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Melissa L. Saunders

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OF MINORITY REPRESENTATION, MULTIPLE-RACE RESPONSES, AND MELTING POTS: REDISTRICTING IN THE NEW AMERICA

MELISSA L. SAUNDERS*

For years, Robinson Everett has waged war on the gerrymander.¹ In his early campaigns, he battled gerrymanders of the partisan variety.² More recently, he has trained his sights on a different breed of gerrymander—the racial gerrymander.³ He is particularly bothered by the kind of racial gerrymander that is designed to give a racial minority a majority in one or more districts,⁴ the kind that Professor Butler has dubbed the “affirmative” racial gerrymander.⁵

* Professor of Law, University of North Carolina School of Law. I thank John Calmore, Bob Saunders, and Marilyn Yarborough for comments, and Ryan Blaine for research assistance. In the interest of full disclosure, I note that I have participated in several cases involving the issues raised by *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, including *Hunt v. Cromartie*, 526 U.S. 541 (1999) (*Cromartie I*); and *Easley v. Cromartie*, 121 S. Ct. 1452 (2001) (*Cromartie II*).

1. Like Everett, I use the term “gerrymander” to mean a legislative districting plan in which the district lines are drawn so as to ensure particular electoral outcomes.

2. Robinson O. Everett, *Redistricting in North Carolina—A Personal Perspective*, 79 N.C. L. REV. 1301, 1304–05 (2001) (discussing his participation in the *Drum* litigation in the 1960s).

3. *See id.* at 1310–31 (discussing his participation in the *Shaw* and *Cromartie* litigation of the last decade).

4. As Everett recognizes, this kind of racial gerrymander is often undertaken with partisan objectives in mind, as well as racial ones. For example, he attributes the United States Department of Justice’s (DOJ or “Justice”) insistence on the “maximization” of black political power in the early 1990s to the Republican Party’s desire to maximize the number of seats that it controlled in Congress. *See id.* at 1307 & n.39. Additionally, he attributes the odd shape of the 12th Congressional District in North Carolina’s 1991 plan to the Democratic Party’s desire to comply with Justice’s command to create a second black district without sacrificing the number of seats that it controlled in the state’s congressional delegation. *See id.* at 1309–10. It is precisely this difficulty that has made the “race [as] the predominant factor” test of *Miller v. Johnson*, 515 U.S. 900, 916 (1995), so difficult to apply.

5. *See* Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595 (1995); Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313 (1995–96). The adjective “affirmative” is apparently designed both to suggest that the practice is said to have the “benign” objective of helping to give the gerrymandered minority a greater voice in the political process, and to link it with so-called “affirmative action” in hiring, government contracting, and college admissions.

In his view, this sort of gerrymander is especially pernicious, because it stimulates public awareness of race, reinforces common stereotypes about the correlation between race and political interest, discourages the building of interracial coalitions, and fans the flames of racial division.⁶ In this respect, he is not alone; many Americans share his concerns.⁷

Over the years, Everett has developed a keen awareness of the limits of litigation as a means of containing the threat of gerrymandering. He notes that while the Supreme Court has interpreted the Constitution as imposing some limits on partisan gerrymandering,⁸ those limits have been difficult to enforce in the courts.⁹ And he fears that the same may ultimately prove true for racial gerrymandering.¹⁰

Frustrated with his efforts to get the courts to put a stop to racial gerrymandering, Everett now proposes to try a different tactic: to shift responsibility for redistricting from the state legislature to an independent redistricting commission. This commission would be prohibited by state law from considering race in drawing district lines, "except to the extent required by federal law."¹¹ Because of the danger "that racial gerrymandering will be disguised as partisan gerrymandering," he would also forbid the commission to consider partisan political data, such as voter registration and election results.¹² And because incumbency protection may be used to justify allowing representatives who were first elected from racially-gerrymandered districts to "retain the[] spoils" of their (apparently illicit) victories, he would forbid the commission to consider incumbency as a factor.¹³

6. See Everett, *supra* note 2, at 1311-13.

7. For similar expressions of concern about the social and political effect of this kind of gerrymander, see *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring, joined by Scalia, J.); *Shaw v. Reno*, 509 U.S. 630, 647-48 (1993) (O'Connor, J.); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 172-74 (1977) (Brennan, J., concurring in part); *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting); ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?* 242-43 (1987).

8. See Everett, *supra* note 2, at 1306 (citing *Davis v. Bandemer*, 478 U.S. 109, 143 (1986)).

9. See Everett, *supra* note 2, at 1305 (describing the "frustrating outcome" of the *Drum* litigation in North Carolina); *id.* at 1306 (noting that the plaintiffs in *Davis v. Bandemer* were "den[ie]d relief" from the courts other than "recogniz[ing] the possibility" of an equal protection violation for those who would engage in partisan gerrymandering in the future); *id.* at 1309 (noting that a partisan gerrymandering challenge to North Carolina's 1992 congressional districting plan proved unsuccessful).

10. *Id.* at 1314, 1326-27.

11. *Id.* at 1329-31.

12. *Id.* at 1330.

