redistricting than it is an improvement. "Incumbency" and "political gerrymandering," are not "principles," traditional or otherwise. What is most fundamentally wrong with Miller's conception of districting from a political perspective is not that it has too short a list of redistricting "principles" but that it treats districting as a matter that is governed by principles in the first place.

In the political conception, districting is a matter of competition and negotiation. Competition and negotiation take place within a framework established by certain ground rules, such as that the process will occur after each census and that the dis tricts will be equally populated. Those who participate in or seek to influence the process may be guided by "principles," or by self-interest, or by party interest, or by pressure from constituents, or by whim, or by whatever they choose. The only "principle" that guides the process as a whole is that the outcome should fairly reflect the competition and negotiation that occurred.

To try to measure the extent that considerations of race (or any other particular considerations, for that matter) influence such a political process is a daunting task, but at least the

84. See id. at 1954.

enterprise is comprehensible. In contrast, it makes no sense to try to separate some set of "traditional" or "legitimate" principles or criteria against which to compare race. There is no "principle" of incumbency-protection or of partisan gerrymandering. These are simply some of the individual and factional motivations that will motivate particular participants in the process.

A political districting process can be hampered by constraints imposed from outside, but it is not fundamentally threatened by them. Thus, despite the fears of some,[85] the one person, one vote rule pushed some possible districting plans out of bounds but it did not change the pluralist, competitive nature of the districting process. It simply became one of the ground rules. The same was true of the mandatory creation of MMD's following the 1990 census, though the constraint in this case cut deeper. It was another ground rule, within which the competitive redistricting process occurred. The outlandish districts that the Court has been striking down reflect both the seriousness of the constraint and the vigor of the political process.

The racial gerrymandering cases threaten the political nature of districting in a manner far more threatening than either the one-person, one-vote rule or the quota for MMD's. The cases do

85. See e.g., Alexander Bickel, **The Supreme Court and the Idea of Progress** 109 (1978, orig. pub. 1970). For a brief argument that the fears were unnecessary, see Daniel Hays Lowenstein, Bandemer's Gap: Gerrymandering and Equal Protection, in **Political Gerrymandering and the Courts** 64, 107 n.15 (Bernard Grofman, ed., 1990).

this, not because of anything they say or do with respect to race, and not even because of their foolish rhetoric about redistricting "principles" and "criteria," but because they seek to make those "principles" and "criteria" real, and subject districting plans that ~~do not conform to~~ are not based on them to strict scrutiny. Districting plans that are devised (and not merely constrained) according to "principles" and "criteria"--any "principles" and "criteria"--are not political districting plans.

C. A Preposterous Issue

Even if the approach taken in the previous section is distinctive in certain respects, the ground covered is quite familiar to persons conversant with the racial gerrymandering cases and the commentary they have received. Now we must turn to what is the single most important point about the Court's effort to define the racial gerrymandering cause of action, and yet has received no notice whatever in either the decisions or the secondary literature. The point is how utterly preposterous is the inquiry in which the Court has engaged.

In Miller, Shaw II and Bush, the Court has gravely asked whether the state "subordinated" other redistricting criteria to race. A passage by Chief Justice Rehnquist, writing for the Court in Shaw II, is representative in both tone and substance:

> We do not quarrel with the dissent's claim that, in shaping District 12, the State effectuated its interest in creating one rural and one urban district, and that partisan politicking was actively at work in the districting process. That the legislature addressed these

> interests does not in any way refute the fact that race was the legislature's predominant consideration. Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made.[86]

Consider the statement that race "was the criterion that, in the State's view, could not be compromised." In the State's view? Why could race not be compromised, "in the State's view"? Because the members of the North Carolina legislature were driven by ideological fervor to create a second MMD? Of course not. The legislature had already adopted a plan containing one MMD, but was forbidden to place it into effect by the Justice Department, which denied it preclearance.[87] "Race was the criterion that, in the State's view, could not be compromised" for the excellent reason that the federal government prohibited the state from compromising the racial criterion. The federal government absolutely required North Carolina to redistrict[88] and the fed-

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86. 116 S.Ct. at 1901.

87. 116 S.Ct. at 1899.

88. This was true for two reasons. First, the congressional districts had to be redrawn to equalize their population. See Wesberry v. Sanders, 376 U.S. 1 (1964). Second, the reapportionment following the 1990 census gave North Carolina an additional seat in the House of Representatives. See Shaw II, 116 S.Ct. at 1899. A federal statute, 2 U.S.C. § 2c (1988), requires that members of the House be elected from single-member districts. Accordingly, North Carolina was required to devise a new 12-district plan to replace the old 11-district plan.

eral government absolutely prohibited North Carolina from redistricting without creating two MMD's. So how was North Carolina supposed to compromise the racial criterion?

In Shaw I, Justice O'Connor referred to the "difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race" and asserted that such a determination would be possible only in "exceptional" cases.[89] In Miller, Justice Kennedy piously intoned that because the "good faith of a state legislature must be presumed," race-based decisionmaking cannot be attributed to the state in the absence of proof.[90] And in each case the Court has gone through the charade of scrutinizing the evidence to see whether the plaintiffs had demonstrated that this indeed was one of those "exceptional" cases in which the state subordinated race to other considerations. Yet in each case, the members of the Court were just as aware as everyone else that the states had subordinated race to other considerations and the reason they had done so was that the federal government forced them to.[91]

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89. 113 S.Ct. at 2826.

90. 115 S.Ct. at 2488.

91. In North Carolina and Georgia, plans adopted by the state containing fewer MMD's were denied preclearance. This did not occur in Texas, but state officials were cognizant of Justice Department policy and, as Justice O'Connor noted, created the contested districts "with a view to complying with the Voting Rights Act." 116 S.Ct. at 1950.

The closest literary analogy is the police inspector in the movie Casablanca who closed down Rick's Cafe because he was shocked to discover that gambling was going on there. But although the inspector collected his gambling winnings immediately after announcing his shocking discovery, he was less hypocritical than the Supreme Court in the racial gerrymandering cases, because he had not forced Rick to have gambling in his cafe. In contrast, the Supreme Court played a major role in coercing the states to make race the predominant consideration in districting. It may be the case that Thornburg was read too broadly by some, but there is no getting around the fact that Thornburg, whose authority has not been questioned by the Court in the racial gerrymandering cases or elsewhere, requires that under specified conditions, which certainly are not rare, states must satisfy a quota of MMD's or be subject to having their plans rejected under Section 2. The requirement that race "not be compromised" is the result of the existence of a quota, not of the size of the quota. And although the Justice Department after 1990 undoubtedly imposed requirements beyond what Thornburg required and even further beyond the reach of the nonretrogression principle, it is the Court and not the states that has both the ability and the responsibility to control federal officials.

To be sure, in Shaw I the Court had North Carolina before it as a defendant, and not the Justice Department.[92] This circum-

92. Two Justice Department officials were originally named as defendants in Shaw I, but their motion for dismissal of the action against them was granted by the lower court. Plaintiffs did not seek review of that dismissal. See 113 S.Ct. at 2821-22.

stance is certainly not an excuse for punishing the state for constitutional violations forced upon it by the federal government. The Court could have and should have affirmed the dismissal of the case in Shaw I, while writing an opinion signaling its willingness to reconsider the application of Section 2 and Section 5 to districting.

Instead, the Court constructed an unwieldy cause of action against the states, which had race-based districting thrust upon them. The Court's standard of "predominance" is imprecise and creates a meaningless issue in these cases. To ask whether one factor "predominates" over others is to imply that the districting process consists of a weighing or balancing of factors. But that is not what occurs with race in redistricting. Under the VRA, race is not a "factor" at all but a prior requirement in a lexical ordering. A lexical (or serial) ordering, has been explained as follows:

> This is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception.[93]

93. John Rawls, **A Theory of Justice** 43 (1971).

A state legislature engaged in redistricting must comply with the following lexical order: 1) comply with the one person, one vote rule; 2) comply with the MMD quota that the Justice Department imposes as a condition of granting preclearance; 3) comply with whatever MMD quota is perceived necessary to avoid a serious risk of the plan being invalidated in a Section 2 action; 4) comply with any state constitutional or legal requirements that are likely to be enforced; and 5) political considerations (which may include "traditional districting criteria" to the extent to which participants in the process regard them as important).

fn: (if state is covered by §5)

A lexically prior consideration is a <u>privileged</u> consideration. It is a necessary precondition of what comes afterward, and aside from that, there is little that can be said about how it is "weighted" against the rest.

