

CONFERENCE

THE SUPREME COURT, RACIAL POLITICS, AND THE RIGHT TO VOTE: *SHAW v. RENO* AND THE FUTURE OF THE VOTING RIGHTS ACT

HOSTED BY THE AMERICAN UNIVERSITY LAW REVIEW
AND THE LAW AND GOVERNMENT PROGRAM OF
THE WASHINGTON COLLEGE OF LAW

TABLE OF CONTENTS

Introduction	1
I. The Rehnquist Court and Voting Rights	2
II. Understanding <i>Shaw v. Reno</i>	28
III. The Value of Majority-Minority Congressional Districts	55
IV. Future Civil Rights Strategies and Alternative Voting Systems	82
V. Luncheon Address by Julian Bond	108
VI. Appendix I: Participants	118
VII. Appendix II: <i>Shaw v. Reno</i> Bibliography	124

INTRODUCTION

On September 9, 1994, *The American University Law Review* and the Law and Government Program of The Washington College of Law co-hosted a conference addressing voting rights, with an emphasis on recent Supreme Court jurisprudence, and *Shaw v. Reno* in particular. The conference brought together many of the leading scholars and

practitioners involved in this area of the law.* The day's events included four panel discussions and a luncheon speech by Julian Bond, the transcripts of which the *Law Review* is honored to publish.**

I. THE REHNQUIST COURT AND VOTING RIGHTS

PROFESSOR RASKIN (MODERATOR): Good morning, everyone. Thank you all for getting up at such an early hour to kick off the day with us. I want to welcome you to the Washington College of Law and American University.

This conference promises to be an extraordinary event, and it is cosponsored by the Program on Law and Government at the Washington College of Law and the American University Law Review, which has been the catalyst behind this conference. I would like to start by saluting the AU Law Review and Tom Goldstein, its editor-in-chief, for coming up with the idea for this conference.

My name is Jamin Raskin. I am the codirector of our Program on Law and Government. I will be our moderator today, although my colleagues will tell you that I pretty much take the word "moderate" out of "moderator." But I will do my best to give everybody a fair shot and to lead an exciting exchange of ideas.

We have got an extremely ambitious agenda, posing four clusters of questions, each of which could constitute a conference of its own, but we have created four panel discussions on them.

Since we have gathered so much raw talent and knowledge in one room, there will be many voices struggling to be heard. We have set the meeting up purposefully as a dialogue and not as a set of papers, each of which would fly off in its own direction. We want the panelists to interact with one another to improve, enlarge and elaborate upon one another's ideas and to challenge views which you might think are mistaken or complacent. Our hope is that the result will be a series of discussions that will be illuminating and exciting to participate in, to witness today, and finally to read in the pages of the AU Law Review when it is published as a special symposium issue.

So let us start now with our first panel discussion. The theme is: The Rehnquist Court and voting rights: Where is the Court headed now?

* Brief biographies of the participants are set out in Appendix I, at page 118.

** The participants and *Law Review* staff made minor editorial changes to the transcripts where necessary for clarity.

Let me start by posing this question, and we will throw it open to you:

Judge Phillips, writing for the Eastern District Court in North Carolina on August 1, several weeks ago, returned the Supreme Court's serve in *Shaw v. Reno*¹ with a 147-page *tour de force* opinion which found that the majority African-American districts in North Carolina passed the new strict scrutiny standard.² The decision ends like this:

"The question in the end is whether a deliberately race-based districting plan enacted by an overwhelmingly white legislature in one of the former Confederate States in order to comply with its understanding of the commands of national law enacted to enforce the guarantees of the 14th and 15th Amendments shall be declared unconstitutional at the behest of five white voters whose voting rights have been in no legally cognizable way harmed by the plan."

Now, my question is: Do you think that the Supreme Court ultimately will be willing to accept this judgment, or do its holdings in *Shaw* and *Johnson v. DeGrandy*³ now require it to reject this kind of conclusion?

PROFESSOR KARLAN: Well, I think that the Supreme Court had no real idea when it decided *Shaw* about the level of litigation that it was going to have to see over the next couple of years. It has six cases that will be up there by the end of this year, and that doesn't even count the likelihood that there will be additional cases brought up as people start to try to apply *Shaw* to districting for state legislatures or local bodies.

I find it hard to believe that the Supreme Court isn't going to try and move back somewhat from *Shaw*, at least to cut down on the amount of litigation. The thing that is most fascinating about the North Carolina opinion in *Shaw II*, coming back on remand, it seems to me, is that the district court has to strain so hard to uphold the districts because the legal standard of *Shaw* is just so likely to provoke litigation.

The point that Judge Phillips is making at the end there, that there has been no denial of any cognizable voting right of any of the plaintiffs, seems to me something the Supreme Court had not addressed in *Shaw I* and may address, in order to cut back on the

1. 113 S. Ct. 2816 (1993) (*Shaw I*).

2. *Shaw v. Hunt* (*Shaw II*), 861 F. Supp. 408 (E.D.N.C. 1994) (2-1 decision).

3. 114 S. Ct. 2647 (1994).

amount of litigation, when *Shaw* and the other five cases get back up there: the legal question of standing for the white plaintiffs.

MODERATOR: So you think that the Supreme Court will retreat somewhat from *Shaw v. Reno* and tolerate lower courts like the North Carolina court going in their own directions in interpreting the new standard?

PROFESSOR KARLAN: Yes. What we may ultimately see, maybe not in this round of cases but in the next, is something like what we saw in the pornography cases in the 1960s. There was a period of time where the Supreme Court took every pornography case, watched the movie, and decided whether they knew it when they saw it. Ultimately, in *Miller v. California*,⁴ the Supreme Court retreated from that and said, "We're going to allow local standards to govern." And I think they may retreat here and start allowing state legislatures and the Justice Department to control the districting a little more because otherwise the Supreme Court is going to spend five years out of every ten hearing all of the challenges to districts that some person or another just doesn't like.

PROFESSOR BUTLER: I disagree. I think that the majority of the Court that decided *Shaw v. Reno* is also going to decide that *Shaw II* is also wrongly decided, and I don't think they're going to conclude that this is ultimately a voting case at all, but rather a case about racial classification and that they are going to conclude that segregated voting districts are no more constitutional than segregated schools or segregated drinking fountains.

MS. WRIGHT: You raised the question in your initial statement of, in light of *Johnson v. DeGrandy*, where do we think the Supreme Court is headed? And I would have to say that if you look at *Johnson v. DeGrandy*, which is a voting rights case handed down on the last day of this year's term, I would have to agree with Pam Karlan that the Supreme Court appears to be moving toward stepping back somewhat from the brink that it approached in *Shaw v. Reno*.

In *Shaw*, what you saw in Justice O'Connor's majority opinion was an almost totally pejorative description and discussion of majority-minority election districts. Very harsh rhetoric was used to describe these districts. The term segregation, which was used by Professor Butler, was used by the Supreme Court as well.

When you look at *Johnson v. DeGrandy*, what jumps out at you is that all of that is missing. And it is especially conspicuous in its absence in Justice O'Connor's concurring opinion in *Johnson*. In the *Johnson*

4. 413 U.S. 15 (1973).

case, the Supreme Court, while it rejected the claims of the particular minority voters in front of it, articulated some standards that certainly recognized the continuing role of majority-minority election districts in providing some measure of political opportunity for minority voters in situations where voting is polarized along racial lines, which is something that we see in many states in this Nation to this day. And certainly North Carolina is one of those states.

And if you look at Justice O'Connor's concurring opinion in *Johnson*, it is very striking that instead of repeating all of this pejorative rhetoric about majority-minority election districts, she makes statements such as, in looking at a state legislative redistricting plan, "Lack of proportionality [for minorities] is probative evidence of vote dilution." In all cases, she believes that lack of proportionality is relevant in proving vote dilution. She doesn't believe that proportionality is the sole dispositive issue in determining whether a plan satisfies the Voting Rights Act, but she says that lack of proportionality is always probative evidence of vote dilution. None of the pejorative rhetoric was repeated there. I think that is very significant in looking at where the Court is headed ultimately on this question.

MODERATOR: But you think that in *Johnson v. DeGrandy* the Court has already begun to soften somewhat its stance in *Shaw v. Reno*. In *Shaw*, the Court appeared to be headed in the direction that Professor Butler was suggesting. It could be seen as an initial move to dismantle many of the majority-black and Hispanic districts, perhaps even all race-conscious districting. And it seems as if Professor Butler is taking the position that the Court may still be headed there.

PROFESSOR PILDES: I wanted to respond to that because I think one of the problems with these discussions is that the issues quickly get raised to very broad levels of political conflict, such as whether black districts are ever permissible or, in Professor Butler's phrase, whether creating segregated districts is ever permissible.

And in a sense that is what Judge Phillips also does in that sentence you quote at the end of his opinion. He raises the issue to the level of the general question can these districts ever be created?

I don't think that that is what *Shaw v. Reno* was about. *Shaw* concerns a much narrower set of circumstances and Judge Phillips doesn't actually address those more specific circumstances in that last sentence. *Shaw* addresses districts that are intentionally designed to have a minority in control but which are so geographically contorted that they depart from all familiar principles of districting.

Many of the initial reactions to *Shaw* responded to the decision as if it were a sweeping attack on race-conscious districting. That is not

the way I read the opinion. I don't think that is what *Shaw* is about. Instead, it addresses oddly shaped districts and those districts alone. As a result, I am not sure that Judge Phillips's opinion really addresses that question as directly as it needs to be addressed to be persuasive when the case comes back to the Supreme Court.

MODERATOR: Well, perhaps then the Texas⁵ and Louisiana⁶ courts had a better understanding of what the Supreme Court meant. However, in Louisiana and in Texas the district courts struck down oddly shaped minority districts.

PROFESSOR ISSACHAROFF: I think it is important to note that in *Shaw* the Court had a majority for striking down not only the excesses of race-conscious districting, but also for moving against the Voting Rights Act if it wished. The Court had a tool available to it, which was simply to say that you cannot take race into account in districting. And it did not exercise that tool.

I think that the problem with *Shaw* is revealed by analogy to the pornography cases under the First Amendment. In each context, the Court is trying to identify a constitutional doctrine of "Don't do it to excess in a way that is offensive," without defining a substantive underlying principle. So what you have in *Shaw* is an irresolute standard under which a districting plan may violate something called traditional notions of districting, but in which the contours of the new principle are neither explicated in the opinion nor are they intuitively obvious from American political experience.

The problem arises when the Court wants to walk a middle line. Despite the harsh rhetoric in *Shaw*, I think the Court wants to find a balance in which promoting minority representation is allowable, as in *Johnson v. DeGrandy*, but in which it doesn't come to dominate all politics as we know it. And that is a hard line to implement and a hard line to constitutionalize.

I think the North Carolina district court on remand in *Shaw* took the Supreme Court at its literal word. The district court's opinion on remand read as if to say, "Okay, if we find these technical requirements for meeting what is a compelling state interest and what are narrowly tailored responses, then we can justify this district." I think they probably got it wrong. I think the Supreme Court is holding out the snake-like district in North Carolina as an example of something

5. *Vera v. Richards*, C.A. No. H-94-0277, 1994 U.S. Dist. LEXIS 12368 (Aug. 17, 1994), order, 1994 U.S. Dist. LEXIS 12334 (S.D. Tx. Sept. 2, 1994).

6. *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993) (*Hays I*), vacated and remanded, 114 S. Ct. 2731, on remand, No. 92-1522, 1994 WL 477159 (W.D. La. July 29, 1994) (*Hays II*), stay granted, 115 S. Ct. 31 (1994).

which the Court is not prepared to tolerate. The same five votes are still there on the Supreme Court and I would tend to doubt that the North Carolina district will survive.

MODERATOR: Don Verrilli, you have practiced a lot before the Supreme Court. What is your sense about where the Court is headed here? Do they indeed want to treat racial gerrymanders like political pornography, i.e., "they know it when they see it"? Are they willing to take up dozens of these cases in order to pick and choose which are okay and which are not?

MR. VERRILLI: Well, I think it's hard to talk about "the Court" here. I think the question really is what does Justice O'Connor want to do. And we now know more than we did at the time *Shaw v. Reno* was decided.

If, by some fortuity, you had attended oral arguments about Voting Rights Act cases that term, the 1992-93 term, *Shaw* wouldn't have come as such a surprise. Although the *Voinovich v. Quilter*⁷ case ended up being a fairly solid affirmance of the basic approach to section 2 of the Voting Rights Act, the oral argument in *Voinovich* was dominated by the question of when, if ever, race-conscious districting is permissible. There was an extraordinary amount of hostility from the Bench during that argument about that proposition, and lo and behold probable jurisdiction was noted in *Shaw I* a week later.

So you had that kind of evolution, I think, going on at the time of *Shaw*, but now more has happened. You now have Justice Thomas' opinion in *Holder v. Hall*⁸ joined by Justice Scalia.

MODERATOR: Would you describe that just a little bit for us?

MR. VERRILLI: That was really a fairly amazing opinion in which Justice Thomas on the one hand offered a plainly implausible reading of section 2 of the Voting Rights Act, the 1982 amended section 2 of the Voting Rights Act, to exclude claims of vote dilution, but then offered a very powerful critique of the whole idea of race-conscious districting and of where this process was heading, in his view, the sort of unstoppable internal logic of taking race into account. So you've got that piece now.

You also have a vote by Justice Scalia against staying the decision in Louisiana.

So it seems to me there is an entrenched right-wing that is quite hostile to the idea of race-consciousness.

7. 113 S. Ct. 1149 (1993).

8. 114 S. Ct. 2581 (1994).

Justice Kennedy has given signals in that direction in separate opinions in Voting Rights Act cases.

What the Chief Justice will do on this is unclear. His pattern of voting in this area is not entirely consistent.

But it seems to me it comes down to Justice O'Connor. It's certainly true that Justice O'Connor in the *DeGrandy* case backed off the harsh rhetoric, and it is certainly true that she has a record of being an incrementalist in virtually every area that is important to her.

So, what I would suspect we will see, if the North Carolina case is the case they really focus on, would be a ruling striking down that district 5-to-4 without reaching the broad question of the permissibility of race-conscious districting. I think the odds are high they'll say we don't need to reach that question, this is what we were talking about in *Shaw I*, nothing that happened in the record justifies the creation of this extreme a district.

But I think it will be harder if the Louisiana case is decided in tandem with *Shaw* or even before *Shaw*, because there the State moved from a more egregiously misshapen district to a less misshapen district, posing the race-consciousness issue in a stronger way.

PROFESSOR BUTLER: Let me make clear that I am not saying that under no circumstances can districts be drawn that are race-conscious. My remarks were that you cannot, with no justification, simply decide that you are going to create a district, the only criterion of which is asking "How many black people can we put in that district?"

That is what the State of North Carolina did. Now, they certainly attempted to justify it. I don't think that that justification is going to fly, because those districts are not required by the Voting Rights Act, and then you have to ask the question, "May they voluntarily use race with no justification?" And I come back to the answer "no."

DeGrandy was simply a different case. *DeGrandy* was a Voting Rights Act case. It was a Voting Rights Act challenge. It was a case in which if the Court had concluded that there had been a Voting Rights Act violation, presumably, they would have concluded there had been discrimination based on race, in which case a remedy based on race would have been appropriate and absolutely consistent with existing jurisprudence.

What the Supreme Court concluded in *DeGrandy* was that there was no violation of the Voting Rights Act. The Court specifically did not reach any issues that might have been presented because Florida quite obviously had consciously created minority districts. What Florida had not done in the districts that were challenged was to create districts

that had no function other than to group together people of various races.

So I think they were just quite different situations and that what happened in *DeGrandy* is not going to be terribly helpful in predicting how these districts that are created solely on the basis of race are likely to fare.

MODERATOR: So are you comfortable if the Court rests with the doctrine that a State may not use race in order to create majority-black or Hispanic districts only in the context in which you have a district which is extremely contorted or odd in configuration?

PROFESSOR BUTLER: I am comfortable with the proposition that a State may realize that it has an obligation under the Voting Rights Act not to dilute minority voting strength and that they may take reasonable precautions to see to it that they don't expose themselves to challenge under the Voting Rights Act. And if I were advising a State, my advice to it would be to employ standard districting criteria throughout the state and, when it's possible following those criteria, to create districts that are in fact majority-minority districts, that is a safe course of action.

When the State goes beyond that, however, then it runs into the constitutional problem. The line, the narrow path the State must follow is between going too far and violating the Constitution and not going far enough and having someone sue you under the Voting Rights Act.

PROFESSOR KARLAN: Well, the point at which Professor Butler ended is part of what I wanted to say, which is that, for a State like North Carolina, whenever it creates districts it will face a lawsuit. If it draws a second majority-black district, it will face a lawsuit from white voters who don't like the shape of the district; if it doesn't draw a second majority-black district, it will face a lawsuit from black voters who claim that the State could have drawn one.

MODERATOR: Does *Johnson v. DeGrandy* foreclose that second suit by minority voters?

PROFESSOR KARLAN: No, it doesn't foreclose the suit. It may foreclose winning some of those suits.

But there are two different questions here. One question is: Are we going to force states to litigate every decision they make about districting because someone will have standing to challenge it? The other question is: At what point in the process will a State be allowed to draw the districts it wants?

A lot of the reason that Judge Phillips's opinion on remand is so long is because he spends a lot of time talking about the precise

districts in North Carolina and talking about the North Carolina 12th District. If you read the Supreme Court opinion, you would think this was a balkanized, bantustan district. If, instead, what you did was look at who was in the district, it's in fact the most racially integrated district in North Carolina.

MODERATOR: In the history of North Carolina.

PROFESSOR KARLAN: In the history of North Carolina. And it is one of the really profound tragedies of American politics that drawing a district that is fifty-five percent black is viewed as racially segregated apartheid or balkanization. No one says that a district is fifty-five percent white is a balkanized, apartheid-driven racially created district.

It is also the only urban district in North Carolina, which I think is important to point out. When you look at Judge Phillips's opinion, he talks about the characteristics that the people in the district share. Although the district strings these people together along I-85, this is not a contorted district if what we are talking about is representing voters as opposed to representing trees and pieces of land.

MODERATOR: Professor Kairys, let me ask you a question. Do you think that the Supreme Court has found that unless a district is a perfect square or triangle or circle, white people have a constitutional right to be in the majority, and how would you read this decision in the context of other race cases that the Court has handed down recently?

PROFESSOR KAIRYS: I am very concerned about the differences between the approach the Court has taken when whites are disadvantaged or appear to be disadvantaged and the approach the Court has taken when blacks or other minorities appear to be disadvantaged. This cuts across various discrimination issues; it isn't only a question of voting.

In a recent article,⁹ I compare three cases. In *Memphis v. Greene*,¹⁰ a traffic barrier was put up in the City of Memphis between a white community and a predominantly black neighborhood. The white community that initiated and requested the barrier was founded as a segregated white community, and it's still exclusively white within a city that now is about half black. The Court approved the barrier without even requiring a specific explanation from the city, on the ground that the black plaintiffs had not met the burden of proving purposeful discrimination, despite the lack of a legitimate or sufficient

9. David Kairys, *Race Trilogy*, 67 TEMP. L. REV. 1 (1994).

10. 451 U.S. 100 (1981).

government interest and the similarities to traditional patterns of discrimination.

When you compare that to the assumptions and the moral and legal basis of *City of Richmond v. J.A. Croson Co.*¹¹ and *Shaw v. Reno*, particularly, the disparity is really startling. I have come to the conclusion that there is now a dual system of equality rules. Led by the more recent conservative judges—who are now usually called “moderate,” and sometimes are, but not on racial equality issues—the Court has drastically different rules and approaches in cases where whites are disadvantaged and cases where minorities are disadvantaged. Let me summarize it briefly.

In cases where blacks or other minorities or women are disadvantaged, there are three basic characteristics to the Court’s approach. First, there is an inordinate burden to prove purposeful action and a tendency to ignore the appearance of discrimination or stereotyping or even strong circumstantial proof. One of the instances of that is *Memphis v. Greene*.

Second, judicial restraint, articulated as a highest-level, general principle.

Third, a moral skepticism that doubts that whites discriminate anymore and questions the credibility and motives of challengers who claim otherwise.

When you look at cases where measures are viewed as disadvantaging whites, the approach is different. In *Shaw v. Reno* I think it’s hard to say there was really any disadvantage, but it’s perceived that way in the majority opinion. There is no disadvantage in the sense that there is the same number of voters in every district and the proportion overall of majority-white districts is actually greater than the white proportion of the State.

If you look, though, at those cases, there is, first, a minimal burden satisfied by circumstantial evidence. The appearance of discrimination or stereotyping is conclusive of at least a *prima facie* case, and a remedial or affirmative purpose is sufficient even if it is a clearly good-faith response to conceded discrimination.

Second, there is judicial activism with no discussion or mention of judicial restraint.

And third, moral repudiation, drawing on the history and symbols of the worst forms of racism.

11. 488 U.S. 469 (1989).

An easy summary of the Court's approach in *Memphis v. Greene*, *Washington v. Davis*,¹² and the whole line of minority claims of discrimination since the early 1970s, is moral skepticism and judicial restraint.

On the other hand, in cases like *Shaw v. Reno* and the other cases we're talking about today, and beyond the voting context, it seems to me we're talking about judicial activism and moral repudiation. The question becomes "smoking out racism"¹³ in *City of Richmond v. J.A. Croson Co.*, and "political apartheid"¹⁴ in *Shaw v. Reno*. Surely, the symbolic question of apartheid would seem to be much more present in *Memphis v. Greene* than *Shaw v. Reno*.

MODERATOR: Just to follow up on that point, in the Texas remand case, the court said that racial gerrymandering is unconstitutional but it is also morally wrong, inconsistent with our founding traditions and Martin Luther King's vision.

To what extent have the symbols and ideas of the civil rights movement been appropriated and corrupted by a conservative majority targeting the success of the Voting Rights Act?

PROFESSOR ISSACHAROFF: The problem is that if you ask people in the street what is the symbolic message of the civil rights movement, the answer will be each person should be judged independent of color, race, creed, or any other such characteristic. That language of formal equality is easily appropriated in decisions that want to call into question what the courts see as excesses in State use of racial classifications.

I think that the problem that the Court will run into with the next generation of *Shaw* cases is that *Shaw* went up to this point of looking hard at this question and then never answered it. As many people here have commented, the rhetorical level of *Shaw* is high; its analytical level and doctrinal contribution is low. And I think that there was a sense in the Court that an opinion which stood simply as an admonition against certain kinds of excesses could suffice. The Court demanded that States not allow their politics to look like apartheid, that they not make it look like political choices are simply driven by race in this society, even if they may in fact be driven by race.

The Court thought that this admonition would be enough, that it would terminate the inquiry and then everyone would proceed. And

12. 426 U.S. 229 (1976).

13. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

14. *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993).

now they are going to get back a handful of these cases. We don't know how many they are going to note probable jurisdiction on, but they have to take Louisiana and Georgia,¹⁵ presumably they have to take North Carolina, they may sweep Texas up as well.

And when they go back, they now have to confront what Don Verrilli identified, Justice Thomas' opinion in *Holder v. Hall*, which raised the stakes in these cases dramatically because of his challenge, "You thought you could avoid the ultimate question by refusing to address whether use of racial classifications per se is unconstitutional. Well, I say it is. And now I have got two votes that are going to push that issue hard and those are two votes that constituted part of the five-vote majority in *Shaw*."

So I think that the next round of cases doesn't have the easy "doctrinal out" that was available in *Shaw*. After all, the *Shaw* holding was simply that the plaintiffs had stated a cause of action which could survive a motion to dismiss. It had been perfectly obvious since *Gomillion v. Lightfoot*¹⁶ that if you challenge line-drawing on racial grounds, it states a cause of action. That is hardly noteworthy.

PROFESSOR PILDES: I wanted to make a couple of points here.

One is that we focus very much on the Court and what its stance is toward the Voting Rights Act. But I think it is important to go back to what Congress did in 1982, or really what it didn't do, because I think an enormous amount of the tentativeness and the uncertainty that we are now seeing on the Court in the voting rights field is a reaction to the lack of clear resolution in the '82 amendments from Congress of how these issues should be dealt with.

The '82 amendments to the Voting Rights Act were absolutely major civil rights policy developments. And Justice Thomas I think is quite clearly wrong in not believing that those amendments were designed to make vote dilution illegal.

But precisely what vote dilution was, how to recognize it, how to define it, were questions Congress refused to confront. And a lot of the questions that are now being addressed in the courts are ones that were posed to Congress at the time and that Congress failed to resolve clearly. That is one of the important variables to the context here.

Second, in terms of debates about gerrymandering, I think it's important to keep two things in mind. First, many of these extremely contorted districts that we have been talking about here are not

15. *Johnson v. Miller*, No. 194-008, 1994 U.S. Dist. LEXIS 13043 (S.D. Ga. Sept. 12, 1994).

16. 364 U.S. 339 (1960).

necessary to create a majority-black district in the states involved. There are findings to that effect in the North Carolina case and in the Louisiana case, although, as Don Verrilli has pointed out, Louisiana has now become somewhat more complicated since the legislature tried to respond by drawing a more compact district.

But the point is we still don't know how many minority seats are actually threatened by a principle which would rule out of bounds the most extreme contortions in the use of district boundary lines to achieve minority control of districts.

Finally, when you look at the data, at least the data I have been able to collect covering the last 20 years, there is no question that districting has become a much more gamesman-like process involving more distorted district shapes in the last round of redistricting than in previous years. And that is clear in many of the states that are now being challenged. So I think it's a mistake to assume that districts have always had these sort of bizarre shapes and suddenly they have become a constitutional problem at this particular moment when they are used to benefit minority voters.

In fact, what is going on is that we do have much more distorted districts being drawn both to benefit minority voters and for other political purposes.

MODERATOR: And part of that has to do with the development of computer technology that allows much easier manipulation of the district lines. But do you think that the Court eventually has to confront the issue that contorted districts are okay for the purposes of incumbent protection, and most incumbents are still white, but not okay for the purposes of facilitating majorities of blacks or Hispanics?

PROFESSOR PILDES: The districting process is a very complicated game involving a mixture of formal rules and implicit norms. Part of what has happened with the Voting Rights Act in the last round of redistricting is that, as more and more distorted districts become legitimate means of creating minority districts, that process also has legitimated more and more distorted districts for other purposes.

These developments are linked. If you look at a state like North Carolina, for example, and ask how many districts in the 1980s fell below a certain measurable standard of compactness, the answer was none. At that same standard in the 1990s eight districts in North Carolina—not just the two challenged in *Shaw*—fail to meet it and hence might be considered “bizarre.” And I think you can't see these as disconnected developments.

So if some constitutional principle were to emerge which constrained the shapes the districts could take, I suspect it would have radiating effects on the districting process in general.

MODERATOR: Even though strict scrutiny is not to be applied?

PROFESSOR PILDES: Even if as a formal constitutional matter that principle didn't apply when the district shapes were distorted for partisan reasons or incumbency protection reasons.

MODERATOR: Is it troubling that the Court tolerates redistricting to protect incumbents and partisan majorities? Will this become a cutting issue?

PROFESSOR ISSACHAROFF: Yes. I think that is the key issue here because the record is clear in Texas, and I believe it's clear in North Carolina as well, that if you took incumbency protection out of the picture, you could get minority districts that were traditionally configured. One enters the realm of creative line drawing often where incumbents have the first bite at the apple and then minorities, who have had less power traditionally, are left to try to cobble together a district out of the leavings of more powerful political actors.

You have a number of factors that come together. First of all, in the 1980s the Republican Party, under Lee Atwater, made a concerted effort to go after the redistricting process, which they had basically not touched much beforehand. Second, the 1982 amendments to the Voting Rights Act gave a formal mechanism for direct court review of the substantive decisions of redistricting that was really not that present in the 1980 round of redistricting and was not really present at all in the 1970 round of redistricting. Third, the computer technology means you can do things that only bizarre geniuses such as Phil Burton could do in the last round of redistricting; that is, in your mind configure a 365-sided district. There are few people who can do that. Now anyone can do that with the computer technology.

The result is that you are getting these districting forms that lose the illusion of being neutral in any way. And right now, because of the weakness of the political gerrymandering doctrine under *Davis v. Bandemer*,¹⁷ the only way to get them into the court substantively is through the question of minority representation. So all the pressure is being put under the Voting Rights Act and under the equal protection clause.

17. 478 U.S. 109 (1986).

And Pam Karlan, in an article in the Texas Law Review,¹⁸ and another one in the Supreme Court Review,¹⁹ I think demonstrates that the Voting Rights Act and the equal protection cases are often times just a pretext for a second round of partisan fighting over what the nature of redistricting will be.

PROFESSOR BUTLER: I just want to add one piece of factual information to the previous two comments. And that is the importance of the change in the format of the census data. I think even more important than the improved computer technology is the fact that now the census reports populations for every closed polygon. In the past, even with the use of computers, gerrymandering was limited by the fact that the pieces of geography were fairly large and it wasn't possible, unless you could get the census to actually split enumeration districts or census blocks, to create districts that were no wider than the interstate. You simply couldn't sort out the population.

More than anything else, the new format of the census has produced these problems, and of course the Census Bureau had no idea it was going to produce these kinds of problems. They thought they were saving themselves work because they were forever being asked to split these larger units into smaller sections.