13. *Id.*

Finally, he would require the commission to comply with certain “traditional neutral districting principles,” like contiguity, compactness, and respect for the boundaries of cities, counties, and political subdivisions, in drawing district lines.¹⁴

In this brief commentary, I address Everett’s proposed solution to the problem of racial gerrymandering and explain why I find it unsatisfying. I also explain why I think the current legal and political solution to the problem of minority representation in this country will become increasingly unworkable in this new century. I conclude with some brief thoughts on where I think we may be headed in this area.

I.

I share some of Everett’s concerns about racial gerrymandering, at least in the extreme forms we saw in the early 1990s.¹⁵ But his proposed solution to the problem strikes me as unsatisfactory, for at least two reasons.

First, it fails to account for the significant social and political pressures to produce a set of district lines that is fair to all relevant interest groups, including those that define themselves by race. Like it or not, racial minorities in today’s America often see themselves—rightly or wrongly—as having distinct political interests. As long as they do so, they will pressure redistricting authorities to be fair to them, just as other interest groups—farmers, bankers, and suburban Republicans—do. Shifting responsibility for redistricting from the state legislatures to independent commissions won’t remove this pressure; it will just redirect it.¹⁶ And telling the commissions they can’t consider race in drawing lines “except to the extent required by federal law”¹⁷ won’t prevent that pressure from influencing state districting choices; it will just obscure its influence from public view.

Second, Everett’s proposal fails to account for the fact that amended section 2 of the Voting Rights Act, as interpreted by the Supreme Court in *Thornburg v. Gingles*,¹⁸ exerts substantial pressure on the states to gerrymander along racial lines. Shifting responsibility for redistricting from the state legislatures to independent

14. *Id.*

15. For further discussion, see Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1605 & n.15 (2000).

16. In addition, it will open a new front in the battle for political influence, as racial and ethnic minorities attempt to ensure that they are fairly represented on the commissions themselves.

17. See Everett, *supra* note 2, at 1329.

18. 478 U.S. 30 (1986).

commissions won't remove this pressure; as arms of the state, the commissions will still be obligated to comply with the Voting Rights Act, just as the state legislatures are.¹⁹ And telling the commissions that they can't consider race in drawing lines "except to the extent required by federal law"²⁰ won't relieve them from that obligation; it will merely serve to remind them of it.

In short, Everett's proposal won't rid us of racial gerrymandering, because it won't rid us of the powerful pressures—social, political, and legal—that are leading redistricting authorities to engage in it.

II.

As states, whether through independent commissions or the legislative process, attempt to comply with amended section 2 in the next round, they will encounter a number of difficulties. One obvious problem will be how to adjust the section 2 analysis to account for increasing racial and ethnic diversity. The current framework for analyzing a section 2 claim, set forth in the *Gingles* decision,²¹ was designed for a jurisdiction with a very specific demographic profile: a

19. The fact that a plan is drawn by an independent commission, rather than a legislature, does not make it immune from challenge under the Voting Rights Act, as many states discovered in the last round of redistricting. *See, e.g., Old Person v. Cooney*, 230 F.3d 1113 (9th Cir. 2000) (section 2 challenge to Montana's 1992 plan for state legislative districts, which was drawn by an independent commission); *Quilter v. Voinovich*, 794 F. Supp. 756 (N.D. Ohio 1992) (section 2 challenge to Ohio's 1991 plan for state legislative districts, which was drawn by an independent apportionment board), *rev'd*, 507 U.S. 146 (1993). A commission-drawn plan may, however, be more likely to survive a *Shaw* challenge than a legislative-drawn plan. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 608 (1998) (noting that the only plans the Supreme Court has ever upheld against *Shaw* challenge have been drawn either by courts or by non-partisan commissions, rather than by legislatures); Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 66–68 (arguing that the Court seems less skeptical of race-conscious districting when it is done by non-partisan commissions than by legislative bodies); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 861–72 (1997) (same).

20. *See* Everett, *supra* note 2, at 1329.

21. In *Gingles*, the Court held that to make out a prima facie case that a multi-member districting plan violates its rights under section 2 of the Voting Rights Act, a minority group must establish: (i) that it is "sufficiently large and geographically compact to constitute a majority in a single-member district" drawn within the challenged multi-member district; (ii) that it is "politically cohesive"; and (iii) that "the white majority votes sufficient as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate." 478 U.S. at 50–51. In the early 1990s, the Court held that the same three prerequisites were necessary to establish a prima facie case of vote dilution with respect to a single-member district. *See* *Grove v. Emison*, 507 U.S. 25, 37–42 (1993).

white majority with a substantial black minority and no other protected minority of any significant size. In that particular setting, the *Gingles* framework does a fairly decent job of answering the ultimate question under section 2: whether the challenged electoral structure causes the members of the plaintiff minority group to have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”²² But extend this framework to a jurisdiction with a different demographic profile—particularly one with two or more protected minority groups of substantial size—and it quickly proves unsatisfactory.

