"An Examination of the history of Court Cases Surrounding the Issue of Minority Vote Dilution and the Impact of the Courts on Legislative Redistricting."

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INTRODUCTION

"In these cases now before the Court, the Court is... being asked to read its own sociological views into the Constitution.... One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind - whether those of business, slaveholders, or Jehovah's Witnesses - have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present court is unable to profit by this example, it must be prepared to see its work fade in time too, as embodying only the sentiments of a transient majority of nine men."[2]
- a memo by law clerk William H. Rehnquist, 1954

Perhaps the most enduring legacy any President of the United States can have is an appointment to the United States Supreme Court. For some presidents the opportunity to leave their mark on the high court may never occur, while others may have the opportunity to appoint one or more of its justices. "[T]he Supreme Court is a somewhat odd institution in a democratic society. A committee of unelected lawyers, the Court possesses the power to nullify the decisions of elected officials, whether the Congress, the president, or a local school board. The Court sets its own rules, decides what it wants to decide, and proudly ignores the public's reaction once it has decided. Not only are its members not selected by the voters, but also, once seated, they hold their jobs for life."[3]

Ours is a nation of laws. Issues arise and lawmakers enact policies in the form of laws. These laws can be, and often are, challenged in our court system. What does a law mean? How is a law interpreted? Nine men and women appointed for

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[2]David G. Savage, Turning Right: The Making of the Rehnquist Supreme Court (New York: John Wiley & Sons, Inc., 1992), p. 36.

[3]Id. at 11.

life make this sole determination. The United States Supreme Court stands as the ultimate arbitrator of our court system interpreting these laws and establishing public policy.

When presidents make appointments to the United States Supreme Court often times they will appoint individuals as justices who they believe share their own political and legal philosophy. Liberal presidents tend to appoint liberal justices; conservative presidents tend to appoint conservative justices. Generally speaking, conservative justices tend to exercise judicial restraint, while liberal justices tend to favor a judicial activist approach to the law. Once appointed to the Court, however, justices tend to vote their own consciences. From time to time this means that a justice thought to be conservative in his or her political and legal philosophy may ultimately be more liberal than expected or a liberal appointee may ultimately be more conservative in his or her political and legal philosophy than was originally thought. In 1969, then-President Richard Nixon appointed Warren Burger as Chief Justice of the United States Supreme Court to "lead a conservative counter-revolution at the court."[4] As David Savage states: "Three other Nixon appointees soon followed, but the counter-revolution did not happen. Indeed, the 1970s saw landmark victories for the liberals. The supposedly conservative Court gave a green light to citywide busing for school desegregation, struck down the death penalty, legalized abortion, and upheld 'affirmative' preferences for racial minorities. Unable to secure the votes - or even the decent regard - of the majority of his colleagues, Burger presided over a fractured, uncertain Court."[5] Other times, it will not be the justice whose legal philosophy has shifted, but the definition of the philosophy itself. For example, Senator Barry Goldwater led the establishment of

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[4]Id. at 4.

[5]Id.

the "conservative" movement, but was pro-choice on abortion. In 1995, however, many ideological conservatives would view individuals who hold this same pro-choice view on abortion as liberals. The definition of conservative has been redefined and narrowed over time.

Retirements and deaths of justices on the high court provide presidents with opportunities to shape the political and legal philosophical makeup of the high court. The result of this never-ending shifting of the political and legal philosophical makeup of the Court, and the resulting public policy established in Court opinions, is what law clerk William H. Rehnquist seemed to be referring to when he stated that the liberal Court: "must be prepared to see its work fade in time too, as embodying only the sentiments of a transient majority of nine men."[6] Young Rehnquist seemed to be forewarning that the liberal Court's attempts to read sociological views into the Constitution would not endure over time, and thus represented a "transient work."[7]

The goal of this paper is to study the legal issues surrounding the public policy issue of minority vote dilution in legislative reapportionment. Specifically, this paper will analyze the history of court cases surrounding minority vote dilution and the impact that the courts have had on legislative reapportionment. This paper represents both a policy study and a political history. First, it constitutes a policy study because it poses the policy issue/problem of minority vote dilution and the various legislative and legal solutions undertaken by those on both sides of the issue and the resolution of each issue/problem in the courts. Second, the paper examines the political history of the involvement in this policy issue by the federal courts in general, and the United States Supreme Court in particular. The policy study and political history are done concurrently. The overall analysis in this paper

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[6]Id. at 36.

[7]Id.

will consist of four sections. The first section examines vote dilution in general, and minority vote dilution in particular. The second section provides a detailed accounting of the political history and policy study of ten court cases which trace the involvement of the courts in this public policy issue. Particular attention is paid to the political and legal philosophy of the Court and the public policy elucidated by the Court when a particular opinion is issued. The third section looks at the future impact of the Court on this policy issue by examining two cases the Court has agreed to hear in the 1995-1996 term. The final analysis section of the paper examines the possible effects of recent Court rulings on the issue of legislative reapportionment with regard to the makeup of the United States House of Representatives. It will be the conclusion of this paper that the political and legal philosophical shifts that have occurred on the United States Supreme Court are directly responsible for the shift in the public policy of legislative reapportionment.

CHAPTER ONE

Background: Legislative Reapportionment

At the founding of our nation a great conflict existed over the composition of the national legislature: would the legislature represent states or people. According to Robert Birkby in The Court and Public Policy, the question of, "[w]hether or not to base representation in the House of Representatives on people or on property divided the Constitutional Convention, leading delegate James Wilson of Pennsylvania to ask: '[c]an we forget for whom we are forming a Government? Is it for men, or for the imaginary beings called States?'"[8]

The "Connecticut Compromise" between the Virginia and Randolph plans of government at the founding of the United States of America led to the creation of the bicameral legislature in the United States Congress established in Article I, Section 1 of the United States Constitution. Under the "Connecticut Compromise" representation in the United States House of Representatives was to be based upon population, and representation in the Senate would be equal with two Senators from each state. The "Connecticut Compromise" ended many of the fears of the smaller, less populous, states that they would be dominated in the national legislature by the larger, more populous states. Today, with the notable exception of Nebraska, each of the fifty states that make up the United States has adopted a similar format consisting of a bicameral legislature.

The laws of our country demand that boundaries be drawn denoting legislative districts for all state legislative offices and seats in the United States House of Representatives. The concept of using reapportionment for political purposes is not new. According to Frank Parker, one of the authors of Minority Vote

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[8]Robert Birkby, The Court and Public Policy, (Washington, D.C.: CQ Press, 1983), p. 46.

Dilution, the very first gerrymander occurred back at the founding of the United States of America. Parker credits Patrick Henry as, "leading an effort to gerrymander the congressional district containing James Madison's home county to prevent Madison's election to Congress because of his opposition to the Bill of Rights."[9]

The term "gerrymandering" was first coined in 1812 by Gilbert Stuart when examining a map of the reapportionment for Essex County, Massachusetts, that had been signed into law by Governor Elbridge Gerry. According to Parker, "Stuart sketched a head, wings, and claws on the distorted district, Stuart thought it looked like a dragon, but his companion thought it looked more like a salamander."[10] The combination coined the phrase gerrymander which has come to describe any legislative district that is drawn with odd or peculiar boundaries that lack contiguity.

While Patrick Henry's gerrymander was designed for political purposes, others are designed to racially discriminate. There are three major forms of electoral discrimination: disfranchisement, candidate diminution, and vote dilution. Disfranchisement is where individuals are prevented or discouraged from voting. In Minority Vote Dilution, edited by Chandler Davidson, the editor states that, "Disfranchisement may also be accomplished indirectly by rules and practices that on their face are not discriminatory but in fact discourage a group of potential voters from casting a ballot."[11] Candidate diminution happens when candidates are discouraged from running for an elective office. Davidson cites, "the changing of governmental posts from elective to appointive ones when a minority candidate has a chance of winning elective office; setting high filing and bonding fees, increasing the number of signatures required on qualifying petitions; manipulating qualifying

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[9]Chandler Davidson, Minority Vote Dilution, (Cambridge: Howard University Press, 1989), p. 85.

[10]Id.

[11]Id. at 3.

deadlines; abolishing party primaries; and intimidating and harassing candidates by threats, violence, cutting off credit, calling in loans and mortgages, and firing them,"[12] as examples of candidate diminution. The third and final form of electoral discrimination, that of vote dilution in general, and minority vote dilution in particular, is the focus of this paper.

VOTE DILUTION

Davidson defines vote dilution as, "a process whereby election laws or practices, either singularly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one group."[13] As can be expected, vote dilution takes many forms. Vote dilution can be as simple as requiring an absolute majority where a minority group might only achieve a plurality in an election. Other vote dilution mechanisms include the prohibition of "bullet voting" (i.e. the practice of voting for only one candidate), poll taxes, literacy tests, and the use of gerrymandering in legislative reapportionment. In each case the vote dilution mechanism serves to diffuse the influence of a block of votes. Prohibitions on "Bullet Voting" serve as a vote dilution mechanism when there are several vacancies for a given office and a voter is prevented from selecting only a single candidate, and must select as many candidates as there are vacancies. As a result, the voter is forced to cast votes for a less favored candidate which may have the effect of diluting the vote for their most desired candidate for whom they would have cast a single vote if allowed to do so. Poll taxes and literacy tests are vote dilution tools designed to prevent individuals from casting a vote. Poll taxes are designed to prevent those of lower incomes from voting because they can not afford to pay the tax. Additionally, literacy tests are designed to prevent less educated individuals

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[12] Id.

[13] Id.

from voting because they are not educated enough to pass a literacy test. Over the years, many of these vote dilution mechanisms have been outlawed and/or declared unconstitutional by the courts due to their discriminatory effects.

Another type of vote discrimination is racial gerrymandering that is designed to dilute an ethic minority community's voting strength. Racial gerrymandering can take several forms: at-large elections, as well as cracking, stacking, and packing. First, at-large elections can be held in order to submerge the influence of the minority community among a non-minority majority. Often times these at-large elections are "winner take all" contests such that the minority community, although a large voting bloc in the community, is denied representation by representatives of their choice. A second form of dilution can occur by cracking or breaking a minority community's representation into multiple districts. When a minority community is cracked, its influence is spread among two or more legislative districts such that its influence is diluted. A third technique is called stacking. Stacking involves the placement of a large minority community with a large non-minority community in order to prevent minority voters from achieving a voting majority. Fourth comes packing. Packing occurs when a minority community is placed into a legislative district in such a high concentration that it wins only one legislative seat where they might have won one legislative seat and strongly influenced another had the concentration in that first district been lower. Packing is typically said to occur when a district has a minority concentration of over eighty percent, but sometimes occurs at lower concentrations.

