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PANEL 2: Enfranchising the Disenfranchised

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ENFRANCHISING THE DISENFRANCHISED

Mr. Still

Welcome to the panel on "Enfranchising the Disenfranchised." I am Edward Still, the director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law.

We have what I believe will be an interesting panel today. The first panelist is Penda Hair, now with the Advancement Project, and formerly with the NAACP Legal Defense and Educational Fund. Penda has been involved in many of the major voting rights cases during the last ten or fifteen years, including *Thornburg v. Gingles*,[1] the first case in which the Supreme Court interpreted the 1982 amendments to Section 2 of the Voting Rights Act.

Our second panelist is Melissa Saunders, who teaches at the University of North Carolina and sometimes works as the Senior Counsel to the North Carolina Attorney General. Melissa has recently been working on *Hunt v. Cromartie*, the latest round of the *Shaw v. Reno* litigation in North Carolina.[2] Because the NAACP Legal Defense and Educational Fund ("LDF")[3] has been involved

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[1] 478 U.S. 30 (1986).

[2] Hunt v. Cromartie, 526 U.S. 541 (1999) ["*Shaw III*"]. *Shaw III* involves the claim that North Carolina's twelfth congressional district, as established by the State's 1997 congressional redistricting plan, created an unconstitutional racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 544-45. The Court held that the issue of whether a districting plan is a political or a racial gerrymander is a triable issue of fact, but the Court made no conclusions on the requisite proof to demonstrate an unconstitutional gerrymander. *Id.* at 553-54.

[3] LDF, which was founded in 1940 by Supreme Court Justice Thurgood Marshall, is the nation's premier civil rights public interest law firm. LDF fights for equality and empowerment for African Americans and other disenfranchised groups in the areas of education, employment, criminal justice, voting rights, housing, health care, and environmental justice. NAACP Legal Defense and Educational Fund, Inc., *About the NAACP Legal Defense and Educational Fund, at* http://www.ldfla.org/ldf.html (last visited Jan. 26, 2001).

in almost every major North Carolina voting rights case over the years, it is used to being sued by the State of North Carolina. In this strange world of shifting alliances, however, the State of North Carolina and LDF are on the same side in voting rights litigation. I have had the same experience dealing with Alabama and it is very strange when people who used to be across the table are now on the same side.

Fortunately, if you acted nice, as your mother always taught you to do, then you have pretty good relations with the lawyers you are now working with on the same side. The bad guys are now a new set of people.

Our third panelist is J. Gerald Hebert. Gerry Hebert was with the Justice Department for twenty years, working primarily in the Civil Rights Division. I first met him in 1981 or 1982, when we were retrying the *Bolden v. City of Mobile* case,[4] and since that time he and I have worked on numerous voting rights cases.

Gerry has been in private practice for several years now in Alexandria, Virginia and handles primarily voting rights cases, both for jurisdictions and for individuals. He is also general counsel for IMPAC 2000, which is the Democrats' national redistricting project. Again in the shifting alliances of groups, sometimes it seems to me that Gerry is on my side, and other times it seems to me he is working against the best interest of my clients. I am sure, of course, that Gerry has a different view of that.

Today we will primarily have a conversation, but first Gerry will give us a presentation on the prospect of voting via the Internet. Gerry will explain to you in just a moment that this is a way of empowering people, of enfranchising people so that they are better able to participate in the voting process. After Gerry completes his presentation, we will have a discussion and then we will go on and talk about some other aspects of how we can enfranchise the disenfranchised. Go right ahead, Gerry.

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[4] 542 F. Supp. 1050 (S.D. Ala. 1982).

Mr. Hebert

Thank you very much. As was previously stated, I am general counsel of IMPAC 2000, and I would like to spend a few minutes telling you about redistricting and how ultimately Internet voting fits into the entire redistricting package.

I will divide my presentation into two parts. First is the short-term presentation. What is the likelihood in the next couple of years that we will be able to continue empowering minority voters through redistricting? Redistricting has already made tremendous strides in the 1990s and now faces different challenges in the post-2000 redistricting cycle. That is the short-term challenge.