Suppose, for example, that the jurisdiction contains two or more protected minority groups, each of which has been the victim of past official discrimination, both inside and outside the electoral process. Each of these groups is able to draw a proposed plan that would give it more “safe” districts than it has under the challenged plan. Each is able to show that, in majority-white districts, bloc voting by the white majority usually results in the defeat of the group’s preferred candidates. Each is able to establish the existence of a number of the other “Senate factors.”²³ And each is able to show that the challenged plan does not allow it to control a number of seats that is roughly proportionate to its numerical strength. It is, however, impossible for the jurisdiction to comply with the demands of each group: if it draws extra “safe” districts for one group, it will not be able to do so for others. If these competing minority groups sue under section 2, what would be the result?²⁴

22. 42 U.S.C. § 1973(b) (1994). Even in such a jurisdiction, the *Gingles* analysis can present difficulties. That analysis was developed for what Samuel Issacharoff calls “classical” claims of racial vote dilution—challenges to at-large electoral systems brought by black voters in predominantly white jurisdictions where blacks had not been elected to office since the fall of Reconstruction. See Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 879–80 (1995). In that context, the dilutive effect of the challenged electoral system was so extreme as to be functionally equivalent to outright exclusion, and courts could declare it invalid under section 2 without having to decide what the “undiluted” strength of the black vote would have been. *Id.* But once section 2 litigation progressed beyond this sort of claim to the kind we saw in the 1990s—a challenge to the lines of a single-member districting scheme, brought by a minority group that was able to win some seats under it—it proved increasingly problematic. See *id.* (citing *Johnson v. De Grandy*, 512 U.S. 997 (1994)).

23. The reference is to the factors that a Senate Committee Report accompanying the bill that amended section 2 lists as being probative of a violation of the amended provision. See S. REP. NO. 97–417, at 28–29 (1982), reprinted in 1982 U.S.C.A.N. 177, 206–07. In *Gingles* and its progeny, the Court has directed courts to consider these factors in adjudicating claims under amended section 2. See, e.g., *De Grandy*, 512 U.S. at 1009–17; *Gingles*, 478 U.S. at 48–52 & n.15.

24. This situation differs in one critical respect from that which the Court confronted

Or suppose the jurisdiction contains two or more protected minority groups, each of which has been the victim of past official discrimination, both inside and outside the electoral process. Neither of them is able to draw a proposed plan that would give it more “safe” districts than the challenged plan, because neither is large enough to constitute a majority in another district. But they can show that it is possible to reconfigure the lines so as to create an additional “majority-minority” district, which the two of them could control by combining forces. If the competing minority groups sue together under section 2, what would be the result?²⁵

Or suppose the jurisdiction is so racially and ethnically diverse that no racial or ethnic group—not even non-Hispanic whites—has a majority. In such a jurisdiction, which demographer William Frey calls a “melting pot” jurisdiction,²⁶ the inquiry that lies at the conceptual heart of the *Gingles* analysis—the inquiry into “racially polarized voting”²⁷—is incoherent. How can one speak coherently of a majority that is voting as a bloc along racial lines²⁸ when that majority consists of two or more different racial or ethnic groups? How can one speak sensibly of racially polarized voting when the relevant majorities and minorities are *themselves* shifting coalitions of different racial and ethnic groups?

In the last round of redistricting, these difficulties with the

in *Johnson v. De Grandy*, 512 U.S. 997 (1994). In *De Grandy*, the challenged plan afforded each of the two competing minority groups “effective voting majorities” in a number of districts that were substantially “proportional to [their share] in the voting-age population.” 512 U.S. at 1000. Here, by contrast, the challenged plan does not offer either of them that sort of “proportionality.” The only way to accommodate the claims of both groups would be to expand the number of seats, which the Court has held that section 2 does not require a jurisdiction to do. See *Holder v. Hall*, 512 U.S. 874 (1994).

25. For examples of courts wrestling with the *Gingles* analysis in this context, see, for example, *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc); *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992); *Concerned Citizens v. Hardee County Bd. of Comm’rs*, 906 F.2d 524 (11th Cir. 1990); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988); *Knox v. Milwaukee County Bd. of Election Comm’rs*, 607 F. Supp. 1112 (E.D. Wis. 1985). For more on these “coalition” lawsuits, see Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a “Rainbow Coalition” Claim the Protection of the Voting Rights Act?*, 21 PAC. L.J. 619 (1990); Sebastian Geraci, Comment, *The Case Against Allowing Multiracial Coalitions to File Section 2 Dilution Claims*, 1995 U. CHI. LEGAL F. 389 (1995); Aylon M. Schulte, Note, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethnically Diverse Communities*, 1995 U. ILL. L. REV. 441 (1995).

26. See William H. Frey, *Regional Shifts in America’s Voting-Aged Population: What Do They Mean for National Politics?*, Research Report No. 00-459, POPULATION STUDIES CENTER, October 2000, at 1, available at <http://www.frey-demographer.org/reports/rr00-459.pdf> (on file with the North Carolina Law Review).