CHAPTER TWO

The Court in Public Policy and Legislative Reapportionment

The United States Supreme Court first became involved in issues of public policy in the landmark case of Marbury v. Madison, 1 Cranch 137 (1803). This case revolved around President John Adams' midnight appointments the night before he was to leave office as President. In this case, a gentleman named Marbury had been denied the position to which President Adams had appointed him, because Marbury had not received the notice of appointment before President Jefferson took office and canceled the appointment. The Court found that, "...as the appointment was complete, Marbury has a right to the commission and that the law affords a remedy."[14] In this case, however, the Court found that to remedy the situation would require the Court to use a Writ of Mandamus granted to the courts by the United States Congress. The Court ruled that the Congress had acted unconstitutionally in granting this power to the courts. The result of this ruling was that the United States Supreme Court had established its purview of judicial review of Congressional actions. This case established the Court's authority to declare acts of Congress unconstitutional. The United States Supreme Court had entered the realm of public policy for the very first time.

Since the mid-1940s numerous cases have been brought before the courts relating to the voting rights of minority communities. Cases occur when individuals from minority communities have been injured and demand a remedy. More recently, as this paper will demonstrate, non-minorities are now claiming injuries. Many of these cases claiming injuries involve the denial of civil rights as guaranteed pursuant to the Voting Rights Act of 1965, as amended over the succeeding years.

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[14]Robert Birkby, The Court and Public Policy, (Washington, D.C.: CQ Press, 1983), p. 46.

VOTING RIGHTS ACT OF 1965

The United States Congress enacted the first comprehensive protections for American voters in the Voting Rights Act of 1965. This Act was primarily designed to "create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally."[15] The effect of this Voting Rights Act was an increase in voter registration among blacks. According to the Legislative History included in Report No. 97-417, titled the Voting Rights Act Amendments of 1982, by the United States Senate, a total of one million blacks were added to the voter registration rolls between the years 1965 and 1972.[16] This same Senate Report No. 97-417 states that the result of this increased registration was an increase in the number of schemes and mechanisms utilized to dilute and prevent blacks from voting or from having their vote be meaningful. The Senate Report makes the point that, "[e]lective posts were made appointive, election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for elections by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote."[17] This act was extended in 1970, 1975, and 1982.

COLEGROVE v. GREEN

The first important reapportionment case to be examined is Colegrove v. Green, 328 U.S. 549 (1946). This case is an appeal to the United States Supreme Court from the District Court of the United States for the Northern District of Illinois. In this case the appellants, three qualified voters of Illinois, brought suit challenging the validity of the Illinois Congressional districts created for electing representatives to

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[15]S. Rep. No. 97-417, 97th Cong., 2nd Sess. at 6 (1982).

[16]Id. at 7.

[17]Id.

the United States House of Representatives. Specifically, the appellants filed the suit against the Governor, the Secretary of State, and the Auditor of the State of Illinois. In this suit the appellants sought to have the Illinois Congressional elections for November of 1946 halted. The Appellants charged that the current congressional districts, as drawn:

> ...violated various provisions of the United States Constitution and § 3 of the Reapportionment Act of August 8, 1911, 37 Stat. 13, as amended, 2 U.S.C. §2a, in that by reason of subsequent changes in population the Congressional districts for the election of Representatives in Congress created by the Illinois Law of 1901... lacked compactness of territory and approximate equality of population. (328 U.S. at 550, 551.)

The opinion of the United States Supreme Court was delivered by Justice Felix Frankfurter. Writing in the majority opinion, Justice Frankfurter agreed that the District Court had acted properly by dismissing this case based upon the precedents established in Wood v. Broom, 287 U.S. 1 (1932). In Wood v. Broom the United States Supreme Court held that the Reapportionment Act of June 18, 1929, had "no requirements 'as to compactness, contiguity and equality in population of districts. 287 U.S. at 8.'"[18] Justice Frankfurter went on to state that what the appellants want in this case is "beyond its [the Court's] competence to grant... due regard for the effective working of our Government revealed this issue to be of a peculiar political nature and therefore not meant for judicial determination."[19] Simply put, a majority on the Court believed that the Court must stay out of this issue because it was political in nature. Justice Frankfurter believed: "It is hostile to a

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[18]Colegrove v. Green, 328 U.S. 549, 551 (1946).

[19]Id.

democratic system to involve the judiciary in the politics of the people."[20] He argued that: "To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[21] The issue of the redistricting of Illinois Congressional Districts was to be left to the Illinois legislature with the people of the State of Illinois acting as the check on their state legislature. The alternative, the Court stated, was the holding of state-wide Congressional elections with the United States House of Representatives determining whether to seat those individuals who were elected.

The United States Supreme Court chose to affirm the dismissal of this case. The primary reason for the Court's decision was its desire to avoid intervening in a political issue. The Court viewed that it had two alternatives in this case. It could allow the districts to exist or it could declare them illegal. The Court states, "[a]t best we could only declare the existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket."[22] The Court viewed the election of members of the United States House of Representatives at-large to be in direct opposition to the reason Congress required districting in the first place. It is worth noting that the election of representatives by districts has been required since 1842. Additionally, the Court noted that the House of Representatives, which controls the official seating of members of that body,

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[20]Id. at 554.

[21]Id. at 556

[22] Id. at 553.

could choose not to seat the Illinois House delegation. In the end, the Court decided that, "[C]ourts ought not to enter this political thicket."[23]

The issue looming large in Colegrove v. Green is the degree of involvement by the Court in issues that are political in nature. Few issues arise that are as political in nature as that of legislative reapportionment. In this case the majority decided against involving the Court in this political issue. The Court chose to allow the political process to sort out political problems, not the court system.

The 4 to 3 opinion of the United States Supreme Court, discussed above, was delivered by Justice Frankfurter. Justices Stanley Reed and Harold Burton concurred with Justice Frankfurter's opinion. Additionally, Justice Wiley B. Rutledge concurred separately with the result, but not necessarily with the reasoning. In his separate concurring opinion, Justice Rutledge felt that the majority was correct in dismissing this case. While he felt that the Court may have had jurisdiction in this case, he believed that, "[T]he cause is of so delicate a character... that the jurisdiction should be exercised only in the most compelling circumstances."[24] Justice Rutledge believed that this was a case in which the Court should "decline to exercise its jurisdiction."[25] During this term of the Court, Chief Justice Harlan Stone was stricken and died on April 22, 1946. As a result, although the Chief Justice heard the case, he was not part of the Court when it delivered this decision. Justice Robert H. Jackson took no part in the consideration or decision of this case.

Justice Hugo L. Black dissented in a separate minority opinion with Justices William O. Douglas and Francis W. Murphy joining in his dissent. In his minority opinion, Justice Black argues that the appellants had a claim to have their case heard

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[23]Id. at 556.

[24]Id. at 565.

[25]Id. at 566.

by the Court because fundamental rights were being denied. Justice Black viewed the disparities in congressional district populations within the State of Illinois as a diminution of the appellants' right to have their vote weighed equally. Justice Black states: "The assertion here is that the right to have their vote counted is abridged unless that vote is given approximately equal weight to that of other citizens."[26] It was his conclusion that because there was "no adequate legal remedy for depriving a citizen of his right to vote, equity can and should be granted."[27] Justice Black believed that the Court could act as a court of equity in this issue to remedy a wrong that could not be remedied elsewhere under the law. What is interesting is that Justice Black constantly refers to the value of an individual's vote not being diminished through the inequality of populations among Illinois' existing congressional district populations. Nowhere does Justice Black mention the fact that having an equal number of individuals residing in a congressional district does not mean an equality in the value of an individual's vote. Justice Black states: "No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. The probable effect of the 1901 State Apportionment Act in the coming election will be that certain citizens, and among them the appellants, will in some instances have votes only one-ninth as effective in choosing representative to Congress as the votes of other citizens. Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit."[28]

This case stands as an example of the differences on the Court between the conservative philosophical majority led by Justice Frankfurter and the liberal legal

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[26]Id. at 568.

[27]Id.

[28]Id. at 569.

philosophy of the minority espoused by Justices Black, Douglas, and Murphy. In coming years, and in future cases, the issue of what exactly is meant by equality, and how or when to apply the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, will take center stage in the Court's debate over legislative reapportionment. As will be demonstrated in our discussion of the next few cases, Colegrove v. Green, 328 U.S. 549 (1946), marks the Court's last stand before becoming thoroughly involved in the political issue of reapportionment and ultimately the role of protecting minority rights in legislative reapportionment.

GOMILLION v. LIGHTFOOT

The Court stayed out of the issue of legislative reapportionment for fifteen years until the case of Gomillion v. Lightfoot, 364 U.S. 339 (1960). This case involves the appeal in 1960 of a United States Court of Appeals, Fifth Circuit, decision to the United States Supreme Court. The subject of this case is the denial of a petition by the black citizens of the City of Tuskegee, Alabama, to have Local Act 140, passed by the Alabama State Legislature, declared unconstitutional, and to enjoin the city and its officers from enforcing Local Act

140 which redrew the municipal boundaries of the City of Tuskegee, Alabama.

In this case, Gomillion and the other black residents charged that the city boundaries of Tuskegee had been drawn to exclude black residents from the city. In fact, no white residents were excluded from the city, but only four of four hundred black residents were left residing within the new municipal boundaries. In total, the new boundaries had twenty-eight different sides. The black residents charged that the legislation was intentionally designed to exclude them from residing within Tuskegee, thereby discriminating against them under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and also depriving them

of their Fifteenth Amendment guaranteed right to vote. Delivering the United States Supreme Court's majority opinion, Justice Frankfurter states that this intentional exclusion of the black community from the City of Tuskegee amounts to "...segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[29] Justice Charles E. Whittaker's concurring opinion states, "It seems to me that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution."[30] Justice Whittaker believed that the black citizens could still vote, just not in Tuskegee, Alabama. It was his position that "'fencing Negro citizens out of' Division A and into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment, Brown v. Board of Education, 347 U.S. 483."[31]

In Gomillion v. Lightfoot, 364 U.S. 339 (1960), the United States Supreme Court took its first major step into legislative reapportionment. In this case the Court established the rule that drawing legislative boundaries in such a way as to exclude a racial minority was a violation of the Fifteenth Amendment. The Court had concluded that there was a difference between political redistricting and redistricting aimed to affect a specific minority group. While redistricting as a policy was political in nature, redistricting designed to discriminate involved discrimination, a subject not deemed political in nature. Later cases will revisit the basis of Justice Whittaker's concurring remarks about the Equal Protection Clause of the Fourteenth Amendment providing the proper protections in this case.

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[29] Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).

[30] Id. at 349.