Since the racial quotas imposed under the VRA are privileged considerations, debate over whether they are "predominant" cannot avoid being uncertain and arbitrary. Thus, although the majority and the dissenters in the racial gerrymandering cases throw around varying events and circumstances taken from the complex factual records, there is not really a serious disagreement between them over what actually happened. In each case, the state had to meet a racial quota and it engaged in a normal political process of competition and negotiation, subject to the constraint of that quota. The majority and the dissenters debate the artificial question of whether to characterize the privileged consideration as predominant, when they all know that the privileged consideration was never balanced against other considerations at all.

There are two important reasons why the racial gerrymandering problem should be seen as one of privilege rather than predominance. The first, as we have just seen, is that the truth of the underlying situation is clarified rather than obscured and a seemingly difficult and controversial factual determination becomes easy. It is infinitely debatable which factor was "predominant" when there are "mixed motives," as Justice O'Connor acknowledged there were in Texas[94] and, in fact, as there always are. There can be no debate at all over whether race was privileged in Georgia, North Carolina, and Texas. Of course it was. And this determination will almost always be an easy one.[95]

The second advantage of treating the issue as one of privilege rather than predominance is that it properly focuses attention on the responsible agent. The hypocritical "discovery" by the Supreme Court that states gave predominant consideration to race obscures the injustice of the Court's holding the states responsible for actions that were forced upon them by the federal government. If the inquiry is switched from predominance to

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94. 116 S.Ct. at 1952.

95. I can think of two types of situations in which the determination might not be easy. First, there might be a rule that to a large extent is honored in the breach. Then there would be a question of whether there is really a privileged consideration in fact, or only in form. Second, the reverse might be the case. That is, there might be no formally applicable rule, but a practice that is so well established that it appears to be treated as a rule. Neither of these cases is likely to arise in connection with creation of MMD's or other treatment of race in districting. Even if they did arise, the issue would be far more specifically defined than the question of whether race was a "predominant" consideration in a districting plan.

privileging, then there can be no glossing over who is responsible. The federal government established racial quotas, not the states.

Until the Court changes the racial gerrymandering standard from predominance to privilege, every case will begin with a preposterous inquiry resulting in a hypocritical declaration that the Court is "shocked" to find another "exceptional" case in which "race was the criterion that, in the State's view, could not be compromised." And every case will end with federal judicial expropriation of the redistricting function that is entrusted by the Constitution to the states.

III. FEDERALISM

A. Districting and the Federal System

In an article defending the Court's decision in United States v. Lopez,[96] Steven Calabresi writes:

> There is nothing in the U.S. Constitution that is more important or that has done more to promote peace, prosperity, and freedom than the federal structure of that great document. There is nothing in the U.S. Constitution that should absorb more completely the attention of the U.S. Supreme Court.[97]

96. 115 S.Ct. 1624 (1995).

97. Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, 94 **Michigan Law Review** 752, 770 (1995) (emphasis in original). Some may scorn Calabresi's statement as nearly as hyperbolic as some of the statements in the present paper. But Calabresi makes a strong case for his claim.

There can be little doubt that the Supreme Court professes to agree with the importance of preserving the role of the states in the federal system. Here is a typical statement of the point from the Supreme Court:

> The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a "counterpoise" to the power of the Federal Government.[98]

In Lopez, the Court for the first time in over half a century struck down a federal statute on the ground that it was outside the enumerated constitutional powers of Congress. Chief Justice Rehnquist pointed to the design of the Framers to create a federal government with limited powers, in contrast with the large and unenumerated powers of the states. He emphasized that the division of authority exists as a safeguard to liberty.[99]

There is no need here to defend Lopez, and I have no inclination to criticize it. However, commentators have provided substantial reasons for doubting whether Lopez and any progeny that may follow it can have a major effect on preserving and strengthening vital state governments.[100]

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98. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239 n.2 (1985).

99. 115 S.Ct. at 1626.

100. See e.g., H. Jefferson Powell, Enumerated Means and Unlimited Ends, 94 **Michigan Law Review** 651 (1995); Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 **Supreme Court Review** 125, 129 and passim.

Fortunately, another strategy is at hand. Contemporary political scientists, examining the federal system as it actually operates, have found that the emphasis on dividing up discrete "powers" between levels of government is illusory. Morton Grodzins described this as the "layer-cake" theory of federalism, and showed why it was misguided:

> In fact, the American system of government as it operates is not a layer cake at all. It is not three layers of government, separated by a sticky substance or anything else. Operationally, it is a marble cake.... No important activity of government in the United States is the exclusive province of one of the levels, not even what may be regarded as the most national of national functions, such as foreign relations; not even the most local of local functions, such as police protection and park maintenance.
>
> If you ask the question, "Who does what?" the answer is in two parts. One is that officials of all "levels" do everything together. The second is that where one level is preponderant in a given activity, the other makes its influence felt politically (here the voice of the peripheral power units are heard most strongly) or through money (here the central view is most influential) or through professional associations.[101]

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101. Morton Grodzins, **The American System** 8 (Daniel J. Elazar, ed., 1984) (emphasis in original).

Following Grodzins, Daniel Elazar, the leading contemporary student of American federalism, also emphasizes that the states are able to preserve their important role "because of their political position in the overall framework of the nation's political system."[102] A key element of that political position within the overall framework is that "[s]tructurally, [the states] are substantially immune from federal interference."[103]

The Supreme Court has often recognized the importance of protecting the autonomy of the states' political structure. In Garcia v. San Antonio Metropolitan Transit Authority,[104] a majority of the Court regarded the states' political influence within the federal government as one reason permitting the Court to decline to review congressional actions under the commerce power on the ground that they infringed state sovereignty.[105] Two members of the current racial gerrymandering majority dissented in Garcia, in part because they thought the states' political influence was not a sufficient protection of state sovereignty against federal intrusions. Justice O'Connor, in a dissenting opinion joined by Justices Rehnquist and Powell, wrote:

> The true "essence" of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are

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102. Daniel J. Elazar, **American Federalism: A View from the States** 1 (3d ed., 1984) (emphasis in original).

103. Id. at 2.

104. 469 U.S. 528 (1985).

105. 469 U.S. at 550-54.

> supreme.... If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.[106]

Justice O'Connor added that "state autonomy is a relevant factor in assessing the means by which Congress exercises its powers,"[107] a remark that ought to apply at least as much to the Court as to Congress. More recently, in a majority opinion joined by the four members of the racial gerrymandering majority, Justice O'Connor evinced a particular concern that the autonomy of structural decisions be protected, because "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."[108] Noteworthy for present purposes, Justice O'Connor said that even when the Court is applying the Equal Protection Clause, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."[109]

Legislative districting, which affects the state's system of representation, certainly lies at the core of the state's struc-

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106. Id. at 580, 580-81.

107. Id. at 586.

108. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

109. Id. at 462 (quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1973)).

tural politics whose autonomy needs to be maintained and protected. Although the immediate electoral consequences are usually greatly exaggerated,[110] districting is part of the woof and warp of the state's politics and political culture. Federal judicial domination of redistricting will therefore affect the state's politics in ways that cannot necessarily be predicted, but that certainly are inconsistent with the idea of state autonomy and, insofar as they reflect some uniformity in the approach of federal judges, will tend to reduce the diversity that is one of federalism's greatest benefits.

Another reason that protecting the autonomy of the states' districting processes is particularly important for federalism is that one of the primary preservatives of state influence within the federal system has been the two-party system.