The long-term opportunity would be the opportunity to vote over the Internet. The first thing I need to tell you is that the rules have changed considerably since 1991. The Supreme Court has handed down a series of decisions[5] and I will not go through them all, because I know other panel members will talk about this in greater detail.

The first thing you should realize is that back in the 1990s, I was at the Justice Department when the post-1990 round of redistricting took place. The theory was then that everyone, including civil rights groups, states, and courts, operated under the idea that if you could create a majority-minority district,[6] that would result in the election of a minority group member to the respective body, whether it was the Congress or the state legislature, and you had to do it.

Throughout the 1990s something happened as a result of a decision called *Johnson v. DeGrandy*,[7] in which the Supreme

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[5] *See* Shaw v. Reno, 509 U.S. 630 (1993) ["*Shaw I*"]; Chisom v. Roemer, 501 U.S. 380 (1991).

[6] *See Gingles*, 478 U.S. at 50-51. Majority-minority voting districts are those in which members of a racial minority group constitute a majority of the population. *Id.* Section 2 of the Voting Rights Act permits the creation of such districts if the totality of the circumstances demonstrates that the current districting scheme impedes the minority group from electing its chosen representatives. *Id.*; *see also* Bush v. Vera, 517 U.S. 952, 978 (1996) (articulating the *Gingles* factors).

[7] 512 U.S. 997 (1994).

Court held that Section 2 of the Voting Rights Act, which is a major enforcement mechanism of the Voting Rights Act,[8] does not require the maximization of minority opportunity or majority-minority districts.[9]

The Supreme Court also held in *Johnson* that, in deciding whether the legislative districting scheme provided the challenging minority group equal political opportunity, great weight should be given to the rough proportionality between the minority group's percentage in the voting-age population in the jurisdiction – the state of Florida in that case – and the number of majority-minority districts.[10] So, if a state creates a number of majority-minority districts that is roughly equal to the relevant share of the population in the jurisdiction, and the state has a number of majority-minority districts in the legislature roughly equal to the state's minority population, then that is usually sufficient to defeat a Section 2 claim.[11]

As a result, I think the debate in the next round of redistricting will be over how we will define minority opportunity districts, and there will be less focus on the *number* of minority opportunity districts that need to be drawn.

The new round will be different from that in 1990, where we debated how many majority-minority districts should be created. This time the debate will be on the composition of the districts. How black do districts need to be for black voters to have equal opportunity, and how Hispanic do districts need to be to enable Hispanic voters to achieve equal opportunity to elect?

One of the things I always look at as the general counsel for a Democratic organization is the margin of victory for our incumbents. When I look nationwide I see that Democratic districts are packed with more Democrats than Republican districts are, which bothers me as a lawyer for the Democrats. Currently in the United States, there are eighty congressional districts in which Democrats have won by more than twenty five points. Now, that is a landslide

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[8] Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (2000).

[9] *Johnson*, 512 U.S. at 1016.

[10] *Id.* at 1013-14.

[11] *Id.*

margin, and those districts are so safe that they really are uncontested by and large.

Packed districts and a number of the heavily majority-minority districts fall into this category, which subsequently suppresses voter turnout among minorities. The reason is that, when a district is so safe that the incumbent is running unopposed, the minority voters tend not to vote because there is no real need to vote in an uncontested election to insure that the black or Hispanic incumbent is reelected. Republicans have told us that their strategy is to make sure that they never put up a Republican against a safe Democratic district, whether that safe Democratic district is held by a white, a black or a Hispanic, because they know that if they do not put up an opponent, they can keep the voter turnout low in that district, which will ultimately diminish the voter turnout for Democrats in statewide races.

I only throw that out here because today with thirty-six black and fifteen Hispanic majority-minority congressional districts, all of them held by Democrats, those are districts where we all have to work very closely with the minority incumbents to make sure that they will be protected, and more importantly that their constituents will continue to enjoy an opportunity to elect candidates of their choice in the newly formed district.