[31] Id.

The unanimous opinion of the Court was delivered by Justice Frankfurter with Chief Justice Warren and Justices Black, Tom C. Clark, John M. Harlan, William Brennan and Potter Stewart also voting in the affirmative.[32] Justice Whittaker concurred separately, as did Justice Douglas.

BAKER v. CARR

A year after the Court's ruling in Gomillion, the case of Baker v. Carr, 369 U.S. 186 (1962) reached the high court. This case is an appeal to the United States Supreme Court from the United States District Court for the Middle District of Tennessee. In this case the appellants claim that there has been a deprivation of federal constitutional rights. Furthermore, the appellants claim that they were denied equal protection under the rights guaranteed to them by the United States Constitution's Fourteenth Amendment, not the Guarantee Clause contained in Article IV, § 4 of the Constitution. The appellants claim that their right to vote has been diminished because of the failure of the Tennessee Legislature to enact a legislative reapportionment plan that takes into account the growth and redistribution of the state's population over the sixty year period from 1901 to 1961. As a result, the legislative districts, that were enacted in 1901, by the Tennessee State Legislature, are "unconstitutional and obsolete."[33]

The three judge District Court panel denied this claim for several reasons: (1) the District Court lacked judicial jurisdiction on the issue involved; (2) the appellants lacked standing to sue because the appellants' claim rested upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This denial was then appealed directly to the United States Supreme Court. The Supreme Court reversed and remanded this case back to the United States District

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[32] Congressional Quarterly's Guide to the United States Supreme Court (Washington, D.C.: Congressional Quarterly, Inc., 1979), p. 898.

[33] Baker v. Carr, 369 U.S. 186,193 (1961).

Court. In writing the majority opinion of the Court, Justice Brennan concludes that: "the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this court, that the appellants have standing to challenge the Tennessee apportionment statutes."[34] Justice Brennan reasoned that jurisdiction existed because the appellants' claim was based on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, not the Guarantee Clause. If the Court had found the claim to be founded upon the Guarantee Clause, then the case would not have been justiciable. As the Court states, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers."[35] Justice Brennan argued that where an individual could show that he or she had been disadvantaged, then that individual had standing to sue. While the issue involved in this case was political in nature, the injury alleged in this case is not politically related. As Justice Brennan states: "[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question."[36] Justice Brennan goes on to cite Snowden v. Hughes, 321 U.S. 1, 11 (1943): "Appellants' claim that they are being denied equal protection is justiciable, and if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.'"[37] Justice Brennan has taken the issue of voting rights in legislative reapportionment out of the "political thicket" and placed it directly under the legal protections of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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[34]Id. at 197-8.

[35]Id. at 210.

[36]Id. at 209.

[37]Id. at 209-10.

Baker v. Carr stands as a landmark case with regard to the issue of legislative reapportionment. In this case, the Court did not address the issue of legislative reapportionment as a political issue. Instead, the Court found that the basis for standing to sue and the justiciability of this case rested upon the appellants' claim to equal protection afforded by the Fourteenth Amendment of the United States Constitution. In Baker, the Court found that involvement by the judicial branch of the government does not violate the Guarantee Clause's protection of the separation of powers if the basis of the discrimination claim is found in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In fact, Justice Brennan cites Gomillion v. Lightfoot in which the issue of reapportionment is addressed not as a political issue, but as a case of racial discrimination protected by the Fifteenth Amendment to the United States Constitution.

It is important to make clear that the Equal Protection Clause does not prevent the creation of legal classifications. The courts utilize the strict scrutiny test for the Equal Protection Clause when suspect classifications such as race, national origin, or issues surrounding fundamental rights, such as voting rights are involved. Under the strict scrutiny test, the courts will determine if there is a compelling state interest for the existence of such a classification. If a statute's purpose can be accomplished another way, without infringing upon a suspect class, then the statute can not stand and will be declared unconstitutional. On the other hand, if there is a compelling governmental interest for a classification, then that statute will be upheld by the courts. The government has the burden of proving that there is a compelling interest for the existence of the classification and that there are no less restrictive means for accomplishing the government's objective. This Fourteenth Amendment protection of the fundamental right of voting proves very important in later minority voting rights cases.

In dissenting opinions in Baker v. Carr Justices Frankfurter and Harlan argue that the Court is reversing course on the issue of legislative reapportionment. They were of the opinion that the Court should continue to stay out of this issue because it is political in nature. Justice Frankfurter argues that it is not up to the courts to solve the political problems of the states, that is up to the people of the states respectively. He states: "In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."[38] Elsewhere in his opinion, Justice Frankfurter goes on to state: "The crux of the matter is that the courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade."[39] Justice Frankfurter believed that the people of the states and their individual state legislatures needed to resolve issues of policy, such as the ones presented in this case, not the court system.

As we have seen, the 6 to 2 majority opinion of the Court was delivered by Justice Brennan with Chief Justice Warren and Justice Black voting with the majority.[40] Justices Douglas, Clark and Stewart each concurred separately with Justice Brennan. Justice Frankfurter dissented with Justice Harlan joining in his dissent. Justice Harlan also issued his own dissent which was joined by Justice Frankfurter. Justice Whittaker took no part in the consideration or decision of this case. This is the first reapportionment case in which the philosophically liberal block of the

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[38]Id. at 270.

[39]Id. at 287.

[40]Congressional Quarterly's Guide to the United States Supreme Court (Washington, D.C.: Congressional Quarterly, Inc., 1979), p. 898.

court has asserted itself as a majority. Generally speaking, Justices Brennan, Douglas, and Black hold a liberal legal philosophy, while Justices Frankfurter and Harlan were generally more conservative in their legal philosophies. Furthermore, Justices Stewart, Clark, and the Chief Justice were centrists and moderates in their political and legal philosophies.

REYNOLDS v. SIMS

Two years after the United States Supreme Court ruling in Baker, the case of Reynolds v. Sims, 377 U.S. 533 (1964), came before the Court. As with Gomillion, and Baker, before it, Reynolds also stands as a landmark reapportionment case. At issue in Reynolds was an appeal to the United States Supreme Court from the United States District Court for the Middle District of Alabama. This case involves an alleged, "deprivation of rights under the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment and asserted that the District Court had jurisdiction under provisions of the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, as well as under 28 U.S.C. § 1343 (3)."[41] In this case voters from the State of Alabama alleged that the existing state reapportionment was unconstitutional because it was based on the 1900 census, despite that state's constitution requiring that the reapportionment be based on the federal census taken every ten years. By law, the Alabama Legislature was to consist of two houses: a State Senate and a House of Representatives. The State Senate was to consist of 35 members and the state House of Representatives was to consist of 106 members.[42] Under the 1901 Alabama state constitution, each county was entitled to one representative in the state House of Representatives. The apportionment of the rest of the representatives in the state House of

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[41] Reynolds v. Sims, 377 U.S. 533, 537 (1963).

[42] Id. at 537-8.

Representatives was to be based on population. Furthermore, State Senate districts were prohibited from crossing county lines. Additionally, the Alabama State Constitution left the responsibility for reapportionment to the legislature following each federal census beginning in 1910.

Reynolds v. Sims is an extremely important reapportionment case because in it the United States Supreme Court sets out the requirement that all state legislative districts have equal populations. In Reynolds, the Court held that failure to have legislative districts with equal populations amounts to a dilution of the right to vote of United States citizens. The Court declared that allocating one representative per county was illegal. Representatives in all state legislative offices must be based upon populations, and that those populations must be equal. This case established the principle that the right to vote is denied or abridged by the dilution of voting strength due to a failure to have a one-person, one-vote reapportionment. The Court states, "[t]he right to vote freely for a candidate of one's choice is of the essence of a democratic society...."[43] What is interesting is that the creation of legislative districts which contain equal numbers of people does not mean that those districts contain an equal number of citizens or an equal number of citizens registered to vote. If legislative districts are drawn in such a way as to have equal populations, there is no guarantee that an equal number of citizen voters will reside in each district. The result is that, in order to receive a majority of the votes in one legislative district, a candidate may need to receive twice the number of votes as might be required to receive a majority in another district, just because there are twice as many voters in the second district. From the voter's perspective, their vote is diluted if they are denied the opportunity to have an equal impact on electing a legislator as voters in other legislative districts. It appears to the author that this constitutes vote dilution

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[43] Id. at 555.

and "discrimination" based upon where one resides and the creation of districts that possess an unequal number of citizens whose protection against vote dilution the Court has found protected in the Fourteenth Amendment. In fact, the Court's majority opinion in Reynolds v. Sims, states that: "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race."[44] The Court opinion in Reynolds v. Sims, seems to confuse equal populations with equal numbers of citizens and equal numbers of voters. At present, however, legislative districts have been required to possess equal populations in compliance with the interpretation of Reynolds v. Sims.

The 8 to 1 majority opinion of the Court was delivered by Chief Justice Earl Warren with Justices Black, Douglas, Brennan, Byron R. White, and Arthur J. Goldberg also voting in the majority.[45] Justices Clark and Stewart concurred separately with the judgment. In the majority opinion, the Chief Justice argues that the Court has consistently recognized the United States Constitution's protection of "all qualified citizens to vote, in state as well as federal elections."[46] The opinion goes on to state that the Court has attempted to protect the rights of individuals to have their vote counted, as a part of their right to vote. The Chief Justice cites United States v. Classic, 313 U.S. 299 (1941), in which the Court states: "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted."[47] Additionally, the Chief justice reiterates the Court's finding in Wesberry v. Sanders,

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[44]Id. at 566.

[45]Congressional Quarterly's Guide to the United States Supreme Court (Washington, D.C.: Congressional Quarterly, Inc., 1979), p. 899.

[46]Reynolds v. Sims, 377 U.S. 533, 554 (1963).

[47]Reynolds v. Sims, 377 U.S. 533, 555 (1963).

376 U.S. 1 (1963), that "[A]n apportionment of congressional seats which 'contracts the value of some votes and expands that of others' is unconstitutional, since 'the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote....'"[48] Warren goes further, again citing Wesberry v. Sanders, at p. 14, when he says: "'It would defeat the principle solemnly embodied in the Great Compromise - equal representation in the House for equal numbers of people - for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.'"[49] It is in order to protect the rights of citizens that the Court appears to have adopted this one person, one vote doctrine.

Justice Harlan issued the lone dissenting opinion in this case. In his dissent, Justice Harlan found that state legislative reapportionment plans were beyond the scope of the Fourteenth Amendment to the United States Constitution and beyond the reach of the Court. He argued that the Equal Protection Clause of the Fourteenth Amendment was not intended to prohibit states from "choosing any democratic method they pleased for the apportionment of their legislatures."[50] Similar to Justice Frankfurter's dissenting opinion in Baker v. Carr, Justice Harlan found the Court's entry into this "political" issue to be unwise. He states: "What is done today deepens my conviction that judicial entry into this realm is profoundly ill advised and constitutionally impermissible."[51]

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[48]Reynolds v. Sims, 377 U.S. 533, 559 (1963).