27. See *Thornburg v. Gingles*, 478 U.S. 30, 54-61 (1986).

28. See *id.* at 51.

Gingles analysis were already rearing their ugly heads in jurisdictions whose demographic profiles did not fit the *Gingles* paradigm.²⁹ In the upcoming round, they will arise more frequently. States like California, Texas, and Florida,³⁰ which did not fit the *Gingles* profile the last time around, are now even more racially and ethnically diverse.³¹ And even in states that have remained majority-white overall, immigration, migration, and differential birth rates have transformed some political subdivisions that once fit the *Gingles* profile into the sort of “melting pot” jurisdiction that does not.³²

The format of the 2000 census data will exacerbate these difficulties with the *Gingles* analysis. In it, individuals were, for the first time, allowed to identify themselves as members of more than one racial category.³³ There were six basic racial categories: “American Indian or Alaska Native,” “Asian,” “Black or African American,” “Native Hawaiian or Other Pacific Islander,” “White,” and “Some Other Race.”³⁴ There are sixty-three possible combinations of these basic racial categories: six for those who report only one race, and fifty-seven for those who report two or more races.³⁵ In the data that it has provided to state and local

29. See, e.g., *Johnson v. De Grandy*, 512 U.S. 997 (1994) (state of Florida); *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc) (Kent County, Michigan).

30. See Frey, *supra* note 25, at 1.

31. See *id.*

32. In North Carolina, for example, a number of counties that once fit the *Gingles* profile no longer do because of their growing Hispanic populations. See Ned Glascoke, *Estimate Alarms Hispanic Advocates*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 21, 1997, at B1; James Rosen, *Adding to the Ethnic Mix*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 4, 1998, at A1. Early data from the 2000 census puts North Carolina’s Hispanic population at 378,963. See U.S. Census Bureau, at <http://factfinder.census.gov> (last visited May 14, 2001) (providing 2000 census data for North Carolina on Race, Hispanic or Latino, and Age) (on file with the North Carolina Law Review). In 1990, this population was only 77,000. *Id.* (providing 1990 census data for North Carolina on General Population and Housing Characteristics). For a county by county breakdown, see *id.* (providing 2000 census data for North Carolina on Race and Hispanic or Latino).

33. See U.S. Census Bureau, *Racial and Ethnic Classifications Used in Census 2000 and Beyond*, <http://www.census.gov/80/population/www/socdemo/race/racefactcb.html> (last revised Apr. 12, 2000) (on file with the North Carolina Law Review) [hereinafter U.S. Census Bureau, *Racial and Ethnic Classifications*]. The Census Bureau decided to offer this option in response to pressure from groups representing mixed-race couples. See D’vera Cohn, *A Racial Tug of War Over Census: New Option Fosters Group Competition*, WASH. POST., Mar. 3, 2000, at B1. Nearly 7 million people (about 2.4% of the respondents) selected more than one racial category in their responses. See D’vera Cohn & Darryl Fears, *Multiracial Growth Seen In Census: Numbers Show Diversity, Complexity of U.S. Count*, WASH. POST., Mar. 13, 2001, at A1. While the overwhelming majority of those marked only two racial categories, some marked three or more. See *id.*

34. U.S. Census Bureau, *Racial and Ethnic Classifications*, *supra* note 33.

35. *Id.*

governments for redistricting,³⁶ the Census Bureau has included numerical distributions for all sixty-three racial categories,³⁷ cross-tabulated with the two ethnicity categories.³⁸ To apply the *Gingles* analysis in the next round of redistricting, courts will have to decide what to do with these multi-race responses.

We already know how the United States Department of Justice (DOJ) will deal with multi-race responses for purposes of preclearance under section 5 of the Voting Rights Act:³⁹ It will follow the allocation rules laid down by the Office of Management and Budget (OMB) in March 2000.⁴⁰ Pursuant to those rules, DOJ will allocate any multiple-race response in which “White” and *one* of the five other basic categories were checked to the minority race that was checked.⁴¹ Thus, the numbers for each minority race will consist of the total of (i) the single-race responses in which only that minority race was checked; and (ii) the multiple-race responses in which only that minority race and “White” were checked.⁴² DOJ will allocate the remaining multiple-race responses—those in which *two* or more minority races were checked, either along with “White” or without it—to a category called “Other Multiple-Race.”⁴³ If it finds that a jurisdiction’s “Other Multiple-Race” category contains a significant number of responses that reflect a particular multiple-race combination, it will allocate those responses alternatively to each of the minority races in that combination.⁴⁴ Thus, if it finds that the “White,” “Black or African-American,” and “Asian” combination

36. This data is contained in a file known as the “PL 94–171 Redistricting File,” after the federal law that requires the Census Bureau to provide it to the states within one year of Census Day. See PUB. L. 94–171, 89 Stat. 1023 (1975) (codified as amended at 13 U.S.C. § 141 (2000)). The PL 94–171 redistricting data from the 2000 census was made available to the states on or before April 1, 2001.