> Despite the greater public attention given the national parties, the real centers of party organization, finance, and power have been on the state and local planes. American political parties rarely have centralized power at all. Characteristically, they have done the reverse, serving as a canopy under which special and local interests are represented, with little regard for anything that can be called a party program.[111]

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110. See Cain, supra note 74, at 151-59; Lowenstein & Steinberg, supra note 74, at 64-69. As Justice O'Connor has observed, "there is good reason to think that political gerrymandering is a self-limiting enterprise." Davis v. Bandemer, 478 U.S. 109, ___ (1986) (O'Connor, J., concurring).

111. Elazar, supra note 102, at 48.

Elazar went on to note that the influence of parties had been declining in recent years, a development he saw as contributing to a "decline in federal self restraint in matters affecting the states."[112] The belief that parties are declining is not now as widespread as in the 1980s when Elazar was writing, but parties, whether or not they have been getting weaker, have been getting more national.[113] Probably more than any other political event, redistricting tends to motivate politicians and activists to rally around state parties. Districting, then, so long as it is an autonomous political process in the states, is probably far more important for its indirect contribution to federalism and the two-party system than for the particular political benefits that generate so much sound and fury.

Generally, constitutional law controversies over federalism involve the possibility of the Court limiting federal power.[114] As we have seen, the Court, and especially the justices who have formed the majority in the racial gerrymandering cases, have expressed great concern for protecting the autonomy of the states, especially on matters affecting their governmental struc-

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112. Id. at 49.

113. See Daniel Hays Lowenstein, American Political Parties, in **Developments in American Politics** 63, 69 (Gillian Peele et al., eds., 1992) (Recent developments "had differed between the two major parties, though they had the common effect of tending to nationalize the party organizations.")

114. Of course, another category of cases, such as those arising under the dormant Commerce Clause, involve the possibility of limiting state power for reasons of federalism, but these are far afield from this paper.

tures. And we have seen that legislative districting not only lies at the center of a state's representational system but makes a valuable contribution to the vigor of the states' participation in the federal political system.

It would seem, then, that it would be especially clear that the Court itself should avoid gratuitously interfering with the state's political process. Yet in the racial gerrymandering cases, the Court has done exactly that. It has vaguely targeted a "predominance" of race in state redistricting over which the states have no effective control, when it could have targeted the privileging of race by the federal government, with greater clarity and effectiveness.[115]

B. Contempt for the States

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115. This is hardly unprecedented. As Elazar observed, it is through politics that the states have built their real strength in the federal system. As the least political branch the Supreme Court, despite lip service of the sort we have observed, has tended to be the greatest threat to the states. See Elazar, supra note 102, at 174, 177, 242. A central threat to the federal system, he writes,

> is the apparent abandonment of restraint by the U.S. Supreme Court in matters that affect the integrity of the states and localities. The Court's actions are not designed to be antifederalist. Quite to the contrary, whenever it has addressed the issue of federalism directly..., it has emphasized the importance of maintaining the integrity of the states in the federal system....
>
> But its inconsistency and, some would say, sheer lack of proper understanding of federal principles--or even lack of clearheadedness at times--have had that effect.

Id. at 253. Had they not been written in 1984, one would suppose that these words had specific reference to the racial gerrymandering cases.

Before the Supreme Court invented the racial gerrymandering doctrine, Conservative critics of race-conscious districting saw that intrusion into states' political autonomy was at the heart of the problem. Abigail Thernstrom wrote:

> Arbitrary federal interference with local and state electoral arrangements is in clear violation of the Constitution, which leaves most franchise questions in state hands. [There is a] general presumption in favor of local freedom to design electoral arrangements to meet local needs. Disrespect for that presumption is obviously particularly egregious when the infringement on state prerogative is a consequence of apparent judicial whim....[116]

Yet there have been no complaints from Conservatives (or conservatives) about the contemptuous treatment the states have received in the racial gerrymandering cases.

We saw in Part II that in finding presumptively unconstitutional racial classifications by the states the Court has ignored the fact that the states were forced to act by reason of the way the VRA was being implemented by federal courts and the Justice Department. The VRA has been ignored in the racial gerrymandering cases except for consideration of whether it provided the states with a "compelling state interest" for the predominant use of race.

In both Georgia and North Carolina, the Justice Department had denied preclearance to the plans originally adopted by the

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116. Thernstrom, supra note 54, at 75.

state legislatures. By reason of the VRA as interpreted by the Supreme Court, this meant that Georgia and North Carolina could not run elections in the districts created by those plans.[117] Furthermore, the Justice Department made it clear that it would not preclear any plans that did not create, in Georgia's case, at least three MMD's and, in North Carolina's, two. Under these circumstances, the legislatures adopted the plans containing the districts that were challenged as racial gerrymanders. The states contended that the need to comply with Section 5 of the VRA was a compelling state interest that overcame the presumptive unconstitutionality of deliberately creating these MMD's.

The Supreme Court rejected this defense in each case because the original plans submitted to the Justice Department did not, in fact, violate Section 5.[118] This premise is hard to quarrel with, but the conclusion is fantastic. In Miller Justice Kennedy wrote that "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."[119] This entirely ignores the fact that the states have no opportunity to decide what Section 5 means "under a constitutional reading and application." The Justice Department decides what it means, and even if the state believes the Justice Department's interpretation is unconstitu-

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117. See Clark v. Roemer, 500 U.S. 646, 652 (1991); Hathorn v. Lovorn, 457 U.S. 255, 269 (1982).

118. Miller, 115 S.Ct. at 2490-94; Shaw II, 116 S.Ct. at 1903-04.

119. 115 S.Ct. at 2491.

tional, the state still cannot put its plan into effect without preclearance. In Shaw II, Justice Stevens in dissent argued that North Carolina had a compelling state interest in avoiding the litigation that would be necessary to overcome the Justice Department's position, even if the denial of preclearance was incorrect.[120] Chief Justice Rehnquist responded that Justice Stevens' argument had to be rejected, because otherwise Miller would have been wrongly decided. But Miller did not consider this point, and by merely pointing to Miller, Shaw II avoided it as well.

In fact, Justice Stevens seriously understates the point. It is not simply a matter of the state wishing to avoid litigation. It is true that under Section 5, a state that has been denied preclearance by the Justice Department retains the option to seek preclearance from the federal District Court in the District of Columbia. But that option is utterly impracticable in the case of redistricting, in which there usually is no time to spare.[121] There are two great advantages for the state in seeking preclearance from the Justice Department rather than from the District Court. First, the Justice Department is required to act within 60 days. More importantly, legislative officials can negotiate with the Justice Department. This does not mean that the Justice Department necessarily will be flexible, but at least

120. 116 S.Ct. at 1907, 1918.

121. See Briffault, supra note 56, at 79-80 (providing practical reasons why states have little choice but to get preclearance from the Justice Department).

the legislature can find out what it has to do to get a plan precleared. In the case of the District Court, even if the state could count on getting a decision in time for the election to be conducted in an orderly manner, the state would be taking too much of a risk in case preclearance were denied by the court. If the court denied preclearance or, as was far more likely, the court simply did not decide the case in time, then, as Katharine Butler writes, "elections would be held pursuant to a temporary plan imposed by a federal court."[122]

Consider, therefore, the state's plight when the Justice Department refuses to preclear any plan except one that the Court will regard as a presumptively unconstitutional racial gerrymander. It cannot implement its own plan, which presumably is constitutional, because without preclearance it is barred from doing so by Section 5, as interpreted by the Supreme Court. If it simply does nothing, its inaction is unconstitutional, because the state is in violation of the Equal Protection Clause (or Article I, § 4 if it is a congressional plan) as interpreted by

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122. Butler, supra note 11, at 609. Butler's solution is that "the state must be free to cure the objection, even if it thinks the Attorney General's objection is patently wrong." Id. But she goes on to say that it is wrong for citizens to be "saddled with an unconstitutional" plan because the state "chose to capitulate to an invalid objection." Therefore, she concludes that the plan "remains subject to strict scrutiny." She does not say in what sense the state can be said to have "chose[n] to capitulate" when, as she acknowledges, the state had no other means of devising a plan within which to run its election. Nor does she explain in what sense the state is "free" to cure the objection it thinks is patently wrong, if by doing so it subjects its plan to strict scrutiny, which cannot be satisfied unless the objection is correct.

the Supreme Court in the one person, one vote cases. If it adopts its own presumably constitutional plan and seeks preclearance in the D.C. District Court, it faces the probability that the court will not rule before it is necessary to prepare for the next election, which means it has engaged in unconstitutional inaction, as in the previous option. In other words, anything the state does or does not do besides satisfying the Justice Department's quota is unconstitutional. Yet Miller and Shaw II say that the state does not have a compelling state interest that justifies satisfying the quota. In short, Miller and Shaw II hold that the state has no compelling interest in acting in accord with the commands of the United States Constitution.