[49]Reynolds v. Sims, 377 U.S. 533, 559 (1963).

[50]Reynolds v. Sims, 377 U.S. 533, 591 (1963).

[51]Reynolds v. Sims, 377 U.S. 533, 624 (1963).

In this case, the philosophically liberal block of justices (Justices Black, Douglas, Brennan, Goldberg) and the centrists moderate to liberal philosophical block of justices (Chief Justice Warren, and Justices White, Stewart, and Clark) voted in the majority, while the lone philosophical conservative, Justice Harlan, voted in the minority. It should be pointed out that Justices White and Stewart were philosophical centrists who tended to defy classification as either conservatives or liberals in their political and legal philosophies.

MOBILE v. BOLDEN

Sixteen years after the Court issued its opinion in Reynolds, the case of Mobile v. Bolden, 446 U.S. 55 (1980), made its way to the high court. Mobile v. Bolden, involves an appeal to the United States Supreme Court from the United States Court of Appeals for the Fifth District. In this case, black citizens of the City of Mobile, Alabama, are suing the City of Mobile, and the city's commissioners, alleging that the city's election of a Mayor and city commissioners, through at-large elections, violates the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The electoral system of Mobile provided for the at-large election of the three city commissioners with a mayor selected from among the three. It was the claim of the black citizens in this suit that, by holding elections for the city commissioners at-large, the city had submerged the votes of the black citizens among those of the total voting population of the city. Black citizens constituted a minority of the city's total voting population. As a result, while the black community might have been capable of electing members to the city commission from among single member districts, they were unable to elect their choice of commissioners at-large. This is what has come to be known as vote dilution of a minority community.

In this case, however, the United States Supreme Court ruled against the black residents. In a plurality ruling, delivered by Justice Stewart, who was joined by

the Chief Justice and Justices Lewis F. Powell and Rehnquist, the Court's philosophical moderate and conservative legal justices ruled that what was occurring in Mobile did not constitute a violation of the Fifteenth Amendment of the United States Constitution's guaranteed right to vote. The black citizens of Mobile were allowed to register and, having registered, allowed to vote. The ability to elect a black candidate is not a guaranteed right. There was, and is, no guarantee to proportional representation based upon race or any other factor. Furthermore, the Court found that there was no intention to discriminate against Mobile's black residents. Without purposeful discrimination, the Court said, a racially neutral reapportionment plan could not be found to violate the Fifteenth Amendment to the United States Constitution. The Court states: "[M]ore recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment Violation."[52] The Court found that, because black residents were allowed to register to vote, to cast their ballots, and to have their ballots count, purposeful discrimination required for in the Fifteenth Amendment did not exist.

The Court also found that the City of Mobile's electoral system was not in violation of the Fourteenth Amendment's Equal Protection Clause. In the plurality opinion, Justice Stewart found that requiring a plaintiff to prove that purposeful discrimination existed was only part of his or her burden. He stated: "This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."[53] The Court also took offense with the District Court and the Court of Appeals findings that at-large elections caused discrimination against blacks within the City of Mobile. The Court found: "[F]eatures of that electoral

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[52]Mobile v. Bolden, 446 U.S. 55, 62 (1979).

[53]Id. at 66.

system, such as the majority vote requirement, tend naturally to disadvantage any voting minority."[54] What the Court was saying is that the existence of an at-large electoral system does not mean that invidious discrimination exists. By relying on this fact, the Court found that both the District Court and the Court of Appeals were in error.

Justice Blackmun concurred in the result of the plurality. While Justice Blackmun found that enough evidence to support the assertion that purposeful discrimination may have existed, he did not wish to have the commission form of government altered into a council-mayor system by the Court. Justice Stevens also concurred with the judgment.

Justices Brennan, White, and Marshall, representing the Court's philosophical liberal and centrist moderate to liberal legal reasoning, dissented in this case. Justice Brennan dissented because he believed that: "[P]roof of discriminatory impact was sufficient in these cases."[55] Justice Brennan believed that it was the resulting discrimination, as presented in the facts of the case, which mattered, not proving an intention to invidiously discriminate. Justice White dissented because he believed that the totality of the circumstances pointed toward invidious discrimination. Justice Marshall, similar to Justices Brennan and White, argued that the plurality was wrong when it required that a plaintiff prove, to a stringent degree, that the invidious discrimination was intentional. Justice Marshall supported a system of justice by which the plaintiff was required to prove by the totality of the circumstances test that vote dilution and discrimination were occurring, while not requiring that an intention to invidiously discriminate be proven conclusively.

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[54] Id. at 74.

[55] Id. at 94.

VOTING RIGHTS ACT, AMENDMENTS OF 1982

As a result of the United States Supreme Court decision in Mobile v. Bolden, the United States Congress passed amendments to the Voting Rights Act. United States Senate Report No. 97-417, the Voting Rights Act Amendments of 1982, discusses the changes that the United States Congress undertook following the Mobile v. Bolden decision.

Prior to the United States Supreme Court ruling in Mobile v. Bolden, plaintiffs in voting rights cases were allowed to challenge election laws and procedures based upon the totality of the circumstances involved. In Mobile v. Bolden, however, this standard was changed by the Court to proving intentional discrimination against individuals based on either race or language. That is to say a racial or lingual minority must now prove the intent behind the perceived discrimination. This means that a plaintiff in a voting rights case has to prove that the election law or procedure was intentionally designed to have the discriminatory effect of either preventing or diluting the effectiveness of the votes of either a racial or lingual minority.

In the Voting Rights Act Amendments of 1982, the United States Congress enacted legislation modifying § 2 of the Act in order to return to the pre-Bolden standard of requiring plaintiffs to prove a claim based upon the totality of the circumstances. Senate Report No. 97-417 states, "[t]o establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question."[56] The Senate Report went on to state:

> Typical factors include: 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in

[56] S. Rep. No. 97-417, 97th Cong., 2nd Sess. at 28 (1982).

the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[57]

These seven factors have come to be referred to as the “seven senate factors.” In the majority report, by the United States Senate, the Congress made it clear that these seven factors were to be considered the "typical factors," but that they were not all required to prove a voting rights case. Additionally, the Congress was mindful that there was no guarantee to proportionate representation for racial or lingual minorities. The factors that are mentioned above are only guidelines for proving that discrimination in voting has indeed occurred. In this way, the Congress enacted legislation to guide the United States Supreme Court in future voting rights cases.

THORNBURG v. GINGLES

Six years after the Mobile decision, the United States Supreme Court heard the case of Thornburg v. Gingles, 478 U.S. 30 (1986). Thornburg v. Gingles was

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[57]Id. at 28-9.

the first major case brought before the United States Supreme Court in which the Court was required to interpret and apply the Voting Rights Act of 1965, as amended in 1982. This case involves the North Carolina General Assembly's enactment of a reapportionment plan for the North Carolina State Senate and House of Representatives. The Court describes this suit as being brought by:

> ...black citizens of North Carolina who are registered to vote, challenged seven districts, one single member and six multimember districts, alleging that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of § 2 of the Voting Rights Act. (478 U.S. at 35.)

When the District Court heard this case it applied the totality of the circumstances test outlined in the seven senate factors. The District Court found in favor of the plaintiffs. Specifically, the District Court found that:

> ...North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a prohibition against bullet (single-shot) voting, and designated seat plans for multimember districts." (478 U.S. at 38, 39.)

The District Court had identified that there was a history of discriminatory voting practices in North Carolina. This was evidence supporting the first senate factor. Next, the court identified a history of discrimination in "education, housing, employment, and health services [that] had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites."[58] This is evidence that the discrimination has had a long-term effect on blacks. Third, the court found that the

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[58] Thornburg v. Gingles, 478 U.S. 30, 39 (1985).

election procedures utilized had the effect of denying black voters the ability to elect candidates of their choice to elective offices. Specifically, the District Court cited the requirement that candidates receive a majority vote in a primary, otherwise, there would be a runoff between the top two candidates. This was viewed as discriminatory because while a black candidate might be able to receive a plurality vote in a primary election, thus qualifying for a run-off, that same candidate may not receive a majority in the run-off and be elected to office if white voters vote in block against the black candidate on the basis of his or her race. Fourth, the court found that racial appeals were used in campaigns. Fifth, the court found that blacks candidates were not elected to elective offices in North Carolina as often as white candidates despite their percentage of the total population. In fact, the court notes that blacks held between 2% and 4% of the State Senate Seats between 1975 and 1983, but that the black population composed 22.4% of North Carolina's total state population.[59] Last, the court found that voting in the seven districts the plaintiffs challenged was racially polarized. In racially polarized voting white voters tend to vote only for white candidates, while black voters tend to only vote for black candidates.

The suit in Thornburg involved multimember districts. Multimember districts exist when several elected officials are elected utilizing a single district and the election is held at-large. Vote dilution among multimember districts occurs when the effectiveness of a minority community's vote is diminished by virtue of being only a portion of the larger block of votes. In order to prove vote dilution the Supreme Court stated that a plaintiff must prove three conditions: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to

[59]Id. at 42.

constitute a majority in a single-member district;"[60] (2) "the minority group must be able to show that it is politically cohesive;"[61] and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it - in the absence of special circumstances, such as the candidate running unopposed... - usually to defeat the minority's preferred candidate."[62] In order for a minority group to establish a voting rights case, all three threshold requirements must legitimately be met. In this case, the Court ruled that the North Carolina multimember districts violated §2 of the Voting Rights Act by reducing the minority community's ability to elect representatives of their choice.

A plurality opinion of the Court was delivered by Justice Brennan with respect to parts I, II, III-A, III-B, IV-A, and V in which Justices White, Marshall, Blackmun, and John Paul Stevens concurred. With regard to Part I of the opinion, the plurality believed that multimember legislative districts did not hinder minority voters from electing the candidate of their choice unless several factors were present. First, the ethnic or lingual majority voting population must be voting as a block such that the ethnic or lingual minority voting population's candidate is consistently defeated. Second, the ethnic or lingual minority must be able to prove that it is politically cohesive. Third, racially polarized voting must exist over a period of time. The majority's agreement in part II of the opinion supported the District Court ruling that limited success at electing minority candidates does not preclude a voting rights claim under § 2 of the Voting Rights Act. The plurality also agreed with part III-A and III-B of Justice Brennan's opinion in which the Court found that the District Court had properly considered the totality of the circumstances when determining the effects of

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[60]Id. at 50.