Another major change has been in the area of Section 5, which pertains to preclearance of changes to voting districts in certain historically discriminatory jurisdictions.[12] Sixteen states in whole or in part have to submit their redistricting plans to the Justice Department or to a D.C. district court for approval. Once again this is an area where the Supreme Court has really cut back on the Justice Department's authority to enforce Section 5: it held in

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[12] 42 U.S.C. § 1973(c) (2000). Section 5 requires states that are subject to pre-clearance and seek changes to their voting qualification, prerequisite, standard, practice, or procedure to: (1) "institute an action in the United States District Court for the District of Columbia for a declaratory judgment;" or(2) bypass the district court "provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General." *Id.*

Miller v. Johnson that it disapproved of the Justice Department's policy of maximization of minority voting rights.[13]

In the 1980s and 1990s redistricting cycles, the Justice Department reviewed redistricting plans under Section 5 to make sure they did not discriminate against minorities. If a redistricting plan violated Section 2 of the Voting Rights Act, the Justice Department used to object to those plans under Section 5 and not allow them to go into effect on the grounds that they continued to dilute and discriminate against minority voters.[14]

In the *Bossier Parish* case, the Supreme Court cut back the Justice Department's authority to incorporate Section 2 into Section 5.[15] This decision has profound implications. It means, for example, that when a plan is drawn by the State of Georgia, even though the plan dilutes black voting strength, and the State submits it to the Justice Department, the Justice Department will conclude that the plan probably violates Section 2 of the Voting Rights Act, but the Justice Department will nonetheless have to approve that plan under Section 5 unless it makes minority voters worse off than they were before. This decision sets back minority voters, maintaining the status quo, and one of the reasons people marched over the Edmond Pettis Bridge was to insure that the Justice Department would not approve plans that dilute minority voting strength.

If you think that is bad, the most recent Supreme Court 5-4 decision authored by Justice Scalia will make the hair on the back of your neck stand up.[16] In that case the Supreme Court simply held that if a state or a local subdivision enacts a plan that is intentionally discriminatory against minority voters, but is not intended to and does not make minority voters worse off than they were before, the Justice Department has to approve that plan under the Voting Rights Act.[17]

That decision is absolutely incredible because, as Justice Scalia even noted in his opinion, a plan that violates the Constitution and

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[13] 515 U.S. 900, 926 (1995).

[14] *See* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 483 (1997) ["*Bossier I*"].

[15] *Id.* at 488.

[16] Reno v. Bossier Parish Sch. Bd., 120 S.Ct. 866 (2000) ["*Bossier II*"].

[17] *Id.* at 874-75.

is intentionally discriminatory will nonetheless now be approved under the Voting Rights Act by the Justice Department.[18] This decision clearly turns Section 5 of the Voting Rights Act on its head.

The final area of the law that has changed considerably is what I would call the *Shaw v. Reno* decision of 1993.[19] The Supreme Court there held that if a state draws redistricting plans that excessively and unjustifiably use race as the predominant criterion, it will be creating a district that is constitutionally suspect under the Constitution.[20] What this essentially means to people like me who have to explain it to members of Congress and state legislative leaders is that you have to take race into account when you redistrict, but not too much. The Supreme Court has yet to tell us how much is too much.

The *Shaw* test basically weighs two elements: racial considerations in drawing a plan cannot outweigh traditional redistricting principles.[21] Race cannot be such a driving force in creating a district as to outweigh or subordinate traditional redistricting principles such as compact districts, contiguous districts, respect for political subdivisions, respect for communities of interest, protection of incumbents, and preservation of the core of existing districts, which is similar to protecting incumbents, although it focuses more on voters than on office holders.[22] The aim of preserving district cores is not to disrupt whole groups of voters needlessly, if you can keep them together.[23]

I think this is going to be one of the areas where we will really be able to protect minority incumbents by using respect for communities of interest and preserving the cores of existing districts to the greatest extent possible.