For the Court to create a situation in which anything a state does is unconstitutional evidences a kind of theoretical contempt for the states and for the federal system. But we should not overlook the practical blow to the state's autonomy. Not only can the state not act constitutionally, it cannot assure that it will be able to design its own districts at all.

If the state fails to act, of course a federal court will impose a districting plan.[123] If it succumbs to the Justice Department, its plan will be struck down under the racial gerrymandering cases. It may then get another chance to adopt a plan. If it does so, it will still need preclearance, but presumably, under these circumstances, a chastened Justice

123. See Katharine Inglis Butler, Affirmative Action Gerrymandering: Rhetoric and Reality, 26 **Cumberland Law Review** 313, 320 n.20 (1996), noting the "powerful incentive" to comply with the Justice Department's demands to avoid a court-drawn plan.

Department will provide it. Nevertheless, this scenario does not protect the state's autonomy, for two reasons. First, redistricting is a lengthy and contentious process, and the state should not be required to engage in it superfluously, simply because the federal executive and the federal judiciary are at loggerheads with each other. Furthermore, the legislators and the citizens and interests that they represent should have the opportunity to strike a deal that will last for the decade.

Second, based on the results to date, the lower federal courts in the racial gerrymandering cases have not the slightest respect for the states' political processes. Consider the Georgia court's treatment of Miller on remand. The Georgia legislature was unable to agree on a revised plan after its original plan for the 1990s was struck down by the Supreme Court, a good illustration of how disruptive judicial intervention into districting can be. Accordingly, it became necessary for the District Court to impose a plan. The Supreme Court has ruled that when a legislative plan is found to violate a federal statute or the Constitution, the federal courts should fix the violation with as little change as possible to the legislative plan.[124] But the Georgia court on remand decided that the normal rule was inapplicable and that it was free to ignore the legislature's plan, even those portions that were constitutional. Why? Because

124. White v. Weiser, 412 U.S. 783, 794-97 (1973); Upham v. Seamon, 456 U.S. 37 (1982).

> Georgia's current plan was not the product of Georgia's legislative will. Rather, the process producing Georgia's current plan was tainted by unconstitutional DOJ interference.[125]

The import of this ruling is that because Georgia was coerced by the federal executive to adopt a plan that did not perfectly match its "legislative will," a federal court is relieved of the obligation to draw districts that take into account any portion of Georgia legislature's will.

A different and even more extreme contempt for state politics was shown in the remand of Bush v. Vera. Bush was decided after Texas had conducted its 1996 primary elections. Nevertheless, the District Court redrew thirteen congressional districts and declared void the primaries that had been held in the earlier versions of those districts. New, run-off primaries are to be held in those districts at the same time as the general election in November. Because a primary will be mixed with a general election, the "straight-ticket lever" that Texas includes in its voting procedures will not apply to the House elections in the thirteen districts, which undoubtedly will cause some voters unknowingly to fail to vote in the House race. In any districts in which no one wins a majority in the November primary, a run-off election will be held in December. This could easily affect the results in a close election, since turnout in a December run-off election is likely to be far lower than in the November presidential election.

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125. Johnson v. Miller, 922 F.Supp. 1556 (S.D.Ga. 1995).

Justice O'Connor opened her dissenting opinion in Garcia v. San Antonio Metropolitan Transit Authority,[126] with these words:

> The Court today surveys the battle scene of federalism and sounds a retreat.... I would prefer to hold the field and, at the very least, render a little aid to the wounded.[127]

In the racial gerrymandering cases, she and her colleagues on the Supreme Court and on the lower federal courts have displayed remarkable indifference to the states' control over their own political systems. Enraged at the result of federal voting rights policies, for which the Supreme Court is to a large extent responsible, they have turned their horses round and run roughshod over the states. Already "wounded" by the federal constraints imposed on their districting plans, the Court has crushed them with new intrusions that, as we saw in Part II, are much more far-reaching.

Punishing the victim, as in the variant on the Jack Benny joke, makes no sense. Punishing the victim, when the victim is frequently pointed to as an object of special solicitude, is both hypocritical and senseless.

Finally, it should be added that punishing the states for compliance with federal requirements the Court later decides were wrong is troubling for reasons apart from the injustice done to the states and the intrusion on their sovereignty. There will

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126. 469 U.S. 528, 580 (1985).

127. Id. at 580.

often be conflict between the states and the federal government and the states will often be inclined to resist federal demands. But the states should not be made to feel that they are required to do so, under threat of punishment if they cooperate with federal policies that later are disavowed. Consider this excerpt from an editorial by James Jackson Kilpatrick, published on June 1, 1955 in the Richmond News Leader:

> To acknowledge the Court's authority does not mean the South is helpless. It is not to abandon hope. Rather, it is to enter upon a long course of lawful resistance; it is to take lawful advantage of every moment of the law's delays; it is to seek at the polls and in the halls of legislative bodies every possible lawful means to overcome or circumvent the Court's requirements. Litigate? Let us pledge ourselves to litigate this thing for fifty years. If one remedial law is ruled invalid, then let us try another; and if the second is ruled invalid, then let us enact a third.... When the Court proposes that its social revolution be imposed upon the South "as soon as practicable," there are those of us who would respond that "as soon as practicable means never at all."[128]

Of course, Kilpatrick was writing for a cause that has been discredited, but set that aside. States will resist federal policies, and the resulting tensions may provide real benefits as

128. Quoted in Staige Blackford, One Man's South, 44 **Emory Law Journal** 847, 852 (1995).

well as costs. Indeed, the expectation that the state and federal governments will act as a check on each other is one of the important purposes for having a federal system in the first place. But a federal system also requires a great deal of cooperation. We do not need special incentives for states to resist the federal government, certainly not incentives based on fear of judicial intrusion into state political systems. This does not mean that state officials who wish to violate the Constitution can find a safe harbor by inducing a federal official to order them to do it. But nothing like that has happened or is likely to happen in the redistricting setting.

The primary failing with respect to federalism in the racial gerrymandering cases is the utter indifference shown to the autonomy of state political systems. But by punishing the failure to resist (even when resistance was impossible), the Court also has stricken more generally at the federal balance.

IV. RACE, POLITICS, AND RACIAL GERRYMANDERING

I can imagine the following possible statement by a Conservative: Perhaps it is true that the Supreme Court has been blaming the victim in the racial gerrymandering cases. Undoubtedly it is true that the federal government has been the prime mover for race-dominant districting to date. Nevertheless, even if some states are being treated unfairly in the 1990s, what is really important about the racial gerrymandering cases is how they will operate prospectively. Race-dominated districting is wrong and unconstitutional, whether the impetus for it comes from the fed-

eral government or from within the states themselves. Perhaps it would have been better if the Court had begun by reining in the federal government, but in the long run it makes little difference, because in the long run race-dominated districting must be unconstitutional no matter who instigates it.

In this Part, I attempt to respond to this hypothetical statement in two ways. The first part is conceptually evasive but practically important. The Court has not declared the federal mandate for race-based districting unconstitutional and shows no signs of doing so. This is one reason the racial gerrymandering cases are not victories for Conservatives. The second part of the response attempts to show why the road the Court has not taken but could have taken and still could take--elimination of both the federal mandate and the racial gerrymandering doctrine--would be vastly preferable for conservatives.

A. Racial Gerrymandering and the Living VRA

In Miller v. Johnson, Justice Kennedy prefaced his rejection of the need to get preclearance under Section 5 as a compelling state interest with this statement.

> Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling state interest independent of any interest in remedying past discrimination, it cannot do so here.[129]

Liberals were understandably concerned for the future of the VRA in light of this statement and also in light of Adarand v.

129. 115 S.Ct. at 2490.

Pena,[130] which had been decided only a few weeks before Miller.[131] Adarand held that racial classifications created by the federal government would be subjected to the same strict scrutiny that is applied to state-drawn racial classifications. Assuming the same level of scrutiny, there is no apparent reason why it is constitutional for the federal government to require states to engage in race-based districting that is unconstitutional when the states do it on their own. After Miller, the constitutionality of the VRA, as applied to districting, was a very open question.

One reason the question did not get resolved in Miller was that Georgia did not assert the need to comply with Section 2 as a compelling state interest in defense of its race-based districting. Both North Carolina and Texas did,[132] and Justice O'Connor's pronouncements on Section 2 were the single most important new development in last term's cases. In her plurality opinion, she followed the formula that has been used in the other

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130. 115 S.Ct. 2097 (1995).

131. See Karlan, supra note 10, at 309 (suggesting that "the legitimacy of race-conscious districting is quite unclear").

132. As a factual matter, North Carolina's defense is unconvincing. North Carolina originally adopted a plan containing one MMD and shifted to the two-MMD plan that was struck down in order to obtain Section 5 compliance. Apparently, the North Carolina legislature thought the risk of losing a Section 2 case with a one-MMD plan was not intolerable. The Texas plan was precleared on the first try, but even so, the Texas legislature was probably more concerned with the immediate problem of getting preclearance than with the somewhat more remote contingency of a Section 2 lawsuit.

racial gerrymandering cases of "assum[ing] without deciding that compliance with the results test [of Section 2] can be a compelling state interest."[133] But Justice O'Connor added a separate opinion in which she spoke only for herself. In that opinion, she said that the Court should allow states to "assume the constitutionality" of Section 2.[134] Accordingly, in her view states have a compelling interest "in complying with the results test as this Court has interpreted it."[135]

Liberals might have preferred a full pardon to what, on its face, is only a reprieve, but the reprieve should be welcome nevertheless. First of all, although Justice O'Connor is still the only justice in the racial gerrymandering majority to say that compliance with Section 2 is a defense to race-based districting, plainly her view is shared by the four dissenters. So Section 2 is alive and well, at least temporarily. Furthermore, only two members of the racial gerrymandering majority have signalled their willingness to eliminate the federal requirement of race-based districting.[136] And Justice O'Connor gave at least a faint sign of a belief in the constitutionality of Section 2 by referring to "concerns of respect for the authority of Congress

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133. 116 S.Ct. at 1960.

134. 116 S.Ct. at 1969.

135. Id.

136. In Holder v. Hall, 114 S.Ct. 2581, 2591 (1994), Justice Thomas, joined by Justice Scalia, stated that as a matter of statutory interpretation he would treat Section 2 as applicable to voting only, not to systems of representation.

under the Reconstruction Amendments,"[137] and perhaps a stronger signal by her statement in the plurality opinion, noted in Part II above, that not all intentionally race-based districts are presumptively unconstitutional.

The rejection of the Section 2 defense in the 1996 cases was based on short-sighted and illogical considerations of the sort that have characterized the racial gerrymandering cases generally. In both cases the Court assumed without deciding that Section 2 could provide a compelling state interest and that the states had a sufficient basis for believing that Section 2 required the number of MMD's contained in the plan.[138] In each case the flaw in the state's defense was said to be that the MMD's were not "narrowly tailored" to accomplishing the goal of complying with Section 2.

In Shaw II, North Carolina stated its defense as the desire to avoid vulnerability to a Section 2 lawsuit. Chief Justice Rehnquist, in a particularly disingenuous passage even by racial gerrymandering standards, rejected the defense because the creation of the 12th congressional district "could not remedy any potential § 2 violation."[139] The reason given was that the compact grouping of blacks that could have provided the basis for a Section 2 lawsuit was located in another part of the state, and that the creation of the 12th congressional district could not

137. 116 S.Ct. at 1969.

138. Shaw II, 116 S.Ct. at 1905; Bush at 1961.

139. 116 S.Ct. at 1906.

deprive that group of their Section 2 claim, assuming that they had a valid one.[140] However, the plan that was under challenge included two MMD's out of a total of twelve, or 16.67%. To create an third MMD would raise the total to 25%. Blacks constituted 20% of the population of North Carolina.[141] Accordingly, the plan North Carolina adopted contained a roughly proportionate number of MMD's and a third MMD would result in more than a proportionate number of MMD's. If Chief Justice Rehnquist's argument is genuine, then he must believe and the Court implicitly held that a state that creates a roughly proportionate number of MMD's may violate Section 2 because it does not create the maximum number of districts consistent with the Thornburg criteria, even if that number is over proportionality. As Sam Issacharoff has demonstrated conclusively, that position is untenable.[142] No one can imagine that the five members of the majority would have taken that position if it had not served their purpose of avoiding North Carolina's defense.

In Justice O'Connor's plurality opinion in Bush, she found that the Texas districts were not narrowly tailored because they were bizarrely shaped. "Narrowly tailored" is a stale metaphor the Court uses to describe the requirement that when a state acts

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140. 116 S.Ct. at 1906.

141. See Shaw I, 113 S.Ct. at 2820.

142. See Samuel Issacharoff, Groups and the Right to Vote, 44 **Emory Law Journal** 869, 873-77 (1995). See also id. at 881, arguing that the Court's precedents preclude such a conclusion.

in a presumptively unconstitutional manner but defends on the ground that its action is necessary to further a compelling state interest, the state must also demonstrate that it has not intruded upon the constitutional value beyond what was necessary to further the compelling state interest. In this case the constitutional value is the avoidance of racial classifications. But a district created intentionally as an MMD because Section 2 is assumed to require it is not more or less of a racial classification because of its shape. The suspicion that Justice O'Connor is engaging in a non sequitur is confirmed by this paragraph:

> These characteristics [i.e., the bizarre shapes] defeat any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominantly racial lines, a district that is not "reasonably compact." [Citation] If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in § 2 requires the race-based creation of a district that is far from compact.[143]

Under Thornburg, one of the prerequisites of a Section 2 claim is that there be a minority grouping large enough to constitute a

143. 116 S.Ct. at 1961.

majority in a district and situated so that they can be placed in a compact district. Therefore, Justice O'Connor is certainly correct to say that Section 2 does not require the creation of noncompact districts. It does not follow, however, that Section 2 requires the creation of compact districts, and nothing in Thornburg or in Section 2 or its purposes suggests otherwise. Section 2 simply requires a specified number of MMD's under certain circumstances (one of which is that it be possible to draw the districts compactly), and is indifferent to the shapes of the MMD's that are actually drawn.

Justice O'Connor was apparently aware of this logical flaw, because she added that "[s]ignificant deviations from traditional districting principles, such as ... bizarre shapes..., cause constitutional harm insofar as they convey the message that political identity is, or should be predominantly racial."[144] By connecting race to shape, Justice O'Connor solves the logical problem in her prior narrow tailoring argument. But she does so by going back to the expressive harm argument of Shaw I, with its normative and empirical weaknesses.[145]

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144. 116 S.Ct. at 1962.

145. It may be, however, that what Justice O'Connor says on this point is not decisive. In his separate concurrence, Justice Kennedy rejected the idea that if an MMD is required by Section 2, it must be drawn compactly to be "narrowly tailored." 116 S.Ct. at 1972.