[61]Id.

[62]Id. at 51.

racial discrimination on minority voters. The seven senate factors constituted the areas examined when considering the totality of the circumstances. With regard to Part IV-A, the plurality found that the District Court had erred by not considering the success of minority candidates. The plurality also found agreement in Part V of the Court's opinion in which they agreed that they could not find error with the District Court's finding that the multi-member electoral system had discriminated against African-Americans.

Justices Marshall, Blackmun, and Stevens joined for Part III-C of Justice Brennan's opinion in which they expressed their collective belief that plaintiffs only need to prove intent to discriminate, not actual discrimination. Justice White issued a concurring opinion. In his opinion, Justice White states that he agreed with Parts I, II, III-A, III-B, and IV-A of Justice Brennan's plurality opinion, but disagreed with Part III-C. Justice White viewed the plurality as being in error in Part III-C when it considered the race of the voters to be important, but not the race of the candidates when determining the existence of polarized voting.

Justice Sandra Day O'Connor also issued an opinion concurring with the judgment in which Chief Justice Warren Burger, Justice Powell, and Justice Rehnquist concurred. In her opinion, Justice O'Connor questions the plurality's approach for measuring the voting strength of a minority community. She views that Congress did not intend §2 of the Voting Rights Act to require proportional representation. Justice O'Connor states, "There is substantial doubt that Congress intended 'undiluted minority voting strength' to mean 'maximum feasible minority voting strength.'"[63] She also argues that even limited success by minority candidates seems to be inconsistent with voting rights claims filed under § 2 of the Voting Rights Act.

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[63]Id. at 94.

Justice Stevens issued an opinion concurring in part with the Court's opinion and dissenting in part of the Court's opinion. Justice Stevens concurred with the plurality opinion with the exception of Part IV-B. He did not believe that the District Court was in error by not considering the success of minority candidates. Justice Stevens states, "The evidence of candidate success... is merely one part of an extremely large record which the District Court carefully considered before making its ultimate finding of fact, all of which should be upheld...."[64] Justice Stevens was joined by Justices Marshall and Blackmun in his opinion.

As is evident from the above description, the opinion in this case is greatly split. Generally, however, the moderates and liberals, led by Justice Brennan, were in the majority favoring parts or entire portions of the opinion. It is important to note that the moderate conservative Justice O'Connor issued an opinion only concurring with the judgment, not with the reasoning utilized in the majority opinion by Justice Brennan. It is equally important to note that the philosophical moderate conservative Chief Justice, and the philosophical conservative Justice Rehnquist, signed on with Justice O'Connor's view concurring with the judgment, but not the reasoning, as did the philosophical moderate, Justice Powell.

GOMEZ v. CITY OF WATSONVILLE

An application of the Thornburg criteria can be seen in Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988). This case is included in our discussion only to illustrate the application of the Thornburg requirements by the federal courts. Gomez is a case in which Hispanic voters claimed that their votes were diluted by virtue of being submerged among all of the other votes cast in Watsonville elections. In this case, the City of Watsonville elected an at-large mayor and city council. The Hispanics, residents and eligible registered voters of the City of

[64] Id. at 106.

Watsonville, brought suit to enjoin the mayor and city council elections scheduled for May of 1987. The suit was filed seeking, "...declaratory and injunctive relief under 42 U.S.C. § 1973 (‘Section 2’), 42 U.S.C. §1983, and the fourteenth and fifteenth amendments."[65] Specifically, the plaintiffs were claiming that their rights under the Voting Rights Act of 1965, as amended in 1982, had been violated. Further, they were claiming that their Fifteenth Amendment guaranteed right to vote had been infringed. Lastly, they claimed that their Fourteenth Amendment right to equal protection had been violated.

The facts presented in Gomez indicate that Hispanic citizens constituted 37% of the total population of the City of Watsonville.[66] No Hispanics, however, had ever been elected to the Watsonville City Council. The plaintiffs' claim was that this lack of electability was due to their votes being submerged due to the at-large elections. The plaintiffs sought to have single member districts drawn in which the Hispanic community as a whole would have a better opportunity of electing a "candidate of their choice"[67] to the Watsonville City Council. Additionally, no Hispanics had ever been appointed to city boards and commissions in Watsonville.

The appellate court in Gomez states that the District Court had, "found that racially polarized voting exists in Watsonville."[68] The District Court also ruled, "Watsonville's Hispanic population insufficiently geographically compact to meet the requirement of a Section 2 claim."[69] The appellate court stated:

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[65]Gomez v. City of Watsonville, 863 F.2d 1407, 1409 (1988).

[66]Id.

[67]Id. at 1411.

[68]Id. at 1410.

[69]Id.

> The district court recognized that the Hispanics have the potential to control two single-member districts, but rejected appellants' vote dilution claim because the majority of the Hispanics would still reside in Anglo-controlled districts in which their vote was ineffective.... [T]he district court also found that appellants failed to demonstrate sufficient political cohesiveness among the Watsonville Hispanics. (863 F.2d 1410.)

It was the District Court's conclusion that, "all Hispanics eligible to vote might not all vote alike."[70]

The appellate court disagreed. The appellate court applied the seven senate factors and the three Thornburg v. Gingles, 478 U.S. 30 (1986), requirements and ruled that the District Court had acted inappropriately. The appellate court found that the Hispanic community was geographically compact The court came to this conclusion based on a reasoning that Hispanics could constitute a majority in at least two of Watsonville's six districts. The court also found that proving that a minority group could constitute a majority in at least one district proved that the community was geographically compact, thus meeting two of the Thornburg v. Gingles criteria.

The appellate court also found that Hispanics were politically cohesive, a ruling in opposition to that of the District Court. In its finding, the appellate court found that the District Court had misinterpreted the meaning of "political cohesiveness." The appellate court states:

> The District Court's finding on this issue is based on a misunderstanding of what is meant by 'political cohesiveness.' The inquiry is essentially whether the minority group has expressed clearly

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[70] Id.

> political preferences that are distinct from those of the majority. Thus, a 'showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim.' Thornburg v. Gingles 478 U.S. at 56. (863 F.2d at 1415.)

In this case, the court found that significant racial bloc voting existed, but that other factors also affect the political cohesiveness within a community. Specifically the court cites "socioeconomic and cultural differences between Hispanics and non-Hispanics,"[71] as contributing factors.

The appellate court further concluded that the first and fifth senate factors were present in this case. First, the court expressed concern that discrimination committed by governmental agencies other than the City of Watsonville were not considered. In this regard the court directly refers to past discrimination by the State of California. Specifically, the court cited the "California constitutional provision making the ability to read English a prerequisite for voting unconstitutional as applied to those literate in another language."[72] Second, the court expressed concern over all of the past discrimination that might have affected the Hispanic community.

The present case was reversed and remanded back to the District Court based on what the appellate court termed, "legal misunderstandings and erroneous findings of insufficient geographical insularity and political cohesiveness.... [B]ased on the totality of the circumstances, the at-large scheme of mayoral and city council elections in Watsonville impermissibly dilutes the voting strength of Hispanics."[73]

THE SHIFTING POLICY OF THE COURT

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[71]Id. at 1414.

[72]Id. at 1419.

[73]Id.

The previous seven cases present a portrait of the evolution of involvement by the federal courts in general, and the United States Supreme Court in particular, with regard to the issue of legislative reapportionment. Much of the involvement in this public policy issue by the United States Supreme Court, and the federal courts as a whole, has occurred since the 1960s when ending segregation and race based discrimination became a major United States public policy focuses of philosophical liberals. It seems fair to describe the United States Supreme Court, and the United States Congress, as having been dominated by individuals espousing moderate and liberal philosophical views on these issues. The result of their efforts has been clear. Both the Court and the Congress have acted as activist policy making bodies on the issue of legislative reapportionment. The shift in the role of the Court is clear. The Court moves from staying out of the "political thicket" in Colegrove v. Green, to involvement in reapportionment for reasons that are non-political in Baker v. Carr, to stating the concept of "one person, one vote" in Reynolds v. Sims, to the establishment of the Thornburg requirements in Thornburg v. Gingles. Where a philosophically liberal activist Court became involved in the issue of legislative reapportionment during the 1960s and 1970s, a philosophically conservative activist Court has become involved in this issue in the 1990s. The next three cases, Shaw v. Reno, Miller v. Johnson, and United States v. Hays, will discuss the Court's recent shift further to the right philosophically on the issue of reapportionment. These three cases will illustrate the effects of recent shift toward a more philosophically conservative Court particularly with regard to the evolution of the Court's interpretation of equality under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

SHAW v. RENO

The issue of legislative reapportionment again reached the United States Supreme Court in Shaw v. Reno, 113 S.Ct. 2816 (1993). The Shaw case

involved a North Carolina reapportionment plan that had been drawn so as to create two majority-minority districts. The appellants in this case included Ruth Shaw, and several other white voters and residents of North Carolina. The appellants charged that the legislative reapportionment plan had been drawn in such a way as to purposefully create two districts in which African-Americans constituted a majority. The appellee in this case was the United States Government represented by Attorney General Janet Reno. At issue was a legislative reapportionment plan that consisted of two African-American districts, one of which stretched for 160 miles mainly along Interstate Highway 85. The question before the Court involved the drawing of legislative districts designed to concentrate African-American voters into two districts which lacked the requirements of compactness, contiguousness, political cohesiveness, and recognized natural geographic boundaries. In this case, the appellants claimed protection under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. A District Court had dismissed their claim, but the Supreme Court agreed to hear their appeal.

Justice O'Connor delivered the opinion of the Court in which she described the geographic and racial makeup of the districts. She described the first district, District One, as, "somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger like extension, it moves far into the southern-most part of the state near the South Carolina border."[74] Justice O'Connor continues by quoting a *Wall Street Journal* article on February 4, 1992, p. A14, which described the district as resembling, "a bug splattered on a windshield."[75]

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[74] Shaw v. Reno, 113 S.Ct. 2816, 2820 (1993).

[75] Id.

The second majority-minority district, Justice O'Connor states is, "even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'"[76] She continues, "[o]ne state legislator has remarked that, '[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.' *Washington Post*, Apr. 20, 1993, p. A4."[77]

At issue in this case is the design of the Voting Rights Act to create majority-minority districts. The question at issue is not one of whether, "the revised plan constituted a political gerrymander, nor that it violated the 'one person, one vote' principle..."[78] of Reynolds v. Sims (377 U.S. 533.) (1964). The claim in this case is one for protection under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The appellants allege that the two districts were drawn for the exclusive purpose of creating majority-minority districts without regard to contiguity, compactness, political cohesiveness, and geographic compactness. At issue is whether these two districts were drawn "'to create Congressional Districts along racial subdivision' with the purpose 'to create Congressional Districts along racial lines' and to assure the election of two black representatives to Congress."[79]

Justice O'Connor states, "[t]he Equal Protection Clause provides that, '[n]o state shall... deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const., Amdt 14, §1. It's central purpose is to prevent the States from

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[76]Id. at 2820-1.