MR. VERRILLI: Kay Butler and Brenda Wright and I were all in the courthouse in Tallahassee for the trial that led to the eventual decision of the Supreme Court in *Johnson v. DeGrandy*, and one impression that I came away from that trial with, something that I think validates what you are hearing from a lot of people this morning, is that the panel, the three-judge panel deciding *Johnson v. DeGrandy* in the district court, thought that the legislative plan stunk to high heaven. They thought it was an outrageous effort to manipulate lines for partisan reasons, to protect incumbents; districts would be drawn with these little blips in them to make sure that the incumbent's residence was inside the district, and things like that.

And that delegitimated the whole enterprise, I thought, in the eyes of the court and made it much more vulnerable ultimately to the Voting Rights Act challenge. There was a sense that this plan wasn't entitled to any real deference as an exercise of democratic politics, that this thing stunk and of course it was a partisan gerrymander and they weren't going to let you use the Voting Rights Act in this way.

18. Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993).

19. Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, in 1993 SUP. CT. REV. 245.

It was, I thought, a very strange and extra-legal dynamic, but one that explained a lot about what happened in the district court. They just thought, "We're not going to listen to your Voting Rights Act defenses. This was all a partisan game, and we know it and we're not going to pay any attention to you."

MS. WRIGHT: To follow up on that, I think there is a lot of truth to what Don Verrilli just said. And I think that the issue of shape of a district, if the Supreme Court is going to treat that as a matter of independent constitutional significance, I think we are going to see how much trouble that this issue is going to get the Court into.

I think a lot of the comments here this morning have sort of hinted at this issue, but the issue of shape, as the Court itself recognized in *Shaw*, doesn't really have any independent constitutional status. There is no constitutional provision that says districts have to be compact.

MODERATOR: Or even that there have to be districts at all.

MS. WRIGHT: Or even necessarily that there have to be districts at all. That is correct.

The Court is, I think, searching for a way to say that you can be race-conscious but you can't be overly race-conscious. And the great difficulty of drawing that line has led the Court to seize on the issue of shape as a possible neutral way of determining when a district is permissible and when it's not.

The problem is that if you start down that path, the Court is going to find that it is creating a very unfair double-standard that works to the great disadvantage of minorities and yet leaves intact many very oddly shaped districts with majority-white populations where States will be able to come in and say, "Well, we didn't really do it for racial reasons. We just did it to protect the incumbent."

You could look at a district such as the 4th Congressional District in Tennessee, which I happen to have a map of here. And I don't know how well the audience can see this. But this district has been described as a district that is 300 miles long, it touches the borders of four different states, it crosses a time zone, and it's a district that has essentially existed in this form in Tennessee for quite some time. It wasn't just a creation of computer technology that became available in 1990.

This district is an overwhelmingly white district that happens to be represented by Representative Jim Cooper in Tennessee. And I am not picking on him in any way.

But what I am suggesting is that the Supreme Court I think is going to have a great deal of difficulty in applying a standard that says shape

is the real issue here, shape is the dividing line that separates constitutional from unconstitutional districts, because if it does that, it is going to have to take a much harder look at all sorts of districts, not just districts drawn for—

MODERATOR: Are you taking issue with Professor Pildes's characterization that there is something radically new about the so-called racially gerrymandered districts? After all, gerrymanders were a creation of the 19th century, not the 20th century. We have had the language around for a long time.

MS. WRIGHT: Well, I am certainly not disputing the fact that the number of districts that are dramatically irregular in shape has increased greatly as a result of the 1990 census and the computer technology that has become available. I don't think I am disputing that at all.

But you can point out two things. One is that these very oddly shaped, elongated districts are not a sole creation of the 1990 redistricting.

And also, the timing is not really necessarily the important thing, because if the Court is moving toward a principle that says there is no strict scrutiny that applies to an oddly-shaped majority-white district drawn to protect a white incumbent, then all of the very strangely shaped districts that are majority-white in population, whether they were drawn in 1990 for the first time or not, are still going to have a special protection that is not available for the majority-black districts, leading to a standard that disadvantages the groups that probably need the most protection in the redistricting process.

PROFESSOR PILDES: I wanted to make a comment on the relationship of politics to race in this area, which is what you raised by asking about the role of incumbency protection or the pursuit of partisan political advantage.

One way you can understand the story here is that politicians are cynically manipulating the Voting Rights Act for these other purposes. And in contexts where these distorted, bizarre districts are not necessary to achieve a minority-controlled district, they nonetheless get created in order to preserve incumbents' bases or to pursue partisan political advantage. And then politicians hide behind the Voting Rights Act and say, "We had to do this. The Justice Department requires it. The Voting Rights Act requires it." But in fact, the goals of the Voting Rights Act can be met with districts that are more traditional.

Of course, the problem with creating those districts would be that the people in control of the process think their side will be disadvan-

taged if they are constrained to draw minority districts that respect traditional districting principles.

And so, rather than seeing some of these constitutional developments as an attack on race-conscious districting or race-conscious districting in the context of extremely distorted districts, there is a way you can look at this as bringing some integrity to the process and establishing what the Voting Rights Act really does require.

MODERATOR: You are suggesting that white politicians are hiding behind the Voting Rights Act in order to produce other electoral outcomes through the districting process?

PROFESSOR PILDES: It's clear from the factual record in some of these cases, particularly North Carolina, that that is exactly what happened in the districting process. When North Carolina was told by the Justice Department that it had an obligation under the Voting Rights Act to create a second minority district, it decided to draw the district that is now subject to litigation in the way it did, not because that was the most compact minority district that could be created, not because the Justice Department had suggested that's where the district should be drawn, but because powerful Democratic incumbents in control of the process in North Carolina thought they would do much better with the minority district being drawn in this highly contorted way. And I think that is quite clear from the record.

MODERATOR: You are thus undermining the idea that these minority districts are being drawn oddly for a racial purpose, you're saying, at best, that this motivation is a component of it but there are really partisan and even individual careerist ambitions that may be driving the legislative calculation.

PROFESSOR PILDES: And I think that is something everybody on the panel has acknowledged. These forces are all at work in the intensely conflictual process of zero-sum politics that redistricting involves.

These forces—partisan politics, incumbency protection—are often the primary forces, not behind the creation of the minority district itself, but behind the drawing of its boundaries in the particular ways in which these districts have been drawn in some places.

MODERATOR: Do I take you to say then that there is some constitutional basis for finding that certain shapes are so outlandish or extravagant that they cannot withstand constitutional scrutiny?

PROFESSOR PILDES: I think that most people, as you said, from the 19th century on are sort of revulsed at the extremely distorted districts that politicians have attempted to create at various points in

the past. Whether that revulsion should—or can be—translated into administrable constitutional doctrine is a far more difficult question.

MODERATOR: But people are pretty complacent about it. After all, when you live in a district, you are not living in a map, you don't really know what it looks like. Are not the vast majority of House districts odd-looking to someone?

PROFESSOR PILDES: I think if you look at the editorials in newspapers in these various parts of the country, if you look at the stories that are being run in North Carolina, Florida, Texas, Illinois, you will find dozens and dozens of stories where local newspapers at least view this as a major public issue. They express outrage not just when highly contorted districts are minority districts but when politicians look like they are taking over the process and deciding who they want as their constituents instead of their constituents deciding who they want in office.

MODERATOR: You have candidates choosing voters rather than voters choosing candidates.

PROFESSOR BUTLER: I agree with the observation that the Voting Rights Act is being used by all sides for partisan advantage. A recent reapportionment case in South Carolina, a room full of lawyers—I can't even tell you how many parties were involved—and everyone was touting their plan as the plan that was best for blacks. In fact, of course, all these plans were best for their own individual interest.

But I do disagree on one point with most of the commentators. I have been involved with States at the level at which they begin to draw the districts. My experience is there is a tendency to draw the majority-black districts first.

Now, in the case of North Carolina, I certainly don't know, but my suspicion is if there really were another nice, compact majority-black district in North Carolina, we would have seen it somewhere. And I have not seen it.

My experience in South Carolina was that they drew the black district and then they protected the incumbents. Now, not to say for a minute that they don't protect the incumbents. They certainly do. The only decisions then turn out to be who are we going to sacrifice?

And, again, my experience is just in South Carolina, but unfortunately for the State and, I think, also for minority groups within the state, the people who have been sacrificed in order to create additional majority-black districts have tended to be our most progressive legislators and in fact those who were most sympathetic to black concerns. In part, that was just because they happened to have

more black voters and their districts were the ones that had to be taken away to create the majority-black districts.

I also want to make sure that we are talking about the same districts. Now, I agree that there are lots of districts in the country that are not lovely, but let me just point out for the benefit of the audience the district that was actually challenged in North Carolina. It is this pencil district here that you are not sure isn't just another line on the map. There it is. (Map shown).

This particular district is a Florida district that was drawn not by the Florida Legislature, but by a federal court. (Map shown). The Court found no violation of the Voting Rights Act, but nevertheless concluded that it was required to create districts in which blacks were in a majority.

While I agree that it would certainly be better if we didn't have any of these districts, I think the Court will treat differently districts that are drawn irregularly to protect incumbents. Part of the reason for the difference in treatment is that these districts tend to be self-correcting. The voters themselves become upset with irregular districts. The districts are self-correcting in that the next census, you can't keep them together anymore, they're so distorted. Shifts in population require gerrymandered incumbents' districts to be redrawn, whereas once racial districts are created, they're there forever and are not self-correcting.

PROFESSOR KARLAN: It seems to me that what has really been confronted—and the Court is uncomfortable confronting this, and everyone else is—is the problem that Rick Pildes has pointed to and Sam Issacharoff in one of his articles has pointed to, which is that the redistricting process involves legislators picking their constituents. And it confronts us with the fact that although the rhetoric and the ideology of American voting is that it is an individual behavior, each of us going in dignity and in secret into a booth and selecting who will govern us, in fact it is a group-oriented process.

The question then becomes whether districting is the proper way of representing groups of voters, because the entire point of districting has always been minority representation in the sense that it changes the electoral consequences. If, for example, in California you elected all forty-five congressional representatives statewide, you might find that there would be forty-five Democrats or forty-five whites or forty-five people who all represent Southern California.

The purpose of districting is to change that outcome by allowing groups that are not a majority of the electorate to be the majority in a smaller area.

Now that we have started to confront the fact that race is one of the group characteristics people share that is quite determinative of what their politics will be, we have to ask whether districting at all is the way of representing racial groups. That discomfort is what animates Justice Thomas' extraordinary opinion in *Holder v. Hall* in which he keeps claiming voting is just about individuals going into a voting booth and pulling a lever.

MODERATOR: So this issue is not just for the Supreme Court to struggle with, but for all of us. What is the best method of electing people to Congress or to the state legislatures?

PROFESSOR KARLAN: Well, for right now, the best method of electing people to Congress is to follow what is the statutory command, although not a constitutional command, and that is to elect from single-member districts. That is correct. I don't think a State can really start debating that issue at great length because Congress has told States to elect from single-member districts.

PROFESSOR KAIRYS: I think what we are getting to now is really the most hopeful and positive thing that could come out of these cases, because I don't think any progress is going to come out of this Court or the judiciary in this period. We are kidding ourselves or deluding ourselves if we think that.

Right now, disenfranchisement of blacks is constitutionally preferable to remedial action. That is just where the law is. But I think particularly since we are in a context when the—

MODERATOR: I'm sorry. When you say disenfranchisement, you don't mean denying the actual right to go cast a ballot?

PROFESSOR KAIRYS: No. Zero black members to Congress from North Carolina is constitutionally preferable to drawing lines that do something about that.

MODERATOR: That may be the Court's approach here?

PROFESSOR KAIRYS: Yes, I think that's the central approach. And it is by the "moderate," "centrist" justices. So it's here to stay for quite some time.

But I think the question it really raises—and it comes in this context when the population generally is questioning the political process; most people today think the political process is part of the problem rather than a source of a solution—is do we want these single-member districts?

We are relatively isolated in the democratic world by having these single-member plurality districts. The trend has been toward proportional representation. A recent example is South Africa. The whites and blacks in that reformulation of their system very clearly

chose proportional representation. This would allow representation of various viewpoints in the proportion they have in the population, rather than people coming from particular geographic areas and having to do redistricting. Redistricting is always political; it is always purposeful and instrumental; and in any place where there are substantial racial minorities, it is always racial. This, I think, is more the subject of the fourth panel.

MODERATOR: Yes. And we will certainly get to what I call by shorthand the Lani Guinier question: Are we using the wrong system altogether?

MS. WRIGHT: I wanted to follow up a little bit on some of the points that were being made earlier about the political nature of the redistricting process and the political uses of the Voting Rights Act.

I think we have to complete that picture in order to make it accurate, because I think it is accurate to say that after the 1990 census, in a lot of the voting rights litigation that went on, all sorts of partisan groups were trying to rely on the Voting Rights Act to convince courts to enact plans that would be favorable to them.

But the other side of the coin is that you really can't take the politics out by imposing constitutional limits on the creation of majority-minority districts. What you will see in the constitutional challenges that have been brought challenging these majority-black and majority-Hispanic districts is that those, by and large, are also driven by politics.

In many of these cases, what we are seeing is defeated white candidates who ran or wanted to run in these majority-black or Hispanic districts saying, "Gee, I've got *Shaw v. Reno* now. I can go in and challenge the district and get the Court to redraw it so that I can win."

So you simply cannot, I think, realistically say that the way to eliminate the political uses of the Voting Rights Act or the Constitution is by cutting back on the protections and the ability to create majority-minority districts.

MODERATOR: Because there is no such thing as a neutral redistricting or a neutral outcome from redistricting.

MS. WRIGHT: That's right. And I think that that is one of the facts that the Supreme Court is really going to have to confront. I think that the cases that are coming up this term are going to require the Court to look at that issue more closely and to think about whether it can really impose on the state legislatures a vision of this sort of apolitical process that is guided only by good government principles, the common cause values of nice compact districts and

following political jurisdiction lines, or whether in fact the Court is really, by preventing the States from drawing non-compact districts, setting up an unnecessary and really intolerable conflict between the States' goals of protecting incumbents and protecting political advantage and partisan advantage on the one hand, and the goal of including minorities who have been excluded for so long on the other hand. And to place too much emphasis on compactness to the exclusion of all other values, I think the Court is going to have to see that that conflict is only going to be intensified by that approach.

MR. VERRILLI: My threshold of revulsion may be higher than most of the public or most of the panelists, but my experience with this, which is perhaps more limited than some others here, has led me to have a less cynical view about it.

I think that Rick Pildes is absolutely right that there is a public perception that this is an extremely cynical manipulation, and that's all it is, by partisan political forces.

I think, in truth, it is much more complicated than that. The process of drawing a map doesn't, at least in my experience, amount to drawing incumbent protection districts first, minority districts second, and then sort of figuring everything else out third. Nor is it minority districts first and incumbent protection districts second.

It is a process of moving forward with many different and sometimes conflicting objectives, and in my experience, in that mix one of the objectives generally is trying to abide by what we are now calling sound districting criteria. Maps are generated and then a process of negotiation will often begin within the legislative process. Of course, that is a partisan process. But that is what we have.

The question to confront here is, "Well, what are the alternatives?" One is to try to make a dramatic move to nongeographic-based districting. But if that is not where we end up, I fear that instead we end up with courts drawing all these maps because what you now have is a situation where, as others on the panel have pointed out, any map is vulnerable to a lawsuit by a white majority or a minority population or both, and courts are extremely skeptical about the deference due the product of a legislative action, and the odds are very high that courts take it away from the legislative process for one or the other reason. And then what happens? Well, the legislature gets an opportunity to draw a new map at the remedial stage, but the same kinds of conflicts and compromises that made it so difficult in the first instance to create a map are exacerbated in the limited time frame of a remedial stage.

So what you then have is what is still a political process transferred to the remedial stage of a court, in which every interest group imaginable is running in with an alternative map and making neutral arguments for why this avowedly partisan map ought to be adopted by the court pursuant to judicial order.

I have to say, with those two options, my preference would be to structure a world where that was happening in the legislative process rather than the judicial process because you are going to have bad decisions made by judges who don't have the time or the resources to think these issues through, to see through partisan manipulations of this process at the remedial stage.

That was certainly the way in which I experienced the remedial process in the Florida case. That process was driven entirely by the Republican National Committee from a suite of hotel rooms across the street from the courthouse. Is that really where we want to end up in this process? I think not.

PROFESSOR KARLAN: I think one point that comes out of what Don Verrilli was saying is that we have to recognize that the courts that are in this process are just as political as the legislatures. It is no accident that Republican-dominated courts strike down plans in which the Democrats in the state legislature have managed to do exactly what Rick Pildes, Sam Issacharoff and Kay were talking about, which is to draw a plan in which they create majority-black or majority-Hispanic districts to satisfy the Voting Rights Act and the Justice Department and gerrymander the hell out of everything else to keep as many Democratic incumbents in as they can.

The courts are equally political, and in a case that was decided the same year as *Shaw*, a case called *Grove v. Emison*,²⁰ the Supreme Court gave a green light to state courts to get into the business and do the reapportionment before the federal courts can. So the idea that allowing courts to draw the plans will depoliticize the process in any way is just an illusion. The courts will be just as partisan. These judges came out of the political system, and a lot of them are still involved in it. Indeed, in Texas, in the first round of cases, a judge had to be censured for calling up a Republican legislator and asking him where he wanted his district drawn.

MODERATOR: Is that what we call judicial activism?

(Laughter)

PROFESSOR KARLAN: Yes. It's called constituent service when it's done by a legislator.

(Laughter)

PROFESSOR KARLAN: The other problem is an historical problem which goes back as far as *Baker v. Carr*.²¹ The Supreme Court keeps thinking that it can police the political process by coming out with a rule that any idiot can apply or, as Justice Fortas referred to it, a rule that someone with fifth-grade math skills can do. And so Chief Justice Warren, after *Reynolds v. Sims*²² comes down—the “one person, one vote” case—says, “This, not *Brown v. Board of Education*,²³ is the most important case I decided in my time on the Court because this case assures that the public interest will be represented properly in the legislatures.” We all know “one person, one vote” has no public interest constraint really at all. It doesn’t create good districts. In fact it allows all sorts of gerrymandering.

So then the Supreme Court tries to come up with some other kind of rule, and again it starts in *Thornburg v. Gingles*,²⁴ saying “Well, let’s have a three-part test,” and in *Davis v. Bandemer*, “Well, let’s have a rule that requires some sort of fairness.” But that rule generates all sorts of distortions in the process too.

It looked in *Johnson v. DeGrandy* as if the Supreme Court was going to try to do something with proportionality. And what they did was to create a weak proportionality constraint saying, “Well, a minority that is proportionally represented will normally not be able to establish a Voting Rights Act violation. Although we are not saying it is an absolute, it is quite relevant.”

Compactness may be the next way of going at this. This is something that Rick Pildes and Richard Niemi did in their article, which was try and talk about what sort of mathematical constraints you can have. That is one option—to try and come up with some mathematical constraint, which we all know will be just another futile attempt to ensure the public interest, whatever that might be, in redistricting.

So it’s really an intractable problem, and the idea that the courts are going to solve it either by coming up with a formula or by doing the redistricting themselves seems to me to just postpone for another cycle the same problem we have already had.

MODERATOR: I am hoping we can pick up on Pam Karlan’s last point. If I could get a brief answer from everybody to this question:

21. 369 U.S. 186 (1962).

22. 377 U.S. 533 (1963).

23. 347 U.S. 483 (1954).

24. 478 U.S. 30 (1986).

Is it a hopeless mess; is there no way out of this dilemma short of scrapping the districting system?

I would like each panelist to respond because, as Justice O'Connor said, appearances do matter and I want to make sure everybody gets a chance to have a last word here.

PROFESSOR BUTLER: I think there is a solution, but compelling that solution is more problematic, and the solution is to insist that we do indeed employ those standard districting criteria that most of us would recognize if we didn't have some other concerns that were driving us.

PROFESSOR ISSACHAROFF: I agree that this problem is intractable when the solutions that come down from the Supreme Court provide no concrete direction to the lower courts.

So, as soon as you start having Supreme Court doctrines that speak of political fairness, systematic degradation of political interests or of something like traditional notions of districting, without giving any content to these constitutional principles, what you invite is a second round of political agitation except this time in the federal courts. The result is a degradation not just of political processes but of the judicial process as well.

PROFESSOR PILDES: I think we have to avoid too much cynicism in discussing the judicial role in the districting process. After all, no one believed, I think, that just adopting a "one person, one vote" principle would magically transform the districting process into something wholesome.

But I also think there is little question that we are better off with the "one person, one vote" principle than we were beforehand. I think representative bodies have been more fairly constituted as a result, not perfectly, but more fairly. And I think that is the kind of incremental process that courts might contribute to productively.

But it is also important to remember that judicial doctrines put pressures on legislatures that can make them change in other ways. For example, one recent development is that bipartisan commissions and other administrative bodies have begun to play more of a role in districting. That is one other option that may come to the fore here as more intensive judicial review makes legislatures more uncomfortable about how courts are going to respond to partisan, legislatively-drawn plans.

MS. WRIGHT: Well, I think that it's certainly highly unlikely that the Supreme Court will ever come up with a set of neutral criteria that courts can apply, or that legislatures can apply that is going to resolve the intensely political problems and remove politics and all of

the intense pressures on the redistricting process that we are going to face after every census.

I think that one of the key questions that the Court is going to have to deal with is how are we going to assure that the very, very recent achievement of diversity in Congress and in the state legislatures and in local elected bodies is not completely reversed in the name of adopting neutral principles that really cannot be enforced in any manner other than perpetual federal judicial supervision over the redistricting process.

MR. VERRILLI: I think it's a mess, but all I think that means is that we have to live with a fairly high level of conflict, and I think that's because we hold some contradictory values at the same time, as a society.

And my view, I guess, is that we are probably better off admitting that and living with that and trying to work through this mess as best we can. And recognizing that, there have been substantial achievements in making the political process more inclusive than it used to be. Is it perfect? No. Is it marred by the most crass forms of partisan manipulation? Yes. But is it better than it used to be in terms of inclusiveness? I think it is. So I guess my view is that it is a tolerable mess.

PROFESSOR KAIRYS: I think the only way would be a recognition that the districting process or redistricting process is always political and is always racial, and that race-consciousness in that process is the rule rather than an exception. Then, there would have to be a recognition that political equality and diversity are positive social values to be furthered, as Congress has said, and as is the predominant mandate of the amendments to the Constitution since the Bill of Rights, which include more and more people who were excluded earlier. I don't think there is a chance in the world that this Court or any currently foreseeable Court would do anything like this.

MODERATOR: Very good. A tremendously promising first session.

II. UNDERSTANDING *SHAW V. RENO*

MODERATOR: We will start our second session. The question is: what exactly did the *Shaw* Court hold and, more specifically, how is the case working itself out on remand in the various district courts that have had to deal with it?

Let us start now with this general theme: What are the key doctrinal battlefields in the district courts dealing with *Shaw*?

Here are my first questions: When is strict scrutiny triggered? How is the compelling state interest which *Shaw* requires States to show being defined in these courts? What is a compelling state interest that would justify the creation of a bizarrely shaped majority-black or Hispanic district?

MR. JEROME: On the first issue, when you say key battlefields, the first question that you come to in a *Shaw v. Reno*-type situation or claim is whether you even get to strict scrutiny and whether the State needs to come forward with a compelling state interest.

And I think a lot of the dispute and legal wrangling over these cases will be what is the threshold that a plaintiff needs to prove in order to push the plan into strict scrutiny? And the higher that threshold, the fewer cases are going to get to court and have to go to trial. And if you have a broad rule that says any racial-conscious redistricting or awareness and use of race in redistricting prompts strict scrutiny, then you are going to have practically every redistricting in which there is a majority-minority district subject to strict scrutiny.

MODERATOR: So what is it that provokes strict scrutiny? Is it the combination of having a majority-black or Hispanic district and a bizarre contour on the map?

MR. JEROME: Well, I think you have got two very different views, and if you look at what happened in *Shaw*, in the remand in *Shaw* and *Hays*, and then compare that to what happened in Texas and in a California case, *DeWitt v. Wilson*,²⁵ you have two different views on that.

In *DeWitt*, and also in the Texas case, the Court found that simply drawing minority-majority districts does not subject the plan to strict scrutiny, particularly if at the same time the redistricting authority is taking into account some of the other nonracial factors: incumbency, compactness, traditional districting principles, however you define that.

Whereas the *Shaw* and the *Hays* courts came up with a very broad rule that said that any significant use of race in redistricting, even if you have compact districts, subjects the plan to strict scrutiny. And then the difference between the result in *Shaw* and in *Hays* was on whether or not there was a compelling state interest.

MODERATOR: So do other people agree that *Shaw v. Reno* can be interpreted very broadly at the lower court level to endanger all districts that are majority-black or Hispanic regardless of what the map looks like?

25. 856 F. Supp. 1409 (E.D. Cal. 1994).

PROFESSOR KARLAN: I don't think if you tried to read *Shaw I* honestly that you can say that because that would make *Shaw I*, which was written by Justice O'Connor, completely inconsistent with her earlier opinion in *Voinovich v. Quilter*.

If you are really asking what did Justice O'Connor mean and what did she have a majority for in *Shaw I*, it was not that any race-conscious districting requires strict scrutiny, because the way that she delineates the claim is to hold that a plaintiff will state a cause of action if he or she can show that the district was so bizarre or irregular so as to give the impression that there was nothing but race involved in the decision to draw the district that way.

Justice O'Connor can't possibly be suggesting, for example, that Charles Rangel's district, which is Central Harlem, is subject to strict scrutiny. She can't possibly be suggesting that Maxine Waters' district is subject to strict scrutiny or that the other district in Louisiana, the Orleans Parish district that Bill Jefferson represents, is subject to strict scrutiny. I don't believe she meant that.

I think that the *Hays* decision was an extraordinarily dishonest decision in saying that all districts require strict scrutiny. The remand decision in *Shaw* is constrained by *Shaw I*. Judge Phillips is essentially compelled to say, "Look, we can see the handwriting on the wall. The Supreme Court wants us to apply strict scrutiny to Mel Watt's district. So we will find that this district is bizarre, because if we go back to the Supreme Court saying, 'We don't think it meets the first prong of *Shaw*,' we will have our opinion reversed, whereas if we take the Supreme Court's opinion and say, 'Yes, it's bizarre,' but explain why it's justified, we have a chance of getting our holding sustained."

MODERATOR: So let's go with the North Carolina district court and assume strict scrutiny applies. Now a State has to come forward and show that in order to create one of these districts it needs a compelling state interest.

What is a compelling state interest?

MS. HAIR: In the Texas case, which is the one that I litigated, we contended the compliance with section 2 and section 5 of the Voting Rights Act is clearly a compelling interest.

But I think you have to look at what that means in the context of these cases. And when I look at what the doctrinal battlefields are and really looking at Justice O'Connor and her pivotal position on the Supreme Court, I think you have to go back to her section 2 opinions and particularly her opinion in *Gingles* where she seemed to be searching for a definition of vote dilution.

In the situation where you have racially polarized voting, and you have a population sufficient to allow creation of, say, an African-American district, she was looking for some limit short of proportional representation on what the definition of vote dilution is.

What she seemed to come up with is a definition that focuses on whether reasonably compact majority-minority districts can be drawn. And I think she viewed that as somehow a definition of vote dilution that was rooted in traditional practice and almost defined a race-neutral way of figuring out what the status quo would be in the absence of the factors that have led you to apply the Voting Rights Act to this situation.

What she was doing in *Shaw v. Reno* was saying, "I don't think that this 12th Congressional District in North Carolina meets the definition of reasonably compact and therefore, it probably wasn't required under section 2 of the Voting Rights Act, and, therefore, perhaps we should strike it down under the Constitution or at least we should consider striking it down under the Constitution because if it's not required by section 2 of the Voting Rights Act, then where does the compelling interest come from?"

There are other arguments about section 5 of the Voting Rights Act.

In Texas the districts are irregular, but it's not just the majority-black and majority-Hispanic districts that are irregular. The majority-white districts are, if anything, more irregular. What we showed in Texas is that compact, reasonably compact, pretty, majority-minority districts could have been drawn and were not drawn because of politics and incumbency protection.

So our theory was that, yes, race was taken into account because they had to; they would have been subject to section 2 liability and therefore there is a compelling interest here to draw a majority-minority district. But the State doesn't have to do it in the most pretty way, particularly if the State's overall pattern is to value some other goal ahead of pretty, compact districts and it applies that uniformly.

The Texas court disagreed with us on that theory on one issue, which is narrow tailoring. They said that the shape has to be pretty or it's not narrowly tailored. And that is probably the issue that we are going to take to the Supreme Court and attempt to convince Justice O'Connor that the Texas court is wrong about that, and try to explain to her why the State should have discretion to draw its districts according to its own values, and if pretty districts are not a

State value, you shouldn't impose that because it's a majority-minority district.

PROFESSOR WILLINGHAM: Well, I think there are a couple of ways to approach the question. One is to go back to this business of objective historic standards and to initially admit that the implication of *Shaw* I was that such things exist and that departure from them raises some suspicions about what you're doing.

So, in one sense, then the first way of dealing with that is to say that the State has to follow the law and that such standards, in fact, are the law, or at least it is the historic way of doing things.

I don't agree with that. I think that if you look specifically at the state of North Carolina, if anything, you find a history and tradition of irregular districts that are as odd and bizarre as anything else that you would want to see. It has been much more of a part of the State's history, from my understanding.

So I think that is one way to look at it. And if left with that interpretation of *Shaw*, then a compelling state interest would be to follow such standards.