Justice Kennedy's reason for finding the two MMD's in Houston not to be narrowly tailored was that they were not required by Section 2, because it appeared that either a compact majority-black district or a compact majority-Hispanic district could be created, but not both. Id. On remand, the District Court imposed a new plan of its own devising on Texas for the 1996 election and said that "without finding that §§ 2 or 5 of the Voting Rights Act compels this Court to act, the Court has responded to the

More important than the poor craftsmanship in the Court's narrow tailoring determinations in Shaw II and Bush is the further inroads that they represent on state autonomy in districting. If taken seriously, Shaw II means states may be required to create MMD's beyond what is warranted by the minority groups' portion of the population, if the groups happen to be situated geographically in a manner that permits it. Bush, if O'Connor's plurality opinion is assumed to be controlling, means that a state that is required by Section 2 to create MMD's must not only create the MMD's but must do so in accordance with "traditional districting principles." As we saw in Part II, this means the districts cannot be created by political means.[146] Remarkably, Justice O'Connor said in her separate statement that to avoid a racial gerrymandering claim, a state required to create MMD's under Section 2 must "not deviate substantially from a hypotheti-

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existing electoral configuration by drawing districts 18, 29 and 30 to include large numbers of minority voters." Vera v. Bush, 1996 WL 442314 (S.D.Tex. 1996). Presumably, the court believes that there are enough minorities in these districts to satisfy Section 2, or it would have to have found that Section 2 was not applicable. The court also claims to have created compact districts. But if these claims are accurate, then it is possible to create two compact MMD's, and the basis for Justice Kennedy's finding that the Houston districts were not "narrowly tailored" is factually inaccurate.

146. Some supporters of the racial gerrymandering cases are overtly hostile to political concerns in districting. See, e.g., Timothy G. O'Rourke, Shaw v. Reno: The Shape of Things to Come, 26 **Rutgers Law Journal** 723, 757 (1995).

cal court-drawn § 2 district for predominantly racial reasons."[147]

Without much doubt, the consequence of the racial gerrymandering cases will be a heightened dominance of racial considerations in redistricting. Some Conservatives may doubt this, because the Court's tightening of the standards of Section 2 and, especially, Section 5, will reduce the number of MMD's, though probably only modestly. But a reduction of the size of the racial quotas should not be seen by Conservatives as a gain, unless Conservatives really are Reactionaries in disguise, which I do not believe is the case. This is especially true when the quotas impose a ceiling as well as a floor, which is the case under the racial gerrymandering decisions.[148] Opposition to any quota is quite understandable. Preference for a smaller quota to a larger one (assuming the larger one does not exceed proportionality) is either not rational or not respectable.

Why will there be more dominance of the process by race? For several reasons:

First, the crucial point is unchanged. So long as Section 2 and Section 5 are in effect and applicable to districting, race is a privileged criterion. The legislature and everyone who participates in the process must start with race.

Second, although Section 5 will have to be implemented in accord with the nonretrogression principle, that principle will

147. 116 S.Ct. at 1970.

148. This terminology is used by Briffault, supra note 56, at 34-35.

have teeth for the first time in the next round of redistricting because of the large number of MMD's that were created around the country after the 1990 census.

Third, the racial gerrymandering cases inject new race-based constraints on the process. These are of two types. First, whereas before these decisions the racial quotas were a minimum, now as a practical matter they will serve as a maximum as well. Because the states are left with little or no margin of error in an area where the legal standards are neither clear nor stable, the likelihood of increased litigation and, as a result, increased intervention into the states' representational politics by federal judges, seem assured.[149] Second, the ability to bargain over the location of district lines in the vicinity of an MMD will be greatly curtailed, because of the emphasis on "traditional criteria" in the racial gerrymandering cases.

Both of these constraints will heighten the role of race in the districting process. All supporters of a proposed districting plan whose details are being negotiated will want the plan to survive legal challenge. Since the litigation will focus exclusively on race, debate over litigation while the plan is being negotiated will also focus exclusively on race. Participants in the debate will press for (or against) changes in the plan that may be favored for other reasons but will be argued in terms of race. The legal relevance of race to the validity of the plan

149. For similar predictions, see Miller v. Johnson, 116 S.Ct. at 2499, 2507 (Ginsburg, J., dissenting); Karlan, supra note 10, at 310.

will be extremely garbled, because legislators usually have little understanding of the law, even when they are lawyers. But through it all, garbled or not, the common currency of debate will be race. Finally, the freedom to compete and negotiate will be especially hampered in parts of the state where blacks and Hispanics reside. Representatives of MMD's who may be interested in adjusting lines with their neighbors for their own benefit or for the benefit of allies or as part of a larger deal, will be greatly inhibited. Maneuvering in those areas may result in findings tht the plan is not "narrowly tailored."

There are already some indications that the racial gerrymandering cases are not reducing and may be intensifying preoccupation with race. The response of a Republican member of the North Carolina House of Representatives and a member of a committe formed to recommend a new congressional plan after Shaw II was that "one of the House committee's first steps will be to meet with the Legislative Black Caucus, 'because this is what it seems to all center around, minority districts.'"

As another indicator, consider these excerpts from the opinion of the court that had to adopt a Georgia plan to replace the one struck down in Miller, in explaining the new 5th District. "Since race is a factor this Court can consider," the opinion said, "we considered it insofar as the legislature would have considered it in maintaining one majority-minority district or else run afoul of VRA Sections 2 and 5."[150] This "consider-

150. Johnson v. Miller, 922 F.Supp. 1556, 1565 (S.D.Ga. 1995).

ing" of race includes the view that "maintaining the percentage of black registered voters as close to fifty-five percent was necessary ... to avoid dilution of the Fifth District minorities' rights." But the court considered not only the percentage of blacks among registered voters but the percentage of blacks in the population, which previously had been 65 percent. "We felt that allowing the minority population to fall below sixty percent might be viewed as dilutive at some level. The minority population in the remedy's Fifth District is just shy of sixty-two percent."[151]

So this is what it means to "consider" race but not make race "predominant"! Conservatives might wonder whether this is the color-blind utopia they have been hoping for.

B. Unregulated Districting

My contention in this paper is that a genuinely Conservative Court would leave the states alone and either eliminate or (if not quite so Conservative) lessen the federal mandate for MMD's.[152]

An immediate concern of Conservatives may be that the predominance of race that gave rise to the racial gerrymandering cases would immediately reemerge. This is extremely unlikely. After all, the state of affairs we are imagining is not so very

151. 922 F.Supp. at 1568.

152. The federal mandate could be eliminated either by finding as a matter of statutory interpretation that the VRA does not apply to districting or by declaring the VRA unconstitutional insofar as it does. Lessening of the mandate would be accomplished by statutory interpretation.

hypothetical. It was pretty much the situation after the 1980 census. Most redistricting was accomplished before the 1982 amendments to Section 2. Mobile v. Bolden was still in force and most of the voting rights cases that were brought were challenges to at-large systems and other electoral devices. Except for covered states that needed preclearance for their plans, the VRA was not a major consideration for redistricters in the 1980s, and even the covered states did not face a Justice Department taking nearly as aggressive a posture as in the 1990s.

Yet, in the 1980s, there was virtually no concern in the United States about racial gerrymandering. This does not mean that redistricting politics was free of racial considerations. In California, for example, the process was controlled by the Democratic Party, which expressly set out to increase the number of districts dominated by Hispanics and maintain the number of seats dominated by blacks.[153] And redistricting in California in the 1980s, especially the plan for the House of Representatives, was as controversial as any redistricting in history. But the controversy was not over the race-based nature of some of the districts. The controversy was about the partisan nature of the plan. Because I had an interest in that controversy, as a scholar, a teacher, a lawyer helping to represent some of the participants in litigation that lasted almost throughout the decade, and as an advocate in California initiative campaigns over redistricting, I read an enormous amount of popular and

153. Kousser working paper (published yet?)

scholarly material relating to the California districting of that decade. Yet I do not recall reading a single criticism of the use of race in that plan. In other states, to the best of my knowledge, there was a modest amount of controversy over there being too few districts drawn favorably to blacks and Hispanics. I am not aware of any controversies in the 1980s over racial gerrymandering in favor of racial minorities.[154]

Conservative objection to overemphasis on race in the 1980s was directed at federal intervention under the VRA, not to spontaneous activity in state legislatures. Certainly this was true of Abigail Thernstrom's influential book, Whose Votes Count?.[155] Rather than objecting to the normal state political processes, her book drew attention to black candidates acquiring "a level of protection that politics as usual would not provide."[156] Near the end of her book, Thernstrom provides a lengthy list of the people and institutions whose actions had brought about widespread, mandatory MMD's and related problems. She mentions civil rights lobbyists, lawyers, members of Congress, the

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154. I do not mean to assert that there was no criticism of districts in California on grounds of race, or that there were no controversies over racial gerrymandering elsewhere. Obviously, I did not read everything that was written about the California plans and I was not familiar with more than a sampling of redistricting controversies around the country. Nor, certainly, do I remember everything I read. My point is simply that racial gerrymandering was not a major concern, probably not even a significant concern, in the districting of the 1980s, when districting in the states was largely unregulated.