37. See U.S. Census Bureau, *Racial and Ethnic Classifications*, *supra* note 33.

38. See *id.* Like its predecessors, the 2000 census also asked individuals to identify themselves as belonging to one of two “ethnicity” categories: “Hispanic or Latino” and “not Hispanic or Latino.” *Id.* Unlike its predecessors, however, the 2000 census asked the ethnicity question before the race question, to reflect the fact that in the federal statistical system, “Hispanic or Latino” is not considered to be a “race.” *Id.*

39. 42 U.S.C. § 1973c (1994).

40. OFFICE OF MANAGEMENT AND BUDGET, BULLETIN NO. 00–02, <http://www.whitehouse.gov/OMB/bulletins/b00-02.html> (Mar. 9, 2000) (on file with the North Carolina Law Review).

41. See U.S. Dept. of Justice, *Guidance Concerning Redistricting and Retrogression*, 66 Fed. Reg. 5412, 5414 (Jan. 18, 2001). The intent here is, presumably, to prevent the new census format from disadvantaging the minority groups that enjoy the protections of the Voting Rights Act.

42. *Id.*

43. *Id.*

44. *Id.*

has a significant number of responses, it will allocate the first of those responses to the “Black or African-American” category, the second to the “Asian” category, the third to the “Black or African-American” category, and so on.⁴⁵ As in the past, DOJ will treat “Hispanic or Latino” as a separate minority group for purposes of enforcing the Voting Rights Act.⁴⁶ If it finds that a significant number of the individuals in the jurisdiction have identified themselves as members of this ethnic category *and* one or more minority races, it will allocate those responses alternatively to the “Hispanic or Latino” category and the minority race(s) checked.⁴⁷ Thus, if it finds that a significant number of responses checked both “Hispanic or Latino” and “Black or African-American,” it will allocate the first of those responses to the “Hispanic or Latino” category, the second to the “Black or African-American” category, and so on.⁴⁸

DOJ will also have to use the OMB allocation rules in enforcing section 2 of the Voting Rights Act.⁴⁹ Presumably, it will also adhere to the refinements on those rules that it has developed for use in the section 5 preclearance process. But what about the courts? When they are asked to apply section 2 in this round—in section 2 suits brought by either DOJ or private litigants, or in *Shaw* suits brought to attack plans that include majority-minority districts drawn to comply with section 2—what will they do? As a formal matter, they are not bound by either the OMB’s allocation rules⁵⁰ or the DOJ’s refinements on those rules.⁵¹ Will they follow the executive branch’s lead here? This seems unlikely, given DOJ’s recent track record in the Supreme Court.⁵² But if the courts do not follow the executive

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Section 12 of the Voting Rights Act authorizes the DOJ to bring suit to enforce the provisions of section 2. See 42 U.S.C. § 1973j(d) (1994). Members of protected minority groups may also bring section 2 suits on their own behalf. See 42 U.S.C. § 1973a (1994); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969).

50. See Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 936 n.141 (2001) (noting that the OMB’s allocation rules apply only to federal agencies that are charged with enforcing the federal civil rights laws).

51. See U.S. Dept. of Justice, *supra* note 40, at 5412 (“This guidance is not legally binding,” but is “intended only to provide assistance to entities and persons affected by the preclearance requirements of section 5.”).

52. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (striking down DOJ regulation interpreting section 5 as requiring it to deny preclearance to a plan that the DOJ thinks would violate section 2); *Miller v. Johnson*, 515 U.S. 900 (1995) (rejecting DOJ’s position that amended section 2 requires the “maximization” of minority voting strength).

branch, what will they do instead? Trying to anticipate how the chips will fall here may well give redistricters fits in the next round.⁵³

Finally, jurisdictions will struggle with the (still unresolved) problem of how to comply with section 2 without running afoul of the Equal Protection Clause, as interpreted in *Shaw v. Reno* and its progeny. Here, the timing of the 2000 census data's release will complicate things. The only data from the 2000 census that will be made available to the states in time for redistricting will be the data on total population, voting age population, and race and ethnicity.⁵⁴ The additional information from the census short form, such as owner/renter status, will not be released until the fall of 2001,⁵⁵ and the detailed socioeconomic data from the long form will not be released until 2002⁵⁶—well after the 2001 round of redistricting must be completed. Absent this additional demographic data, jurisdictions that are required to *consider* race in designing their districts, in order to comply with section 2 and/or section 5 of the Voting Rights Act, will have difficulty convincing courts that they have not made it the “predominant factor” in the process, triggering strict scrutiny under *Shaw*.⁵⁷

53. For some thoughts on how the multiple-race responses may complicate the *Gingles* analysis in jurisdictions where there are a significant number of them, see Persily, *supra* note 49, at 936–37; Nathaniel Persily, *2000 Census Data: New Format and New Challenges*, in *THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY 2*, 20–21 (Nathaniel Persily ed., 2000) [hereinafter Persily, *New Format*].