I, of course, look at it differently. I think that you have got a couple of issues here. One, after the Department of Justice sent back their objection letter, the state of North Carolina had to understand the law to mean that they had to create another district. So compliance with federal law and the federal Voting Rights Act, in our opinion, was a justifiable state interest.

Secondly, I will offer to you that of all states, this one, and such states like this in the old bi-racial South, should be commended for such efforts. I am very pleased to see them assert racial fairness for once, that racial fairness can come out of these state legislatures as a goal and as an interest that the State has.

After all, we have had to fight them on this issue for generations. So I think that I would offer that.

They, of course, also offer the issue of incumbency. They put a certain twist on that, though, different a little bit from the way it was discussed in the prior panel, suggesting that the State is trying to protect its interest inside the federal system and the status of its particular people in Congress has a larger meaning that secures a larger public good for the State. So they argue that incumbency is a special interest.

Finally, in these states, probably in most American states but certainly the old bi-racial states and section 5 states, you do in fact have interesting sub-state regional variations that are historically present and that predate either the Voting Rights Act or all of the

voting rights stuff that we are dealing with now, and in North Carolina that is pretty clear, in our opinion, and efforts to recognize and district, as it were, around those areas is in fact a legitimate way of doing things.

So I think that the State in this particular case can identify some compelling interests that, in my opinion, are rational and justifiable.

MODERATOR: Professor Lichtman, you have been a frequent expert witness in these cases. I was reading through some of the district court litigation and throughout the footnotes you are a ubiquitous presence.

But often what is happening is it seems as if the judges in Texas and Louisiana say in effect, "Well, Professor Lichtman has given us some very strong testimony about what other compelling interest there might be for creating these districts for example, to keep together certain urban areas or rural areas or people with common socioeconomic characteristics." But then they say it is all irrelevant because race is such an overriding component in what has gone on that the districts must fall. Will it be impossible to demonstrate, at least to the more conservative courts, that there is an alternative compelling state interest?

PROFESSOR LICHTMAN: You know, I am wrestling with the fundamental question, would I rather be right or relevant? And it seems to depend upon the forum in which these arguments are presented.

Let me address—I will get to that question specifically, but I want to make a few comments about the broader issue of strict scrutiny and compelling state interests.

I believe clearly at the heart of this is the issue which has broadly been defined as compactness, whether it's defined strictly geographically in terms of the shape of the district, or more broadly in terms of things such as keeping counties or municipalities together, this issue of compactness is at the heart of both the legal and political controversies in *Shaw v. Reno*. And I have a number of things to say about that that relates to my testimony and to broader analysis.

First, I think a terrible misconception has come out of the last panel. And that misconception is that in states like Texas and North Carolina, the admittedly unusual shape of the district is somehow evidence that the Democratically-controlled legislatures in these states are using the Voting Rights Act for partisan political purposes.

In fact, precisely the opposite is true. These are defensive actions being taken by these States because the Voting Rights Act, by concentrating minorities, the most loyal of Democratic voters, poses

an enormous constraint and difficulty upon any kind of goal of incumbency protection.

Take the state of Texas. If, in drawing the districts in the Dallas County area, the Democrats simply could have spread the blacks evenly among the Democratic districts, there would have been absolutely no problem in preserving the incumbencies of Congresspersons such as Martin Frost and John Bryant.

The difficulty in fact arose because of the necessity under the Voting Rights Act to create an effective African-American district and in many states from the pressure coming from the Republicans to maximally concentrate minorities in such a way as to dilute Democratic voting strength outside majority-minority districts.

So I think it is a terrible misconception to say that North Carolina or Texas or these other states are examples of utilizing the Voting Rights Act for partisan purposes. Quite the contrary.

MODERATOR: Allan Lichtman, to rise to the hypothetical defense of some other panelists, let me pose a question about this. I understood them to be saying that there was a command from the Federal Government to create such districts and, at that point, it became a very important political imperative to create them in such a way as to protect the white incumbents, which is why the maps got so jumbled-looking.

PROFESSOR LICHTMAN: That is no more political than you would have if you didn't have a command of the Voting Rights Act. They would still have been creating the districts in a political fashion. To implicate the Voting Rights Act in incumbency protection or political line-drawing I think is the great mistake.

I think there is a huge problem with the whole issue of compactness, much of which was quite correctly laid out in the earlier session, the enormous difficulties of, A) defining it in some coherent way, which no court has done, and, B) even if you could define it in some coherent way, measuring it.

I think in terms of what is happening in the lower court, and what is happening with the expert witness testimony, is we are getting a conflation of compactness which serves double duty, unfortunately, for the courts.

On the one hand, compactness, however you define it, is a signal that districts are sufficiently bizarrely drawn so you've got to subject it to strict scrutiny. And I agree with Pam Karlan that that is the only reasonable read of *Shaw v. Reno*, not that anytime you create a minority district you are subject to strict scrutiny. But then compactness then also seems to trump strict scrutiny. That is, when you get

to strict scrutiny, the very standards of compactness that triggered strict scrutiny in the first place then become the rationale of the Court to say, "Well, these districts are therefore not narrowly tailored." And I do think narrow tailoring is the key issue.

I argued exactly the same thing as an expert witness in the *Hays* case where it was rejected, and in the *Shaw v. Hunt* case where it was accepted. Essentially, what we were able to show, and the court accepted it in North Carolina, was that compactness is not the critical factor in terms of districting, that in fact there were other legitimate state interests aside from anything political that was at play here, such as putting together individuals who shared common political and socioeconomic characteristics independent of race.

You can draw lines and circles if you like, but that is no way a guarantee that you are going to unite people of common interests. There had never been in either Louisiana or North Carolina, for example, districts that united the less-affluent. The less-affluent had been merged in other districts and their interests were pretty well disregarded.

We were also able to show that these districts, despite their shape, were among the most homogeneous in terms of politics and socioeconomics independent of race in the state and that they had no adverse impact whatever on voting or representation.

So I think if we can get away from this conflation of compactness both as triggering strict scrutiny and then as an argument to show there isn't a compelling state interest and focusing on a broader view of districting and focusing on whether these districts indeed are doing harm or good, I do think there are answers to the riddle of *Shaw v. Reno*.

PROFESSOR MILLER: Just to follow up on Allan Lichtman's and Pam Karlan's comments, whatever we might think about the sort of uselessness of a distinction about districting that has to do with the shape of the district, I think the real message for people litigating voting rights cases these days and for jurisdictions drawing those districts is to draw districts that look as "normal" as they possibly can because the real concern is that the more bizarre a district is shaped, the more race-conscious it will appear.

And of course, there is an obvious irony to that because all of us who have done these cases and have studied the field know that you can do a lot of racially-conscious things without ever drawing a district that looks funny, and you can draw funny districts that have purposes that are not racial but are political and are gerrymandered for other reasons.

But the real pressure at the bottom level, at the places where the cases are being generated and at the places where the plans are being drawn, is to draw nice, neat, pretty districts that comply with whatever the Supreme Court might think of as traditional districting principles. Although there never have been traditional districting principles, allegiance to the Court's vision of these principles will at least to some extent protect districts from challenge.

And I suspect that has some possible implications. I suspect that it means that it may be harder to draw districts with as high a percentage of minority voters, so jurisdictions will opt for districts that may be closer to fifty-fifty districts or fifty-five-forty-five districts, although certainly that didn't save the district in *Shaw* from challenge.

I think those are some of the implications we can look for as the courts and lawyers on both sides struggle with how to comply with a standard where the Court gave almost no guidance on what that standard is, or how to draw districts that avoid litigation.

PROFESSOR KOUSSER: Well, I should say first that I did testify or at least wrote reports in both North Carolina and Texas.

I want to go back to the original *Shaw v. Reno* opinion to try to put these succeeding cases in context. One of the things that strikes you most if you look at *Shaw v. Reno* is how few facts they had. It was a case that had been dismissed, and the question was whether there was a cause of action at all. And there are almost no facts in it, and most of the ones that are there are wrong.

For example, the only mention of the degree of "segregation" in the districts is in a footnote in Justice White's dissent in which he says the 12th District is 54.71% black. And they didn't have any evidence at all about the historical nature of redistricting in North Carolina.

In the plaintiff's brief before the Supreme Court in *Shaw v. Reno*, it says, "There has never been a racial gerrymander in North Carolina before. Just look at the shapes of the districts."

Now, he knew that that was incorrect. In fact, in 1981 there was a six-month deadlock in the state legislature because they wanted to draw a district to protect a very conservative white incumbent, and they wanted to draw it to exclude Durham, which is where all these people who were plaintiffs in *Shaw v. Reno* came from. They wanted to exclude Durham because they didn't want to draw a district that a black had a fair chance to get elected in.

That was overturned by the Justice Department, a section 5 objection. That was surely on record. But the Supreme Court didn't take any of this into account.

It seems to me that *Shaw v. Reno* ought to be seen as an intent case, and it ought to be seen as an intent case that goes back on remand to the lower courts, and it says, "All right, on the face of it, it would look like this district was drawn only because of race. But we want more evidence on this. Is this the only thing?"

And Justice O'Connor again and again in her opinion says this is the only reason why the districts were drawn.

Kay Butler, in her previous remarks, uses the same terms. And yet we all know that that is not true. We know that this district, if you look at it, the 12th District in North Carolina or the districts in Dallas or Houston, were drawn in the particular shape they were in and would have the particular compactness score that they have because of a whole variety of reasons.

Lots of things go into districting: incumbent protection, partisanship, where a certain legislative assistant lives, where a Congressman lives. All sorts of things go into districting, and that is what results in the shapes of districts.

So it seems to me that what we ought to do in seeing the remand cases is to say that the Supreme Court is asking for more evidence on these sorts of questions: What is the nature of the districting process? Is there any historical discrimination in the process of redistricting itself—a specific thing, not general societal redistricting—to be alleviated here? And then we should ask whether the lower courts have done a very good job in answering what seems to me to be the focus of the questions by the Supreme Court. And I think the answer to that is "no." And unfortunately, I think that is true in Judge Phillips's opinion as well as the bizarre opinion in *Hays v. Louisiana* and the less bizarre but still strange opinion in *Vera v. Richards*, the Texas case.

I think that the best way to get at those sorts of questions is to look at a huge array of specific evidence. That evidence was presented in *Shaw v. Reno*; it was presented in great detail in *Vera v. Richards*. But the district court judges basically ignored it—in *Vera v. Richards* in particular.

And I think one of the things that is likely to happen in the Supreme Court is that either that evidence is going to be presented or they are going to assume that it isn't in existence or they're going to ask for more evidence, as far as you could interpret the *Hays*

vacating of the opinion as asking for more evidence or looking at further empirical evidence. .

So it seems to me that there are a whole series of empirical questions which are raised by *Shaw v. Reno*, which are not settled, and which the district court cases ought to settle.

MODERATOR: How can they settle them? If they take the broad-minded reading that you suggest, it would be clear that all of these districts would pass the strict scrutiny hurdle. So, for *Shaw v. Reno* to have any of its guts left, you would have to read Justice O'Connor as saying that as long as race is a substantial factor at all, the districts have to fall. Isn't that right?

PROFESSOR KOUSSER: I am not sure. That's not what she says. She says "sole factor." One of the questions when it goes up again is did she mean that? If she says it means substantial factor, then the Supreme Court or a set of district courts is going to have to lay out some principles by which we can decide whether there was a racial intent in the gerrymandering. How substantial does substantial have to be? That question certainly has not been addressed so far.

And it certainly can't be addressed within the mechanical compactness standard. It's going to have to be addressed in a much more fact-laden, empirical framework. And district courts ought to be very good at that, at dealing with the huge amount of evidence. But they haven't been, so far.

MODERATOR: Anita Hodgkiss, let me come to you. You have been a lawyer in the *Shaw v. Reno* case on remand. Why did the district court there say that there was a sufficient compelling interest, and in what ways was the solution of creating the two minority districts narrowly tailored to accomplish that purpose?

MS. HODGKISS: I actually think that Judge Phillips did a good job on both those questions. He said that there were three compelling state interests.

The first was compliance with section 2 of the Voting Rights Act, and he said that earlier plans that had been presented to the North Carolina legislature as well as the very plan that the Republican intervenor plaintiffs in the litigation presented to the Court both showed that it was possible to draw two compact majority-black districts in North Carolina, thereby meeting the *Gingles* threshold requirement.

And once you do that, the state legislature then has the discretion to draw the districts in whatever portion of the state they want to and to have whatever shape they want to, in line with all the other considerations that the legislature needs to take into account.

So he found that compliance with section 2 was a compelling state interest and that, in fact, the North Carolina legislature was very much concerned about section 2 liability when they passed the second plan.

He also found that compliance with section 5 of the Voting Rights Act was a compelling state interest, and in language that really gave weight to what the Voting Rights Act is all about, he said, "Look, this is about the legitimacy of our government and the ability of minorities to participate in that government."

If the Justice Department sends back a plan saying that the state of North Carolina has failed through an administrative process to prove that there is a lack of discriminatory purpose in the plan that it has passed, and North Carolina then decides, "Well, we're going to go back and try to draw up a plan that doesn't have discriminatory purpose," they have a compelling state interest in doing that. So he found that under section 5 there is a compelling state interest.

He also said that a State could have a compelling state interest in remedying the effects of past discrimination even if it's not a section 5 jurisdiction and perhaps there is not section 2 liability because of compactness problems, if you have a situation where minorities have repeatedly and continuously been excluded from congressional elections and all the other factors that you're supposed to look at in evaluating the totality of circumstances and looking at vote dilution are present, that if you have all those circumstances, remedying past discrimination is a compelling state interest.

MODERATOR: What about narrow tailoring?

MS. HODGKISS: When they got to narrowly tailoring, what he said was that, "Let's go back to the affirmative action precedents and look at the five factors in those cases, like *United States v. Paradise*²⁶ or *Croson* or *Fullilove v. Klutznick*²⁷ and apply those to the voting rights context." And he sets out initially some reasons why that is difficult, but he says you look at the efficacy of alternative remedies, whether the program imposes a rigid quota or a goal, the planned duration of the program, the relationship between the goal and the percentage of minorities in the relevant pool, and the impact of the program on the rights of third parties.

None of those factors involve compactness. I mean it just doesn't—it's not involved in any of those.

26. 480 U.S. 149 (1987).

27. 448 U.S. 448 (1980).

MODERATOR: Well, would you take one second and just tell us how he does apply those factors to show how the districts created in North Carolina were narrowly tailored?

MS. HODGKISS: Some of them are sort of obvious. The planned duration of the program, the legislature has to redistrict in ten years, so there is another chance to go back and see whether you still need a race-conscious remedy.

MODERATOR: So there is a built-in clock there?

MS. HODGKISS: Right.

On whether it's a quota or a goal, he says it's clearly not a quota. The voters in those districts can elect a white, you don't have to have a black candidate who is elected. And he points to majority-black legislative districts in North Carolina that have elected white candidates.

MODERATOR: So any person can run for office, black or white, in the districts.

MS. HODGKISS: Right.

On the question of the relationship between the goal and the percentage of minorities, he says the North Carolina black population is roughly 20 percent and having two out of 12 districts is not overly—

MODERATOR: It's only sixteen percent.

MS. HODGKISS: Right. The real interesting factor is the impact of the program on the rights of third parties. And I think that in fact Justice Phillips didn't ignore all of our evidence about all the other factors that went into the drawing of these plans, because what he said was that when you look at the impact on the rights of third parties, these other factors, such as urban-rural, the 12th District being an urban district, the first being a rural district, the evidence about the communities of interest among the Piedmont Crescent, among the rural coastal plain in North Carolina, and the desire to protect incumbents for the reasons that that is good.

I mean there are some reasons why protecting incumbents benefits the people of the state. He says all of those things demonstrate that the burden on the third parties, the white voters in the state, is not unreasonable.

And he reminds us that what we are talking about when we talk about minority participation in the electoral process is a right of constitutional dimensions and that if you are looking at the impact on third parties, you focus first on those constitutional questions, is there one person, one vote, is there any vote dilution? And in North Carolina this plan doesn't have those problems for other parties.

MODERATOR: If he is right, doesn't that mean that every district which is challenged under *Shaw v. Reno* can really withstand the scrutiny that *Shaw v. Reno* requires?

Attorney General Reno has created a voting rights protection task force. We have two attorneys from the Justice Department here. Let me turn to Robert Kengle, who is one of those lawyers.

In other words, is there really a compelling state interest, narrowly tailored, in all cases, the interest being to comply with the Voting Rights Act to overcome the history of racial discrimination? And are not all of them narrowly tailored because they will only last for the duration of the decade before the next redistricting and because the white voters who live in the district can run and vote like anyone else?

Doesn't the solution that Judge Phillips came up with in North Carolina provide a key to overcoming the Supreme Court's hostility to some minority districts?

MR. KENGLE: Well, that may be the case. I think if you look at the history of discrimination in many of the jurisdictions in the country, you are going to find a history of discrimination that legitimately should form the basis for the State to undertake remedial action.

It has been a long, hard process to try to get the States to try to do that. It may be the case that there are some jurisdictions where you won't find that type of history. And if that is the case, then perhaps plaintiffs would be able to make their case out.

But it certainly seems to be a legitimate approach to take that into account and to give it substantial weight in arriving at a decision. The *Vera* decision in Texas didn't place very much weight on that type of approach and didn't factor very much into its decision in terms of the State's response to the history of discrimination, which in Texas has pretty much gone without saying.

MODERATOR: Which arguments is the Justice Department mobilizing to try to defend these districts?

MR. JEROME: Well, I think one thing is important, and that is to note that each of these situations in each case is very fact-intensive. And *Shaw v. Reno*, as noted before, was decided without a record. And now it is up to the district courts to really evaluate the process of adoption of these plans and whether these plans are rational or not, why they were adopted, what nonracial factors were involved.

And it is very interesting because in each case to some extent the strategies are slightly different, and I think there are very strong arguments for defending these plans in each case.

In Georgia, I think the initial issue that comes up is, is this district a bizarre district? And the Justice Department took the position that no, it really isn't. It has a geographic core, it may have some oddities on the margin, but that in itself does not make it a racial gerrymander.

MODERATOR: So you stopped at the first point and said strict scrutiny doesn't even apply because the district isn't bizarre?

MR. JEROME: Well, I think in all of these cases, as a defendant you have to try to approach all the issues and take them all on. In Georgia, I think you have a very clear case of a compelling interest under section 5, where the Justice Department interposed two objections to the congressional plan before the State went ahead and adopted a plan that fairly recognized minority voting patterns.

MODERATOR: Well, let me ask you about that. To the extent that a State relies on Justice Department intervention or rejection of plans as the basis for a compelling state interest, to what extent does that lure the Court into looking at whether the Voting Rights Act, or at least the way it is being interpreted, itself violates the Constitution?

Are you afraid that you are going to overextend on that argument? And at least you get a hint of this from Justice Thomas. Is he going to turn around and say, "Well, the Voting Rights Act, or the way it's being implemented now, itself is inconsistent with equal protection."

MR. JEROME: Well, I think the Voting Rights Act, and the Justice Department's interpretation of it, has been an ongoing process for 25 years that has consistently been upheld by the Supreme Court. And I think that was an important aspect of *Shaw v. Hunt* and Judge Phillips's decision, which points out that the Justice Department does have a unique perspective and responsibility and history in evaluating these plans, and that deference to that process has to be given where there is an objection.

Under the Voting Rights Act the local district courts really do not have the jurisdiction and authority to review the process of the Attorney General and the objection itself. But I think it is important to point out that the section 5 process has been consistently upheld in the past and we expect it to continue.

PROFESSOR KOUSSER: A couple of straws in the wind, since Justice Thomas' opinion was talked about here. One, it wasn't noted in the earlier panel that *Johnson v. DeGrandy* in Justice Souter's opinion does not cite *Shaw* at all. It is really quite bizarre that that should be so, in some sense. It is cited in Justice Kennedy's concurrence quite heavily, but it is not cited in Justice Souter's opinion at all.

In the strange dissent by Justice Thomas in *Holder*, there is an almost desperate quality about it which seems to be responsible for part of its strangeness. If he really thought that the *Shaw* majority—in the extreme interpretations of *Shaw*—were very secure, then it would not be necessary to rewrite the history of the Voting Rights Act and of Congress for the past 25 years to say that minority vote dilution was not covered at all, that the *Allen*²⁸ decision in 1969 was wrongly decided and that the Congress for three times after the *Allen* decision renewed the Voting Rights Act with a strong consciousness that it had been held by the Supreme Court to relate to minority vote dilution and didn't challenge that at all.

So, it seems to me that if you're looking for straws in the wind about what the Supreme Court is going to do when we get these cases back, some other straws in the wind seem to be coming from either the majority—Justice O'Connor went along and Justice Rehnquist went along in *Johnson v. DeGrandy*—or the minority in Justice Thomas' strange dissent in *Holder v. Hall*.

MR. KENGLE: In terms of the constitutional validity of the enforcement of the Voting Rights Act, the court in the Georgia litigation, which has not yet of course entered its decision, I would expect is going to have a very strong focus on the Attorney General's enforcement of the Voting Rights Act.

What I thought was remarkable about that case was that the court permitted an extraordinary degree of discovery into the section 5 administrative process in terms of orders from the court for the Justice Department to produce certain classes of materials that previously had been held subject to some type of privilege, including some communications with contacts that had been considered privileged in the past.

If that is a practice that continues in other cases, that degree of focus on the internal processes, I, at least, have a concern about the viability of our ability to enforce the Voting Rights Act, due to local persons in jurisdictions being unwilling to talk with us under confidential circumstances.

MODERATOR: That the court might turn its attention to the Justice Department and how it decides how to enforce the Voting Rights Act in particular states?

MR. KENGLE: Correct. If the courts get into the Voting Rights Act's constitutionality, as in this particular case's mode of analysis,

28. *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

then you have district courts in essence reviewing the review process that may have occasioned the districts that are being challenged.

MODERATOR: And those courts may even be searching for improper political influence in the Justice Department?

MR. KENGLE: It's not clear exactly what they would be searching for. I think one could expect that different courts would be searching for different things.

MODERATOR: Let me turn to another question, which is the question of injury. Judge Phillips in the Eastern District of North Carolina I think cast some very suspicious glances on the whole question of injury and basically said he wondered whether there was any injury at all, but since the Supreme Court assumed in *Shaw v. Reno* that white voters were injured somehow by the creation of these districts, he would for the sake of argument assume it as well.

How is this question of injury working itself out in the various district courts? How is this injury being defined?

PROFESSOR KARLAN: The whole question of standing has to be addressed by the Supreme Court when it takes one of these cases back up. There is something extraordinary about the response the Court has had here, and I think David Kairys got into this a little bit in the previous panel.

If you look at what Justice Scalia in his scholarly career and on the Supreme Court thinks about who has the right to sue and what sorts of injuries confer standing, you will see it is extraordinarily narrow.

You have to show that you suffered some sort of concrete injury, not an injury that you share with every other person in the jurisdiction.

Justice O'Connor wrote an opinion for the Supreme Court in a case called *Allen v. Wright*²⁹ that involved a challenge by black parents to the Internal Revenue Service's policy of not denying tax exemptions to segregation academies.

And Justice O'Connor said in that case the black parents had no standing to challenge the IRS's decision to grant the exemptions because whatever stigma they suffered or whatever discomfort they suffered at the idea that the Government was approving racial discrimination by other parties just wasn't enough to give them the right to come into court and sue.

MODERATOR: It was too generalized and too diffuse.

29. 468 U.S. 737 (1984).

PROFESSOR KARLAN: Too generalized an injury—everyone suffered it, and therefore no one suffered it. The remedy for that is to go through the political process, not to go through the courts.

Now we come to *Shaw v. Reno*, and lo and behold you have five white people with standing. And when you take this in conjunction with the *Northeastern Florida Contractors*³⁰ case that was decided earlier in the 1992. Term, what you have is what I have sometimes started referring to as “universal white persons’ standing,” which means that white people have standing to challenge anything the Government does that they don’t like involving issues of racial justice.

What is so fascinating in *Shaw v. Reno* is that several plaintiffs don’t live in the district they’re challenging. In fact they live in other districts. So, their right to vote hasn’t been infringed in any way; their ability to elect the candidate of their choice hasn’t been infringed.

I think probably Anita Hodgkiss can talk to this in much more detail than I can, but in the discovery process in *Shaw*, when the plaintiffs were asked, “What is your injury; how have you been disadvantaged? How have you been injured by the districts you are challenging?,” their answers were unresponsive or unpersuasive. If this weren’t a case involving majority-black districts, their litigation would have been tossed out of court for lack of standing.

So I think one thing that the Court will have to confront when the case gets back up there is this technical, legal doctrine which has always been used to keep out of the courts arguments about generalized injuries to the citizenry as a whole, and which Judge Phillips confronted in a kind of backhanded way by writing that he didn’t think there was standing here but obviously the Supreme Court wanted him to reach the merits, so he would.

MODERATOR: Symbolic injuries.

PROFESSOR KARLAN: Yes. Symbolic injuries.

MODERATOR: Stigmatic injuries.

PROFESSOR KARLAN: Stigmatic injuries or arguments about how the political system should be doing its job, which is what Richard Jerome was talking about. You know, the Justice Department is not supposed to be reviewed by local district courts, it’s supposed to be reviewed by the District Court for the District of Columbia and by the Supreme Court hearing appeals there, not by any of this other process.

30. *Northeastern Fla. Contractors v. Jacksonville*, 113 S. Ct. 2297 (1993).

MODERATOR: It's hard to fathom what the injury might be that the Court has in mind. You picture a white kid being teased at school because he lives in an oddly shaped majority-black district as the stigmatic injury here.

Where is the injury? How is this working out in the federal district courts? How is injury being proved, or is it simply being assumed?

MS. HODGKISS: Well, not only in depositions but in the trial testimony, Professor Melvin Shimm addressed how he was injured. He is one of the two plaintiffs that lives in District 12. His answer was that his injury consisted of being represented by a black Congressman who wouldn't take into account his interests.

That was his injury.

I think that we put on a lot of evidence about how the shape of the district does not impact effective and fair representation, that voters do figure out who they're supposed to vote for, they get to the polls, and there was very strong evidence that Allan Lichtman can talk about more, of looking at roll-off, when you look at a Presidential election year, how many voters voted for President but didn't vote for the lower offices or the congressional offices. And what we found in North Carolina was that whether a county had been split or not didn't impact the number of people who were able to vote for their Congressperson and that the state, as a whole, had lower roll-off than in all the surrounding states.

So the lack of compactness of these districts did not affect the crucial thing we are talking about here, which is people going to the polls. They went to the polls.

The second thing that we were able to show it did not affect is the ability of the Representatives from those districts to effectively represent their constituents.

The fact that the district looks funny didn't have any negative impact on Eva Clayton or Mel Watt's ability to represent the people who live in their districts. They are accessible.

We genuinely tried to address the question of harm and say, "Well, how might people be harmed?" and I think we had a lot of evidence that there wasn't any harm. But I also think it affects not only standing but the question of whether or not the plan unfairly impacts the rights of white voters.

PROFESSOR WILLINGHAM: Let me make a couple of points.

First of all, no whites are denied any participation in these particular systems. Whites vote. Whites can run for office. Whites can be elected to office. So there are no real restrictions on what they can in fact do.

Secondly, black elected officials from these particular districts are not racially isolated or in other ways insensitive to these white citizens in these particular communities.

In my opinion, if such an argument is to be made, it ought to be stated explicitly and then evaluated according to the particular evidence brought forth.

My sense is that as I look at districts that have been created, that have in fact elected black men and women, those men and women have been, frankly, in some cases, more open to their white constituencies because of the history of participation and that sort of thing than to the black community.

So I think it is bad to pinpoint them and pigeonhole them into that little stereotype. They function as politicians just as well as any white person can.

Also, there is a special place that must be maintained in our minds as we think about this, because of the historic economic advantages that the white community has accumulated, in part because of racial discrimination, that continue to operate.

Just having the money to make campaign contributions, for example, enables them to have access to the new black elected officials. And that should be kept in mind.

Additionally, there are numerous places where we have districts where the race that is a majority is represented by the other race.

In some cases, you have majority-black districts where whites have been in fact elected. And references were made here to North Carolina.

I might also point out that in most of these states, black citizens spend most of their time voting not for black officials but for white officials. But that is the only option. But you have numerous places where you in fact have that situation.

Also, I think that what we have in North Carolina in particular is a little too playful of an attempt, in my opinion, on the part of the white plaintiffs to provoke a constitutional argument. I mean what probably should have been worked out on the pages of the academic journals or something turns out to have gotten into the court. And I always thought, and I still do, that that was probably not an appropriate use of the legal system.

And I think that constitutional argument is dangerous if it, without regard to the formal court proceedings, enters the larger discourse in the Nation in a negative way where it implies that minorities have some sort of pernicious scheme in mind when they look for these particular districts.

So I am bothered about that.

Finally, in the partisan cases, particularly the one out in Indiana, the judges argued that—and I agree with this—that when we think about the districting process we ought to keep in mind a distinction between sort of a “context of election” where race is a major priority—where partisanship is a major priority—for campaign purposes and a “context of governance,” where the person, now elected, is understood to represent all of the people.

Such a distinction calls attention to the differing responsibilities that are involved between the time that you are running for office where people of your own skin color are important to your chances, particularly in these sort of states, and the process of governance where your responsibility, according to the very words used by the judge, is to represent, as it were, all the people.

So I offer those comments at least on that injury question.

PROFESSOR LICHTMAN: I will leave aside the question of standing and let the lawyers debate that. But I do think the question of injury is critical, and what I believe to be the whole pivot point of *Shaw v. Reno*, and that is the issue of narrow tailoring.