155. Thernstrom, supra note .

156. Id. at 4.

Supreme Court, lower courts, the Justice Department, impersonal and bureaucratic forces, and many others. In short, she mentions virtually everyone and everything that had to do with voting rights except state legislatures.

How is it that legislatures, when they act autonomously, can engage in race-based districting without attracting the opposition that has been directed at race-based districting that is federally mandated?

One reason is that people are used to it. "Politics as usual" may not get much admiration, but neither does it stir much opposition.

A second reason is that state legislatures acting on their own do not carry race-based districting to excess. Racial and ethnic groups, like other groups, will be accommodated, but none will be privileged. Politicians acting freely will create MMD's, but they will not often create districts like the North Carolina 12th Congressional District. The reason is not that they are scrupulous about "traditional districting criteria," though they might be if they think the press, the public, or other significant constituencies care about such criteria. Rather, districts with such a bizarre shape, especially if they are stretched out, are likely to create problems in the design of other districts.

A third reason, and one that ought to be of great importance to conservatives (but not only conservatives), is that race-based districting that emerges from an unregulated legislative process both reflects and encourages a different kind of racial politics than districting regulated by the VRA.

In his study of Mexican-American politics in California and in San Antonio, Texas, Peter Skerry distinguished between "ethnic" and "minority" politics.[157] "'[M]inority has come to denote ... a victimized racial claimant group in both popular and scholarly usage."[158] Minorities "are understood to have experienced systematic racial discrimination."[159] In contrast, "because ethnics were not conquered, enslaved, or otherwise colonized by American society, but immigrated here voluntarily, they have no special claims on the American conscience--nor are they inclined to make any."[160] Although his definitions are cast as if groups simply <u>are</u> either minority or ethnic, Skerry's point is more the opposite.

> [T]here is nothing automatic or preordained about minority politics. Whether or not a group makes minority claims on the polity results in part from its own strategic choices. And such <u>political</u> choices are not automatically determined by a group's social and economic choices.[161]

These categories correspond, then, to contrasting political strategies and styles. "Minority" politics is ideological and

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157. Peter Skerry, **Mexican Americans: The Ambivalent Minority** 11-15 (1993).

158. Id. at 11.

159. Id.

160. Id. at 12.

161. Id. at 15.

seeks special government benefits as a matter of right, either as redress for past wrongs or for related reasons. The claims made on society are often a function of the group's status as a victim. "Ethnic" groups also make demands on society, but they are not ideological demands. Their demands typically are not made as a matter of right, but simply through normal forms of political competition.

In recent years, some black writers have commented on the problems, both personal and political, associated with a "minority" political strategy. Shelby Steele, for example, writes:

> Though we have gained equality under law and even special entitlements through social programs and affirmative action, our leadership continues to stress our victimization. On the basis of this emphasis they have demanded concessions from government, industry, and society at large while demanding very little from blacks themselves by way of living up to the opportunities that have already been won. Our leaders still see us as victims, as people who can only be helped from the outside.[162]

Dinesh D'Souza lists two or three dozen black "reformers," some conservative like Steele, some liberal, who share a skepticism of the ability of government to solve the problems of blacks and who emphasize the need for individual initiative and entrepreneur-

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162. Shelby Steele, The Content of Our Character 68 (1990).

ship.[163] In Skerry's terms, these writers are supporting an ethnic rather than a minority style of black politics.

In the world of electoral politics, unregulated political districting is a natural home for ethnic politics. Certainly those with ideologies and programmatic views, including minority politicians, can and do influence the political process of competition and negotiation. But ideological politics get mediated and diluted in the districting negotiations that occur in the partisan setting of a legislature.

In contrast, the Justice Department and the courts are natural homes for minority politics. When blacks and Hispanics are assured MMD's under Section 2 and Section 5, it is because of their status as victims, whether of past discrimination or of present racially polarized voting. Minorities claim MMD's as a matter of right under these sections.

Under the regime that the Supreme Court has brought about, in cooperation with Congress and the Justice Department, first by the expansion of voting rights through the early 1990s and then by the capping of those rights through the racial gerrymandering cases, blacks and Hispanics are channeled into minority politics and away from ethnic politics. Under the Voting Rights Act they still are entitled by law to a floor of MMD's. The racial gerrymandering cases greatly inhibit their ability to engage freely in the political process of competition and negotiation.

One of the contested issues in the debates over the racial gerrymandering cases has been prompted by charges that the Court

163. See D'Souza, supra note 24, at 521-23.

is singling out blacks and Hispanics, who alone are disabled from competing for legislative districts that serve their interests.[164] Katharine Butler, writing in defense of the Court, denies this charge, pointing out that it is only these groups "who already receive special protection as groups in the redistricting process that is unavailable to any other interests--not whites, not non-protected ethnic groups, not Republicans, not homeowners, not farmers, not environmentalists."[165] Viewed through the lens of ethnic vs. minority group politics, it can be seen that each side in this argument is right--and that each side is wrong. Blacks and Hispanics do receive special privileges in the form of mandatory MMD's. But they are also specially disabled, to the extent they wish to engage in traditional districting politics as ethnic groups.

It should be clear at this point that the racial gerrymandering issue touches chords that run far deeper than the arcana of legislative districting. Many people, including, I should think, most conservatives, believe that the best hope for the success and complete integration into American society of blacks and Hispanics is through the ethnic, not the minority strategy. The VRA combined with the racial gerrymandering restrictions virtually force black and Hispanic politicians into the minority

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164. See, e.g., Miller, 115 S.Ct. at 2505-06 (Ginsburg, J., dissenting); Pamela S. Karlan, Our Separatism? Voting Rights as an American Nationalities Policy, 1995 **University of Chicago Legal Forum** 83, 94-95.

165. Butler, supra note 11, at 619.

strategy, so far as districting is concerned. Unregulated districting by competition and negotiation has the opposite effect.

Still, some conservatives may contend, the color-blindness principle is important and should not be breached. Therefore, the state should not be able to district for racial purposes, under any circumstances. However, even the strongest supporters of color-blindness do not maintain that it is an absolute.[166] In particular, there are certain governmental activities that are recognized as inherently political, and that are recognized as reflecting the choice of the decision-makers in their political capacity and not as the choice of the "government" per se.

An obvious example is the appointment of high government officials by presidents, governors and mayors. When it became evident that President Clinton was determined to fill out the last few positions in his Cabinet with women, this was no doubt a source of amusement to some and of gratification to others, but probably very few people thought he was violating the Equal Protection Clause.[167] No one doubts that presidents consider race and national background in filling offices all the way from Supreme Court justices to ambassadors to lower level executive

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166. See, e.g., Andrew Kull, **The Color-Blind Constitution** 166-67 (1992) (suggesting that even under a color-blindness principle, the government could use race in enterprises such as the census).

167. See Barbara R. Bergmann, **In Defense of Affirmative Action** 1-7 (1996) (describing the search for women for Clinton's Cabinet).

positions.[168] Such appointments are understood to be political. Some Americans may scoff at and others may appreciate the symbolic message that goes to the racial and ethnic groups involved, but no one thinks of them as racial classifications in a constitutional sense. The practice would be just about impossible to police, despite the fact that everyone knows it occurs. And, most importantly, such racial and ethnic choices are ordinarily made by elected officials or party officials, who are subject to electoral check.