[77]Id. at 2821.

[78]Id.

[79]Id.

purposefully discriminating between individuals on the basis of race."[80] Elsewhere in the opinion the Court states:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same race group -- regardless of their age, education, economic status, or the community in which they live-- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. (113 S.Ct. at 2817.)

In the present case, the Court concluded that the districts drawn could not be explained for any reason other than to draw racially drawn districts. Justice O'Connor states:

> When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antitethical to our system of representative democracy. (113 S.Ct. at 2827.)

In Shaw,113 S.Ct. 2816 (1993), the Court ruled in favor of the appellants claim to protection under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Court ruled that the appellants could

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[80]Id. at 2824.

challenge the reapportionment plan on the basis that the districts were drawn with the effect of separating voters based upon race. The Court states: "Redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race, ... demands the same close scrutiny that we give other state laws classifying citizens by race."[81] The Court remanded this case back to the District Court to determine if a compelling governmental interest was served by the creating of these two majority-minority districts.

Shaw v. Reno, 113 S.Ct. 2816 (1993), stands as a modern landmark case in the case law relating to legislative reapportionment. It is worth noting that the Shaw Court was deeply divided in a five to four decision. In Shaw, the Court ruled that reapportionment schemes created in compliance with § 2 of the Voting Rights Act can be challenged in the courts under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court's ruling in Shaw opens up the proverbial "can of worms." As will be seen in the next case, it is now possible to bring challenges to reapportionment plans that are crafted under the Voting Rights Act. This is an extremely important conclusion by the Court because it has the effect of allowing non-minorities to challenge districts that were created solely on the basis of race. This marks a major political and legal philosophical shift by the Court which is now being led by a philosophically moderate conservative majority.

The 5 to 4 majority opinion of the Court was delivered by one of the Court's two moderate conservative justices, Justice O'Connor. The Court's philosophical conservatives, Chief Justice Rehnquist and Justices Antonin Scalia and Clarence Thomas concurred, as did the Court's other moderate conservative Justice Anthony M. Kennedy. The minority in this case is a combination of a moderate liberal in

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[81] Id. at 2825.

Justice Blackmun, two moderates in Justices Stevens and David H. Souter and a centrist in Justice White.

The composition of the majority in this case demonstrates the impact that Presidents Ronald Reagan and George Bush had on the high court. A Nixon appointee, for many years Justice Rehnquist was the lone conservative on the Court. A vacancy allowed President Reagan to appoint Justice Sandra Day O'Connor as the first woman on the Court. Six years into his presidency, the retirement of Chief Justice Warren Burger allowed President Reagan to elevate Justice Rehnquist to be the Court's new Chief Justice. President Reagan then appointed Justice Antonin Scalia, a fiery conservative and the Court's first Italian American, to replace Justice Rehnquist as an Associate Justice on the high court. Later, President Reagan would appoint, Justice Anthony M. Kennedy, a moderate conservative, to the Court. President Bush also added to the high court by appointing a moderate, Justice David H. Souter. He later added to the conservative block on the high court with his appointment of Justice Clarence Thomas. Between these two administrations, the majority in the Shaw case, and the majority in our next case, Miller v. Johnson, was forged.

MILLER v. JOHNSON

Two years after the Shaw ruling, the United States Supreme Court again crafted sweeping changes in the public policy of legislative reapportionment with the Court's ruling in the case of Miller v. Johnson, 115 S.Ct. 2475 (1995). Miller was the first major reapportionment case brought before the high court since the Court's Shaw ruling. The Miller case involves the State of Georgia's reapportionment plan for the United States House of Representatives. Originally, the State of Georgia had adopted a reapportionment plan that created two majority-minority districts for blacks. As a result of past discrimination, Georgia is covered by the pre-clearance procedures for reapportionment plans as required by § 5 of the Voting Rights Act.

Because the State of Georgia is covered by the Voting Rights Act, approval of any reapportionment plan is required by either the United States Attorney General or the United States District Court in Washington, D.C.. Upon review by the United States Department of Justice, during then-President George Bush's Administration, the reapportionment plan was rejected because it failed to maximize the creation of majority-minority districts. The rejected plan was then altered in order to create three majority-minority districts for blacks. At issue in Miller was whether congressional district lines that were drawn with race as the "predominant factor" were constitutional. A three judge District Court panel heard this case and ruled that the challenged districts were unconstitutional. The District Court, in Justice Kennedy's words, "[R]ead Shaw to require strict scrutiny whenever race is the 'overriding, predominant force' in the redistricting process."[82] Writing the majority opinion in Miller, Justice Kennedy states that by "predominant factor" the Court means, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles ... to racial considerations."[83] In this case, the District Court found that the three districts had been racially gerrymandered to create three majority-minority black districts. The District Court, in applying the strict scrutiny test to the Georgia districts, considered compliance with the Voting Rights Act to be a compelling state interest. It was, however, the District Court's conclusion that the Voting Rights Act did not required the creation of the maximum number of three majority-minority black districts; Therefore, the District Court found that the challenged reapportionment was not narrowly tailored to further a compelling state interest; As a result, the District Court invalidated the reapportionment plan.

[82] Miller v. Johnson, 115 S.Ct. 2475, 2485 (1995).

[83] Id. at 2488.

According to Justice Kennedy, the question before the Court in Miller is "whether Georgia's new 11th District gives rise to a valid equal protection claim under the principles announced in Shaw, and, if so, whether it can be sustained nonetheless as narrowly tailored to serve a compelling government interest."[84] Justice Kennedy concluded that reapportionment plans, like other "laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieve a compelling state interest."[85] The conclusion of Justice Kennedy appears to be that the United States Department of Justice had gone beyond the requirements of the Voting Rights Act, as amended in 1982, by pushing for three majority-minority congressional districts in Georgia.[86] Justice Kennedy says of Shaw: "[A]n action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in Shaw is that the State has used race as a basis for separating voters into districts."[87] Justice Kennedy is arguing that equal protection requires that all voters must be treated equally under the law. In Shaw, the issue was the separation of voters based upon race. Justice Kennedy states: "The idea is a simple one: 'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens' as individuals, not 'as simple components of racial, religious, sexual or national class.'"[88] By assigning voters to districts based upon race, Justice Kennedy argues, individuals are not treated equal, but rather stereotyped. He states: "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that

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[84] Id. at 2482.

[85] Id.

[86] Holly Idelson, "Court Takes a Harder Line on Minority Voting Blocks," Congressional Quarterly, July 1, 1995, p.1946.

[87] Miller v. Johnson, 115 S.Ct. 2475, 2485-6 (1995).

[88] Id. at 2486.

voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[89] In this case, the Justice Department was requiring the creation of three majority-minority black districts as a condition of pre-clearance for determining compliance with the Voting Rights Act. What the Court said in this case is that the Justice Department can attempt to require the creation of these districts, but that these districts can be challenged in the federal courts. The Court reasoned that if it did not allow for the examination of reapportionment legislation precleared by the Department of Justice in the courts, then the courts would be "surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action."[90]

The 5 to 4 majority opinion of the Court was delivered by Justice Kennedy. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas concurred with Justice Kennedy. Justice Ruth Bader Ginsburg issued a dissenting opinion in which Justices Steven Breyer, Stevens, and Souter joined. The majority in this case is the same collection of philosophical conservatives led by Chief Justice Rehnquist and Justices Scalia and Thomas and philosophical moderate conservatives composed of Justices O'Connor and Kennedy that comprised the majority in Shaw v. Reno. The minority opinion is composed of a new collection of justices. Justices Ginsburg and Breyer are recent philosophical liberals appointed to the high court. They replaced the philosophical moderate liberal Justice Blackmun and the philosophical centrist Justice White. As was mentioned in the previous discussion of the Shaw case, Justice Stevens and Justice Souter are the Court's two moderates While the composition of the Court has changed in the two years since the Shaw case, the political and legal philosophical bent of the Court did not change.

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[89]Id.

[90]Id. at 2491.

The Court still possesses a strong moderate conservative majority block which possesses a consistently different interpretation and application of equality under the law from that of the Court's philosophically liberal minority block. To the Court's philosophical conservatives "equal" means equal, not discrimination in the name of equality.

UNITED STATES v. HAYS

The same day that the high court issued its opinion in Miller v. Johnson, the Court also handed down its opinion in the case of United States v. Hays, 115 S.Ct. 2431 (1995). In Hays the Court heard an appeal of a case brought by white voters in Louisiana who challenged the reapportionment plan drawn in Louisiana for the election of members of the United States House of Representatives as a "racial gerrymander."[91] As a result of past discrimination, Louisiana is covered by the pre-clearance procedures for reapportionment plans as required by § 5 of the Voting Rights Act.

In 1991, the Louisiana state legislature submitted a reapportionment plan to the United States Attorney General for pre-clearance of a redistricting plan for state Board of Elementary and Secondary Education districts (BESE). In the past, the Board of Elementary and Secondary Education districts had utilized the same boundaries as Louisiana's congressional districts. The first reapportionment plan that the state submitted to the Justice Department was rejected because it contained only one majority-minority district. The reason for the rejection of this first reapportionment plan was the state's failure to justify why a second majority-minority district had not been created. A second redistricting plan containing two majority-minority districts was then submitted to the Department of Justice. This second reapportionment plan was given pre-clearance by the Department of Justice. This

[91] United States v. Hays, 115 S.Ct. 2431, 2433 (1995).

reapportionment plan was then challenged by Ray Hays, and others, as a racial gerrymander. Both the District Court and the Court of Appeals agreed that a racial gerrymander had occurred.

The United States government appealed the two lower court rulings. On this appeal, however, the Court ruled that the white voters in Louisiana lacked standing to sue. While the individuals who brought the original law suit challenging the reapportionment plan may have been legitimate voters from the State of Louisiana, they did not reside in the districts that were being challenged. The Court stated: "[A]ppellees' position that 'anybody in the state' can state a racial gerrymander claim is rejected, and they must show that they, personally, have been subjected to a racial classification."[92] As a result of their failure to be registered voters residing within the challenged district, and their failure to prove that they had been "subjected to racial classifications,"[93] the Court found that the appellees lacked legal standing to sue. In order to have standing to sue the appellees would have had to prove that they had suffered an injury in fact, but the Court found that no injury in fact was demonstrated. What is interesting is that the majority appears to be willing to find standing if the appellees had resided in the challenged districts.