I think it also goes to your question, if Judge Phillips is right, does that mean that the defendants always win? I think the answer is absolutely no.

Judge Phillips's five criteria do not of themselves compel a victory for either side, because they have to be empirically determined.

MODERATOR: Give me a case that you think would not withstand scrutiny under his analysis.

PROFESSOR LICHTMAN: I will get to that.

I think I will give a preliminary discussion of what I am talking about before I jump to that point.

The action is really in No. 5. Yes, 1 to 4 are probably fairly easily met, although in Georgia, for example, the plaintiffs argued that in fact, minorities had gone beyond proportionality that really did represent the racial quota. But leaving that aside, it seems to me, the key one is No. 5, impact on the rights of innocent third parties.

And there is an extraordinary development in the *Shaw v. Reno* case. If you read the deposition of their key political science expert—and they only had one, Professor Timothy O'Rourke—it is filled with rhetoric about creating dysfunctional districts, that when you violate compactness to this degree, when you split localities and counties, you create districts that don't work.

And when asked what a key indicator of this would be, he said, “Well, in North Carolina, what I want to look at is this question of

falloff. Are we getting people not participating in congressional elections who are participating in Presidential elections because the plan is so noncompact, it so violates traditional districting principles that we are sowing vast voter confusion?" And, he said, "One thing I want to look at is falloff in 1992 under this bizarre plan as compared with falloff in 1988 under the old plan."

Mr. O'Rourke testifies not a word, not word one, about this voter confusion, this falloff.

Why?

Because the evidence is devastatingly in the other direction. It shows, in fact, falloff is far less in 1992 than it was in 1988.

MODERATOR: But, Allan Lichtman, couldn't Justice O'Connor come back and say the reason you have greater voter participation than you did before is precisely because the white voters feel so victimized or marginalized in the district that they turn out in higher numbers?

PROFESSOR LICHTMAN: This is true across the board in North Carolina. It doesn't focus just on the district, it focuses across the board on the entire state, which had the lowest compactness score, and vastly lower scores in terms of compactness and splitting municipalities than previously.

And there was just a devastating cross examination of this witness which went to his own evidence which showed none of this rhetoric about dysfunctional districts applies to North Carolina.

Moreover, our analysis went way beyond falloff. We did a survey, we did a study of representation, which showed that there was no lack of linkage between the representative and the represented in these districts, and it didn't follow racial lines.

MODERATOR: How did you show that?

PROFESSOR LICHTMAN: By looking at constituent service, contact between the representative and the constituents.

MODERATOR: So white voters were at least as likely to contact a black Representative?

PROFESSOR LICHTMAN: They were more likely. They were more likely to contact their Representative than black voters, even in the black district. And, in fact, the falloff of blacks contacting versus whites was greater in the white districts than in the black districts.

And we didn't stop there. We also showed that these districts had among the most significantly unified communities of interest of any districts in the state, that if you believe communities of interest, people sharing political views and socioeconomic status, that that is

important—and there is a whole political science literature on this—then indeed these districts did conform.

We showed that the North Carolina plan was more distinctive than any previous plan, that the districts as a whole better represented, independent of race, the diversity of districts in the State. In other words, we compiled a whole series of empirical demonstrations showing that indeed there was no impact on innocent third parties and that, in fact, these so-called dysfunctional districts functioned better than more traditionally compact districts.

Now, would that hold elsewhere? Would you find those same characteristics? The answer is we don't know. There certainly, for example, in Texas, was not evidence that the districts in the urban areas shared the same kind of socioeconomic homogeneity of the districts in North Carolina, and that argument was not made in the State of Texas.

So by no means are these things determined. And once we get away from this narrow fixation with compactness and look at the real issues of whether districts function or not, I think there are reasonable standards for judging these districts.

MODERATOR: Let's go back to two words in Justice O'Connor's opinion in *Shaw v. Reno*: "political apartheid." To what extent is there a symbolic injury in being forced to live in a district or a state where certain voters have obviously been "corralled," in the language of some of the lower courts, into particular areas because of their race? Is this something that is being litigated? Is this something where evidence is being taken at the lower courts about whether there is such a symbolic or even emotional injury?

PROFESSOR KOUSSER: I should point out that the first racial gerrymandering congressional districts in North Carolina came in 1871-72. There was a district called the Black 2nd. It is the only district in the South during the 19th century that has a biography written about it.

The State was approximately one-third black, and it was the only majority-black congressional district drawn in the state, and it was drawn in a very self-conscious manner. So if there is a symbolic injury from racial gerrymanders, it is a symbolic injury that black people have had to be putting up with since very shortly after the promulgation of the Fifteenth Amendment, and it is strange that the Supreme Court should decide it now and that it is something that only white people get a chance to talk about.

There was an inevitable conflict between two conceptions of the Reconstruction Amendments, I think. When Justice O'Connor

discusses the 14th Amendment in *Shaw v. Reno*, she uses the phrase "discrimination *between*." Generally, when we have thought of the Fourteenth Amendment and other amendments in the Reconstruction Amendments previously, we have thought of "discrimination *against*." And in some sense, most of the time in American history since Reconstruction has been a story of racial discrimination in which there hasn't been any distinction between discrimination between and discrimination against.

Discrimination between black people and white people or black people and Latinos, black people and Asians, white people and Asians, anybody like that, has always been *against* the people of color as well as *between*.

Here, she seems to finesse the issue of injury by talking about discrimination between. And it seems to me that one way that we can think about the conflict between *Shaw v. Reno*, at least in its initial guise, in these opinions in their initial guise, and the trend of minority vote dilution cases, is to distinguish between discrimination between and discrimination against.

And it seems to me what the Supreme Court fundamentally has to face in any consideration, further consideration of such issues, is when you come to the question of when discrimination between and discrimination against are not entirely compatible, then what do you do?

In the *Croson* line of cases, and other sorts of things, you have discrimination at least allegedly against, and not purely discrimination between. There is allegedly injury there which is relatively concrete. The company, in *Croson*, lost a contract to produce urinals for the City of Richmond, and they were angry at this. And so there was some injury.

In *Shaw*, the injury is not at all clear. One more fact indicates from the depositions that the injury is not clear, and that is, Ruth Shaw, the named plaintiff, voted for Mel Watt, she says, in the 1992 election. If she was not represented, why did she vote for him?

MS. HAIR: I think this question of political apartheid is very important, and I think it's important to go back and look at what Justice O'Connor said about what the indicia are of this condition of political apartheid or racial gerrymander.

When she tried to identify injuries, the types of injuries that she identified were that the districts were likely to lead to the election of congressional representatives who owed their election to only one race and therefore were answerable only to constituents of one race.

She also said that she thought that the creation of these districts would stereotype African-Americans as all thinking alike and having the same interests regardless of income level or age or basically geographic location.

Then she threw around the word segregation and said this is segregation.

I know in all the cases, and I will talk about the Texas case, records have been made, evidence has been submitted and basically uncontradicted that these factual assumptions that Justice O'Connor was making simply are not true, have not been true under the districts that have been created under the Voting Rights Act for the last several years.

In Texas, in North Carolina, we had white citizens file affidavits or testify about the responsiveness of the African-American representatives to them.

One of the districts struck down in Texas is Houston Congressional District 18, which was first held by Barbara Jordan. Race was taken into account when that district was created.

Even the plaintiffs in this case, when we would say, "What did you think about Barbara Jordan, did she respond to the white community?" they would say, "She was wonderful." Of course, everybody knows that Barbara Jordan was wonderful, and Barbara Jordan, you know, put Texas race relations ahead light years because she was such a star when she got to Congress that it showed white citizens of Texas that African-Americans could effectively represent them.

So there are massive amounts of evidence that, far from increasing racial polarization, allowing African-Americans to become representatives, and allowing them to show how they can perform, decreases feelings of racial hostility and prejudice.

With regard to the stereotypes that all African-Americans are alike, what we did is we traced African-American communities and showed that, in fact, the African-Americans that had migrated into certain areas like north of Dallas came from South Dallas originally, had family in South Dallas as the core of the African-American community, went back to church in South Dallas and, perhaps most importantly, was highly politically cohesive with the African-American community in South Dallas.

So it's not a stereotype. In fact, if you look at the African-Americans that were joined together in the congressional districts, they are highly politically cohesive and have a high community of interest with each other. And that doesn't mean necessarily that African-Americans in Houston have a community of interest that would justify joining

them with African-Americans in Dallas, but when you look at the particular facts, you see that the districts are justified in terms of community of interest.

Finally, this term segregation really irritates me the way it gets thrown around. If you put African-Americans together in one district, they say it's segregated. If you do what they did in Texas, which was divide the African American community in Dallas between two white Democrats and the new majority-black district, then they say that's segregating, you're segregating them into the white districts even though when they go into those districts they in fact integrate those districts which would otherwise be all white, but you are also segregating them into the African-American districts.

So, to me, it is just a perversion of the use of the word segregation, which means what it meant in *Brown v. Board of Education*, which is: intentional separation of the races. In these cases, no matter where you put African-Americans, the courts say it's segregated.

The plaintiffs in Texas simply were not able to identify any injury. They formed an organization called Coalition for a Color-Blind Texas, and they testified they were offended by the use of race in the districting process, and the court said that's enough injury for us.

PROFESSOR MILLER: I have a slightly different take on the question of injury. Whatever the imagined injury that white voters would suffer from being represented by a black representative, the Court still is fixated on a notion of apartheid. And I think one of the waves of the future of litigation on this issue is the kind of alternative voting systems that Lani Guinier and Pam Karlan and others have written about. Those kinds of systems don't residentially segregate people in the way that districting systems do. Yet they still allow for a great deal of minority representation; in fact, they can be completely tailored to allow for the same amount of minority representation that a district could. And they don't raise the specter of Justice O'Connor's concern in *Shaw*.

Especially at the local level and the state legislative level, those kinds of answers to the question of injury are going to become really important. Obviously, for congressional elections, these remedies require an amendment to the Constitution; for state and local elections they often require no legislative changes. For example, within the last several months a Maryland federal court implemented a cumulative voting remedy in Worcester County on the Eastern Shore.

So, in a way, the irony of *Shaw* is that it may in fact create space for the kinds of remedies that voting rights scholars and litigators have

been proposing for years, and in many ways that might be a good thing.

MR. JEROME: We have transparencies for some of the districts, we don't have them for all of the districts. So we will go ahead and as I talk about the districts, we will go ahead and see if we can at least illustrate some of them.

Shaw v. Hunt, we have heard a lot about today. The decision came down on August 1, and since that time both the plaintiffs and the plaintiff intervenors, basically the representatives of the Republican Party, have filed their notices of appeal and their jurisdictional statements with the Supreme Court will be due in mid-October.

In *Hays v. Louisiana*, that one is on its way to the Supreme Court. Both the Justice Department and the State of Louisiana filed notices of appeal after the decision.

One of the interesting aspects of *Hays* is the court ruled that the new plan—this transparency is the plan that was struck down initially, and then in 1993 the State came back and drew a plan that was at a much lower black percentage and also much less irregularly-shaped. And one of the main arguments that we had in this second trial was that the district that was drawn in fact is very similar and was modeled on districts that were created in the 1970s that followed the Red River along from Baton Rouge to Shreveport.

So, our argument in the second go-around in *Hays* was that this district in fact does follow traditional districting principles and follows the traditions of Louisiana. Unfortunately, the court didn't agree with us on that and, when they struck down the second plan, ordered into effect a court-drawn plan that the court drew in one day.

We filed a notice of appeal, and both the State and the Justice Department sought a stay of the district court's order in the Supreme Court that was granted.

The jurisdictional statements from both the State and the Justice Department will be due at the end of September.

Vera v. Richards had an interesting history after the decision as well. The court determined that three of the districts out of the 30 districts in Texas were unconstitutional, the 18th and 29th in Houston and the 30th in Dallas, but it did not at the time it ruled provide for relief.

The parties then were provided an opportunity to ask for relief. The plaintiffs sought a new plan for the 1994 elections. But instead, the court ruled that elections in 1994 will go forward using the State's plan and the State will have the first opportunity in the 1995 legislature to come up with a remedy.

The decision will likely be appealed, and that appeal will progress as well to the Supreme Court.

MR. KENGLE: I would like to add one thing. This is a map, this is one of the exhibits that was presented at trial showing District 30, which is almost entirely in Dallas County. This is one of the districts that was struck down by the court as unconstitutional.

The district as a whole is less than fifty percent black in voting-age population. Nobody disputed that the boundaries of this district were not convoluted.

But if you look at the composition of the convoluted parts of the district, you will see that the various segments are 21% black, 38% black, 26% black, 29% black, and at the very bottom, 20% black, 37% black, 31% black. The irregular portions of this district were not majority-black.

And what the court seems to be saying there, at least to me, is that going out and picking up majority-white areas is somehow a racial gerrymander. And I think that is a very interesting question that the Supreme Court may confront if this case is presented before it.

MR. JEROME: One of the other cases that has not progressed quite as far is *Johnson v. Smith*, and that is the Florida case which challenges Corrine Brown's district, District 3. There, the court also declined to enjoin the 1994 election. So, Florida will be held using the State's plan, and just recently, on September 2, the court denied the defendants' motion to dismiss.

The plaintiffs' motion for summary judgment in this case is still awaiting a decision. So it's likely that this case will not really proceed very quickly, at least it seems that way, until the Supreme Court has ruled on some of these other appeals.

Johnson v. Miller is the Georgia case which challenges Cynthia McKinney's 11th District. In that case we are awaiting a decision by the district court.

MÓDERATOR: We have to break now.

I want to thank all of our panelists for an extraordinary session.

III. THE VALUE OF MAJORITY-MINORITY CONGRESSIONAL DISTRICTS

MÓDERATOR: What is the practical political and social experience of having majority-black, Hispanic, and Asian districts? We want to examine several different points: What has been the effect on partisanship and party competition and the political positions of the parties? What have been the effects on race relations? What have been the effects on the cohesiveness of different racial groups? And

now what are the potential effects of *Shaw v. Reno* on the various communities affected by them?

Let's start with the question about political parties. What have been the partisan effects of having these minority districts? And I am specifically interested in whether it benefits the Republican Party and hurts the Democratic Party. And why does the Republican Party seem to have changed its tune on these districts in the last few years?

PROFESSOR LICHTMAN: The Republican Party has twice changed its tune with respect to the formation of minority districts in the United States.

The first change of tune came during the 1980s with what might be called their majority-minority strategy; that is, the Republicans decided, under the leadership of their general counsel, Benjamin Ginsburg, that it would be highly beneficial to Republicans to form majority-minority districts because you can concentrate minorities, who are the most reliable of Democratic voters, in a few districts and thereby weaken the ability of Democrats to get elected in all surrounding districts.

In other words, you might have one eighty percent Democratic district, which results in a series of surrounding Republican districts.

This strategy, put into effect for the post-1990 round of redistricting, was viewed by the Republicans, I think, in a very cynical way, of netting them a harvest of new Republican seats in the 1992 congressional elections.

For the most part, the strategy was a resounding failure. In a few states, the Republicans did gain some benefits; for example, in the state of Georgia. But overall, only a small handful of seats could be attributed to this strategy.

Why did it fail? Because Democratically-controlled legislators proved remarkably effective at both crafting majority-minority districts, conforming to the Voting Rights Act, while crafting additional districts that would elect Democrats.

As a result, the Republican Party again changed its tune. It now decided to join the *Shaw v. Reno* bandwagon and challenge majority-minority districts. And indeed, the National Republican Party, under a new general counsel, Mike Hess, was a party in the *Shaw v. Reno* decision attacking the very majority-minority districts in North Carolina that in their formation the Republican Party had been instrumental in creating.

Why? What is going on politically? It's very simple. What the Republican Party wants to do for the next round of districting—and we have talked immensely this morning about the effects of *Shaw v.*

Reno in the courts—the real effect is going to come in the actual round of redistricting, and we can talk about that later.

What they want to do now is clamp restraints on the year 2000-plus redistricting, force legislatures to create majority-minority districts, but constrain the way they can draw districts in such a manner so that finally the Republican strategy of putting minorities together and weakening Democratic districts can work. That is what it is all about. That is what is at stake politically here, and that is why the Republican Party has been involved in *Shaw v. Reno*.

When you cut through the rhetoric, it is power politics.

PROFESSOR PARKER: This is the real world panel. We are going to be talking about the real world.

First of all, I want to make the point that the creation of these majority-black and majority-Hispanic districts is not overreaching. In no sense can it be viewed as overreaching. The fact is that before redistricting after the 1990 census, blacks and Hispanics were severely underrepresented both in Congress and state legislatures. The statistics were voting age population U.S.: 11% black, 7.3% Hispanic; black people made up only 4.9% of Congress, 5.4% of state legislatures; Hispanics 2.5% of Congress, 1.7% of state legislatures.

As a result of redistricting after the 1990 Census, the number of majority-minority districts was doubled from twenty-six to fifty-two. This resulted in a fifty percent increase in black representation in the House of Representatives and a thirty-eight percent increase in Hispanic representation.

So, clearly the political fortunes of minorities in America are tied to the creation of majority-black, majority-Hispanic, and majority-minority districts. Without those districts, minorities remain severely underrepresented, and the remedy for curing that is to create majority-minority districts.

Now, the question that Professor Raskin raised is the following argument: Creating majority-minority districts does more harm than good. That is the argument.

And the argument is that it operates against the best interests of minorities because it results, by taking minorities out of the racially-mixed districts and creating majority-minority districts, in making the adjoining districts whiter, yielding an increase in conservative representation and Republican representation in Congress, which is against the best interests of minorities in America. That is an empirical question. Has it occurred?

Now, I was following very carefully the predictions of the Republican National Committee after the 1990 Census and the redistricting

process. I completely agree with Professor Lichtman's analysis. The first prediction was: Republicans will gain forty seats in the House of Representatives, forty to fifty seats in the House of Representatives, as a result of creating majority-minority districts.

Then it went down to thirty seats. Then it went down to twenty-five. Do you know how many Republican seats Republicans gained in the House as a result of the 1992 election? Ten. Net gain—correct me if I am wrong—net gain, ten Republican seats.

Now, you still read in the newspapers, it's still in all the New York Times articles, that Republicans will gain as a result of the creation of majority-minority districts. Even articles this summer said that black people and Hispanics are to blame if there is a Republican increase in Congress in these elections.

Now, let's be reasonable about this. The creation of these majority-minority districts is not the political force operating in the South today where the most significant gain in congressional seats occurred. The South is going Republican. White people in the South are increasingly voting Republican. And so if Republicans make additional gains in 1994, it will be the result of many factors, the creation of majority-minority districts being probably one of the least significant factors.

But to me, the argument that it will do more harm than good was not proven in the 1992 elections and really should be put to rest.

PROFESSOR KARLAN: There has been a consequence, but it doesn't play out in the number of Republicans who get elected as opposed to how many would have been elected if we had had more racially-mixed districts. Where it does play out is in a change in American attitudes about race, and I think one of the most dangerous things about *Shaw* and about the way in which the political parties have cynically tried to manipulate the Voting Rights Act is that it has changed the whole tenor of debate.

Civil rights used to be viewed as a kind of universal imperative. It is now viewed as special-interest politics. And to the extent that the Republican Party can make the Democratic Party look like the party of black people and can fan the kind of racial polarization which Brad Reynolds explicitly committed himself to when he was head of the Civil Rights Division of the Department of Justice, that has an effect on the way politics works that is not measured in the number of seats gained or seats lost but is measured in the question of how responsive to the particularized needs of racial minorities Congress or state legislatures are after they are elected.

Blaming the Voting Rights Act for that is, as Congress said in the 1982 amendments, like blaming the thermometer for the fever in a patient.

But I think that the debate about voting rights and about race-conscious districting and the like has transformed, at least in part, the whole way in which politics is argued about. And that is something that we need to be concerned about, trying to develop a strategy that can counter that.

MODERATOR: Well, there is an alternative hypothesis, and I heard it expressed recently by former Congressman Stephen Solarz, which is that through the creation of minority districts you create a lock in those districts and then you get people elected to Congress who very vociferously represent the interests of minority groups, but by draining the minority votes from neighboring districts you make those representatives much less accountable and much less responsive to minority concerns.

PROFESSOR BUTLER: I think you would have to look at a lot more factors, and I don't believe that anyone on this panel really has the information to address this particular issue. I don't. I can speak only of what I see in South Carolina. And the creation of minority districts has indeed resulted in the increase in Republicans. It hasn't been as true in Congress. We only have six districts.

We did create a majority-black district, which incidentally, I was in favor of creating, and it did indeed elect a very fine black representative, and we lost one Democrat. The two in fact were not connected in South Carolina, but it is much more true at the state legislative level in the state Senate and the state House of Representatives. I think if you were to look, you would see a direct correlation.

PROFESSOR KOUSSER: I actually have something to say about this, and I have a handout.

You get to be a professor, you get to give out handouts.

This is from testimony that I gave in North Carolina, and I would direct your attention particularly to the nice figures, figure 1 and figure 2 (see page 61).

PROFESSOR BUTLER: May I say something before you get started on this? This will be the second time that we have heard from a witness in the case of North Carolina. You have also on these panels lawyers who were involved on one side of this case in North Carolina. And it seems to me that what we're getting is a conceivably very skewed notion of what the facts might have been in North Carolina, with no one on the other side of this issue to say, "Well, these were

the facts that our witnesses presented, and these were the arguments that our lawyers made.”

You know, it seems to me that at least the audience ought to recognize that this is a partisan panel and that this is a partisan presentation by a partisan witness and indeed somebody else may look at those facts—I am not sufficiently familiar with the North Carolina case to comment—but I believe before Professor Kousser makes his remarks, that it’s important that you understand that perspective.

MODERATOR: Okay. Professor Butler, thank you for that intervention.

I would like to say that we have made an effort to have several points of view represented here. There is no monolithic ideology represented on this panel, and I think anyone who has participated in these discussions has seen that there is a diversity of views about the value of these districts, about alternatives to these districts, and your presence here demonstrates a commitment to finding other voices. But if you are unhappy with that, we’ll just have to do better next time.

Professor Kousser, please proceed.

PROFESSOR KOUSSER: I would be happy to have anybody else look at this same information, and you can come to whatever conclusions you want. Figure 1 and figure 2 are drawn from the Congressional Quarterly Conservative Coalition scores, which are readily available in the Congressional Quarterly annual index to anybody.

I have divided Congresspeople in North Carolina into three groups. If you look at the Conservative Coalition scores, I divided the Members of Congress into three groups. One is Republicans. I looked at the Conservative Coalition indexes for 1973 to 1993. Republicans are the ones up at the top. They are always around ninety percent or ninety percent-plus Conservative Coalition scores.

If you look at the Democrats from the two districts that have the largest proportion black, the 1st and 2nd Districts up through 1991, those are white Democrats. Those are the squares. And those people are about sixty to seventy percent, they started up even higher on the Conservative Coalition index. Up through 1980, they looked just like Republicans, despite the fact that these are what would be expected to be minority-influenced districts.

PROFESSOR PARKER: These are the ones that are supposed to be most responsive to minority interests.

PROFESSOR KOUSSER: That’s correct.

Fig. 1: Do White and Black Congressmen Differ in North Carolina?

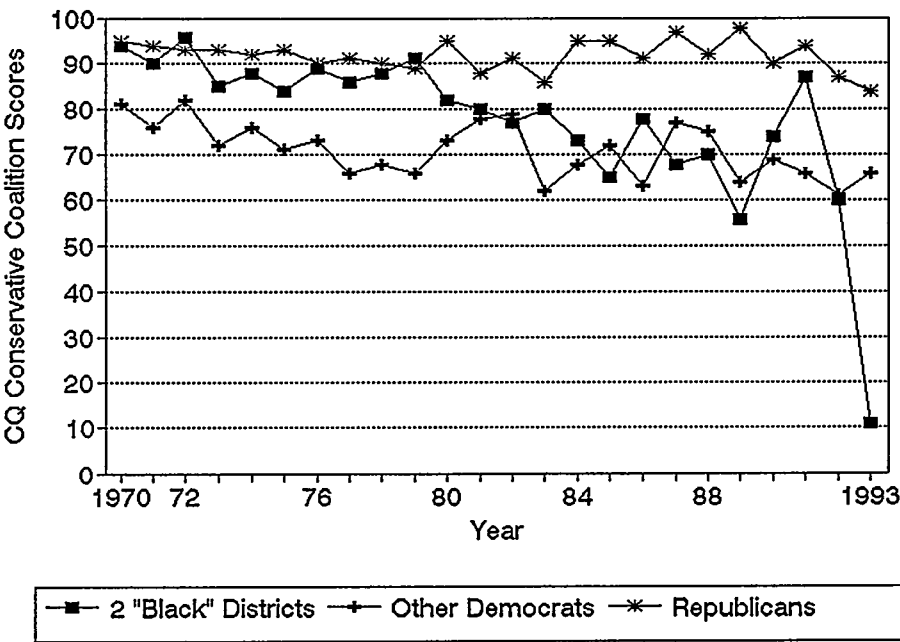
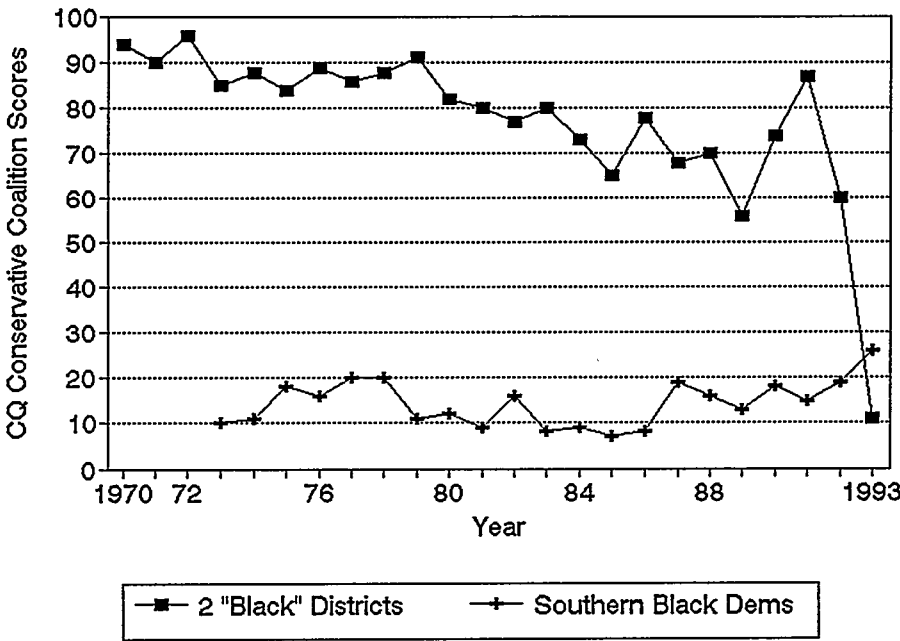


Fig.2: N.C. "Black Districts" vs. Other Southern Black Members of Congress



PROFESSOR PARKER: Because they are from districts that are thirty to forty percent black?

PROFESSOR KOUSSER: That's correct.

The other Democrats from districts with smaller proportions of minorities are the little crosses. They start at around eighty percent conservative; they go down to perhaps seventy percent. They are indistinguishable, basically. After 1980, they are basically indistinguishable from the other districts.

Obviously, the thing that should catch your eye is what happens in 1993. For the first time since 1898 you elect Members of Congress who are black from North Carolina and their Conservative Coalition scores average about ten.

Blacks had been excluded, in the views that black voters had before 1993, they had been excluded from representation in Congress. Finally, they get included.

Now, you could choose another index. If you chose any of the rest of the normal indexes that are used, the ADA index, the American Conservative Action, the Chamber of Commerce index, you would find roughly the same thing. The correlations between the Conservative Coalition scores and the others show that they are roughly the same.

Was this something that just happened because of a time effect that was because you've got a Clinton Administration and you suddenly got people who would vote very liberally? Well, if you look at the rest of the black Members of Congress from the South in figure 2, they are on the lower part of the scale. They are approximately ten to twenty percent conservative. Mel Watt and Eva Clayton come right in that area.

So, it appears that they were not different from what would have happened before if there had been majority-black districts, if blacks would have gotten their policy views represented. Until you get black-majority districts, in North Carolina at least, it certainly doesn't happen.

So, if you ask the third empirical question that Justice O'Connor asks, which is, "Do you get people who are responsive to only one constituency, once you get black-majority districts or minority-opportunity districts drawn," the answer to the question is probably "no," in general.

But if you flip the question over and you say, "Unless you have black-majority or majority-opportunity districts—minority opportunity districts, do you get representatives who are white, but who are favorable to the minorities," then the answer for North Carolina is

"no." You don't get people who are favorable to minority interests until you get minority-opportunity districts drawn. There is exclusion. There is segregation of white congressional opinion. Blacks are segregated out, their influence is segregated out until you get minority-opportunity districts drawn.

So it is an empirical question. Anybody can draw these sorts of things. Anybody can critique these sorts of things. In this sense, this is an extremely objective way to look at it. It is not simply a partisan thing on the part of the voting rights lobby or anyone else. But this is the fact of the matter. Blacks were excluded.

MS. KING: I think it would be a very interesting concept, Dr. Kousser, and it's a very realistic concept. In the *Johnson v. Miller* case, although I thought it was a very ridiculous theory, one of the harms that was set forth by the moving party was that this was the precise harm that they were alleging, that issues were being raised on the congressional floor that were contrary to the interests of Republicans and conservatives, such as the crime bill's Racial Justice Act, and the fact that you were allowing minorities to be represented disallowed the representation of the majority people in a particular district because these issues were being raised on the floor and these issues were being voted upon by minority Members of Congress.