As a result of the traditional redistricting principles, such as compactness and continuity, we now know that shape matters in determining whether race has played too much of a role. Justice

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[18] *Id.* at 875-76.
[19] 509 U.S. 630 (1993) ["*Shaw I*"].
[20] *Id.* at 643-44.
[21] *Id.*
[22] *Id.* at 644-47.
[23] *Id.* at 647.

O'Connor in her opinion for the Court in *Shaw I* told us that the shapes of the districts matter.[24] The problem is that shapes that are good to some people might not be good to other people, and vice versa. Moreover, districts take on different shapes for all kinds of different reasons, incumbency protection being just one of them, and we know that is okay.

What has happened as a result of *Shaw I* is that only the majority-minority districts have been invalidated by the Supreme Court, while similarly bizarrely shaped white districts have not been declared presumptively unconstitutional because racial considerations were not the predominant reason for their creation. I think ultimately we will see that in the next round of redistricting, shapes of districts will take on more regular and less bizarre shapes.

The ultimate point of all this, of course, is that the Supreme Court has created a ball of confusion for people who have to draw districts. Legal challenges will clearly be inevitable. During the last round of redistricting forty of the fifty states were sued over their state wide redistricting plans.[25] Many were sued over different redistricting plans in the same state pertaining to their congressional state senate and state house.[26] North Carolina, for example,

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[24] *See* Shaw v. Hunt, 517 U.S. 899 (1996) ["*Shaw II*"] (holding that the North Carolina reapportionment scheme challenged in *Shaw I* was based on racial considerations and not sufficiently tailored to serve a compelling state interest); *see also Bush*, 517 U.S. at 978 (holding that strict scrutiny applies whenever race is the predominant factor motivating the drawing of district lines, and that the Texas district lines creating three majority-minority districts were subject to strict scrutiny and not narrowly tailored to serve a compelling state interest).

[25] *See, e.g.*, *Bush*, 517 U.S. at 956-57 (Texas); *Shaw II*, 517 U.S. at 901-02 (North Carolina); *Miller*, 515 U.S. at 903 (Georgia); United States v. Hays, 515 U.S. 737, 740 (1995) (Louisiana); *Johnson*, 512 U.S. at 1000 (Florida).

[26] *See, e.g.*, *In re* Certification of a Question of Law, 615 N.W.2d 590, 592-93 (S.D. 2000) (challenging the constitutionality of a statutory amendment that, citing minority representation concerns, modified the election system of state representatives from two single-member house districts consisting of specified geographic areas to at-large voting for two representatives); Town of Brookline v. Sec'y of Commonwealth, 631 N.E.2d 968, 977-78 (Mass. 1994) (upholding districting plan, and stating that districts must be formed "as nearly as may be, without uniting" different political subdivisions or parts thereof into one district,

got sued over the same plan several times.[27] I know you are going to find this prediction a little hard to believe, but there will be even more litigation over these plans in the upcoming round.

Race and politics are now at the boiling point in many ways. Democrats and Republicans are at near parity in Congress, and a shift of just a handful of seats will determine who controls it. Who controls the House of Representatives is extremely important to minority voters. If the Democrats take control of the House in this next election, Charlie Rangel[28] will become the first African American to head up the House Ways and Means Committee, the most powerful committee in Congress.[29]

Some wealthy people on Wall Street have already been courting Charlie Rangel because they think he will be the next House Ways and Means Committee chair. In addition, John Conyers[30] will be the Chairman of the House Judiciary Committee,[31] John Lewis[32]

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even though the plan divided towns among two or more districts); *In re* Petition of Stephan, 836 P.2d 574, 584 (Kan. 1992) (per curiam) (holding that state reapportionment legislation to protect minority districts does not violate the Constitutions of the United States or of the State of Kansas).

[27] *See Shaw III*, 526 U.S. at 543; *Shaw II*, 517 U.S. at 901-02; *Shaw I*, 509 U.S. at 633-34.