Both by reason of history and tradition, and because of the kind of activity it is, I believe redistricting plainly fits into the same category. As we have seen, racial and ethnic districting, carried out without privileging and through a normal, competitive political process, has long occurred without significant alarm or opposition. The activity is correctly seen as a politi-

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168. Consider this account of President Nixon's political strategy:

> In addition to legislative appeals to labor, the White House stepped up recruitment of white ethnics onto its team. According to Nixon assistant Michael P. Balzano, Jr., ethnic hiring after 1970 was intended to serve a political purpose, as Nixon tried to bring disgruntled Democrats into his administration. By October 1971 Pat Buchanan told Nixon, regarding a new Supreme Court appointment, "[W]e ought to get the most brilliant and qualified Italian-American strict constructionist jurist ... and then play up his Italian background--and let the Democrats chop him up if they want." By 1972, as Balzano put it, "a series of agency directorships and assistant secretary positions began going to people whose names were difficult to spell and almost impossible to pronounce."

John David Skrentny, **The Ironies of Affirmative Action** 213 (1996).

cal one of bargaining and not as one of principled allocation of government benefits. Preventing reliance on race would be impossible, so long as the districting process remains a political one. And the primary decision makers are legislators who are elected and therefore are required to pay some heed to public opinion.

I can now summarize my response to the hypothetical conservative interlocutor. You argue that at worst the Supreme Court took things up in the wrong order, because sooner or later race-based districting must end, whether it occurs by federal privileging or state politics. Your argument is unsound for two reasons.

The most practical reason is that you are being unduly optimistic. Perhaps the Court will end the federal privileging of race, but so far it shows no sign of doing so. The latest signals from Justice O'Connor are to the contrary.

The regime that the Court has handed us, at least for the time being, has serious drawbacks, especially from a conservative standpoint. The inroads of the racial gerrymandering cases into the states' systems of representation are far more destructive than previous ventures, such as the one person, one vote rule, because the new cases do not simply impose some constraints, but rather they impose affirmative nonpolitical criteria. Furthermore, the racial gerrymandering cases, together with the VRA, produce the worst possible race policy, from a conservative point of view. Blacks and Hispanics are assured a quota of legislative seats by the federal government. Not quite as many as they had

before, perhaps, and certainly not as many as Liberals think they should have, but still a quota. But they are handicapped severely from engaging in the normal competitive districting process on a level with other groups, because accommodations of their interests may result in racial gerrymandering violations. In short, the Court's regime ~~the Court has created~~ guarantees results and denies opportunity.

Complete color-blindness is neither possible nor desirable in districting. Knowledge of the past and appreciation of the huge number and variety of cross-cutting pressures that exist in a political districting process provide a guarantee that a political process will not be dominated by race. But neither can race be eliminated, without singling out one set of politically salient groups for denial of opportunity. Whatever the intent, the effects of mandatory color-blindness in a political districting process would be Reactionary. Finally, redistricting is analogous to executive appointments as a generally recognized political process governed by political rather than strictly governmental purposes. Participants in the competitive struggle have racial goals, but the system within which they participate has no substantive goals at all.

CONCLUSION: WHAT IS TO BE DONE?

I have attempted to show that a proper Conservative response to the problem of race-based districting is to eliminate federal requirements that privilege race but to leave the states unregulated. However, I have not attempted to demonstrate that the

Conservative position is the best. As Thernstrom writes, "In the end..., views on this issue turn on a much more intractable question: the continuing pervasiveness of American racism." If federally required privileging of race is necessary to prevent pervasive polarized voting from largely freezing out blacks and Hispanics from public office, then the imposition on the states resulting from the VRA may be justified in the same manner as the original Act in 1965. I have not attempted to resolve that question in this paper.

I have identified three major conservative values that are pertinent to the problem. First, conservatives favor judicial restraint. Second, they are solicitous to avoid federal intrusions into the autonomy of state political institutions. And third, they favor policies on race that guarantee equality of opportunity but not equality of results.

People who are conservative with respect to these values may not be Conservative on race-based districting. Contrariwise, persons who are Conservative on race-based districting may not be conservative on all these values. Furthermore, if we consider the Supreme Court, it could be that there are some justices who are both conservative and Conservative but who cannot prevail because the median voter on the Court is not Conservative. For all these reasons, it is worth looking at a few permutations.

For people who are both conservative and Conservative, there is only one element of the mix that does not line up with the others. These people will regard lifting both race-privileging and racial gerrymandering constraints from the states as good

federalism and will also view deregulation as good race policy and good voting rights policy. The problem is judicial activism. Such persons will have to weight the drawback of having the Court strike down (or drastically reinterpret) a major federal statute against the advantages to federalism and race policy.

Another relatively easy case is for Liberals. They favor the maximum number of MMD's, so they will favor expansion of the VRA, by Congress or by the Court. Either they are not conservative on issues of federalism or, if they are, they believe the importance of creating more MMD's outweighs inroads on federalism, or they wouldn't be Liberals. On the other hand, they will oppose the racial gerrymandering cases, and can take comfort in the knowledge that the policy they favor is considerably less of an invasion of state sovereignty than the one they oppose.

Moderates face essentially the same calculus as Liberals, except that they require even fewer inroads on state sovereignty.

Now, what about people who are conservative on the three values but either some brand of Moderate on race-based voting or a member of the Court who is Conservative when the median voter on the Court is Moderate? Such a person will certainly favor reducing the force of the federal mandate. Depending on exactly where such a person (or the Court's median voter) is on the Liberal-Conservative spectrum, the favored policy might be to prohibit the Justice Department from requiring additional MMD's under Section 5 when the MMD's are not required by Gingles; to revisit Gingles and apply Section 2 as it was understood prior to Mobile v. Bolden; or to go back to Bolden, perhaps on constitu-

tional grounds, and hold that federal law prohibits only intentional discrimination.

But whichever of the above options is selected, I contend that such a person should favor abolishing the racial gerrymandering doctrine, despite the recognition that not all all race-privileging will be eliminated. Even when race-privileging, to which the Conservative objects, is present to some extent, the racial gerrymandering doctrine simply compounds the costs, both to federalism and to generally conservative race policies.

Ultimately, it is hard to see how people who regard themselves as conservative (and I use the term now in the ordinary sense) can look at the ill-defined ceilings and floors that squeeze the state's discretion out of their own districting processes and regard it as good. I believe conservatives have been blinded by the immediate gratification from elimination of some of the districts they found most offensive or grotesque, and have failed to consider the broader aspects of what the Court is doing.

One group that has taken comfort from the racial gerrymandering cases is the Radicals. They see that the edifice of judicial regulation that the Court has erected is unlikely to be stable, and they hope that the country will scrap the single-member district system that the Court is plaguing and switch to some form of proportional representation.[169] That the supposedly conserva-

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169. See, in particular, Samuel Issacharoff, Supreme Court Destabilization of Single-Member Districts, 1995 **University of Chicago Legal Forum** 205.

tive justices are giving a shot in the arm to those who would drastically change the electoral system that has been used since this country's birth is a sign in itself that they do not deserve the title.

Part of the Radicals' argument is that it is inherent to any districting system that state authorities must assign representation on the basis of what they believe is the "defining feature of a citizen's existence."[170] That is largely true of a districting system that is conceived to be rational in its content, and therefore based on "criteria" and "principles," traditional or otherwise. The Radicals argue state authorities, judges included, cannot do this as well as people can do it for themselves, within a system of proportional representation. But there are serious drawbacks to proportional representation, and some of us are conservative enough in the inertial sense to believe that a system that has served the country well for centuries should not be scrapped for something that looks neater on a mathematician's desk.

Fortunately, the theoretical plight of single-member district systems is not as desparate as the Radicals suppose. Legislators developing a plan through a process of competition and negotiation make no decisions about the "defining feature of a citizen's existence." They make decisions about what set of lines can attract the required majority in the legislature and the governor's signature. The content of such a plan is not and is

170. Samuel Issacharoff, Groups and the Right to Vote, 44 **Emory Law Journal** 869, 903 (1995).

not intended to be rational in its content, any more than tomorrow's stock market is supposed to be rational. It just reflects the forces applied to it, for any number of reasons, good and bad.

A single-member district system, perceived as a product of and an instrument of politics, can serve the country as well for the next two centuries as it has done for the last two. But the system is not invulnerable to shock, and right now the Supreme Court, in the racial gerrymandering cases, is administering what promises to be the most severe shock in its history.

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