In this case, Justice O'Connor issued the majority opinion of the Court in which the Chief Justice and Justices Scalia, Kennedy, Souter, Thomas, and Breyer joined. Justices Breyer and Stevens each issued concurring opinions. Justice Breyer agreed with the Court's opinion as it related to the voters in this case not residing in the districts they sought to challenge. Justice Stevens concurred with Justice Breyer's concurring opinion. In his separate concurring opinion, Justice Stevens concluded that simply living in a district in Louisiana did not provide the

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[92] Id. at 2432.

[93] Id.

appellees with standing to sue for the challenged districts. Justice Stevens reasoned that the appellees had not proven that the legislative reapportionment scheme had disadvantaged this or any group of voters in the State of Louisiana. He could not, however, understand why the majority felt that the appellees would have standing to sue had they resided in the challenged district because he viewed that they had not been substantially disadvantaged electorally. Lastly, Justice Ginsburg concurred with the judgment, but did not issue a separate opinion. The vote breakdown in this case does not reflect the deep philosophical split between the Court's conservative and liberal justices on the policy issue of legislative reapportionment. What the vote breakdown does demonstrate is that there was general agreement that the requirements for standing to sue had not been met by the appellees. This case is significant for two reasons. First, the justices rejected the concept that anybody can state a claim alleging a racial gerrymander, even if they have not been directly injured because they do not reside in the challenged district. Second, the Court left unresolved, and the majority appeared to support, the issue of standing to sue for non-minorities residing in challenged districts. This issue is bound to be addressed in future cases before the Court.

CHAPTER THREE

WHAT IS NEXT FOR THE HIGH COURT?

Shortly after issuing its opinion in Miller v. Johnson, 115 S.Ct. 2475 (1995), the United States Supreme Court agreed to hear two additional legislative reapportionment cases in the fall of 1995. These two cases involve challenges to reapportionment plans in the states of Texas and North Carolina. These two cases are extremely important because they will allow the current Court the opportunity to clarify and expand its reinterpretation of the concept of equality under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and the application of the strict scrutiny test and the Voting Rights Act, as they apply to legislative reapportionment. These cases are important because they will serve to further redefine the legal parameters of legislative reapportionment as a public policy issue.

TEXAS: VERA v. RICHARDS

Vera v. Richards, 861 F. Supp. 1304 (1994), is an appeal to the United States Supreme Court of a Texas case challenging the constitutionality of congressional districts created by the Texas state legislature. The case was tried before a three judge panel in the United States District Court for the Southern District of Texas, Houston Division. The plaintiffs in this case were an individual named Al Vera and several other individuals. The defendants were then-Governor of the State of Texas Ann Richards, and other state officials. The United States government, the Reverend William Lawson, and the League of United Latin American Citizens (LULAC) each acted independently as a defendant-intervenors.

The plaintiffs' complaint is that the redistricting plan adopted by the State of Texas in 1991 constitutes an "unconstitutional effort to segregate the races for purposes of voting: (1) without regard for traditional districting principles, including compactness, contiguousness [sic], consistency with existing political, economic,

societal, governmental or jurisdictional boundaries; (2) without sufficiently compelling justification; and (3) without 'narrow tailoring' as required by the United States Constitution."[94] A total of twenty-four congressional districts are challenged in this case. The question before the court, in light of the United States Supreme Court ruling in Shaw v. Reno is: can the district lines for any of the twenty-four challenged districts boundaries be explained for any reason other than by race? The District Court found that the district boundaries for congressional districts eighteen, twenty-nine, and thirty were not explainable by any reason other than by race. The District Court found that two of these districts were designed to safely elect African-Americans, while the third was designed to safely elect an Hispanic.

The State of Texas is subject to § 5 of the 1975 amendments to Voting Rights Act of 1965 due to the state's previous history of vote discrimination. Texas, like other § 5 states has a history of official discrimination against African-Americans and Hispanics by denying their right to register and vote by: "the poll tax, an all-white primary system, and restrictive voter registration time periods."[95] As a result of being subject to § 5 of the Voting Rights Act of 1965, as amended, Texas is required to receive pre-approval of any reapportionment plan that alters existing legislative boundaries. This approval must come from the District Court in Washington, D.C. or from the United States Department of Justice.

In this case, the State of Texas argued two defenses. First, the state argued that Texas never had utilized the "traditional redistricting principles such as natural geographic boundaries, contiguity, compactness, and conformity to political subdivisions."[96] Next, the state argued: "[T]he districts' irregular shapes were caused

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[94]Vera v. Richard, 861 F. Supp. 1304,1310 (1994).

[95]Id. at 1317.

[96]Id. at 1333

not by racial classification of voters in any instance but by the Congressional delegation's demands, acceded to by state government, that all incumbent Congressional officeholders be protected."[97] The District Court disagreed with the State of Texas on both accounts. First, the District Court found that the State of Texas presented only one case in which a congressional district did not comply with "traditional redistricting principles." Second, the District Court found that the creation of majority-minority districts did not significantly impact incumbent members of Texas' Congressional delegation. In fact, the District Court states that it found only two or three members of Congress who were placed in jeopardy.[98] The conclusion here is that neither of the state's arguments were valid in the face of the plaintiffs' complaint.

The District Court relied on Shaw, 113 S.Ct. 2816 (1993), in coming to the conclusion that the "traditional redistricting principles" did matter. The court, citing Shaw, states:

> we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geography and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls... a racial gerrymander may exacerbate

[97] Id.

[98] Id.

the very patterns of bloc voting that the majority-minority districting is sometimes said to counteract. (861 F. Supp. 1304 at p. 1335).

District 30 was created as a majority-minority, safe, African-American congressional district. The district was at least 25 miles in length and 30 miles in width and covered with tentacles to reach certain pockets of African-American voters. The District Court's opinion describes the district as looking nearly as "complex and attenuated as a series of DNA molecules."[99] The state contended that this district was explainable for reasons other than race that included economic and geographic factors. The District Court, however, found no evidence that the data upon which the state relied was available at the time this district was drawn. Second, the court found that the state's argument that the district was drawn to protect incumbent political interests was flawed. The court found that many of the voters that the incumbent legislators were fighting over were African-American. The District Court found that the state could not: "[H]ave it both ways. It cannot say that African-American voters are African-American when they are moved into District 30, but they are merely 'Democrats' when they are deliberately placed in a contiguous district for the purpose of bolstering the re-election chances of other Democrats."[100] The conclusion of the court was that this district had been carefully gerrymandered on a racial basis to create a majority-minority African-American congressional district.

The District Court also found that congressional districts 18 and 29, similar to district 30, had been drawn so as to create additional majority-minority districts. Again, the court found that the non-traditional shape of these districts was the result of racial considerations, not a desire to protect incumbents. In essence, the court found

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[99]Id. at 1337.

[100]Id. at 1339.

that, "the essential goal in creating these districts was to segregate Hispanics from African-Americans and both minorities from whites in order to retain at least 50% total African American population in District 18 and achieve at least 61% total Hispanic population in District 29."[101] In addition, the court found that, with regard to district 30, the separation of voters based upon race was designed to protect the incumbent. The court concluded that the segregation of voters by race was being used for partisan political purposes. The District Court states: "Incumbent Democrats were fencing minorities into their districts or into the new majority-minority districts, while those same minorities were removed from Republican incumbents' districts."[102] The court raises, but leaves unanswered, the question of whether "Hispanic plaintiffs should have to prove that the citizen and non-citizen Hispanic populations should be regarded as a cohesive ethnic group."[103]

As the plaintiffs had met their burden to show that the districts had been created as a result of a racial gerrymander, the State of Texas had the burden of proving that the districts questioned had been narrowly tailored to serve a compelling state interest. The District Court, relying on Shaw, held: "[T]o be narrowly tailored, a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.... Where obvious alternatives to a racially offensive districting scheme exist, the bizarre districts are not narrowly tailored."[104] The District Court found no serious argument by the state that the three districts, described above, had been "narrowly tailored" to meet a compelling state interest - namely compliance with the Voting Rights Act, as amended. Had the state argued

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[101] Id. at 1340.

[102] Id. at 1339.

[103] Id. at 1341.

[104] Id. at 1343-4.

that the districts had been "narrowly tailored" to serve a compelling state interest, such as receiving pre-approval of any new reapportionment plan in compliance with the Voting Rights Act, then the districts might have survived the strict scrutiny test.

Lastly, the plaintiffs challenged all but six of the remaining congressional districts. The claim was that all but those six districts, and districts 18, 29, and 30 described above, were the result of deliberate segregation brought about to create districts 18, 29, and 30. Their claim was that certain individuals were either included in a given district, or conversely excluded from a given district, solely on a basis of their race. In short, the plaintiffs argue that the remaining challenged districts were the result of racial discrimination. The court, however, found that it could not conclude that the remaining challenged districts were generally irregular in shape or contiguity. Additionally, the court found that the addition or subtraction of minority voters from districts was not significant. As a result, the District Court found that the remaining challenged districts did not constitute an unconstitutional racial gerrymander.

This case was heard by the District Court following the United States Supreme Court's ruling in Shaw v. Reno, 113 S.Ct. 2816 (1993). The decision of the District Court was made in light of the Shaw ruling. As Chapter Three discussed, the high court moved beyond Shaw in its opinion in Miller v. Johnson. When the United States Supreme Court decides this case it has numerous legal fronts with which to contend. Given the Court's recent rulings in Shaw and Miller, the Court is not likely to over-rule the District Court in Vera v. Richards. The high court is likely to hold to its precedent of Shaw that the appearance of the district's shape can lead to suspicion that the district was drawn for racial purposes. The Court is likely to further find that the ruling in Miller requiring strict scrutiny will be necessary for, at a minimum, districts 18, 19, and 30, and possibly for all but the six unchallenged districts. The basis for the requirement for strict scrutiny is that race was found by the District Court to be the predominant factor in the drawing of districts 18, 19, and 30, and that all but

the six unchallenged districts were the ripple result of race based redistricting. The high court may also address the issue of how citizen and non-citizen Hispanics are treated when identifying cohesive ethic groups for the drawing of district boundaries. Only time will tell, as the Court will hear the arguments in this case during the fall of 1995, and, perhaps, issue an opinion in the spring of 1996.