[28] Representative Charles B. Rangel, a Democrat from New York, is the ranking member of the House Committee on Ways and Means. He is serving his fifteenth term as a representative from New York's fifteenth congressional district. U.S. House of Representatives, *Biography of Charles B. Rangel*, *at* http://www.house.gov/rangel/biography.htm (last visited Mar. 5, 2001).

[29] The House Committee on Ways and Means is the "starting point for every bill dealing with federal revenues that is introduced in Congress." Committee on Ways and Means, *History*, *at* http://www.house.gov/ways_means/chrwelco.htm (last visited Mar. 5, 2001).

[30] Representative John Conyers, Jr., a Democrat from Michigan, is the second most senior member of the House of Representatives. Conyers is serving his eighteenth term for Michigan's fourteenth congressional district, and he is serving his second term as the first African-American Democratic leader of the House Committee of the Judiciary. U.S. House of Representatives, *Biography of John Conyers, Jr.*, *at* http://www.house.gov/conyers/bio_john_conyers.htm (last visited Mar. 5, 2001).

[31] The House Judiciary Committee oversees the Department of Justice and the federal courts, and is responsible for copyrights, consumer protection, and civil rights issues. *Id.*

and others with great seniority may also chair committees, and the list goes on and on. The aforementioned great members of Congress can really empower minority voters in ways that we cannot even begin to describe here.

I want to make a segue at this point into Internet voting. This is relevant here because ultimately I think that despite some of the negative implications of all this redistricting for minority voters, one of the potential levelers of the playing field is Internet voting.

I defended the Arizona Democratic Party recently in a lawsuit that challenged its plan to offer Internet voting to voters.[33] The challenge was that this would discriminate against minority voters because whites have greater computer access than minorities.[34] Therefore, the plaintiffs argued that, by extending the franchise to whites who had computers, the Arizona Democratic Party allegedly disproportionately extended the franchise in a way that would hurt minority voters.[35]

The first thing we had to do was to distinguish between computer ownership and access to a modem, because one who owns a computer does not necessarily have a modem, so what might be more important is modem ownership. We also had to consider whether one had access to a computer anywhere, if not at home then somewhere else. One does not have to vote from home over the Internet; one can vote from anywhere where one has access to a computer.

In addition, the Commerce Department told us that Internet access was expanding.[36] In 1994, Anglos or whites were 2.8 times as likely to own computers as blacks.[37] By 1998, just four years

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[32] Congressman John Lewis, an African American, represents Georgia's fifth congressional district. U.S. House of Representatives, *Member WWW Services*, *at* http://www.house.gov/house/MemberWWW.html (last visited Mar. 5, 2001).

[33] Voting Integrity v. Fleisher, No. 00-CV-109 (D. Ariz. filed Jan. 21, 2000).

[34] *Id.*

[35] *Id.*

[36] U.S. Dep't of Commerce, National Telecommunications and Information Administration, *Falling Through the Net: Defining the Digital Divide* (July 8, 1999) (Appendix: Trendline Study on Electronic Access by Households: 1984-1998), *available at* http://www.ntia.doc.gov/ntiahome/fttn99/appendix.html.

[37] *Id.*

later, they were 2.0 times as likely.[38] Anglos were 2.2 times as likely to own computers as Hispanics in 1994, and only 1.8 times as likely to own computers in 1998.[39]

Those were 1998 numbers; no other Commerce Department studies have been available since, and those of you who follow Internet-related issues know that the numbers change quickly. The Internet universe expanded by 22.7% in 1999 alone.[40] And from February 1999 to December 1999, the number of U.S. based users increased from 97 million to approximately 117 million.[41]

We then began conducting some surveys of our own. A large survey was conducted by the American Internet User Service ("AIUS").[42] The survey uncovered that the digital divide, as it is sometimes called, between whites and minorities relating to computer access was narrower than the Commerce Department seemed to indicate in similar studies.[43] The survey took place in 1999 and measured data the Commerce Department did not measure.[44] The AIUS survey did not measure household or individual access. Measuring household access is not necessarily accurate, as a child could be accessing the computer, not necessarily an adult. Additionally, when measuring household access, one might be talking about a family that includes non-citizens, who have no opportunity to vote.