I think that is the danger of *Shaw v. Reno*, and it goes far beyond partisan politics, and it really gets down to issues that are being raised and issues which certain individuals do not want to be discussed in these political debates.

PROFESSOR PARKER: The data from Mississippi also support Professor Kousser's conclusions. I was not involved—well, let me say, first of all, I had nothing to do with the North Carolina case, I wasn't a lawyer in the North Carolina case, I wasn't a witness in the North Carolina case, so I can be an unbiased, impartial panelist here.

The same thing is true. Webb Franklin was elected in a Mississippi congressional district, the 2nd Congressional District, which was forty-eight percent black in voting age population in 1992 and 1994. He voted as high on the Conservative Coalition scale, voted against black interests.

And also, Mike Parker, who represents a congressional district, a white Representative in the congressional district in Mississippi that is over thirty percent black, voted against the Civil Rights Act of 1991.

MODERATOR: So is the contrary hypothesis then that the presence of a substantial minority but a distinct minority—say, twenty to thirty percent of blacks in an overwhelmingly white district—encourages at least racially coded politics by conservative

politicians who can capitalize on polarization to get elected? Is that your theory?

PROFESSOR PARKER: In the South, it has been our experience that the districts, very often the districts that are over forty percent black are the most racially polarized districts. These are the districts in which the white candidates make the most direct appeal and the most racist appeal to the white folks because those are the votes that they need to get elected, and we find, unfortunately—this is not a terrific thing—but the pattern of coalition politics. We don't find that in every one of these districts. But biracial coalitions are few and far between. I am not saying they don't exist, but we find that many of these districts are very polarized at over forty percent.

MODERATOR: So are you suggesting that the draining of minority votes from neighboring districts may in fact have a moderating effect on the politics in surrounding districts? Or are you saying it may not change at all?

PROFESSOR PARKER: No, I think it will have a moderating effect. It increases black representation and could conceivably make the majority-white districts, as the black percentage goes down, less polarized.

PROFESSOR WILLINGHAM: Well, I think that one way to look at that question is to talk about draining black votes from the neighboring white district, and I do think there are a variety of interesting things to say about that.

I want to reemphasize, though, that what we often are dealing with is the option of drawing a majority-black district or a majority-minority district or not, and this kind of information indicates once again that when that option is there, it is better to draw the minority district.

And frankly, just one other comment about the politics of this business: I don't think we should have ever understood the Voting Rights Act and related policy as taking race essentially out of politics. It is going to be there and communities of color recognize that. In those districts where they are a minority of the population where nothing else can be done by this method, barring other alternative schemes that we might talk about later today, then they have their politics to take care of.

MODERATOR: Well, let me turn to the somewhat larger, macro-political question that I think Professor Karlan touched on originally. If you leave aside the political effects that follow from the specific districts, what are the general political messages being sent to the electorate by the existence of majority-black or Hispanic districts; or, contrarily, what message is being sent by the Supreme Court's

decision in *Shaw v. Reno*? Does *Shaw v. Reno* characterize those districts in a particular way?

PROFESSOR WILLINGHAM: I do think that in one sense that is the more important battleground. The language and the discourse that has resulted from *Shaw* could very well serve to stigmatize men and women elected from minority districts who are otherwise capable elected officials and fine public servants. Some of them are not fine public servants, but that certainly doesn't have anything to do with districting, and it does not distinguish them significantly from their white counterparts. So I think that there is a problem there, and I think that problem very much gets us beyond the boundaries of the courtroom and takes us out into the larger world of public discourse. And I would be very concerned if that in fact were to happen.

I would just say, by way of one more comment, after the *Shaw* decision came down, I was particularly distressed at two things. One was the fact that the Supreme Court of the United States, the highest court, essentially legitimated language, very targeted language, much of which is driven by bigotry, which served to stigmatize these particular elected officials. It brought it into the decision. I am talking about balkanization. I am talking about the allusion that when blacks are elected by persons of their own race, there is something tainted about them. No mention of other people who are elected by members, as it were, of their own race. I think that was a problem.

But the second and most distressing problem was the reaction in the popular press. A lot of people did not understand what was going on and immediately bought into the language, serving, I think, to cast this stigma that I am very much concerned about.

So, I believe that if that language is allowed to prevail, it will certainly have a very negative consequence on how we see one another as citizens.

MS. KING: Yes. I was about to say that I think the *Shaw v. Reno* decision is a very dangerous decision. It uses very inflammatory language that I think—for example, the term “political apartheid,” which the Supreme Court has never used before, which really has nothing to do with the creation of majority-minority districts in this country, because we are not talking about total exclusion of any population, we are talking about inclusion, we are talking about some of the most integrated districts throughout this country. And I think it is very dangerous.

The decision also dismisses the reality of black and Hispanic and minority culture. Basically, it talks about the perpetuation of racial

stereotypes without recognizing the fact that people who have similar cultures and similar backgrounds do have things in common. And I think as we talked about—you may have talked about this morning—on preemptive defense of these cases, we were able to present some of the information that educated the Court about the fact that people do have things in common, blacks have a similar culture.

De jure segregation was a reality in this country until very recently. There was Jim Crowism. There was institutionalized racism. And there still is the subtle discrimination that exists today. I think we cannot deny that, and I think that *Shaw v. Reno* denies that reality that we all need to be aware of.

It also disparages minority candidates because basically they are saying that minority candidates cannot represent a diverse sector of the population in a particular majority-minority district. And so I think that too is very damaging.

MODERATOR: Has it turned out that there has been more competition within minority communities since the creation of these districts? I want to volunteer a mostly unfounded hypothesis, looking at a few of these districts.

I live in a majority African-American district, the 4th District in Maryland. As soon as the majority-black district was created there, there were six or seven African-American candidates as well as a couple of white candidates. Now, if blacks are thirty or thirty-five percent of a district, isn't it more likely that you would get just one black candidate on the theory that everyone has to get behind one candidate?

In other words, do these districts in fact contribute to more political diversity and dialogue within minority communities?

MS. KING: I think that in some localities people may galvanize around one candidate. But I think it's a good thing because now people who have talent, who believe they may be able to get elected, will take the opportunity and make that effort to be elected, and you may have four or five or six minority candidates whereas before none of them may have taken that chance because of the reality that they would not have been elected to office.

PROFESSOR KARLAN: I wanted to say something about the post-election process that I think you were getting at. And that is that I don't think we can maintain in a multiracial society the legitimacy of governmental institutions if people look at those institutions and don't see anyone in there who is what Hannah Pitkin refers to as "descriptively representative" of them.

If you look back at the Clarence Thomas hearings, there were no women sitting on the Senate Judiciary Committee, and there was a lot of discussion following the Thomas nomination about the fact that there were no women in the Senate. And I think a lot of the women who were elected to the Senate were elected precisely because people looked and they said, "There's something wrong in a country that is half female with having so few female Senators."

Indeed, the reason Clarence Thomas is on the Supreme Court is that even the Republicans understood that there would be something illegitimate in a multiracial society in having an all-white Supreme Court, and he was the only person around who they thought was sufficiently politically reliable, and so there he sits.

The same thing is going to be true of legislatures and minorities. To the extent that in most parts of the country white voters will not vote for minority candidates, we can only have a racially integrated legislature by having some majority nonwhite districts, because that is where all but two or three of the thirty-seven black Representatives come from. All the rest of them come from districts that are majority nonwhite.

This is not just an American problem; it is a worldwide problem. The only countries that seem to be able to maintain democratic legitimacy are countries in which every recognizable group in society has some people who represent that group sitting in the legislature. And that is what is particularly dangerous about *Shaw*. If we retreat so that suddenly half of the black or half of the Hispanic faces disappear from Congress, that is going to send a very damaging message about how representative Congress and state legislatures really are.

PROFESSOR PARKER: To follow up on what Professor Karlan says, the other argument we heard a lot before the 1992 elections was that it won't make any difference. Eleanor Clift, the Newsweek reporter who was recently reassigned because she was viewed as being too pro-Clinton by Newsweek magazine, said in a broadcast in January 1991, Newsweek Magazine of the Air, that she had talked with House Democratic leaders and they said that if the Black Caucus grows in the House of Representatives as a result of redistricting, it won't make any difference.

So that argument was made. And we don't hear that much anymore because, obviously, with thirty-nine members of the House Black Caucus, they now have a key vote and have played a key role in NAFTA, passage of the crime bill, and U.S.-Haiti policy. I mean this group of legislators is very influential today because within the Clinton

Administration so many of the votes are so close in passing legislation supported by the Administration that they are playing a key role. And so it does make a very significant difference in American politics that we have thirty-nine blacks in the House.

Then we have to look at the issue, if the implementation of the *Shaw v. Reno* decision is successful in reducing black representation in Congress and for the first time since the post-Reconstruction period, for the first time basically in more than one hundred years, there is a reduction in black and Hispanic representation in Congress, what will that say about the American political process and what will that say about institutional fairness and institutional legitimacy in American government?

PROFESSOR LICHTMAN: I think we have got to give the critics of the Voting Rights Act and black-majority districts maybe a tad more credit for sophistication. I don't think they frontally attacked the argument that society benefits from a diversity of representation in the political system. Rather, the argument has become more subtle. They say the way to get there is not by whatever pejorative term you might want to use—balkanizing, separating, isolating majorities—but rather by building and fostering coalition voting.

And their argument is that if you are going to depend on majority-minority districts, there is only a finite amount of representation that minorities are ever going to achieve. For example, African-Americans might well, they would argue, be bumping up against their maximum degree of representation in Congress right now and it might be very difficult, they would argue, to squeeze out more majority nonwhite districts with a plurality of African-Americans.

The problem with this argument is it fundamentally lacks empirical basis. If in fact there was the development of coalitional voting, then the drawing of majority-minority districts would not be required under the Voting Rights Act. What the critics don't tell you is that to invoke the Voting Rights Act you have to prove that non-minorities—that Anglos—vote as a bloc in such a way as to usually defeat the minority candidate of choice. If that is not the case and coalitional voting is flourishing, then the fact is there is no requirement to form majority-minority districts.

The very formation of these districts is by itself demonstration that this coalitional voting has somehow so far proved to be illusory. This was brought home at recent hearings in the Congress when we heard all these stereotypical arguments about we shouldn't form minority-majority districts because it kills coalitional voting, blacks like

everybody else can participate in the bargaining coalition process and get elected.

Well, Mel Watt walked into the room and just looked these people in the eye and said, "How long, how long, how long do you want me to wait until white people become ready to elect an African-American to Congress in North Carolina?" He says, "We have waited ninety-two years. We have had no black representation throughout the twentieth century. How long do you expect me to wait?"

The other pervasive myth is that somehow the creation of these majority-minority districts itself promotes racially polarized voting and undermines voter coalitions. The evidence is just to the contrary. When minorities do get elected and serve in legislatures—and it turns out they, like everybody else, participate in the bargaining, the give-and-take, the usual legislative process—it demystifies the election of minorities. And in fact, minority representatives who have been elected from majority-minority districts in the first round, usually under conditions of polarized voting, have turned out in subsequent elections that they have been able to produce black-white coalitions and go on to become national political figures.

Mike Espy, elected from the 2nd Congressional District in Mississippi, almost entirely with black votes in the first round, got a majority of the white vote the second time he was elected, and built a very powerful interracial coalition. If they had never created the 2nd District in Mississippi, you would never have had a black serving in Congress, and you would never have had any opportunity of putting a black person in the position to build an interracial coalition.

Doug Wilder in Virginia, cited as the epitomal example of coalition voting, where did he get his start? How was he able to first build coalitions? By getting elected to the legislature in a majority-minority district and then being in a position to build coalitions.

So the argument goes you've got to wait for coalition building to take place, and yet the critics deprive minorities of the very preconditions necessary for nurturing that coalition.

PROFESSOR BUTLER: There have been so many points that have gone down, it's hard for me even to begin to think about where I would start responding to this.

Let's start with the notion that coalitions are only coalitions if they produce the particular result of electing a black person to Congress. That is certainly not my view of things. I think that there are biracial coalitions that have elected white candidates to Congress—candidates who were the choice of black voters, but not of white voters in

majority-white districts. So I am not convinced that the absence of blacks in Congress means the absence of black representation.

I also will point out that no other group in America is assigned districts on the basis of their race or ethnicity. The notion that because districts are majority white, *white people* are represented as *white people* is just nonsense. I mean all you have to do is look at this panel. Of the white people on the panel alone, there is at least one different point of view, and if we were to poll the audience, I think we would find that the white people in this room don't think of their political ideas as corresponding with being white. Most of the candidates who run for office are white and white voters split all over the lot in terms the candidates they support.

So there is an underlying assumption through all this that because the districts are majority white, *white people* as *white people* are represented. It simply isn't true.

Essentially what is being asked for by the creation of majority-black districts (that are deliberately created for that purpose) is to have districts set aside on the basis of race.

Now, I want to make absolutely clear that the problem is not districts that happen to be majority-black. When standard districting criteria are followed and even when standard districting criteria include recognizing communities of interest, which to me certainly include black communities, the results may be the production of majority-black districts. I don't think that the political process is harmed. Nor do I see this as an example of districts being created on the basis of race, or people being assigned to districts on the basis of race.

The injury to me, though, is the assumption that we ought to create districts based on race and if we don't create those districts, that people aren't represented, and that somehow blacks are being treated differently because we don't create districts for black people.

MODERATOR: Let me ask you a question, and I hesitate to do it because I don't want you to get mad at me. But is it your position then that when majority-white districts have been created historically by state legislatures, that race was not a factor in their creation? For example, Professor Lichtman says until the forced creation of majority-black districts in North Carolina through the Voting Rights Act, there had never been a black elected to Congress since Reconstruction.

PROFESSOR BUTLER: I am certainly not going to contend that there were blacks elected to Congress from North Carolina. I mean that is an historical fact.

Now, whether districts were intentionally created to be white, certainly there were times in the past where districts were created so that they would not be majority-black. Now, that to me is a different proposition.

MODERATOR: Why?

PROFESSOR BUTLER: It's a different proposition because there may have been intentional efforts to avoid the creation of majority-black districts. I don't deny that.

MODERATOR: Could you view the Voting Rights Act as an intentional effort to avoid the artificial creation of majority-white districts? Could you recharacterize the Voting Rights Act as an attempt to prevent the deliberate creation of majority-white districts? In other words, is the Act compensating for the fact that whites historically, and presently, control the districting process?

PROFESSOR BUTLER: But, again, when *whites* as *whites* are in fact controlling the districting process, and when they are in fact making decisions on the basis of race to disadvantage black voters, then you now indeed have a racial injury for which I think you have to recognize a racial remedy.

But I don't think that's what's going on in the creation of most districts. Districts are created for political purposes, and white folks, at least today in the South, are all over the political spectrum. There certainly was a time in the South when that was not true—a time when race was indeed a unifying force for the white population.

Are some of those attitudes still there among some people? Sure they are. But, you know, all you have to do is look at the spectrum of political opinion now being expressed in the South to realize that *white people* as *white people* are no longer represented in the legislatures.

The other thing that I want to say concerns the public's response to what has been going on. There have been some concerns expressed here that the public will get the impression that somehow the blacks elected from these *Shaw v. Reno*-type districts are somehow undeserving and unworthy. My impression is that that is not the public's perception. The public's response is that it's outrageous for districts to be created like this. They would think these districts were outrageous regardless of the particular purpose for which they were created.

In terms of whether race-based districts had an impact on realignment of politics let me offer an example of recent public perception. Just last week, after the elections in South Carolina, there was an interesting cartoon in the State newspaper, the local newspaper. It had a picture of water fountains in 1945 with the labels "white" and

"colored" over them. Then in 1994, it had two more water fountains, and these had the labels over them "Democrats" and "Republicans." I think that increasingly within the South, certainly in South Carolina and, I think, in other parts of the South, there is a growing notion that the Democratic Party is the black party. Now, I think some of that perception follows from the intentional creation of black districts.

PROFESSOR PARKER: I would like to respond to some of the points that Professor Butler has made because I think they do need to be answered.

The first point is, in my opinion, Professor Butler's points represent a complete distortion of the requirements of the Voting Rights Act. If white Members of Congress are indeed the first choice of black voters of a particular district, then there can't possibly be a Voting Rights Act violation, because a Voting Rights Act violation is predicated on the existence of racially polarized voting and the consistent defeat of minority-preferred candidates, and if minority-preferred candidates are elected, then there is no section 2 violation. And not only could a section 2 lawsuit not be brought, but also, it seems to me a legislature would be precluded from using compliance with the Voting Rights Act as the justification for the creation of a majority-black district under those circumstances.

So, in those circumstances that she postulated, where white Members of Congress are the first choice of the black voters, there would be no necessity to create a majority-black district, and there would be no Voting Rights Act violation. So, it seems to me, that that is a false argument.

The second argument that she made is also patently untrue. It is not true that there is no other group in the United States assigned districts on the basis of ethnicity. Anyone who has been in politics knows that in every state there are Irish districts, Polish districts, Ukrainian districts, Jewish districts. A lot of ethnicity is used in the political process.

I would like to refer back to the House Subcommittee on Civil and Constitutional Rights hearing that Professor Lichtman referred to just a moment ago. Barney Frank, a Member of Congress from Massachusetts, was asking a defender of the *Shaw v. Reno* decision a series of questions that went along the lines of, "Now everybody who is involved in Massachusetts politics knows that every time the legislature gets together, we create this Polish district, and this has been a traditional Polish district in Massachusetts, been in effect for a long period of time, and it's assumed that this Polish district will be created every time the redistricting process occurs."

PROFESSOR BUTLER: Is it drawn down the interstate, Frank Parker?

PROFESSOR PARKER: I don't know what the boundary of the Polish district is. Your claim was that no other group in the United States is assigned districts on the basis of ethnicity. Barney Frank said we always create a Polish district. If you doubt his word, ask him.

He said, "Now, are you telling me that we can create this Polish district, there is no constitutional violation, it's *prima facie* constitutional, and there is no question raised and no lawsuits filed, but if we create a majority-black district and we use race-consciousness to create that majority-black district under *Shaw v. Reno*, it's *prima facie* unconstitutional?"

The burden is on the State to justify it by strict scrutiny, the heaviest burden of justification, and there is a great likelihood that the Court will throw the district out. There is a double standard here that ethnicity can be used for some purposes but not others. It makes black people and minorities who are the intended beneficiaries of the Voting Rights Act a disfavored group, if districts are drawn in their favor, subject to the strict scrutiny standard and are *prima facie* unconstitutional.

Now, the third point that Professor Butler made, and I am glad she made this point because I think this issue needs to be brought on the table too, is the question of following traditional redistricting criteria. And I want to illustrate my point by referring not to compactness but to following political subdivision boundaries.

If you have been following redistricting for the past ten or twenty years, you know that political subdivision boundaries have pretty much gone by the board a long time ago because in most instances you cannot follow political subdivision boundaries and comply with "one person, one vote." So towns are split, counties are split. Political subdivision boundaries are departed from. Little pieces of counties, little pieces of towns are put in other districts in the name of "one person, one vote." And the newspapers are not editorializing against this. There is no Supreme Court decision that says this is *prima facie* unconstitutional. This is widely-accepted because everyone considers compliance with "one person, one vote" fairness in redistricting.

Now, if you can do away with political subdivision boundaries in the name of "one person, one vote," why is it so horrible and why is it so unconstitutional to diminish the importance of political subdivision boundaries if you are drawing lines to create majority-black, majority-Hispanic districts to comply with the Voting Rights Act? I don't understand the argument.

PROFESSOR BUTLER: First of all, my position certainly would be, if you draw a Polish district by running down the interstate and adding Polish people at every crossroads of the interstate, then you've got the same constitutional problem that you have if the district is drawn for blacks, or for any other ethnic group on the basis of ethnicity.

If you create districts that recognize communities of interest and those communities of interest share a common racial characteristic, well, that's standard. I don't find anything wrong with that at all. That to me is an entirely different proposition.

And just to show you that somehow this is not just the position of some right-wing Southerner, let me read to you what Drew Days had to say when he was testifying before Congress on this very issue in response to the notion that the Voting Rights Act, if it were amended, was going to result in the kind of gerrymandering that we are fighting today.

He is talking about circumstances in which the Justice Department might object to a redistricting plan. He says, "Take the case of redistricting plans in a community with a twenty-five percent minority population. Let us assume that local officials can create a compact and contiguous set of four city council districts where minorities are likely to have a sizeable population advantage in one district. When the jurisdiction submits instead, however, a plan that is not compact or contiguous, reflects substantial population deviations from district to district, or is otherwise drawn in a fashion that frustrates any prospect minorities will gain control of one district, the Department is likely to object.

On the other hand, we might assume another set of facts in which it can be shown that no fairly drawn redistricting plan will result in minority control of one district because of dispersed minority residential patterns, for example. The Department's response is not to demand that the jurisdiction adopt a crazy-quilt gerrymandered districting plan to assure proportional minority representation."³¹

Now, that was the representation that Drew Days, who was a very important player in the extension of the Voting Rights Act, made to Congress.

I can't imagine that if the kinds of districts that are being supported here today had been offered to Congress as something that was

31. *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, and S. 1992 and H.R. 3112 Before the Subcomm. on Constitution of the Senate Jud. Comm.*, 97th Cong., 2d Sess. 1388 (1982) (statement of Drew Days). Drew Days was Assistant Attorney General for Civil Rights in the Carter Administration. He currently serves as Solicitor General.

going to come out of the Voting Rights Act Amendment in 1992, that the Amendment would have passed.

And I think if you will go back and examine Mr. Days' testimony, there certainly isn't any clue in his testimony that this is what he thought was going to be the ultimate result of the Amendment of the Voting Rights Act.

MS. KING: I just have to say that I think you are missing the point. I think the point goes beyond race. I think we are talking about communities of interest and we are talking about traditional redistricting criteria. And just as Professor Parker mentioned, you are talking about putting together people who have things in common just as that has been done historically throughout this country. And in those situations, it is appropriate to allow people to get together and to elect the candidate of their choice, someone who is going to bring the issues that are relevant to those individuals to the table so those issues can be discussed, debated, and voted upon.

As a representative of the Justice Department, I have to say that we precleared many of the districts that are at issue in this litigation, and Mr. Patrick is committed, and the Attorney General is committed, to defending these districts to make sure that minorities have a voice and they are enfranchised in this country.

PROFESSOR KARLAN: For all of the back and forth about the facts, this is not really a debate about facts, this is a debate about values. And what you get from the Supreme Court is an attempt to make the rhetorical argument that this is a color-blind society. This has never been a color-blind society. The Fourteenth Amendment was not passed for color-blindness reasons. The Fifteenth Amendment certainly wasn't passed for color-blindness reasons.

There seem to me to be two separate questions. One is a question of end-state: What do we think the proper end goal is? And the other is a question of means: how do we reach the desired end-state? People disagree profoundly today about both of these issues, so that you end up with some people saying the ultimate end of America should be color-blindness. And for those people, it would be perfectly okay to have an all-white legislature because in a color-blind society no one would notice a Representative's race. When I teach these issues, this is what one of my students referred to as "the little gray babies argument"—down the road somewhere race will become irrelevant and we will all be exactly the same color. That's one argument about what the end-state should be.

The other argument about what the end-state should be is that America should not have a race-blind end-state. This is sometimes a

"gorgeous mosaic" argument; sometimes it rests on the idea that people in America have profoundly different attitudes and cultures and the like that are, in part, a product of race and ethnicity and there is no reason to try and dissolve those things; what we would like to have is a society in which those don't lead to political or economic or social disadvantages. But differences would still exist even in a perfect American society.

The other is the question of means. Even if you believe that ultimately we should have a color-blind society, how do you get there? And the argument that the Supreme Court seems to be advancing is that if only we stopped talking about race, it would go away, if only we weren't confronted and slapped in the face by these 160-mile-long districts that look like bugs splattered on windshields or Zorro or the Jerry Duck or whatever, our problems would go away and we would all be just what Martin Luther King promised us in the March on Washington.

The other argument is that we are never going to get to the color-blind society unless we take race into account right now.

But really what this is about is values. It's not about facts. And that is why both sides can argue until they're blue in the face about whether the North Carolina district is really an urban district or a black district. It's like the old advertisement: "Is it a breath mint or is it a candy mint?" It's both things at the same time.

The real problem here, which was raised by Clarence Thomas' concurrence in *Holder v. Hall* most clearly, is: Who makes the decision about whether we should be race-conscious in our districting or not? Clarence Thomas and Antonin Scalia take the position that the Supreme Court should make that determination, and that they should announce right here and right now, "No more racial vote dilution cases, no more judicial intervention, no more federal legislative intervention."

People on the other side take the position of saying that Congress should make that determination. The Voting Rights Act is an explicitly race-conscious statute. The statute is explicitly concerned both with racial vote dilution and the election of minority group members. Professor Butler is entirely correct that the statute singles out particular groups. Polish Americans are not protected as a class under the Voting Rights Act. Spanish-speaking Americans are. And that is just something that we have to face. It's a race-conscious statute.

PROFESSOR KOUSSER: Let me start out by agreeing with Professor Butler on one of the things that she said, which is that we

have got some white people who have divergent opinions here. And let me then turn to my divergent opinion with Professor Karlan. Even the civil rights lobby has divergent opinions.

I think that one of the main divisions here that has not been recognized is between lawyers and other people, or perhaps lawyers and people. And my view is that in fact this is about facts and not about simply values.

I think in *Shaw v. Reno*, not only were there not facts on the table as to what had happened in North Carolina, and what the history of redistricting had been in North Carolina, and what actually happened in 1991-92, but also there was a series of factual allegations essentially that Justice O'Connor used to justify her public policy position, the public policy position being that there should not be funny-shaped districts that were minority-opportunity districts.

There were three arguments that she used. Just as she would use the same types of arguments that you would use if you were testifying before a committee in Congress or the state legislature, she said these districts form stereotypes about the voters which implicitly, at least, she said are not true. That is a factual question: Are they true or not? Are black voters and white voters different or not? Do they have systematic opinion differences, or do they not? That is a factual question.

The second question is does racially polarized voting go up or not? She insisted that it did go up when you had minority opportunity districts. I think it is demonstrable that that is not true in the minority opportunity districts that were drawn in 1991-92, but it is a factual question.

And the third question, the third thing that she implicitly said, which this addresses, that the districts would make blacks or the people who were elected think that they were only responsive to that part of their constituency, and they were not.

The fourth thing, which is implicit in what she said, was that there were a set of traditional districting principles which had been followed traditionally by everybody all of the time which were essentially not followed.

Well, gerrymandering is a word that came up in 1812, and probably the practice of gerrymandering was old in 1812. If you want to look at the traditional districting principles in the United States, partisan gerrymandering, incumbent protection, et cetera, et cetera, are the traditional districting principles. We have gotten a little better at it because we have got a little more fine-grained data, but that is really the only difference.

So, there are a series of factual assertions which we don't have terribly good evidence on systematically that were raised by *Shaw v. Reno*. I think that those factual assertions are at the heart of the persuasive argument that she makes, if not the legal argument that she makes. I think they should be addressed. I think they should have been addressed before now more systematically by social scientists. And I think they should be addressed whenever this gets up to the appeal.

If anybody out there has influence over this, I appeal to you to make these and other factual assertions part of the evidence that is presented to the Supreme Court.

MODERATOR: Well, we have five minutes now to resolve not only the ambiguities of *Shaw v. Reno* but the fact-value distinction.

PROFESSOR PARKER: One question that hasn't been asked at this symposium, which I think is an interesting question, is: What would be the consequences of using exclusively traditional redistricting principles? What would be the consequences of taking race completely out of the picture, completely out of the redistricting process and using exclusively traditional redistricting principles?

It hasn't been done very much, needless to say. We did an experiment. In 1975, in the Mississippi legislative redistricting case, we were trying to figure out a way of how to convince a three-judge district court to adopt our single-member district plan statewide for the Mississippi House and the Mississippi Senate. And so we decided that the most convincing plan would be a completely neutral plan, race-blind plan relying exclusively on traditional redistricting principles.

So what we did was we used a random-numbers table to locate the center of each possible state legislative district, and then we included, by randomly locating the center, the nearest, most contiguous territory to that center to create the district until we reached the population norm. And we did that statewide for both the Mississippi House of Representatives and the Mississippi Senate—complete use of traditional redistricting principles, color-blind plan.

So what do you think the consequence was? Well, the consequence was that discrimination was randomly distributed throughout the plan. The plan was fifty percent discriminatory. Black people would only have fifty percent of the representation to which they, under some fairness principle, would otherwise get if the plan had been drawn in a race-conscious way.

MODERATOR: Frank Parker, let me just clarify that. You are saying if you do it randomly, that you produce as many minority-black districts as you would if you used race explicitly as a criterion?

PROFESSOR PARKER: No, you produce half as many.

MODERATOR: Half as many. Okay.

PROFESSOR PARKER: Half as many. Fifty percent of the majority-black districts as if you had done it in a color-conscious way to create the maximum number of minority black districts.

So from this we conclude—I haven't seen any published data on this, and I don't know that anyone else has performed this experiment—from this we conclude that a randomly drawn plan without the use of race at all, a color-blind plan using exclusively traditional redistricting principles, will have a bias against minorities every time.

PROFESSOR LICHTMAN: I am going, of course, to finesse the fact-value dilemma by saying it is a bit of both and, in closing remarks, briefly address each one of them.