NORTH CAROLINA: SHAW v. HUNT

During the 1995-1996 term the high court will also revisit the case of Ruth Shaw in Shaw v. Hunt, 861 F. Supp. 408 (1994). The plaintiff in this case is Ruth O. Shaw. The defendants are Governor James B. Hunt, Jr. of North Carolina, Lieutenant Governor Dennis A. Wicker, and others. This case is basically the remanded Shaw v. Reno discussed in Chapter Three. Ms. Shaw's case had been sent back to the District Court because the United States Supreme Court had found that an equal protection claim existed and that an examination utilizing the strict scrutiny was required. The District Court, hearing the case on remand, found that, while the plaintiff had a claim requiring an examination utilizing the strict scrutiny test, North Carolina's redistricting plan was constitutional because it had been "narrowly tailored" to meet a compelling state interest. Specifically, this compelling state interest for which the redistricting plan had been "narrowly tailored" was to comply with the Voting Rights Act. A total of forty counties in North Carolina are covered by § 5 of the Voting Rights Act. As a result, redistricting plans affecting these forty counties are subject to the approval of the Department of Justice or the United States District Court in Washington, DC.. It is for this reason that the District Court found that the state had a compelling state interest that allowed narrowly tailoring of these districts.

When the United States Supreme Court hears this case this fall it is possible that the Court could use this new case to expand upon its previous ruling in Shaw v.

Reno. One issue that the Court could address includes the very notion of drawing majority-minority districts at the expense of discriminating against individuals of other races. This would be consistent with the current moderate conservative majority's definition of "equality." It is also possible that the Court could challenge the very concept of the Voting Rights Act under which § 5 requires the approval of redistricting plans by the Department of Justice, rather than only by a federal court. The Court could further find that the Equal Protection Clause, as a portion of the United States Constitution which is the supreme law of the land, supersedes the Voting Rights Act, such that the creation of districts in which minorities are a majority, in order to comply with the Voting Rights Act, is in itself unconstitutional. Other than clarifying current uncertainties, the prohibition of the creation of districts based upon race appears to be the next logical step for this philosophically moderate conservative Court as it reinterprets the concepts of equality, the Voting Rights Act, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

CHAPTER FOUR

Effect of recent Court rulings on the United States House of Representatives

In its 1986 ruling in Thornburg v. Gingles, the United States Supreme Court laid out the rules for the creation of minority dominated legislative districts through race conscious redistricting. It is because of this ruling, and the Voting Rights Act's requirement for pre-clearance of covered redistricting plans, that many state legislatures, charged with the drawing of reapportionment plans, began to create more and more majority-minority legislative districts. Evidence of the three Thornburg requirements the Court stated includes: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district;"[105] (2) "the minority group must be able to show that it is politically cohesive;"[106] and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it - in the absence of special circumstances, such as the candidate running unopposed... - usually to defeat the minority's preferred candidate."[107] The United States Department of Justice pushed for, and state legislatures generally complied with, the creation of majority-minority legislative districts when these three conditions were found to exist.

The Court's ruling in Miller v. Johnson, 115 S.Ct. 2475 (1995), marks a changing of this policy. In Miller, the Court states that while race conscious redistricting may be permissible, in some circumstances, it will be held to the highest level of scrutiny - strict scrutiny. As a result, legislative reapportionment plans in

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[105]Thornburg v. Gingles, 478 U.S. 30, 50 (1985).

[106]Id.

[107]Id. at 51.

which districts were drawn with race being the "predominant factor"[108] are subject to legal challenge. The conclusion here is that the United States Supreme Court's recent ruling in Miller v. Johnson, is likely to encourage more lawsuits challenging reapportionment plans drawn following the 1990 decenial census of the United States. The possibility of lawsuits and the uncertainty of the results threatens not only the racial but also the political composition of the United States House of Representatives and other legislative bodies.

This paper has traced the involvement of the philosophically liberal activist courts from the early 1960s through the mid-1980s. As this paper has demonstrated, the liberal leaning judiciary pursued the role of social activism with regard to legislative reapportionment. It was the goal of these courts to protect the rights of the minority from the majority through the creation of protections such as those outlined in the case of Thornburg v. Gingles. It is probably not surprising to the reader that the United States Department of Justice actively sought to enforce the Court's ruling on this issue. The result of the Thornburg ruling, and subsequent enforcement, is evident in the numerous majority-minority legislative districts that were created for Hispanics and blacks in the first post-Thornburg reapportionment following the 1990 census. The Miller ruling, however, throws many of these reapportionment plans containing majority-minority districts into limbo. According to articles in Congressional Quarterly, majority-minority districts most likely can be challenged in Florida, Louisiana, Illinois, and New York.[109] As Chapter Three noted, challenges are already being heard this term to Texas and North Carolina reapportionment plans. Should any of the challenged reapportionment schemes

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[108]Holly Idelson, "Court Takes a Harder Line on Minority Voting Blocks," Congressional Quarterly, July 1, 1995, p.1944.

[109]Juliana Gruenwald, "Court Ruling Expected to Spark More Suits," Congressional Quarterly, July 1, 1995, p. 1947.

drawing majority-minority districts fail the test for strict scrutiny, then the courts would declare those districting plans unconstitutional, possibly causing a great ripple effect. This ripple effect could occur because, in order for state legislators or the courts to change the district lines for one district, they would have to change the district lines of, at a minimum, one other adjoining district, and potentially the districts adjoining that district.

What is the likely effect on the United States House of Representatives? It is likely that minority membership in the United States House of Representatives will drop because districts created for minorities will be challenged and found to have been created with race being the "predominant factor." Where the Court's ruling in Thornburg, and Congress' 1982 amendments to the Voting Rights Act, led to the creation of more majority-minority districts through an activist Justice Department, the effect of the Miller ruling will be the dissolution of a number of these districts, provided they are challenged in the courts.

The congressional elections of 1992 marked the first reapportionment cycle for congressional districts since the 1986 Thornburg decision, and the 1982 amendments to the Voting Rights Act. As such, the 1992 congressional elections provide a picture of the effects of reapportionment plans designed to create majority-minority congressional districts. A total of 17 majority-minority black districts were created during this reapportionment cycle.[110] The result of the 1992 congressional elections showed African-Americans gaining 13 new seats, thereby increasing their ranks from 26 African-American members of the House of Representatives to 39 members.[111] Additionally, Hispanics gained 7 new seats increasing their membership from 12 members of the House of Representatives to

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[110]Id.

[111]Id.

19.[112] It has been estimated that up to a dozen of these new districts could be subject to legal challenges.

Challenges to majority-minority legislative districts also contain political ramifications. The creation of majority-minority legislative districts created legislative districts that were predominately Democratic in political composition. As a result, fewer minorities were able to be placed into neighboring districts to increase the Democratic composition of those districts. The ripple effect of creating these majority-minority districts was great. Because of the loss of minorities in their legislative districts southern Democrats found it tougher to win races for the House of Representatives. The results can be seen in the 1994 elections in which the Republican Party took control of the House of Representatives for the first time since the 1950s. Assisting the Republicans in their effort to seize control of the House of Representatives was their winning a majority of Southern house seats for the first time since Reconstruction.[113]

The actual effects of the shift from Thornburg to Miller will depend on what reapportionment plans are challenged in the courts and which survive the strict scrutiny test. Those plans that fail strict scrutiny will be redrawn without necessarily maximizing the creation of majority-minority districts. The result may very well be that fewer minorities will be elected to the United States House of Representatives. One can never underestimate the power of incumbency. However, the ultimate effect of the Miller decision, and those of future Court rulings, remains far from certain. What is certain is that a new chapter in the public policy of legislative reapportionment is being written based upon the political and legal philosophies of

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[112]Id.

[113]Id.

the five members of the United States Supreme Court who constitute the Court's present "transient majority."[114]

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[114]David G. Savage, Turning Right: The Making of the Rehnquist Supreme Court (New York: John Wiley & Sons, Inc., 1992), p. 36.

CONCLUSION

Today the United States Supreme Court consists of seven men and two women. They are nine justices whose interpretations of the United States Constitution are based upon their individual personal, political, and legal philosophical beliefs and values. As the composition of the Court changes due to new appointments, brought about by the retirements and deaths of justices, the composition of the Court's personal, political, and legal philosophical beliefs and values change. It is these changes that lead to new interpretations and reinterpretations of the law, and thus to changes in the application of the law as it pertains to public policy.

The United States Supreme Court of today is much more philosophically conservative than the Court during the 1960s and 1970s. Today the Court can be described as right of center politically, whereas during the 1960s it is probably fair to characterize the Court as having been left of center politically. This shifting of political and legal opinions and philosophies to the right has led to the shift evidenced in the Court with regard to the issue of legislative reapportionment. This shift is primarily due to a differing interpretation of equality under the Equal Protection Clause of the Fourteenth Amendment among those justices espousing generally liberal political and legal philosophies versus those justices espousing generally conservative political and legal philosophies. Generally speaking, those voicing liberal political and legal philosophies tend to favor an activist Court seeking to protect and further minority voting rights in the name of equality for all, but seemingly at the expense of non-minorities. Those justices espousing conservative political and legal philosophies tend to view the creation of majority-minority districts as promoting the interests of one group of people at the expense of another, thus denying equal protection under the law to the non-minority. The conservative justices tend to favor judicial restraint over judicial activism.

This paper has traced the involvement of the courts on the issue of legislative reapportionment from remaining out of the "political thicket" to being deeply immersed in the issue. The involvement of the courts led to all state legislative districts being based upon population. The Court ordered the principle of "one person, one vote." The Court outlined the guidelines that districts be contiguous, geographically compact, politically cohesive, and consider natural boundaries. It has been the courts that have declared reapportionment plans legal and illegal. It has been the courts that have ruled that legislative reapportionment schemes designed to discriminate are unconstitutional. Furthermore, it was the United States Supreme Court's ruling in Mobile that led the United States Congress to enact changes to the Voting Rights Act. Who draws the lines and how they are drawn is a major political issue.

As the history of court cases has demonstrated, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides equitable relief for those found to have been injured in legislative reapportionment cases. It is this equitable relief that has provided the courts with a broad scope of authority to remedy constitutional violations by enacting public policy in the area of legislative reapportionment. It is, however, the interpretation of the Equal Protection Clause and the very definition of what is meant by equality that is at the heart of the philosophical debate among the justices. As this paper has demonstrated, it is the shifting philosophical composition of the Supreme Court that has led to this shifting interpretation of the concept of "equality" and equal protection under the law as viewed in these reapportionment cases.

The role of the courts in public policy has taken many different directions over the past one-hundred-ninety-two years since the Marbury decision. In particular, the past forty years have marked a new chapter in the history of the United States judicial system with the Court’s involvement in the issue of legislative

reapportionment. Today, it is the state and federal courts that are charged with acting as the referee in reapportionment disputes. The next forty years, let alone the next year, will undoubtedly witness further involvement by the courts in this issue, in varying directions, and to varying degrees, based upon the political and legal philosophy of the Court and the justices appointed.

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