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[38] *Id.*

[39] *Id.*

[40] Nielsen, NetRatings Reports on Internet Year 1999 in Review, *Internet Universe Expands 22.7% in 1999*, *at* http://209.249.142.22/press_releases/pr_001-20_review.htm (last visited Mar. 11, 2001).

[41] *Id.*

[42] The AIUS survey, the largest "random digit dialed survey of Internet users and non-users," is a detailed survey of the behavior and characteristics of the Internet consumer. The AIUS survey was conducted via telephone interviews by over thirty research sponsors. The interviews lasted approximately thirty minutes and consisted of 155 questions "exploring how respondents use the Internet for business, personal and educational reasons, and included questions about the relationship between use of the Internet and other information and communications media." NCSA Technology Research Group, *The American Internet User Service Survey*, *at* http://www.ncsa.uiuc.edu//edu/trg/survey/j-4.html [hereinafter *AIUS Survey*] (last visited Sept. 19, 2000).

[43] *AIUS Survey*, *supra* note 42.

[44] *AIUS Survey*, *supra* note 42.

Therefore, we believed the most relevant study would involve looking at adult access and, if dealing with a state, adult access to the Internet within that state.[45]

We also found that in the Native American community nationwide, which is also vital in Arizona, nearly ninety percent of Native American schools have libraries, which have both computers and Internet access. In Arizona, the figure is approximately the same.[46] These results were important because in the Navajo reservation of Northeast Arizona, voters sometimes have to travel two hours one way to get to the polls. That is a four-hour trip just to vote and often people cannot make that trip if the election is held in March when it is snowing. Thus, the opportunity to go to the nearby Chapter House on the reservation, or to a reservation school nearby over a two- or three-day period and vote extends the franchise even more.

Also relevant is the study conducted by the Forrester Research Group in 1999.[47] It illustrates the narrowing of the digital divide between Blacks, Hispanics, Asians, and Whites from 1999 to 2000.[48] Blacks are the fastest growing group to have access to the Internet, followed by Anglos, Hispanics and then Asian Americans.[49]

The final point I want to make about Internet voting is this: I do not believe that Internet access right now is the only way people should be voting because of concern over the digital divide. We do not know how to measure it yet because it is a difficult database to create, since it also includes non-citizens. One cannot look at the entire population of Arizona and say that because it is thirty percent Hispanic, therefore thirty percent of the people should have

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[45] *See generally* Arizona Democrats, *Paper Ballots vs. Internet Votes*, *at* http://www.azdem.org/breakdown.html(last visited Jan. 25, 2001) (analyzing voter turnout in Arizona) [hereinafter Arizona Democrats].

[46] *See* Arizona Democrats, *supra* note 45.

[47] Forrester Research, *Net Access Takes Shape*, *at* http://www.forrester.com/-ER/Research/Report/0,1338,897,FF.html (last visited Sept. 13, 2000) [hereinafter Forrester Research].

[48] *See* Forrester Research, *The Truth About Digital Divides*, *at* http://www.-forrester.com/ER/Research/Brief/0,1317,9208,FF.html (last visited Sept. 13, 2000).

[49] *See id.*

computers to make parity. If forty percent of the Hispanics in Arizona are not citizens, it does not matter whether they have computers or not, since they cannot vote anyway.

Therefore, there must be other methods of voting available to voters in addition to Internet voting. A state should have mail-in voting and physical voting on election day because some people will continue to use those traditional methods.

Something else I want to mention in the Arizona case is that we increased the number of polling places. In 1996, the last time there was a presidential primary, fifty polling places were available in the white community, about thirty-two in the Hispanic community and approximately seventeen in the Native American community. There were only about four or five polling places in the Black community because blacks represent only four percent of the state population.[50]

In a Democratic primary there is a very small voter turnout, so these numbers can be increased substantially by adding polling sites. On election day in Arizona, the number of polling sites increased significantly among all groups, except for Anglos. It seems to me that if we advocate Internet voting, we have to advocate also for the continued opportunity for minority voters to cast ballots in traditional methods, so that we can ensure elections permit equal opportunity for all to cast ballots.