54. See U.S. Census Bureau, *Strength in Numbers: Your Guide to Census 2000 Redistricting Data From the U.S. Census Bureau*, available at <http://www.census.gov/clo/www/strength2.pdf> (issued July 2000) (describing the contents of the PL 94–171 Redistricting File) (on file with the North Carolina Law Review). Federal law requires the PL 94–171 file to contain only the data on total population. See 13 U.S.C. § 141(c) (1994). Since 1980, however, the Bureau has, at the request of the DOJ and the state legislatures, also included the race and ethnicity data. See U.S. Census Bureau, *supra* at 5. Since 1990, it has included data on voting age population as well. *Id.*

55. This information will appear in “Summary File 2,” which will be released to the states beginning in September of 2001. U.S. Census Bureau, *Census 2000 Data Products At a Glance* (2000), available at <http://www.census.gov/population/www/censusdata/c2kproducts.html> (last modified Apr. 16, 2001) (on file with the North Carolina Law Review).

56. This information will appear in “Summary File 3,” which will be released beginning in June of 2002. See *id.*

57. See *Bush v. Vera*, 517 U.S. 952, 967 (1996) (plurality opinion) (holding that in considering whether the state made race the “predominant factor” in the linedrawing process, it is “evidentially significant” that the racial data compiled was “more detailed” than the data it claimed to have used to identify non-racial “communities of interest”); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (holding that the strict scrutiny of *Shaw* applies whenever the state has used race as the “predominant factor” in drawing a district’s lines). For further discussion of this problem, see Persily, *supra* note 49, at 938–44; Persily, *New Format*, *supra* note 52, at 20. The only way out of this dilemma will be to look to sources other than the census for non-racial demographic data. See Persily, *supra* note 49, at 942–

III.

To a proponent of colorblind districting, there is a simple solution to these difficulties: The Court should abandon *Gingles*, declare amended section 2 of the Voting Rights Act unconstitutional, and forbid all consideration of race and ethnicity in drawing district lines. This would discourage the racial and ethnic minority groups that currently enjoy special protection under the Voting Rights Act from pursuing a strategy of political separatism, and force them to assimilate themselves into the existing political power structure, just as other minority groups—the Germans, the Irish, the Italians, and the Poles, to name a few—have done in the past. This solution to the problem of minority representation, which we might call the “melting pot” solution, is intuitively attractive to many Americans—at least to many *white* Americans, and it seems to be where the Supreme Court is currently headed, albeit not as quickly as Everett would like.⁵⁸

I wonder, though, whether this solution will continue to command so much support from the white majority as demographic change renders it just another minority. If historical experience is any guide, I suspect the answer will be no.

History teaches us that when a group that has long enjoyed a comfortable electoral majority—be it defined by race, class, partisan affiliation, or some combination thereof—begins to feel its power eroding because of demographic changes in the electorate, it tends to try to beat back the threat and preserve its own dominance in one of two ways. The first is to try to prevent the would-be usurpers from participating in the political process. This is how upper- and middle-class whites in the South responded in the last quarter of the nineteenth century, when they felt their traditional political dominance threatened by the enfranchisement of thousands of new black and poor white voters. They engaged in a concerted effort to prevent all of these groups from voting, through adoption of literacy tests and other stiff new restrictions on the franchise, burdensome voting procedures, fraudulent administration of the election laws, and sheer physical intimidation.⁵⁹ And it is how upper- and middle-class

44. For a discussion of some of the possible sources of this data, see Lisa Handley, *A Guide to 2000 Redistricting Tools and Technology*, in *THE REAL Y2K PROBLEM*, *supra* note 53, at 30–31. For a thoughtful discussion of some of the difficulties that jurisdictions will encounter if they attempt to use non-census data to design their districting plans, see Persily, *Color by Numbers*, *supra* note 49, at 943–44.

58. The *Shaw* cases are certainly a move in this direction, though some members of the *Shaw* majority are clearly willing to move faster than others. *Compare Bush*, 517 U.S. at 958, *with id.* at 999–1000 (Thomas, J., concurring, joined by Scalia, J.).

59. For extensive accounts of this campaign, see ALEXANDER KEYSSAR, *THE RIGHT*

whites in our Northern and Midwestern cities responded in the same era, when they felt their traditional political dominance threatened by new waves of immigrant voters who were affiliating themselves with the Democratic Party: They enacted rigid new registration procedures designed to prevent these new voters from participating.⁶⁰

The second (and decidedly more benign) reaction is to try to change the voting rules, replacing the traditional single-member district plurality system of voting with some other sort of voting system that does a better job of ensuring that minority interests are able to win seats in the legislatures. This is what happened in England in the nineteenth century, when upper-class elites suddenly found themselves a minority in the electorate, thanks to the extension of the vote to the lower classes: They attempted to install a system of proportional representation in Parliament.⁶¹ It is what happened in South Carolina during Reconstruction, when whites suddenly found themselves a minority in the electorate, thanks to the Fifteenth Amendment's extension of the franchise to blacks, who constituted over sixty percent of the state's population: They sought to install a system of cumulative voting in elections for state and local legislative bodies.⁶² And it is what happened in South Africa in 1994, when white Afrikaners saw that they would soon become a minority in the electorate, thanks to the proposed enfranchisement of the black population: They demanded a system of proportional representation in the national legislature.⁶³

As demographic changes in the American electorate threaten the

TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 105-16 (2000); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 45-62 (1974); MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908*, at 11 (2001).