First, on values. The notion of a color-blind society is indeed rhetorically persuasive and at some level appeals to our basic notions of equality. But let me remind you that in the 1890s the notion of separate-but-equal was also in many ways a very appealing idea that appealed to people's sense of fairness. Of course, separate never became equal.

So, too, the rhetorical invocation today of a color-blind society simply means, in many aspects, you're freezing into place the continued discrimination and inequality that exists in America.

Let me remind you who some of the strongest advocates of a color-blind society are: They are the very people who, back in the 1960s, bitterly and most strongly opposed the basic federal legislation to end segregation and end the most blatant forms of discrimination, including the landmark Voting Rights Act of 1964. The very same people who opposed the most important means of equality now talk about a color-blind society. I think it is a subterfuge.

Secondly, with respect to facts. I think facts are important, and I think we have heard today a lot of the same kind of rhetoric we heard at the very beginning of the North Carolina case: "You have drawn this ridiculous-looking district. It runs down the interstate. These people can't have anything in common. It violates all basic principles."

It is, again, appealing on its surface because it is easy to ridicule a district that looks like the 12th District in North Carolina. When you look at the facts, though, it turns out to be patently, totally untrue. In fact, there are strong communities of interest reflected in that

district, stronger than many of the more compact districts in the state and elsewhere, and in no way are the basic ideas of democracy or representation undermined by that. And those are the factual findings reflected in the *Shaw v. Reno* decision.

So, facts are important. It is important to get beyond the rhetoric and look at what is actually going on in these districts.

PROFESSOR WILLINGHAM: I am going to finesse the fact-value distinction by calling up a good old political science term called "perception," which means it's neither, and I want to drop the rest of the other questions. And I don't want to dump on Professor Butler.

PROFESSOR BUTLER: Well, that's nice. Thanks.

PROFESSOR WILLINGHAM: But I am a little unclear about—and I don't want to give the impression that I have done a survey of national minorities in this country—but I think a fair reading of the *Shaw* opinion and Ms. O'Connor's opinion and editorial commentary on that in a wide variety of sources, including many ostensibly liberal newspapers, would suggest that there is more going on here than a constitutional inquiry into these particular election districts, and that there are enormous forces attempting to use excessive, unnecessary, prejudicial language for more reasons than a narrow inquiry into these particular congressional and other districts.

I think, and I very much feel this to be the case, that racial minorities in this country ought to feel quite uncomfortable about that situation. And I am a little confused as to precisely how one can deny that reality.

PROFESSOR BUTLER: I think we tend, when we talk about these issues, to stop history at a particular point. And what I would like to do in my closing remarks is extend history back just a bit.

I think that most people will agree that one of the founding principles of this country was that neither benefits nor burdens would be assigned on the basis of nationality.

Now, needless to say, when the country was founded, we did have a group of people that we didn't include in the category of citizens. We did not include this group as people who would be free from burdens assigned by nationality because we didn't quite consider them to be people.

But an initial founding principle of this country was that we would not benefit the English at the expense of the Germans. Certainly we weren't going to let the State do it. Now, to be sure, individuals will continue to be able to make such distinctions.

When we passed the Fourteenth Amendment, we extended that principle to protect all of the people of the country. The purpose for

the extension of that principle was to include black people as a part of the citizenry to whom we will not assign benefits and burdens on the basis of race.

Now, it is certainly beyond denial that that promise was not fulfilled, and today has still not been completely fulfilled. But to say that the Supreme Court's refusal to permit States to make decisions on the basis of race is a drastic change in policy is absolutely not to pay any attention to history.

The other thing that I would suggest to you is that you should look beyond the history of this country to the history of the world. I have been spending a fair amount of time in recent years in Central and Eastern Europe. And if you think that assigning benefits and burdens to the population on the basis of ethnicity is the solution to the problems of multiracial societies, you need to take a closer look at history.

I do not believe that there is a single minority group in the history of the world that has been able to achieve parity by emphasizing its minority status, except in those circumstances where the minority group happened to be in control of everything.

MODERATOR: If you would permit me a substantive intervention, I would like to recall the genesis of the expression "color-blindness." It of course came from Justice Harlan's dissent in 1896 in *Plessy v. Ferguson*,³² where he said that our Constitution is color-blind and we know no caste here, which is very much the same rhetoric, I think, that Professor Butler and other people who are critical of the Voting Rights Act now invoke.

But what is often passed over is what he said after that. Justice Harlan went on to say that the white race in this country is supreme and superior and dominant when it comes to education and prestige and wealth and success and achievements, and he had no doubt that the white race would continue to be that way if it respected the principle of color-blindness that he thought was enshrined in the Constitution.

So, at its very inception, the doctrine of color-blindness was deemed to be perfectly compatible with white supremacy. And so I think that the controversy over *Shaw v. Reno* illuminates this struggle between a formal doctrine of color-blindness, and then the reality of the struggle to dismantle white supremacy in American history.

32. 163 U.S. 537 (1896).

IV. FUTURE CIVIL RIGHTS STRATEGIES AND ALTERNATIVE VOTING SYSTEMS

MODERATOR: Mr. Still, why don't we start with you. We spent the day kicking around the various implications of *Shaw v. Reno* and what it means. And at certain points people seemed to have come to the conclusion that there really is no way to satisfy the competing values that we have with the single-member district system.

Do you agree?

MR. STILL: Yes. I think what we have got to do is cut the Gordian knot here by acknowledging, or at least taking at face value, the criticisms that are made by people like Justice O'Connor of the shape of a district, like that found in *Shaw v. Reno*, and say, "Well, look, is there a way in which we can meet the values, to use Pam Karlan's term, the values that one group wants to have black representation or Hispanic representation in the legislature, in the Congress, while at the same time accepting the values of Justice O'Connor that we should not have these districts which are too bizarrely shaped and appear to have aggregated people solely on the basis of their color?"

One way to do that is to adopt some method of modified at-large voting where you use cumulative voting or the single transferrable vote. Justice Thomas mentions both of those in his *Holder v. Hall* concurrence, which is also his dissent in the *Johnson v. DeGrandy* case.

MODERATOR: Now, Mr. Still, let me stop you there because that might make some people nervous. That is, Justice Thomas' speculations might make some people think that the advertisement of these alternative strategies is really being used as a way to undermine the majority-black and Hispanic districts. Is there a danger there?

MR. STILL: Well, I am not sure that Justice Thomas was speaking without his tongue in his cheek when he was advertising these, as you say. It may be that because he goes on to say all that's necessary for the Supreme Court to move to something like this is for them to advance in their political thinking. And I think that that was an ironic or sarcastic statement that was being made by him, and perhaps he was saying, "And this is just the furthest out principle and see how bad it is." He didn't explicitly say that. And on the other hand, he didn't explicitly say, "And I think that proportional representation or single transferrable vote or cumulative voting is a good idea."

But I think that what we can find is, if you look at democracies around the world, you will find that we, the Canadians, the Australians, and the English are the ones who are left with single-member

districts, and that even the New Zealanders have now adopted this year, although they haven't yet put it into effect, a system like Germany uses, which is proportional representation mixed with single-member districts but eventually the proportionality rules overall by using the extra seats as a make-up, you might say, so that everybody gets their proportionate share of the votes. Now, that is between political parties, but political parties could be formed on racial lines or they could be formed with members of racial minorities liberally mixed into their party list.

So, there is a world of things out there for us to look at, and we should not be restricted only to looking at single-member districts because the Supreme Court happened to say, I think at the urging of Frank Parker—that single-member districts are to be preferred when federal courts have to draw remedies.

So, federal courts are stuck in that rut, and that is who draws a lot of districts or they get settled in federal court, and everybody wants to look at single-member district plans because they generally have the effect of tending toward proportionality more than at-large plans.

But you can get more proportionality and you can avoid having to, in the words of Justice O'Connor, segregate people by race into districts if you use these modified at-large plans.

MODERATOR: A lot of people at this conference are friends with Lani Guinier, and I wonder if you could abstract yourself for a moment as friends and try to reflect a little bit on her experience when she was nominated an Assistant Attorney General for Civil Rights.

Does the failure of her nomination sound the death knell for these ideas? In fact, does it close the book on various proportional representation strategies, or does her experience in fact herald things to come? Is this the critical debate of the next century which we are simply not mature enough to have yet?

MR. STILL: Well, let me just jump in on that. The progression of ideas is such that the first stage is where everybody says the idea is crazy and eventually everybody says, well, it's just the thing that we use all the time.

Single-member districts were like that twenty or thirty years ago. They were used in a lot of places in the United States, but as long ago as fifteen years ago I was still getting expert witnesses on the stand who were having to be cross-examined because they were saying that at-large elections were just the absolute best thing, and the single-member districts had all these awful side effects to them. As it turns

out, I now believe that they were probably right about many of the side effects.

But the one that they kept predicting was that you wouldn't be able to elect African Americans using single-member districts. They were wrong.

PROFESSOR PILDES: I think any complex political event like the Lani Guinier nomination is too complicated to reduce to one particular variable. As to whether there is any message in it about cumulative voting, for example, several months before she was nominated, the New Republic ran a piece I submitted to them advocating cumulative voting as a remedy for the Voting Rights Act.³³ And they were quite interested in the idea. And when they, not very surprisingly, I think, took an extremely hostile position on her nomination, the one thing they were very explicit about was to say they thought cumulative voting was an interesting idea, a very promising idea for these problems.

So, people could have been opposed to one idea or another in Lani Guinier's writings, or one presentation of an idea or manipulation of an idea in the media, without it necessarily having these sweeping meanings for something like the future of cumulative voting.

In response to your initial question, I think one of the things that we need to appreciate about territorial districting is that it is precisely meant *not* to be a proportional representation system. The very idea of territorial districting with majority rule is that a fifty-one percent majority gets one hundred percent of the control. If fifty-one percent of the voters vote Republican, a Republican controls the seat.

So, to evaluate territorial districting systems in terms of whether they produce proportional representation is, in a sense, to fail to understand the basic idea behind the very system.

And I think one of the problems that we face in the voting rights area now is that we are trying to wedge into this territorial districting system concerns for proportional representation or fair representation of various interests, and the system is being stretched to the breaking point because it simply isn't designed to accommodate that.

MODERATOR: When you wrote your piece for the New Republic, were you throwing your weight behind various Lani Guinier strategies, or were you simply trying to put an idea out there?

PROFESSOR PILDES: No, I think cumulative voting is an attractive option for dealing with some of the issues that the Voting Rights Act addresses.

33. Richard Pildes, *Gimme Five*, NEW REPUBLIC, Mar. 1, 1993, at 16.

I don't think it's a panacea. I do think it has potential costs that have to be thought about and there are trade-offs here with either of the two systems.

The traditional advantage that is offered for territorial districting is that by blowing up majorities, taking fifty-one percent of the vote and transforming it into one hundred percent of the political power, you enable government to act more decisively, to be effective. It's not stalemated and paralyzed. And the cost is that you have less proportional, less fairly distributed representation.

The advantage of things like cumulative voting and other proportional representation systems is that you get fairer representation in political bodies, and one of the costs that you have to think about is does that make for potentially less effective government because stalemate follows as a result?

I think on balance it's worth experimenting with these cumulative voting options, particularly, I think, at the local governmental level, where they are starting to be experimented with.

PROFESSOR ISSACHAROFF: I think that the Lani Guinier episode does not seal the fate of alternative voting systems. And I think that there are two issues that play into that.

The first is that if you look at the policy objectives or, in the language of the day, the values expressed in Supreme Court opinions dealing with voting over the last thirty years, you see a large number of issues raised by the Court which have never been operationalized: concepts of political fairness, concepts of individual autonomy both in terms of being able to actually cast a ballot and also in not being locked into a certain group or preexisting arrangement by the State. In its clearest form that is *Shaw*: questions of group representation, of group fairness, of group entitlement to an active and equal participation in the process.

And if you put all those together, and you gave them to a political scientist to start designing a system of representation from scratch, it is unlikely that anyone would turn to single-member districts with the plurality getting all the representation as the system of choice. It simply can't carry that much freight, particularly once you have any kind of notion of a representative outcome or a fair outcome, because single-member districts are notoriously unstable and if not gerrymandered, they will produce all kinds of results which will depart from that conception of group fairness.

So that that is one impetus toward looking at other solutions, particularly because if there is something always distasteful about the

State telling you that you belong in this district because we want you to vote for this person who we think is your proper representative.

The second issue has to do with this last point: anytime the State starts to redistrict, the language used in its decisions is whether this is a Polish district, this a black district, this a Democratic district, this a Republican district, and the trick is to get it right in terms of the mix. This means if you want to create a Polish district, you want about sixty percent Polish, one hundred percent is packing, and that means that you have to throw people in there that the State has said, "You get in that district because we need you to fill out the numbers, but we don't really want you to affect the outcome. This is not your district."

You know, if we want to create a sixty percent black district, that means we need forty percent white votes who aren't supposed to affect the outcome of the election. If we want a Republican district, the Democrats are there to fill out the numbers, but they're not supposed to alter the outcome either.

With the computer, the manipulation of lines, the way that these people are being forced—and I call them the filler people—the way that they are being forced to fill out the numbers in these districts is so much more apparent. It is because this is so much more transparent that I think that the level of distaste at the grass-roots response level is much higher.

MODERATOR: So you're saying that what is being laid bare is the fact that a lot of people's votes are sacrificed when you create a permanent majority, whether it's for a party, for a racial group, or for an incumbent. When you fashion a permanent majority, you are also creating a permanent minority, an electoral minority which is going to lose.

PROFESSOR ISSACHAROFF: That's right. You know, there is a line from Tolstoy about once an illusion is exposed, it can never be renewed. And it is the fact that we have laid bare these processes, largely through Voting Rights Act litigation and somewhat through the "one person, one vote" litigation, that means that everybody can see what we're doing.

And with the computer, as Rick Pildes has shown, the lines are more extreme than they used to be. And there is a sense of just looking at it and saying, "I don't really want to be told that I should be the person that fills out the numbers in a district that belongs to another group as determined by the state districting authorities."

MODERATOR: And there is no going back to neutral districting because it never existed in the first place.

PROFESSOR ISSACHAROFF: It never existed in the first place. Either you radically redirect the means by which districting is carried out, or you move away from districted election systems.

PROFESSOR PARKER: I am sympathetic with proportional representation, or "PR," systems, and I think that most of us here are. But I want to list some disadvantages of PR systems and some problems I have. I don't think they're required by the Voting Rights Act, but in many cases they are a good idea.

First of all, I think advocates of PR systems have to be very careful not to base their arguments on criticisms of single-member districting. I think this does a disservice to the civil rights community because it does on some occasions provide ammunition to the other side. It provides Clarence Thomas with ammunition; it provides other people with ammunition to point to the criticisms of single-member districting by advocates of PR systems, even people reading the transcript of this afternoon's discussion would say, "See, here Ed Still is embracing Justice O'Connor's arguments, and the voting rights community is divided." Now, that is misreading, but I think there is a danger there.

Face it, PR systems are a form of at-large voting. And so even though they do provide for increased minority representation, there is a down side. And I think as part of the discussion of PR systems we do have to address the disadvantages.

First, generally, unless you had district residency requirements, there is no neighborhood representation. In other words, everyone elected under a PR system can live in the same apartment building and represent a whole state or a whole county. So you do away with the notion of neighborhood representation.

MODERATOR: Which is, perhaps, the principal virtue of the current system.

PROFESSOR PARKER: Which is the principal virtue of the current system. You have somebody living near you who represents your interests.

Second, it is susceptible to the criticism that it does provide for representation by committee. You don't know who your representative is. You don't know who is the person you're supposed to go to if you have a problem with government, because you have at-large elections and groups of people are elected.

Third, I think it does put a premium on slating. And Ed Still mentioned the formation of political parties, which is a form of slating. And so, unless someone is included on a slate or has a kind of

political party affiliation, it does make independent candidacies problematic.

MODERATOR: Tell me how that works, because that seems counter-intuitive to me. If there are eight seats on the city council and I only need one-eighth of the vote plus one to win, doesn't that instead put a premium on my being able to organize my narrow bloc of the vote?

PROFESSOR PARKER: Well, I am seeing it in terms of electing larger groups, like a state legislature. It is an advantage. If you are included on the slate or within a political party, the people will bloc-vote; then you have greater chances of getting elected than if you are just running by yourself. I might be wrong on this, but people on the panel can criticize me if this is not correct.

And the last one is that it does require a highly-disciplined electorate. You have to vote the right way for a PR system to be effective, particularly with cumulative voting and limited voting. And if you make a mistake and you don't vote the right way—and this is a particular problem, say, with black people or Hispanics in the South or the Southwest—they have to understand that they have to vote exactly the right way, they have to cast all eight of their votes for one candidate, and if they split that and by mistake vote for another candidate, the candidate favored by them, the chances of election are decreased for that particular candidate. So it does require an electorate that is highly disciplined.

I think the debate over PR highlights the public choices that are available today. And *Shaw v. Reno* brings in great emphasis these are the choices available. First of all, let's assume that you think that minority representation is desirable, it's desirable to have black people and Hispanics in Congress. And fairness in representation as a goal as well.

So that means you have two choices: You can go with single-member district plans, some of which may result in oddly shaped districts, but this is a cost of having minority representation, having fairness in the electoral process. If you don't like that, the other choice available is PR voting systems. But it seems to me if we are going to have fair levels of minority representation, it has to be one or the other. And if we do away with both of them, then the goal of fairness for minorities and representation is defeated.

MR. VERRILLI: I think Frank Parker has made many good points there. One thing that has struck me about this debate is that either way you go—single-member districting or some form of a proportion-

al representation system—each approach to vindicating minority voting rights has its own inexorable logic.

If you stay within geographic districting and you want to maximize your efforts to ensure fairness to minorities in the electoral process, you push the concept of geography further and further and further. But if you go in the other direction and use proportional representation systems, particularly if you start conceiving of using them on a national scale, well, are we going to stop electing Members of the House of Representatives by state, for example, because why should those territorial constraints matter anymore?

MODERATOR: Another thing, you could view election of Senators from the states as a form of proportional representation.

MR. VERRILLI: Certainly with the Senate. But the experiment that I use is the House of Representatives: Are we going to stop electing them by state, because in order to achieve the logic of a proportional representation system to its full extent, you would need to do that.

MODERATOR: You would have to change the Constitution. You would have to change Article I to accomplish it.

MR. VERRILLI: But, apart from the practical difficulties of doing it, it seems at least to me that is a jarring thought that we would do that.

So, the odds are that whichever way you go, you are going to be making pragmatic compromises that take our objectives, which are laudable objectives, and take our traditions, which embody certain political theory values that are weighty and need to be considered, and you have got to work them out. I don't think you solve that problem by saying, "Well, proportional representation versus single-member districts." That is not to say there aren't times when proportional representation schemes are very effective remedies for particular problems.

MODERATOR: Let me press that point. To what extent do we really have a single, monolithic theory of representation? The Senate has a very different form of representation than the House. We have all kinds of super-majority rules in terms of the constitutional amendment process, in terms of ratification of treaties. We have super-majority requirements all over the place, and single-member districts themselves are an historically contingent innovation.

PROFESSOR KARLAN: I was going to say that this seems to me the place to divide discussion about the House of Representatives level, which Don Verrilli was referring to, from discussion about county or municipal offices. Until the last ten or fifteen years, the dominant

form of election on the local level was not single-member districts, it was at-large elections of various kinds. In some places, those at-large elections used various proportional systems. New York City has used all sorts of proportional systems. Illinois used cumulative voting for one hundred years. Cambridge has used a form of single transferable vote. Cincinnati used proportional representation.

One of the interesting things about these was when you looked at the justifications for them they were given in explicit terms of wanting minority representatives. Interestingly enough, of course, that wasn't in racial terms, it was in political terms. These systems were designed to give representation to the minority political party.

When I was growing up in Connecticut, we used a form of proportional representation for school boards called limited voting. Not a single voter, probably, was aware of that because the system was transparent to the voter. A voter would go into the voting booth and be instructed to vote for any two candidates for school board. Actually, three seats were being filled. Any group that was forty percent of the electorate—and it always meant Republicans in Democratic towns and Democrats in Republican towns—got represented. Voters did not view this as communistic, they didn't view it as quotas. This was the way elections for school boards were done. They viewed it as inefficient and corrupt, which was normal American politics.

(Laughter)

What I think is promising about these systems in local elections is that they allow us to elide the distinction of what it means to be a minority group entitled to representation. And they allow us to do something that Kay Butler was talking about on the last panel. She said, "Look, all white people are not monolithic." And that is exactly right. And so what you find when you have cumulative voting systems is that what might otherwise be a monolithic white bloc if the choices are posed in racial terms—"Are you white or are you black?"—becomes more fluid.

In some of the cases that Ed Still and I have worked on that have resulted in cumulative voting, what you see is the election of black Democrats to a county commission, for example, and some white Democrats to the county commission, and also white Republicans. You may in some cases get some candidates who are elected on the basis of neighbors joining together because the thing that is most important to them in the election is a neighborhood issue, "Don't put the county dump near our house, put it near somebody else's house."

On other issues, though, you get cross-county coalitions. So, for example, you will get all of the people who have kids in the public schools wanting to vote for particular candidates.

And it allows voters to decide for themselves with which bloc they want to vote, and to change that from election to election. So, I don't worry as much as Frank Parker does about black voters in a particular election not using the system exactly right, because even if they don't use it exactly right in one election, they are free to do it in the next election.

And what we have in fact seen is not that black voters do worse than expected under these systems, but in general that black voters do better than expected because the white community doesn't vote as a bloc; it fragments into white liberals, white conservatives, and the like.

MODERATOR: Well, we have an interesting local example of this. Indeed, because in the District of Columbia the local is the federal, Congress is implicated. Congress, in enacting the Home Rule Charter for the District of Columbia in 1973, said that of the four at-large council seats in the District of Columbia, two had to be set aside for people who were not of the majority party. So the Democrats control every ward council seat, two at-large seats, and then the other two have gone either to independents, Republicans, or the D.C. Statehood Party.

PROFESSOR PARKER: That is a true quota.

MODERATOR: That is a true quota, yes.

PROFESSOR MILLER: What this discussion demonstrates to me is that all of us, lawyers included, have a real public education project to educate people out in the world about how these modified at-large systems work and what their benefits are. That is something that certainly did not happen in the course of the Guinier nomination, which was actually a fairly truncated debate.

One thing I have noticed in reading the same newspapers that beat up on her so badly in the nomination process is that there now actually is more information and more knowledge out there about the value and benefits of some of these systems. There is a lot more knowledge on the part of voters that they haven't always voted only in single-member districts systems or at-large systems, but that other systems have been around for years and years and they are as traditional, in some ways more traditional, than single-member districts.

Education is an ongoing process. But education is really in some ways more the key issue than what position lawyers take in their cases on these issues because education creates real choices.

PROFESSOR KAIRYS: Let me start by qualifying what I'm about to say. I think you have to evaluate each specific situation, particularly when you're talking about relief under the Voting Rights Act. I don't think there is one right answer to this. But perhaps there is a great opportunity here.

First of all, our system is really peculiar. We are used to thinking of it as normal; we are used to thinking that what we do *is* democracy. But there are many forms of democracy. So you look around the world, and as Ed Still just said, there are only two or three countries left from the Old Commonwealth who still do it this way. And in each one of those—except the U.S.—there is a very substantial mass movement to throw it out and get proportional representation.

We are really stuck in this. We are used to these single-member geographic districts where a representative can come without even winning a majority, a plurality can win; and we are used to giving them all the power.

What happens as a result of that? Some of the things that the whole population is currently really aroused about: There is a two-party monopoly; politicians don't listen; they don't do what they said they were going to do; they ignore groups that weren't in the majority that sent them there, including minorities of all types; the Government is immobilized, or gridlocked; they tend to think that they and their parties have a hold on the position. The two parties have a hold that is very detrimental, and I think maybe a majority of the people agrees with this at this point.

Now, if I could say one other thing in terms of the context of this that would just take a moment. Pam Karlan alluded to this. I think we have to be realistic about the context right now. Civil rights is viewed as a special interest issue, as something that helps minorities and women at the expense of white men. That expense is viewed as very costly. People who think this way believe it costs them opportunities that they deserve. They believe it's expensive in terms of taxes. And they believe it is dangerous. Civil rights causes crime, if you haven't heard yet, or watched prime-time TV.

This, of course, is utter nonsense. Maybe it's characteristic of a period when short-term narrow self-interest has become our defining principle. It is the guiding principle for individuals, for businesses, and for society at large.

We have lost a sense of compassion or connection to community or to other individuals. We have no sense or understanding that misfortune or prejudice could befall any of us; we seem to think that that is just a problem for other people. We have no sense that working together, things could be changed.

We have even lost the sense that our short-term self-interest might demand civil rights and civil liberties, which the most vehement opponent of civil rights immediately learns when they get charged with a crime. Look at Oliver North. He is already condemning civil rights again, the same civil rights that kept him out of a deserved term in jail.

PROFESSOR KARLAN: I am glad there is some criminal you want to prosecute.

(Laughter)

PROFESSOR KAIRYS: There are many.

Now, I think this means that from the civil rights community or from the progressive community, we have to be thinking about a reconceptualization of civil rights.

The other part of this that I am not really going to get into is the meaning of the collapse of what looked like the practical progressive alternatives to our system in other parts of the world. Whether you supported or cared about those systems, whether you were a great opponent of those systems, that leaves progressive politics in this period in extreme disarray.

So I think we need this reconceptualization. There are lots of aspects of this we can talk about and there are lots of groups working on really interesting parts of this, but central to it has got to be a revitalization of democracy. That is what makes progressive politics different than what is happening right now, and has the ability of broadening the appeal of a new approach.

Now, what do I mean? I mean the two-party system really does stink. It tends to depoliticize our social discourse; it tends to drive people out of the political process. We have these terribly low voting rates compared to the proportional systems. We don't have a choice in candidates, and we could tick off many other consequences.

What this leads to, for me, is a need, in the voting context as well as in the voting rights context, to emphasize this revitalization of democracy. The issue is on the agenda across the political spectrum. It has been effectively taken over or diverted by the term limit question. We are in a very conservative period. There is a conservative agenda in this period that tends to swallow up and divert such

vital issues. Discontent about the political process has so far been effectively channeled into this term limit issue.

But there is a range of democratic reforms which we could be working on, and we could coalesce with these voting rights issues: proportional representation; elimination of the role of money in elections; media access for every candidate in limited equal amounts; elimination of the barriers to voting; elimination also of the barriers to ballot access. For example, we are the only country in the world that requires you to register to vote well in front of an election. In most places, you show up on election day, and you vote.

So, those are the kind of issues and reforms we could coalesce with the voting rights issues.

MODERATOR: In a pro-democracy movement?

PROFESSOR KAIRYS: Yes.

MR. STILL: Let me answer a couple of the criticisms that Frank Parker made about proportional systems, and maybe we ought to call those inclusive systems rather than necessarily proportional systems, because in some cases they don't result in proportionality but they result in some minimum level of inclusion of minority groups of various sorts within the political process.

PROFESSOR PARKER: Why don't you call it "good government"?

MR. STILL: Yes. Good government.

In case you didn't hear that, Pam Karlan suggests modified capitalism. Well, as a matter of fact, think about this for a minute. When you go buy something at the grocery store, you plunk down your money and you say, "I want a can of Pepsi," and they say, "We don't have any Pepsi. We are going to give you Coke instead." "No, I would like my money back." "No, I'm sorry, we're going to give you Coke instead." You see, that's the American system we have right now with elections. I plunk down my money or my vote and I get somebody I didn't vote for.

MODERATOR: Chosen by Coke and Pepsi.

MR. STILL: That's right. Chosen by Coke and Pepsi, in most cases.

(Laughter)

MR. STILL: But the point is, right now I know who my Member of Congress is. He's a guy I voted against last time. I am going to vote against him this fall. He is going to get elected again this fall. Why? Because I am in a "Republican district." See, I don't have as much of a choice. I get to vote for whatever sheep for the slaughter the Democrats put up against this guy at any particular time, so I know who my Representative is, but he's not anybody I can go to.

But Frank Parker criticizes this modified at-large system as being government by committee, that I wouldn't know who my Representative is. I have got two Senators in my State. Frank Parker, who doesn't have any representation in the Senate, doesn't even think about this. But I have got two Senators, I have got two Senators from my State, and I get to choose which one of them I want to go to: Richard Shelby or Howell Heflin. See, I've got a lot of choice there.

(Laughter)

MR. STILL: So if one of them is going to be more favorable to me on a particular issue, then I can go to that particular Member. In the same way, if it's a modified at-large system or proportional system, I will know who I voted for, I will know which one of those people I was most in favor of, and that is the person I will go to first on a particular thing. They don't have to know whether I voted for them or not in order to respond to me, and most of the time they don't know whether you voted for them or not.

I think Frank Parker is correct that at least cumulative voting and limited voting do put a premium on slating. They do put a premium on getting the vote divided up right or cumulated right among the minority group, and there can be a slip and you can end up with no representation at all. For that reason I believe that the single transferrable vote is a preferable system in the long run to cumulative voting or limited voting.

I don't want to be understood to be criticizing single-member districts. I was quoting Justice O'Connor and Justice Thomas to show that I believe that their criticisms of single-member districts, of the present method of single-member districting in this country, can be met by going to these proportional systems.

And it is not necessary for you to believe that they are right, but it is necessary for you to believe that you could undercut their arguments by arguing for something other than single-member districts.

PROFESSOR ISSACHAROFF: I just want to pick up on one point that Ed Still just made. I think that Justice O'Connor's opinion in *Shaw* is potentially quite destabilizing of the entire regime of single-member districts. And I think that *Shaw* does this more than any other opinion by trying to elevate an individual right in the political marketplace to some kind of premier value.

Various members of this panel have written on this question and we have referred to this problem as "stigmatic harms," "dignitary harms," or "essentializing harms." These harms arise when the State tells you that you are primarily an X and you are expected to participate in the political process as an X, act in this way, and take the representation

that we, the State who has redistricted for you, have decided is what best befits you.

O'Connor goes after this issue in terms of race with the inflammatory language of "apartheid" and "segregation." But the critique that she launches is not, in my opinion, confined to race. The critique is ultimately directed at state agencies assigning you your slot in the political process. It perverts the concept of elections as being where we choose rather than where others choose for us.

I believe that if this individual autonomy claim is really pursued, it threatens to do the most damage to single-member districts. And I think it flows right out of *Shaw*.

PROFESSOR PILDES: I was going to follow up on how to move discussion over toward some of these alternative voting systems.

One means is pointing out the comparisons between our system and other systems that people have already made, and one fact about this that I think is telling is that there are only two countries in Western Europe that use the system we use for elections. Obviously, England is one of them, since we inherited our system from England. But I doubt anyone in the audience could tell me the other country, because it's the Vatican. And all the other countries, all the other democracies in Western Europe use some form of one of these alternative systems.

A second way you can open up discussion about these alternatives is to point out the historical process by which we came to inherit this system of territorial districting. I think people imagine that there was some careful, deliberative choice among democratic alternatives, and we got the system we have, and it's worked in some way or another, at least, for some people, for a long time. So why think about changing it?

In fact, these alternative voting systems simply weren't conceived of at the time that we were making the choices underlying our system. They were conceptualized in the 19th century and adopted by virtually all the countries that created democratic systems since then.

So there was no deliberative choice. The options on the table were the ones we inherited from England, and that is how we ended up with a geographically-based districting system.

One way also to think about prompting discussion about these issues would be to consider efforts to amend the Voting Rights Act to make clear that alternative voting systems are a legitimate remedial option for federal courts to employ in these cases. I think one can argue both ways about whether the Voting Rights Act now should already be understood to permit this as an option. But I suspect

many federal judges will be reluctant to at least impose these alternative voting systems over the objections of governments. It has been done once now in Worcester County, Maryland.

And that case is up on appeal. All the other contexts in which these alternative voting systems have been developed under the Voting Rights Act are ones in which consent decrees have been used to employ alternative voting systems.

One of the advantages of moving toward amending the Voting Rights Act simply to permit this as one option is that it might open up a real public debate about these alternative systems versus the territorial districting system that we have.

MODERATOR: Would it be possible, outside of the judicial context, to mobilize powerful political interests, *i.e.*, the major political parties when they are in the minority to get behind proportional representation? Say you are in a state where the Republican Party is always in the minority, would they not have an interest perhaps in moving to a PR system?

PROFESSOR KARLAN: Well, in the places where it's to their interest, they have already done it. There are a tremendous number of state and local offices for which there are so-called limited slate laws, so that neither political party can nominate a full slate for all of the offices. That is what Connecticut did, that is what Illinois did, that is what New York has done.

Bipartisan gerrymanders are done all the time. These are a form of proportional representation for minorities, the minority being the minority political party. That is what *Gaffney v. Cummings*³⁴ is about, for example.

The plain fact is that if you are an incumbent legislator of any kind, an incumbent elected political official, you don't have a great incentive to change the system because, of course, you got elected under this system and you don't know what would happen under another system. The likelihood that anybody who has already been elected would want to change the system dramatically is quite low. And this is true even for people who are going to be perpetually in the minority within an elected body. And that, I think, means that the place this is most likely to come from is not from the members of the two major political parties as they sit in legislatures.

Where it is more likely to come from—and this is why local elections are more likely to have this—is in places where, at least formally, the system is nonpartisan. A lot of municipal elections are

34. 412 U.S. 735 (1973).

nonpartisan. You don't run as a member of a political party. And there it is easier for groups to coalesce around pushing for some form of alternative to single-member districts than it is when you have the two political parties, because no matter how partisan a legislator is, that legislator prefers retaining his own seat and having his party in the minority to giving up his seat in order for his party to increase its share.

PROFESSOR MILLER: Although I don't know the empirical evidence on this question, I would suspect that in some respects the Republican Party would probably have the least to gain from modified at-large systems in most places, even where they are a minority and could ostensibly gain from such systems.

Republicans have already gained so much, I think, under the single-member district system. They are so often on the side of implementation of those districts, especially where those districts have additional black voters who would otherwise vote Democratic moving black voters into majority-minority districts creates other districts where it is possible for Republicans to be elected.

And I am not sure what position the Democratic Party would take, but I agree with Pam Karlan that the biggest push for those systems will be either in nonpartisan situations or situations where you have progressive voters, whether they call themselves Democrats or Republicans, who see themselves as allies of minority voters.

I think that could be women voters on a lot of issues. It could be gay and lesbian voters. It could be a wide variety of voters. But it would really transcend party affiliation.

MODERATOR: You could create a coalition of either minority parties like the Libertarian Party or a coalition of minority interests.

PROFESSOR MILLER: Sure. And we have seen that happen in some elections. The recent New York City school board elections provide some nice examples of some extremely progressive candidates getting elected through somewhat unusual multiracial, multiethnic, multisexual orientation kinds of linkages. These kinds of elections are where you see the most push.

If you're looking for a progressive agenda, which, of course, the Voting Rights Act does not mandate, but if that is your political view, then in some ways modified at-large voting may get you closer to that than a single-member district system, although single-member districts have certain advantages.

MR. STILL: Republicans complain that they are gerrymandered out of their fair share of congressional seats by Democratically controlled legislatures. Again, don't understand me as buying that

argument. But if they believe that, then they would be likely to believe that a proportional system would be more favorable to them than the present, what they consider to be gerrymandered system of single-member districts.

PROFESSOR ISSACHAROFF: Let me introduce two caveats in this discussion. One is that the objective of a proportional representation system is to move closer to what the electors, more specifically the voters, actually want. And one immediate effect would be that, in Louisiana, probably the largest party in the State legislature today would be David Duke's party. So you have to be willing to face that consequence directly.

In Texas, in 1990, we had 14 contested congressional elections. Over two million votes were cast. The Democrats obtained 3,000 more votes total than the Republicans, yet they took 10 of 14 seats. That outcome is going to change as well.

The other effect, because it is more closely aligned with what the voters want, is that there is a risk addressed by Professor Rodolfo de la Garza at the University of Texas, that Hispanics will be quite adversely affected by any kind of proportional representation scheme. So long as you have single-member districts that are based upon the one person, one vote allocation system, then a district that has a large Hispanic community, which may be heavily immigrant, heavily under 18, and have extraordinarily low numbers of actual votes cast, will nonetheless control one Representative.

MODERATOR: That is, unless you have noncitizen voting.

PROFESSOR ISSACHAROFF: Unless you have noncitizen voting, which you have raised. But then you have the question of state versus local versus federal elections and at what point do you allow noncitizen voting?

But the direct impact may very well be on Hispanic political power, particularly in the Southwest United States.

PROFESSOR KAIRYS: I think the last concerns are very serious, but they pose a basic choice. And that is, do we believe in democracy? There are people out there for David Duke. Right now our political system suppresses any views other than the rather watered-down views of the Republicans and the Democrats.

I don't think that is a good thing. Those people are still out there; the David Duke view is there. It does get reflected in many ways. We like to think it's not visible. I would just as soon have David Duke or right wing-identified representatives.

MODERATOR: Well, but he's already an elected Republican from a single-member district.

PROFESSOR KAIRYS: Yes.

MODERATOR: In the Louisiana legislature.

PROFESSOR KAIRYS: But at the same time that I feel very strongly about how beneficial this might be, practically we have to realize that the Republicans and the Democrats are going to have very serious institutional and individual reasons to be entirely hostile to this.

First of all, whole sections of the Democrats and Republicans are likely to move into other parties that actually stand for something. The two parties may dissolve, or new coalitions may form. We would have an array of parties. There would be a choice. There might even be some real debate.

MODERATOR: Does anyone believe that the question of campaign finance is a voting rights-civil rights issue? This is something that I have tried to raise, and I was happy to hear Professor Willingham raise it this morning where he said one reason why the majority-black and Hispanic districts are so important is because in them the amount of money raised and given is much less but there is a level playing field, whereas if minority candidates try to run in majority-white districts, they have a much smaller financial base to draw upon.

PROFESSOR WILLINGHAM: Well, apropos of that, I hadn't really thought of it until you just mentioned that, but Bobby Agee, who is the black county commissioner in Chilton County, Alabama, which uses cumulative voting, told us just a few days ago that he manages to run his campaign on about \$500, whereas some of the whites who are running are spending thousands of dollars campaigning for county commission seats.

But he is able to do it because he is essentially targeting his voters. He is doing what you ordinarily associate with what merchants do: They're going to go to a direct mail campaign, they're going to target the people they want to get to who are going to buy their product. He does that because he knows the voters who are likely to vote for him are black voters. He is able to get to them in an efficient way and doesn't waste his money.

So, in that sense, even when you abandon single-member districts and go to a modified at-large system, you can still sometimes be able to run very efficient, low-cost campaigns.

MODERATOR: Well, our panel finally seems to have run out of ideas. I thought it would never happen.

Why don't we give everyone a chance to make one or two closing remarks. It has been a long and very fruitful day.

MR. STILL: Let me respond to a point that David Kairys has raised just a couple of times here and I meant to say something about it each time.

He has talked about the two-party system. As it happens, right now I am reading again the 1984 book, "Democracies,"³⁵ by Arend Lijphart, in which he is comparing twenty-one democratic regimes around the world, including the United States. Just as I was on the plane coming here yesterday, I was reading the chapter on how many political parties are present in a particular system.

It is dependent, he says, not upon the political system that you have, but upon the issue splits that you have within the community. Now, perhaps you could say the issue splits are a reflection of various other factors. Perhaps they are.

But in the United States, for instance, we have a moderate split on the socioeconomic axis between the left and the right, the Newt Gingrich type and the Ted Kennedy-type, if we can use them as the archetypes, we might say, whereas there are other countries that have cleavages not only along that—that is found in every one of the democracies he studied—but they will also have an urban-rural split. One or two countries have what he calls a post-modernist split, post-modernist versus modernist split. Other places have a religious dimension to their politics.

So, those are reflected in the number of political parties, and if you have three issue dimensions, you are generally not going to have two political parties, you are generally going to have four, five, or six political parties.

In the United States, we have one predominant issue dimension: the socioeconomic dimension. And to a moderate extent we have a cultural divide, a cultural-ethnic divide with most blacks being in the Democratic Party but they're not being an explicitly racial party like you will have in some countries.

So, those two issue dimensions are the only ones we have in the United States, and they are reflected in two political parties. Now, perhaps if we change electoral systems, more issue dimensions will develop and more political parties will develop, but it is not necessarily a given that if you go to a proportional system, what Arend Lijphart calls the consensual method of government, that you necessarily have to develop additional political parties.

35. AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* (1984).

PROFESSOR KAIRYS: Well, I am just going to briefly respond to that rather than sum up.

First of all, there are two aspects of our system that make us rather peculiar. One is the lack of proportional representation. The other is the nonparliamentary nature of our political system.

There are lots of issues that are just suppressed. We have divisions along all the lines you listed. They are very deep. But most of our differences are suppressed.

The nonparliamentary aspect of our system would obviously take a constitutional amendment to change. Many scholars feel you could shift to a proportional system for Congress by just a statute, and I think there is a very good argument for that.

But the parliamentary system was available at the time the Framers were around and was the norm in almost every other democratic country.

In a parliamentary system, the elections of legislators and the chief executive are connected. The legislative candidate or the party you vote for gets some ongoing power based on the votes they get. If a Clinton were elected based on support from certain constituencies or a coalition of parties, in a parliamentary system those constituencies would have their proportion of Congress and would therefore vote on every issue, every bill that comes before Congress. They cannot be ignored after the election.

In those systems you are encouraged to vote your beliefs. You get some ongoing influence based on your vote, and the parties have ongoing power in that proportion. They make their compromises to assemble a ruling majority coalition among various parties *after* the election. We have to make our compromises before because whoever gets the most votes in the electoral college or in the election—which is usually the same; it doesn't have to be—is going to be President, and every other vote has no ongoing significance at all. Therefore, you have to narrow and you have to appeal to as mushy a middle as we are used to seeing them appeal to in *advance* of the election. You can't stand for much of anything because the only goal is to get that winning vote rather than saying what you believe in and making the compromise later.

I think that the nonparliamentary aspect of our system has a lot more to do with the two-party monopoly in the United States than anything else; but I also think, in a proportional system, if we only made that step, we would see, at least in certain areas, a breakdown of the two-party system and more debate and more choice.

PROFESSOR PARKER: The advocates of PR, in order to sell the system in America, are going to have to find their country. The opponents of PR have the Fourth French Republic and Israeli politics and a large number of other examples of what they consider to be disadvantageous politics under PR systems.

So, the advocates of PR really are going to have to find their country that they want the United States to emulate and that will show the advantages of adopting a PR system. It might be Italy.

MR. STILL: I will take the Republic of Ireland.

PROFESSOR PARKER: Italy abandoned PR. Italy thought that PR was the reason for the corruption in Italian politics of the past ten or fifteen years. And so they abandoned PR for a modified district system. And what did they get? Forza Italia, the Northern League, and Mussolini's granddaughter.

PROFESSOR KARLAN: I am not sure that—and this is a point that a lot of the academic criticism has made—I am not sure that there is any political system that solves all of these problems because I think that America has, at least among Western democracies, a unique racial history that is different from a lot of the other countries whose systems we are looking at. And I think that the same point that W.E.B. du Bois made at the beginning of the twentieth century is still true: the problem in America is the problem of the color line. We have managed to do a pretty good job of solving a lot of the other problems of democratic theory, at least to the extent that most Americans find the system legitimate, but we haven't yet found a way of dealing with continued racial exclusion. And nothing the Supreme Court has done in the last five years has advanced the ball very much on that issue, and nothing that the legislative system has done over the last five years has advanced the ball much on that issue.

I think what we really have to do is go back and regain all the ground that was lost during the Reagan Administration in which the general public commitment to the idea of racial equality was just lost and the public sentiment became "Enough's enough. We've had affirmative action now for twenty-five years. Enough's enough. Let's go back to a system of individualism." And I think that that individualist perspective is the hardest thing for us to deal with, and until we confront the fact that politics has always been about groups, it's not really about individual voters voting for individual candidates, we are not going to really move very far beyond where we now find ourselves.

PROFESSOR MILLER: I would just add that the verdict is still a bit out about the real impact of alternative systems, in part because as a country we don't have very much experience with the kind of

multiracial or multiethnic coalitions that those kinds of systems would at least in theory make possible. There was really no incentive for them under at-large systems, and probably not a great deal of incentive for them under the single-member district systems.

So, coalition-building is one of the biggest promises that alternative systems hold out, but it remains to be seen how much of that really plays out. We actually know very little about those kinds of coalitions, and there aren't many examples of those kinds of coalitions being formed.

There are isolated candidates who have certainly won election where there was no significant racial bloc voting, but I think that is something different than having a real commitment to voting across traditional lines or an understanding of what those coalitions would mean over a long period of time. Without this understanding, coalitions would simply be a number of different competing factions, none of them really joining together to deal with crossing the racial divide or any of the other divides that we face.

PROFESSOR PILDES: I wanted to go back to *Shaw v. Reno* and make a comment about civil rights debates over the last ten or fifteen years.

I think that one of the unfortunate developments has been how polemical and confrontational a lot of discussion about these sorts of issues has become, and I think that that is certainly something that is a product of conservative argument, in part, over the last ten or fifteen years, but also something that liberals have participated in to a considerable extent as well.

Some of the things that you read about *Shaw v. Reno*—in fact, I will cite an op-ed piece³⁶ that Jamin Raskin, our moderator, just published last week or so—refer to *Shaw v. Reno* as another *Dred Scott* or another *Plessy v. Ferguson*.

I think that whatever you ultimately think about *Shaw v. Reno*, it does seem to me that the question of these kind of highly contorted districts is a troubling, difficult question. It is a hard question. You can come out, I think, with different views about the question, but to ignore it, to dismiss it, as a difficult, troubling problem, seems to me complacent and really not listening to the sorts of debates that are taking place.

So I guess I have been happy by the discussion today because I think it has been very productive. And I agree with Allan Lichtman

36. Jamin Raskin & Thomas Goldstein, *Turning the Voting Rights Act on Its Head*, L.A. TIMES, Sept. 4, 1994.

and Morgan Kousser that there are a lot of factual things we can pin down about some of these issues and we need to pay attention to facts where they are available.

MR. VERRILLI: I think that one real problem that confronts us in thinking about and imagining alternatives is that what we need more than coalitions in our society now, I think, are communities. And I think the real challenge for those who are imagining alternatives is to answer the question, "Do they build communities or do they prevent the building of communities?"

From my admittedly untutored view on this, the fear I would have of moving away from geography, and especially moving away radically from geography, is that where we live does matter and who we live with does matter. And the need to factor that in to whatever we are imagining for the future I think is quite important.

PROFESSOR ISSACHAROFF: I would like to return to a point that Don Verrilli made at the end of one of the morning panels, which is that we must not lose sight of how much we have changed the political process in the last thirty years, largely through either legislation or judicial action in the voting arena. It is a far more open, participatory process than we have ever had before in this country. And with the openness and the greater participation in the political process, comes a new set of problems that is revealed only as a product of the newly open process. Only when apportionment is reasonably fair and minorities are permitted to vote can we observe limitations on political change and political involvement of the citizenry that weren't apparent before.

I agree with Rick Pildes that *Shaw v. Reno* is not *Plessy*. I think that *Shaw v. Reno* is a confrontation with an extraordinarily difficult question of how do we license the use of racial classifications by the State in a context where the Supreme Court wants to say both we don't want to live with racial exclusion anymore and we don't like racial classifications in general.

The message comes out somewhat incoherent, somewhat inconsistent, but it is a reflection of the fact that we now have a polity where minority political power is expressed, is felt, and actually makes a difference in how we allocate electoral opportunity. *Shaw* shows the unresolved tensions, or new limitations, of our system in terms of both minority integration and respect for individual autonomy. That, in turn, creates the discussion about alternative voting systems as an attempt to resolve the very difficult discussions that are engendered by *Shaw*.

MR. STILL: I wanted to thank you very much for having this panel discussion this afternoon because I think that it is important that we begin to have a debate about these kind of issues.

We have thousands of jurisdictions in the United States. Not all of them will adopt the same system at any particular time. But if a good number of jurisdictions adopt a variety of systems, we will be able to get some of this empirical study that people are raising these questions about: Will cumulative voting or will proportional representation hurt Hispanics, will it hurt blacks, will it hurt the sense of community that people have? Will it hurt the representation? Will it do something better for people's sense of not having anybody in politics or in government who is representing their particular point of view? I think these are all important questions, and I thank you for starting the debate today, and I hope that it gets carried on.

For any of you who are interested, I have got a factsheet up here, just a one-sheet thing that will give you some background information on these various alternative systems that we have been talking about up here, and you can sign up and get some more information and I will send it to you as well courtesy of the Center for Voting and Democracy.

PROFESSOR KAIRYS: I think the central feature of *Shaw v. Reno*, which is after all our focus, is really the moral repudiation of the goals of the Voting Rights Act and the civil rights movement of the 1960s.

And in service of that Justice O'Connor's opinion very effectively appropriates the language and symbols of the progressive civil rights struggle in support of a role reversal. The role reversal is that now the presumed victims of racism are white people, and the presumed racists are black people. And this is a moral shell game, if you will, that the media has either gone along with or not seen what was going on.

When you get to whether we should urge these alternative remedies, I think you have to evaluate each jurisdiction in terms of the history of each state, what is possible, what can be done, what furthers the basic goal of diversity and inclusion in the political process. But I think we should start being more open to these alternatives and perhaps start educating ourselves about them.³⁷

MODERATOR: Thank you.

I was not planning to raise my Los Angeles Times op-ed because I thought it would have been self-serving. But since it has been

37. A good place to start is DOUGLAS AMY, REAL CHOICES, NEW VOICES, THE CASE FOR PROPORTIONAL REPRESENTATION IN THE UNITED STATES (1993).

brought up at the last minute here, this op-ed piece—which I am proud to have coauthored with Tom Goldstein, the editor-in-chief of the Law Review—is available here to all of you.

If I could just say one word about it. Nowhere do I think we say that *Shaw*, “is another *Plessy*” or “another *Dred Scott*.” The first sentence, if I am able to recall it, is, “Like the *Dred Scott* decision, *Plessy v. Ferguson* and *Korematsu* cases, the 1993 decision in *Shaw v. Reno* is proving to be another landmark holding about race in American life that the Supreme Court got all wrong.”

So I think it is perfectly fair and right to locate it in the context of those decisions. Indeed, it seems to me that this conference has shown that *Shaw v. Reno* is another landmark case about race in American life that the Court got all wrong. But maybe we can have another conference and debate that op-ed.

Perhaps above all, I want to thank all of the participants who did such a brilliant job in elucidating the issues and elevating the debate perhaps to the highest level I have witnessed it. And even without prepared texts, you did a remarkable and polished job of presenting your views in a respectful and mutually supportive way.

So thank you for coming to the Washington College of Law. I hope you come back, and we look forward to sending you your remarks, which you should feel free to edit—a little bit.

Professor Raskin concluded the Conference by offering thanks to key individuals who helped in bringing the event to its fruition. Most notably, Professor Raskin thanked: Sarah Miller, Assistant to the Deans, for her work in making arrangements and publicizing the Conference; the people of the Kay Spiritual Life Center; Tom Goldstein and the American University Law Review; Professor Raskin’s research assistants who are with the Program on Law and Government; and the audience, who “showed a lot of fortitude by sticking through a long day.”

V. LUNCHEON ADDRESS BY JULIAN BOND

I want to talk about the Voting Rights Act,¹ not so much in the sense that many of you know it, but as someone who has been its beneficiary. As you know, it's called the "most effective civil rights legislation ever passed."² It protects what President Ronald Reagan called "the crown jewel of our democracy,"³ and that is the right to vote.

Before it became law, blacks in the South were victims of a century-old system of legally sanctioned white supremacy enforced by private and State terror in all but a few isolated instances, and excluded from voting without any influence in the conduct of public affairs.

The years since the Act passed in 1965 have seen a dramatic, if slow, reversal of this exclusion. Within the first two years after it was passed, the percentage of blacks registered to vote in my home state of Georgia doubled from 27% to 52.6%.⁴ Today, almost three decades after the Act was passed, blacks have begun to participate in electoral politics at levels nearly equal to those of whites.

That's why the threat embodied in the Supreme Court's decision in *Shaw v. Reno*⁵ is so serious. What follows is an account of my experiences with voting rights litigation and the Voting Rights Act as an intervenor, as a plaintiff, and as one of many of who benefitted from the Voting Rights Act of 1965.

I tell these stories in the hope that when we gather for the numerous celebrations planned next year for the 30th anniversary of the Act that we will also be celebrating the demise of *Shaw v. Reno*.

From 1960 until the fall of 1965 I worked for the Student Nonviolent Coordinating Committee.⁶ This is the organization that played an important and sometimes overlooked role in pre-Selma Southern voter registration, organizing and increasing public consciousness of the South's denials of the right to vote and the terror used to enforce white supremacy at the ballot box.

1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. 1971, 1973-1973bb-1 (1988)).

2. S. REP. NO. 295, 94th Cong., 1st Sess. 11 (1975), reprinted in 1975 U.S.C.A.N. 774, 777.

3. Voting Rights Act Amendments, 18 WEEKLY COMP. PRES. DOC. 846 (June 29, 1982).

4. POLITICAL PARTICIPATION: A REPORT OF THE U.S. COMM'N ON CIVIL RIGHTS 238, 239 (1968).

5. 113 S. Ct. 2816 (1993).

6. See CLAYBORNE CARSON, in STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960s (1981).

We sent field secretaries to Selma in 1963, two years before Martin Luther King, Jr. arrived. With the NAACP outlawed in Alabama, with Medgar Evers as the only full-time civil rights worker in Mississippi, SNCC field secretaries were often the only professional organizers seen in many rural southern communities between 1961 and 1964. In Selma, as elsewhere, SNCC helped to bolster indigenous leadership and local organizations like Selma's Dallas County Voters League.

By 1965, SNCC's organizers had conducted dangerous voter registration drives in parts of the Black Belt in Mississippi, Alabama, Arkansas, and Georgia, had forced a reluctant Department of Justice to take its first tentative steps toward protecting voter registration workers⁷ and, building on work done by generations before them, had hastened the momentum of the political revolution that soon would sweep the South.

Those generations before, whose stories tell the origin of the southern rights movement, can probably be traced back to slavery. There is no recounting of the modern movement which can afford to ignore the heroic and often unheralded work of the South's black citizens and the organizers who assisted them.⁸

The year following the passage of the Voting Rights Act, I was the plaintiff in a case which reached the United States Supreme Court, and which strongly reinforced the right to vote. The case was called *Bond v. Floyd*,⁹ and it grew from my first election in 1965 to the Georgia House of Representatives. Federal lawsuits had reapportioned the Georgia General Assembly, overturning legislation where cows and horses were better represented than human beings. The Court ordered new equal districts created in urban Fulton County and ordered elections for a one-year term.¹⁰

As a successful candidate for one of those seats, I was to take the oath of office on January 10th, 1966. Seven days before I was to be sworn in, Samuel Younge, Jr., a Tuskegee Institute student and SNCC worker, was shot and killed while trying to use the segregated

7. *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961).

8. See, e.g., JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* (1994); STEPHEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969* (1976); FRANK R. PARKER, JR., *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* (1990).

9. 385 U.S. 116 (1966).

10. See *Fortson v. Toombs*, 379 U.S. 621 (1965) (indicating court decree enjoining state officials from placing issue of state Constitution on November 3, 1964 ballot should be reviewed by district court); *Gray v. Sanders*, 372 U.S. 368 (1963) (holding Georgia's use of county-unit voting system violated Equal Protection Clause). The previous disposition of *Toombs* determined that the State's General Assembly was malapportioned and required the injunction. *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962).

bathroom at a Tuskegee service station. He was a Navy veteran. The irony of losing the life he had offered his country over a segregated toilet prompted the release of an anti-war statement by SNCC's Executive Committee.

On January 6th, SNCC became the first national civil rights organization to link the prosecution of the Vietnam War with the persecution of blacks at home. The statement we issued accused the United States of deception in its claims for concern for the freedom of colored people in such countries as the Dominican Republic, the Congo, South Africa, Rhodesia, and in the United States itself. "The United States," the statement said, "is no respecter of persons or laws when such persons or laws run counter to its needs and desires."

Well, it created a sensation. In the civil rights community, it marked a break in the relationship between the more militant civil rights organizations and the administration of President Lyndon B. Johnson, and further widened the gap between SNCC and the civil rights mainstream. The reaction in the white South was even more severe including harsh criticism from Southern white liberals, such as Ralph McGill and Lillian Smith, whose anti-communism competed with their commitment to equal rights for blacks.

I was the SNCC Communications Director, and when I appeared to take the oath of office on January 10th of 1966, hostility from white legislators was nearly absolute. They prevented me from taking the oath. They declared my seat vacant, and they ordered another election to fill that vacancy. I won that election and was expelled again. By the time I approached a third election, this time for a two-year term, I had filed suit in Federal Court.

Federal Judge Griffin Bell wrote the majority decision for the three-judge court which refused to overturn the Georgia Legislature's decision to deny me the seat I had already won twice. His decision was in turn overruled by a unanimous Supreme Court, and a year after my first attempt I became a Member of the Georgia House of Representatives.

Before the three-judge court, I was represented by Charles Morgan, Jr. of the Southern Regional Office of the American Civil Liberties Union, and Howard Moore. For the appeal to the Supreme Court I secured the services of Moore, Victor Rabinowitz and Leonard Boudin.

Now, I had never been to the Supreme Court. As I sat and listened to the arguments of Georgia's Attorney General, Arthur Bolton, who argued that Georgia had a right to refuse to seat me, I found myself

hypnotically nodding in agreement. Rabinowitz elbowed me and whispered, "Stop that!"

Further on during Bolton's argument, the Justices asked a few questions. When Justice Byron White asked, "Is that all you have? You've come all this way and that's all you have?" I turned to Rabinowitz and I said, "We're winning, aren't we?" And he said, "Yes, we are." The decision from Chief Justice Earl Warren in *Bond v. Floyd* was larger than a victory for the First Amendment. It was a reaffirmation of my constituents' rights to free choice in casting their votes.

I ran afoul of Judge Bell again in 1971. Once more the unfettered right to vote was at issue, and once again Judge Bell ruled against me. In a case called *Bond v. Fortson*,¹¹ Andrew Young and I challenged Georgia's runoff primary vote provision for Members of Congress. Judge Bell granted summary judgment to the defendants on the grounds that the issue was not ripe for review because neither Young nor I knew if we would ever run for Congress.

Finally, I was party to a suit in 1981 in which the Voting Rights Act's protections were invoked to help create a majority-black congressional district in Georgia. This case, *Busbee v. Smith*,¹² stands as an important landmark in voting rights litigation. In *Busbee*, a federal court found impermissible racial intent in a voting rights case requiring creation of a majority-black district.