60. For an account of this effort, see FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON'T VOTE AND WHY POLITICIANS WANT IT THAT WAY* 86-93 (2000).

61. KATHLEEN L. BARBER, *A RIGHT TO REPRESENTATION: PROPORTIONAL ELECTION SYSTEMS FOR THE TWENTY-FIRST CENTURY* 10, 12-16 (2000).

62. *Id.* at 22. The proposed reform was never adopted, because the state legislature was already controlled by black Republicans. *Id.* Once military Reconstruction was over, however, white Democrats, though still a numerical minority, were able to regain control by disenfranchising blacks. *Id.* at 23. For more on this incident, see RICHARD ZUCZEK, *STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA* (1996).

63. See Paul Taylor, *De Klerk Rebuffs Charge That He Gave in to Blacks*, WASH. POST, Nov. 23, 1993, at A31; Paul Taylor, *South African Black, White Leaders Agree on New Charter*, WASH. POST, Nov. 18, 1993, at A1; Paul Taylor, *South Africans Near Agreement on Power-Sharing*, WASH. POST, Feb. 13, 1993, at A24. For more on the compromise embodied in South Africa's 1994 constitution, see Peter N. Levenberg, *South Africa's New Constitution: Will It Last?*, 29 INTL. LAWY. 633, 638-41 (1995).

long-standing political dominance of non-Hispanic whites,⁶⁴ will we see them reacting in a similar fashion? I expect so. Indeed, there are already signs of this on the horizon. Take, for example, what happened in California in the 1990s. During that decade, the racial and ethnic composition of California's population changed dramatically, as growth in the state's Latino and Asian populations dwarfed that of its non-Hispanic white population.⁶⁵ The white majority reacted by using the citizens' initiative process to pass several measures designed to preserve its traditional social, economic, and political dominance.⁶⁶ While none of these measures dealt directly with the franchise, they were certainly designed, at least in part, to keep Latinos and Asians from participating effectively in the state's political process.⁶⁷

64. The Census Bureau projects that whites will become a minority in this country during the second half of this century. See, e.g., U.S. Census Bureau, *Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050 to 2070*, at <http://www.census.gov/population/projections/nation/summary/np-t5-g.pdf> (last visited May 14, 2001) (on file with the North Carolina Law Review). Demographers predict that by 2025, ten states—California, Arizona, Florida, Hawaii, Illinois, Nevada, New Jersey, New Mexico, New York, and Texas—will become what they call “melting pot” states, in which no single racial or ethnic group has a majority. See Gregory Rodriguez, *Candidates’ Racial Views Outdated*, L.A. TIMES, Mar. 5, 2000, at M1 (citing work of William H. Frey). California became a majority-minority state last year, as the non-Hispanic white population dipped to just under 50%. See William Booth, *California Minorities Are Now the Majority: Non-Hispanic Whites Dip Below 50%*, WASH. POST, Aug. 31, 2000, at A01. By contrast, demographers expect the remaining forty states to remain largely white. See Stuart Silverstein, *U.S. Dividing Into Immigrant Zones, Report Contends*, L.A. TIMES, Mar. 9, 2000, at A33. For more on this important new demographic divide, see William H. Frey, *Multiple Melting Pots*, WORLD AND I, May 2000, at 36; William H. Frey, *New Demographic Divide in the US: Immigrant and Domestic “Migrant Magnets,” THE PUBLIC PERSPECTIVE*, June-July 1998, at 38; William H. Frey, *Emerging Demographic Balkanization: Toward One America or Two?*, PSC Research Report No. 97-410 (Nov. 1997).

65. See MARK BALDASSARE, CALIFORNIA IN THE NEW MILLENIUM: THE CHANGING SOCIAL AND POLITICAL LANDSCAPE 2-3, 101-03 (2000). The growth in the Latino and Asian populations has been fueled largely by immigration and by differential birth rates. *Id.* at 2-3, 102-03. The state's demographers now estimate that Latinos will outnumber non-Hispanic whites sometime in the 2020s, and that Latinos will actually become a majority in the 2040s. *Id.* at 3 & 101 tbl.4-1. (citing a 1998 California Department of Finance report).

66. See Baldassarre, *supra* note 65, at 99 (citing Proposition 187, passed in 1994, which restricted public services for illegal immigrants; Proposition 209, passed in 1996, which ended affirmative action at the state and local level; and Proposition 227, passed in 1998, which limited bilingual education in the public schools). For more on the racial and ethnic undertones of these initiatives, see LYDIA CHAVEZ, THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION (1998); DALE MAHARIDGE, THE COMING WHITE MINORITY: CALIFORNIA'S ERUPTIONS AND AMERICA'S FUTURE (1996); PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE (1998).

67. Ironically, these initiatives seem to have touched off increased political participation by Latinos. See BALDASSARE, *supra* note 65, at 109-111 & 111 tbl.4-4.

For another example, take what is alleged to have happened in Florida, one of the ten states in which whites are likely to lose their majority status in the near future, in the last presidential election. Across the state, there were allegations that white Republicans had attempted to keep African Americans, Haitians, and non-Cuban Hispanics from voting, through such familiar techniques as purging them from the voting lists just prior to the election, having the police harass or intimidate them on their way to the polls, moving polling places without notifying them, demanding that they produce identification or prove that they were not convicted felons before being allowed to vote, falsely representing to them that they were not on the voting lists, and simply refusing to let them cast ballots.⁶⁸ The parallel between this behavior and that of white Democrats in North Carolina in the last quarter of the nineteenth century is manifest

Finally, think of the great hue and cry raised in the wake of last year's presidential election about the unfairness of using winner-take-all elections to select a state's presidential electors.⁶⁹ True, some of this came from academics who had long been hostile to winner-take-all systems.⁷⁰ But much of it came from average citizens, who had never had much occasion to reflect seriously on the issue before, because they themselves had never really borne the brunt of the winner-take-all system, at least not enough to make them stand up and take notice.⁷¹ The outcome that has seemed so outrageous to

68. See, e.g., Noah Bierman, *U.S. Rights Probe of Florida Voting Aims At Governor*, PALM BEACH POST (Palm Beach, Fla.), Jan. 7, 2001, at 1A; Robert E. Pierre & Carol Morello, *Irregularities Cited in Fla. Voting: Blacks Say Faulty Machines, Poll Mistakes Cost Them Their Ballots*, WASH. POST, Dec. 12, 2000, at A38; Deborah Sharp, *Some Black Voters Say Election Excluded Them*, USA TODAY, Dec. 8, 2000, at 8A; Peter Slevin & Serge F. Kovalski, *Outside Palm Beach, Complaints Growing: Democratic Hotline Collects 6,000 Reports of Problems Voting in Florida*, WASH. POST, Nov. 11, 2000, at A12; see also Farrell & Johnson, 79 N.C. L. REV. 1215, 1237-40, 1251 tbl. 3 (2001). For a more complete account of these allegations, see U.S. Commission on Civil Rights, *Draft Report on Voting Irregularities in Florida During the 2000 Presidential Election*, available at <http://www.usccr.gov/vote2000/stdraft1/main.htm> (June 8, 2001) (on file with the North Carolina Law Review).

69. At present, all but two states—Maine and Nebraska—use such a system to select their presidential electors. See William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 160 & n.98 (1996); Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 667 n.1 (1996).

70. See, e.g., Lani Guinier, *How To Make Every Vote Count*, NEWARK STAR-LEDGER, Nov. 19, 2000, at 001; Lani Guinier, *Making Every Vote Count*, THE NATION, Dec. 4, 2000, at 5 [hereinafter Guinier, *Making Every Vote Count*]; Lani Guinier, *Proportional Representation: First Step in Election Reform*, SEATTLE POST-INTELLIGENCER, Dec. 19, 2000, at B4.

71. See, e.g., Letters to the Times, *Electoral College: Change or Remove It?*, L.A. TIMES, Nov. 13, 2000, at B6; Letters to the Editor, *The Long Count Gets Longer*, WASH.

these individuals—that a presidential candidate who garners only 50.1% of the popular vote in a state can win its entire slate of electors, leaving a competitor who wins 49.9% with none of them—is precisely the same as the one that the racial and ethnic minorities, protected by the Voting Rights Act, have faced for years under geographic districting schemes in which the plurality winner takes all.⁷² This time, however, the winner-take-all system operated to render “irrelevant” the votes of many members of the traditional white majority, who are not accustomed to having their interests ignored in elections—white Democrats in North Carolina, white Republicans in Michigan, and white Republicans in New Mexico. Now that these individuals are feeling the pinch of the winner-take-all system themselves, they are beginning to reconsider their long-standing affection for it.

In the new America, this experience will be repeated many times over, as non-Hispanic whites who have enjoyed comfortable majority status for centuries suddenly find themselves just another minority. Will these changes cause Everett and other like-minded individuals to change their tune about the “melting pot” solution to the problem of minority representation? Given the strong tendency of principle to take a back seat to self-interest in matters political, I suspect they will. For this reason, Lani Guinier may well be right when she says that the aftermath of Election 2000 offers us a once in a generation opportunity to rethink our approach to the problem of minority representation in this country.⁷³

POST, Dec. 9, 2000, at A28; Letters to the Editor, *Reforming the Electoral College*, WASH. POST, Dec. 24, 2000, at B6.

72. If anything, the arguments for a plurality winner-takes-all rule seem somewhat stronger in elections for presidential electors than in elections for seats in legislatures. While we are nominally choosing members of a “representative” body (the electoral college), that body is not, as currently structured, a deliberative one, and its sole purpose is to choose a single executive who will represent the entire country. In this context, there is arguably a greater need for consensus. See JUDITH A. BEST, *THE CHOICE OF THE PEOPLE?: DEBATING THE ELECTORAL COLLEGE* 10–12 (1996).

73. See Guinier, *Making Every Vote Count*, supra note 70.