Busbee grew from my unsuccessful legislative attempts to create a majority-black congressional district in Georgia. Georgia's 5th District, then encompassing Fulton County and most of the City of Atlanta, was 50.33 percent black according to the 1980 census.

Andrew Young had been elected to the United States Congress from Georgia's Fifth in what voting rights attorney Laughlin McDonald called the biracial afterflow of the civil rights movement. Young was elected in 1972, and he served there until he was appointed U.S. Ambassador to the U.N. by President Carter in 1977.

The 5th District from which he had been elected was drawn only after the Attorney General had imposed a Section 5 objection to preclearance of the 1970 reapportionment plan drawn by the Georgia General Assembly. That plan had fragmented concentrations of black persons, and had placed the residences of potential black Congressional candidates outside the 5th District and the residences of potential white candidates inside the 5th District. For example, the homes of

11. 334 F. Supp. 1192 (N.D. Ga. 1971).

12. 549 F. Supp. 494 (D.D.C. 1982) (three-judge panel).

Andrew Young and Maynard Jackson were placed one block outside the boundary of the Fifth.

In a special 1981 session of the Georgia General Assembly called to consider reapportionment of state and congressional districts, I made several attempts to introduce and pass a plan which would have created a majority-black congressional district. My white colleagues in the Senate and the House also introduced a variety of plans. In each one, the 5th District was drawn basically in the same fashion. In almost all the plans submitted by the white legislators, the 5th District followed the plan drawn in 1971. It stretched from north to south with part of East Fulton County lying in the 4th Congressional District. In three plans, the county was divided between Congressional Districts Five and Six. In each plan submitted by white legislators, the black percentage of the population in the 5th District remained between fifty-one and fifty-two percent.

In early August, the State House Reapportionment Committee adopted a plan that gave the district a black population of fifty-one percent. Five days later, I introduced in the Senate Reapportionment Committee a plan which would have created a seventy-three percent Black Congressional District encompassing the black communities of Fulton and DeKalb Counties. I had waited until the disputes involving eight of Georgia's ten congressional districts were resolved. The eight districts surrounded Fulton and DeKalb Counties, creating a predominantly white doughnut around two heavily black counties. The hole in the doughnut would be my playground, and my battlefield.

The rationale of my plan, I told my colleagues, was to put together a large, harmonious, homogeneous black community living in Southern Fulton and DeKalb Counties that shared a common income, the value of their housing stock is the same, their educational level is generally the same, and, most important, their race is almost absolutely the same. Now, my plan did not affect the eight districts and the doughnut surrounding these two counties and those districts covering the rest of the state.

After it was introduced, the Chairman of the Committee adjourned the meeting without seeking a vote. On the next day, they adopted a reapportionment plan which included my plan. The Chairman cast the sole vote against the plan in violation of the Senate rules, which permitted his vote only to break a tie. On the Senate floor, the Chairman of the Reapportionment Committee, at the urging of the Lt. Governor, Zell Miller, introduced an amendment to the Committee plan. His amendment accomplished two tasks. It split prosperous

Gwinnett County between two districts so the county would not overshadow the 9th or the Mountain District where the Lt. Governor lived, and it drew a 5th District with a fifty-five percent black population.

I moved to amend the Chairman's plan creating a 5th District that was sixty-nine percent black. My amendment was adopted. The Senate adopted a final plan encompassing my amendment, and the entire plan was sent to the House for consideration. The House rejected the Senate plan and adopted one of its own. That plan was rejected by the Senate, and Conference Committees were appointed. After failing to adopt five Conference Committee Reports, the General Assembly agreed to a plan with a fifty-seven percent black population 5th District.

Now, I knew that population *majority* meant only a forty-six percent voting *minority* because blacks are on the whole younger than whites, and equal population numbers will not produce equal numbers in both races old enough to vote. I knew, too, and subsequently proved in court, that voting in Atlanta had become more, not less, racially polarized in the years since Andrew Young had been elected to Congress. The election of a black Mayor in Atlanta in 1972 had decreased the possibility that white voters would cross the color line. Atlanta's first taste of black power had reinforced the tribal tendencies of many white voters, solidifying their tendency to bloc vote.

With the assistance of Georgia's then-Republican Senator Mack Mattingly, a former IBM salesman, I sought a meeting with William Bradford Reynolds, the Assistant Attorney General for Civil Rights. When Senator Mattingly was unable to arrange such a meeting, I turned to State Senator Paul Coverdell, the Minority Leader of the Senate. He secured a meeting with Reynolds, and he and I flew to Washington.

Reynolds received us graciously, heard our arguments, and imposed a Section 5 objection against the Georgia plan. Georgia sought a judgment against his decision in the federal court here in Washington. With a number of other legislators, I intervened, and *Busbee v. Smith* was joined.

During the legislative debate and the court fight which followed, the proponents of a majority-black 5th District were abused and scorned in the media. The Atlanta Constitution accused me of creating a ghetto district whose representative would be ineffective.

Senator Coverdell was shown in an editorial cartoon in a graveyard unearthing the coffin of segregation. Coverdell and the Republicans were accused in the media of trying to move blacks from the Fourth

to the Fifth, solidifying the already Democratic strength of the Fifth, while increasing Republican hopes in the Fourth. Of course, Republicans, then and now, were willing to help black legislators, all of us Democrats, create a "blacker" Fifth. We blacks were eager to accept whatever assistance was offered, and little was forthcoming from members of our own party.

After trial, the District Court concluded that the 5th Congressional District was drawn to suppress black voting strength in Georgia.¹³ The arguments against my plan in the Legislature and the trial testimony in *Busbee* are richly illustrative of the congressional arguments which would rage over amending Section 2 a year later in 1982.

The *Busbee* arguments are predictive as well of arguments used today to discredit the Act, and to limit its effectiveness in enfranchising and empowering minority voters. Those arguments lost in *Busbee*, and of course they deserve to lose today.

The *Busbee* plaintiffs, including the Governor, George Busbee, Lt. Governor Miller, Speaker Tom Murphy and the leadership of the House and Senate made several arguments. First, that creating black-majority voting districts perpetuates racial polarization in voting behavior. Next, that relying on the courts supplants the normal methods of the political process, coalition building, voter registration, and voting.

Using race-conscious remedies, they argued, is alien to the American political process, and they argued that the Voting Rights Act demanded no more than a level playing field—that creating an opportunity to elect a black candidate was not required. In fact, nothing more than racial prejudice and racial prejudice alone motivated the defenders of the final plan.

The court found that the Lt. Governor believed keeping white rural mountain voters in a cohesive district was crucial. Keeping black urban voters in a cohesive district was not. They found that the legislative leadership abandoned its standard for proper reapportionment when considering districts other than the Fifth. The goals of maintaining historical borders, of preserving county and city lines, and of avoiding a Republican 4th District, all of these were pretexts for discrimination.

The House found that the Chairman of the House Reapportionment Committee, Joe Mack Wilson, was in their words, a racist and

13. *Busbee v. Smith*, 549 F. Supp. 494, 515 (D.D.C. 1982) (three-judge panel).

opposed drawing what he called a "Nigger District." Wilson had said, "I'm not for drawing no Nigger District." Pretty good proof.

Lt. Governor Miller's stated opposition to my plan for allegedly creating a Republican 4th District, the court said, was suspect. Neither Miller, nor any other Senator, expressed any fear of Republican domination of the Fourth. Miller had, in fact, approved a plan that preserved the 6th District, represented by Representative Newt Gingrich, and supported a plan placing heavily Republican Gwinnett County in that district. Because the evidence was overwhelming, the court denied Georgia the preclearance that it sought.

Since 1980, the standard for challenging discriminatory election procedures was set by *White v. Register*.¹⁴ The court held then that the 14th Amendment prohibits methods for election that deny minority voters an equal opportunity "to participate in the political process and to elect legislators of their choice."¹⁵

Today, the Act faces similar attacks to those raised in *Busbee* twenty-three years ago.¹⁶ Today's neosegregationists argue that majority-black districts set impermissible quotas for minority office-holders, and guarantee proportional representation despite a prohibition against quotas in the amended Act. They argue that majority-black districts resegregate, creating racial polarization in the electorate, a criticism majority-white districts have never engendered. They argue that race has vanished as a consideration in American political life despite all evidence to the contrary. These neo-Bourbons say they are color-blind. They are blind, but only to the consequences of color consciousness in American life.

The 1965 Voting Rights Act has begun to level the playing field for America's racial minorities and politics. It would be foolish to imagine that the passage of just three decades has lifted the heavy hand of white supremacy from any aspect of American life.

14. 412 U.S. 755 (1973).

15. *White v. Register*, 412 U.S. 755, 766 (1973). The *White* decision was later undermined by *City of Mobile v. Bolden*, 446 U.S. 65 (1980), which placed a discriminatory motivation requirement in instances of possible Fifteenth Amendment violations. In particular, the majority opinion noted that the Equal Protection Clause "does not protect any 'political group,' however defined, from electoral defeat." *Id.* at 77.

16. See ABIGAIL M. THERMSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987) (attacking Voting Rights Act as instrument of discrimination against whites). But see Pamela S. Karlan & Peyton McCrary, *Without Fear & Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 VA. J. L. & POLITICS 751 (1988) (book review) (critiquing Thernstrom's assertion as constituting flawed legal analysis and serving a conservative political agenda); Laughlin McDonald, *The Law*, SOUTHERN CHANGES, Nov. 1989; Alex Willingham, *Beginning With Voting*, NATION, Feb. 20, 1989, at 239 (book review) (arguing that Thernstrom ignores inherent "limits of single-member districts as a remedy for discrimination").

Georgia subsequently passed a reapportionment plan that the Justice Department found met their standards. In an election in the 4th and 5th Districts, Wyche Fowler was elected to the U.S. House of Representatives, and Representative Elliott Levitas was re-elected from the new Fourth. Levitas would later lose his seat to Republican Patrick Swindall. Embroiled in a scandal, Swindall lost in 1988 to Representative Ben Jones, returning the Fourth to the Democrats once again. Fowler, of course, was elected to the U.S. Senate in 1986, defeating Mack Mattingly.

I became the first candidate in 1986 to announce for the 5th District race, but lost in a primary run-off, to Atlanta City Council member John Lewis. Judge Bell, of course, became Attorney General in the Carter Administration. I had the happy opportunity to testify against his nomination, and he took that occasion to apologize for writing the decision which kept me out of office for a year.

Maynard Jackson, who had seen the 1970 Georgia Legislature set the Congressional District line one block past his house, served as Mayor of Atlanta from 1972 to 1980. In November of 1989, he was elected Mayor again. He succeeded Andrew Young, who served from 1981 until 1990, and who was a candidate for Governor in Georgia's 1990 Democratic Primary. One of his opponents then was Lt. Governor Zell Miller, who won that election and is Georgia's Governor today.

State Senator Coverdell was named Director of the Peace Corps by President George Bush, and was elected to the U.S. Senate after defeating Wyche Fowler in 1992, and I have become a teacher.

Now, today's racists, however sophisticated their tools or their arguments, will use the same methods to divide and delude black voters tomorrow that they have used for years and years before. There are lessons to be drawn from this Georgia experience and the experiences of countless thousands of others who have tried to make equal rights a reality in modern America.

One lesson is that racists, whether they are wool-hat boys from below Georgia's gnat line, sophisticates at elite colleges who use their scholarship and service to a conservative agenda, or the black faced right-wing accomplices to social genocide, will all employ any argument to oppose racial progress. They may be as crude as Joe Mack Wilson in his opposition to "Nigger Districts." They may be as clever as an academic in her manipulation of facts and misquotation of the record. They may be as self-hating and shameless as African-American apologists for domestic apartheid who favor race-neutral laws in a race-conscious society. Their intent and result are the same.

Black Americans fought and died to force their way into the political process and to erect an effective federal apparatus to protect their continued participation in it. No American, black, brown, or white, can afford to have that right destroyed or its protections relaxed.

VI. APPENDIX I: PARTICIPANTS

KATHARINE INGLIS BUTLER is a Professor of Law at the University of South Carolina. Prior to joining the South Carolina Law Faculty in 1978, Professor Butler was an attorney with the Voting Section of the Department of Justice. She has written and spoken extensively about the Voting Rights Act and about representation of racial and ethnic minorities. She has represented numerous states and political subdivisions in voting rights litigation, and advised others concerning administrative compliance with the Act. She represented the Florida Senate in the lower court in *Johnson v. DeGrandy*. Her interests also include the impact of electoral laws and representational systems on ethnic minorities in other countries. She has been a member of pre-election observer teams for national elections in Bulgaria and former Soviet Georgia.

PENDA HAIR is Director of the Fair Housing Program of the NAACP Legal Defense & Educational Fund, Inc. She specializes in fair housing and voting rights litigation and advocacy. She currently serves as lead counsel for intervenors defending African American opportunity districts in Texas. She has extensive civil rights and voting rights experience, including representation of African American voters in Arkansas in a statewide districting case won under the Voting Rights Act. Ms. Hair is a 1978 graduate of Harvard Law School, where she was Supreme Court Notes Editor of the Law Review. She served as a Law Clerk to Supreme Court Justice Harry A. Blackmun and Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit.

ANITA S. HODGKISS is a partner with Ferguson, Stein, Wallas, Adkins, Gresham & Sumter in Charlotte, North Carolina where she handles civil rights litigation and criminal defense work. Her practice focuses on voting rights, police misconduct, and employment discrimination cases. Together with the NAACP Legal Defense Fund, she represents the *Gingles* defendant-intervenors in the *Shaw v. Reno* case on remand. Anita is a graduate of Yale Law School, where she was a Senior Editor for the *Yale Law Journal* and published a student note entitled "Petitioning and the Empowerment Theory of Practice." She is a member of North Carolina Association of Black Lawyers, and currently serves on the Board of Directors of the ACLU of North

Carolina, and the Board of Directors of Legal Services of the Southern Piedmont.

SAMUEL ISSACHAROFF is the Charles Tilford McCormick Professor of Law at The University of Texas School of Law. He teaches and writes in the fields of voting rights, employment law, and civil procedure. He received his J.D. in 1983 from Yale Law School. He served as law clerk to the Honorable Arlin M. Adams of the United States Court of Appeals for the Third Circuit before becoming an active federal litigator. He has been a member of the Texas faculty since 1989.

RICHARD JEROME is one of six trial attorneys on the Justice Department's Voting Rights Protection Task Force, formed to respond to *Shaw v. Reno* claims. He has been the Department's lead trial attorney in *Hays v. Louisiana* and *Shaw v. Hunt*, and he was also a member of the trial team in *Vera v. Richards*, the Texas congressional challenge. Mr. Jerome has been a key participant in the Department's review of redistrictings after the 1990 Census. He served as an Attorney Reviewer in 1991 and 1992, supervising the review of redistrictings and other voting changes submitted to the Attorney General for preclearance under section 5 of the Voting Rights Act. Mr. Jerome has received the Department's Special Achievement Award in 1991, 1992 and 1993. After he graduated *cum laude* from Harvard Law School in 1984, Mr. Jerome worked for Verner, Liipfert, Bernhard, Liipfert & Hand, a private law firm in Washington, D.C. In 1987, he moved to the office of Senator Brock Adams of Washington (D-WA) as a Legislative Assistant for judiciary, commerce, and transportation issues. In 1989, he joined the Voting Section of the Civil Rights Division at the Justice Department.

DAVID KAIRYS, professor of law at the Temple University School of Law, has litigated some of the leading civil rights cases over the past two decades. His most recent book is *With Liberty and Justice for Some, A Critique of the Conservative Supreme Court* (1993).

PAMELA S. KARLAN is the Roy L. and Rosamond Woodruff Morgan Professor of Law at the University of Virginia and a Visiting Professor of Law at Harvard Law School. She is the author of numerous articles on voting rights, and served as assistant counsel at the NAACP Legal Defense and Educational Fund, Inc., where she litigated voting rights cases.

ROBERT A. KENGLE graduated in 1984 from Antioch School of Law in Washington, D.C. As a third-year law student, he worked with the Civil Rights Division as an intern from July to December 1983 on the trial of the school and housing desegregation case *United States v. City of Yonkers*. He joined the Justice Department in September 1984 as Honor Law Graduate and has worked in the Voting Section since then. He has engaged in substantial section 2 litigation, served as a section 5 attorney-reviewer from March 1992 to August 1993 and has conducted staff training sessions on racially polarized voting and section 2 investigations. He recently defended a section 5 declaratory judgment action in *Castro County, Texas v. United States* (county commissioners' court redistricting) and *Vera v. Richards*. He is presently defending a section 5 declaratory judgment action in *State of Texas v. United States* (concerning judicial positions).

LORETTA KING is the career Deputy Assistant Attorney General of the Civil Rights Division, United States Department of Justice. Her primary responsibilities include the supervision of the Voting Rights, Special Litigation and Coordination and Review Sections. She is also Chairperson of the Voting Rights Protection Task Force. Ms. King began working at the Department of Justice as a law clerk in 1979, and was hired as an Honor Law Graduate in 1980. From 1980 to 1990, she worked in the Employment Litigation Section of the Civil Rights Division, enforcing Title VII of the Civil Rights Act of 1964, as amended, and Executive Order 11246. While there, she brought and settled the Department's first sexual harassment and paternity leave cases. In 1990, Ms. King transferred to the Civil Division, Torts Branch, where she defended the government in multi-million dollar medical malpractice and other personal liability cases which were usually brought pursuant to the Federal Tort Claims Act. In 1992, Ms. King returned to the Civil Rights Division as Deputy Chief of the Voting Section. After graduating *cum laude* from Duke University in 1977 with majors in Public Policy Studies and Black Studies, Ms. King attended the American University, Washington College of Law, where she received her J.D. degree in 1980.

J. MORGAN KOUSSER is a professor of History and Social Science at the California Institute of Technology, and the author of *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*, as well as nearly 90 articles and book reviews, most on legal and political aspects of race relations in nineteenth and twentieth century America. He has testified as an expert witness on

the intent issue in *Garza v. Los Angeles County Board of Supervisors* (1990), *U.S. v. Memphis* (1991), *Shaw v. Hunt*, and *Vera v. Richards*. He was educated at Princeton and Yale, and has taught at Michigan, Harvard, Oxford, and Claremont Graduate School, in addition to Caltech.

ALLAN J. LICHTMAN received his Ph.D. in history from Harvard University, specializing in American political history and the quantitative analysis of historical data. He is Professor of History and formerly Associate Dean of the College of Arts and Sciences at The American University. Dr. Lichtman is the co-author of *The Thirteen Keys to the Presidency*, among five other books and more than one hundred scholarly and popular articles. He has served as a consultant or expert witness in more than 50 voting rights and redistricting cases, and is a regular commentator on public affairs for television networks. He has worked as an expert witness for defendants in *Shaw v. Reno* in addition to several other cases challenging minority congressional districts under the *Shaw* doctrine.

BINNY MILLER is an associate professor of law at the Washington College of Law at the American University, where she teaches the Criminal Justice Clinic and other lawyering courses. After graduating from the University of Chicago Law School, she clerked for Judge Barrington D. Parker of the U.S. District Court for the District of Columbia, and then litigated voting rights cases as a trial attorney with the Voting Section of the Civil Rights Division of the United States Department of Justice. She has published an academic article about the voting rights implications of local legislative delegations in the South, and a popular piece about voting rights issues for lesbian and gay voters.

FRANK R. PARKER is Professor of Law at the District of Columbia School of Law. Previously, Professor Parker was Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law, where he helped lead the effort to persuade Congress to extend the Voting Rights Act in 1982, and litigated numerous voting rights cases. From 1968 to 1981 he was staff attorney and chief counsel of the Lawyers' Committee's Mississippi Office, where he litigated many of the major Mississippi civil rights cases of the 1970's. He is the author of an award-winning book, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* (UNC Press, 1990), and has written numerous book chapters and law review

articles on voting rights issues. Professor Parker received his A.B. degree from Oberlin College and his law degree from Harvard Law School.

RICHARD H. PILDES teaches constitutional law, voting rights, legislation and public policy, and legal theory courses at the University of Michigan Law School. He has published academic articles on *Shaw v. Reno*, constitutional law, democratic theory, and regulatory policy. In addition, he has written on voting rights in more popular forms like *The New Republic*. Professor Pildes is a co-author, along with Professors Issacharoff and Karlan, of a forthcoming casebook on the Law of Political Participation (to be published by Foundation Press). After graduating Harvard Law School *magna cum laude*, he clerked for Judge Abner J. Mikva of the U.S. Court of Appeals for the District of Columbia Circuit, and for Justice Thurgood Marshall of the United States Supreme Court.

JAMIN B. RASKIN is an Associate Professor of Law and Associate Dean at the Washington College of Law at the American University, where he also serves as Co-Director of the Law and Government Program. A graduate of Harvard College and Law School, he has served as an Editor of the Harvard Law Review, an Assistant Attorney General of Massachusetts, and General Counsel of the National Rainbow Coalition. He has litigated and written widely in the field of voting rights, publishing articles on non-citizen voting in local elections, the suffrage rights of citizens in the District of Columbia, workplace democracy, and federal campaign finance and the "wealth primary."

EDWARD STILL is a lawyer in solo practice in Birmingham, Alabama and a board member of the Center for Voting and Democracy, Washington, D.C. He has argued three cases before the U.S. Supreme Court: *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978); *Hunter v. Underwood*, 471 U.S. 222 (1985); and *Presley v. Etowah County Commission*, 502 U.S. 491 (1992). He was also one of the counsel for the plaintiffs in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and in 185 related cases seeking an end to at-large elections in Alabama counties, school boards, and municipalities, *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 649 F. Supp. 289 (M.D. Ala. 1986). He is the author of several articles and book-chapters concerning the right to vote.

DONALD B. VERRILLI, JR. is a partner in the D.C. office of the law firm of Jenner & Block, where he specializes in Supreme Court practice, constitutional law, and voting rights issues. He represented the State of Florida in *Johnson v. DeGrandy*. After receiving his J.D. in 1983 from Columbia Law School, he clerked for Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit, and for Justice William J. Brennan, Jr. of the U.S. Supreme Court. Mr. Verrilli is an adjunct professor of law at the Georgetown University Law Center, where he teaches First Amendment law.

ALEX WILLINGHAM provided expert testimony in *Shaw v. Hunt* and *Holder v. Hall*. He studies U.S. voting laws and advises organizations and communities about electoral opportunities for minorities. His writings cover the role of race in recent elections, the movement to develop affirmative voting and election procedures, as well as the redefinition of the political community resulting from the increasing empowerment of national minorities. He teaches courses in U.S. politics and the civil rights movement at Williams College, and serves on the Board of Directors of the Highlander Center.

BRENDA WRIGHT is currently the Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. She oversees the Project's efforts to overcome racial discrimination in the electoral process through litigation on behalf of minority voters under the Voting Rights Act and Constitution and through public education and advocacy. Ms. Wright has been active in efforts to create majority-African American congressional and legislative districts and to defend such districts from reverse-discrimination challenges brought under *Shaw v. Reno*. She represented African-American voters in litigation in Florida which led to the creation of the State's first majority African-American congressional districts in 1992, and is currently participating in the defense of those districts as well as the defense of Louisiana's majority-black 4th Congressional District. Ms. Wright has testified before Congress and state legislatures on issues of racial discrimination in the electoral process, and is the author of several articles on the Voting Rights Act. She is a 1982 graduate of Yale Law School.

VII. APPENDIX II: *SHAW V. RENO* BIBLIOGRAPHY

As of November 28, 1994

Shaw v. Reno, 113 S. Ct. 2816 (1993):

Shaw's district court progeny:

- 1) *Johnson v. Miller*, No. 194-008, 1994 U.S. Dist. LEXIS 13043 (S.D. Ga. Sept. 12, 1994) (per curiam; 2-1 decision).
- 2) *Vera v. Richards*, 861 F. Supp. 1304 (1994), *order*, 1994 U.S. Dist. LEXIS 12334 (S.D. Tex. Sept. 2, 1994).
- 3) *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994) (2-1 decision) (*Shaw II*).
- 4) *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993) (*Hays I*), *vacated and remanded*, 114 S. Ct. 2731 (1994), *on remand*, No. 92-1522, 1994 WL 477159 (W.D. La. July 29, 1994) (*Hays II*), *stay granted*, 115 S. Ct. 31 (1994).
- 5) *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994).

Other cases discussing *Shaw*:

- 1) *Cane v. Worchester County*, 35 F.3d 921 (4th Cir. 1994).
- 2) *Bridgeport Coalition for Fair Representation v. Bridgeport*, 26 F.3d 271 (2d Cir. 1994).
- 3) *Clark v. Calhoun County*, 21 F.3d 92 (5th Cir. 1994).
- 4) *Sanchez v. Colorado*, 861 F. Supp. 1516 (D. Colo. 1994).
- 5) *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994).
- 6) *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994).
- 7) *Jeffers v. Tucker*, 847 F. Supp. 655 (E.D. Ark. 1994).
- 8) *Houston v. Lafayette County*, 841 F. Supp. 751 (N.D. Miss. 1993).

Articles, essays, etc.:

- 1) T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588-651 (1993).

- 2) Richard Briffault, *The Crack-Up: Place, Race and Representation After Shaw v. Reno*, U. CHI. LEGAL F. (forthcoming 1995).
- 3) Emily Calhoun, Essay, *Shaw v. Reno: On the Borderline*, 65 U. COLO. L. REV. 137-49 (1994).
- 4) Jerome M. Culp, Jr., Essay, *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162-96 (1994).
- 5) Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297-1336 (1994).
- 6) Robinson O. Everett, *Afterword*, 72 N.C. L. REV. 761-62 (1994).
- 7) Bernard Grofman, *Shaw v. Reno: An Overview of the Legal Background and the Central Issues* (forthcoming).
- 8) A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593-1659 (1994).
- 9) Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, U. CHI. LEGAL F. (forthcoming 1995).
- 10) David Kairys, *Race Trilogy*, 67 TEMP. L. REV. 1-12 (1994).
- 11) J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, RUTGERS L. REV. (forthcoming 1995).
- 12) Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, in 1993 SUP. CT. REV. 245-87.
- 13) Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, U. CHI. LEGAL F. (forthcoming 1995).
- 14) Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483-587 (1993).
- 15) Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652-82 (1993).
- 16) Charles S. Ralston & Michael A. Carvin, *Voting Rights Debate*, 10 Touro L. REV. 415-58 (1994).
- 17) Mark E. Rush, *Shaw v. Reno and the Curious Evolution of Voting Rights Jurisprudence* (forthcoming).
- 18) George S. Swan, *The Political Economy of American "Apartheid": Shaw v. Reno*, 3 THOMAS M. COOLEY L. REV. 1-44 (1994).
- 19) Melvin L. Watt, *Afterword*, 72 N.C. L. REV. 762-63 (1994).

Notes, comments, etc.:

- 1) Shelley S. Bailey, Comment, *The Voting Rights Act Enters a New Era: A Bare Majority of the Supreme Court Recognizes a New Cause of Action to Challenge Voting Rights Act Redistricting*, 39 LOY. L. REV. 807-36 (1994).
- 2) Kathleen L. Barrón, Comment, *Color Blind Lines: Shaw v. Reno and the Demise of Majority-Minority Districts*, 31 HOUS. L. REV. 889-919 (1994).
- 3) Robert A. Blake, Jr., Note, *A Step Towards a Colorblind Society: Shaw v. Reno*, 29 WAKE L. REV. 937-62 (1994).
- 4) Patricia Doyle, Note, 24 SETON HALL L. REV. 2146-94 (1994).
- 5) Tara A. Dunican, Note, 4 SETON HALL CONST. L.J. 323-59 (1993).
- 6) Sean P. Dunn, Comment, *Coloring Within the Lines—The New Law Regarding Race-Conscious Reapportionment*, 54 OHIO ST. L.J. 1481-1503 (1993).
- 7) Anthony Q. Fletcher, Recent Development, *White Lines, Black Districts — The Dilution of the Anti-Dilution Principle*, 29 HARV. C.R.-C.L. L. REV. 231-55 (1994).
- 8) Thomas C. Goldstein, Note, *Unpacking and Applying Shaw v. Reno*, 43 AM. U. L. REV. 1135-96 (1994).
- 9) Cynthia Kurz, Note, *Shaw v. Reno: Defining the Constitutional Parameters of Racial Reapportionment*, 1994 DET. C.L. REV. 239-78.
- 10) Leading Case, 107 HARV. L. REV. 194-204 (1993).
- 11) Kimberly V. Mann, Note, *A Grim Foreboding for Minority Voting Rights*, 5 MD. J. CONTEMP. LEGAL ISSUES 147-71 (1993-94).
- 12) Ripley E. Rand, Note, *The Fancied Line: Shaw v. Reno and the Chimerical Racial Gerrymander*, 72 N.C. L. REV. 725-60 (1994).
- 13) Jay N. Shepherd, Note, *"Abridge" Too Far: Racial Gerrymandering, the Fifteenth Amendment, and Shaw v. Reno*, 14 B.C. THIRD WORLD L.J. 337-67 (1994).
- 14) Christopher J. Soller, Recent Decision, 32 DUQ. L. REV. 865-96 (1994).
- 15) Jonathan M. Sperling, *Equal Protection and Race-Conscious Reapportionment: Shaw v. Reno*, 17 HARV. J.L. & PUB. POL'Y 283-92 (1994).
- 16) Timothy F. Sullivan, Note, *Shaw v. Reno: Discrimination By Design*, 39 LOY. L. REV. 885-901 (1994).