In conclusion, the Arizona Democratic Party made voting opportunities available in three different ways: (1) in person, by expanding the number of polling places and expanding the places convenient to minority voters; (2) by mail; and (3) by the Internet. For the first time, a mailing was sent to all 900,000 registered voters in the state, informing them they could vote by mail or over the Internet.

The election results are not yet complete but here is what we know. So far in Arizona in this election, 40,000 people have

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[50] The black population in Arizona in 1999 was estimated as 3.7 % of the total population in the state. U.S. Census Bureau, *1999 State Population Estimates Ranked by Black Population, at* http://www.census.gov/population/estimates/state/rank/black.txt (last visited Jan. 25, 2001).

already asked for a mail-in ballot.[51] That is just one method, and we have three different ways to vote. Therefore, it seems that voter turnout will increase tremendously in this election.

The purpose of my talk today was to make you aware that this is a coming trend and the voting opportunity of the future, and I see it as having potential to level the playing field. Thank you very much for the opportunity to speak to you today.

Mr. Still

Let us now follow up with a few of the challenges that Gerry talked about. First Melissa Saunders will discuss the *Shaw* challenges to black and Hispanic districts. Melissa Saunders has been involved in the latest round of what we are now calling the *Shaw III* challenge.[52]

Professor Saunders

Well, it has now morphed into *Cromartie* ("Shaw III").[53]

Mr. Still

Yes, it now goes under a completely different name because the plaintiff was changed so that the judges could be changed. There were all sorts of other strange procedural quirks in that case.[54] But tell us a little about what is happening in that case, Melissa, and what you see as being the future of that sort of litigation.

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[51] Of the total voting turnout of 86,907 in Arizona, 32,748 ballots were cast by mail. Arizona Democrats, *supra* note 45.

[52] *See Shaw III*, 526 U.S. at 541-42. Hunt v. Cromartie ["*Shaw III*"] is the state's most recent appeal to the Shaw v. Hunt ["*Shaw II*"] and Shaw v. Reno ["*Shaw I*"] litigation.

[53] *Shaw III*, 526 U.S. at 541-42.

[54] The procedural problems encountered in the *Shaw III* litigation included the state's failure to enter reply briefs and maps that demonstrated that race was not the predominant factor used in drawing the challenged districts. *Shaw III*, 526 U.S. at 551 n.6. The Supreme Court remained unsympathetic to the state's excuse that the tardy filing resulted from the district court's setting of an advance deadline conflicting with the state's summary judgment motion. *Id.*

Professor Saunders

It has just been tried.[55] We are awaiting a decision from obviously a very hostile panel of judges. I expect it will be a two to one decision to strike the plan down yet again, at least to strike Mel Watt's[56] district down.[57]

We did win a minor victory in the Supreme Court in the last round of litigation by convincing the court that summary judgment could not be granted against the state on the question of whether race had been the predominant motive, at least without hearing some evidence. This would strike most of us as a no-brainer, but it did not strike the three- judge panel the first time around as one.[58] We managed to convince the district court that if it really cares about *Washington vs. Davis*,[59] it should not allow the plaintiffs in *Shaw I* to obtain summary judgment without showing any evidence as to what the state's motive actually was.[60]

Based on the couple of cases I have seen since *Shaw III*, the brakes seem to have been applied a little. I think there was a case in Louisiana where the court actually found that race had not been the predominant factor, which is something we had not seen before.[61] Maybe lower courts are going to interpret that as a

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[55] Hunt v. Cromartie, No. 4:96-CV-104-B0(3) (E.D.N.C. entered Mar. 8, 2000).

[56] Representative Mel Watt, a black Democrat, has represented North Carolina twelfth congressional district since the district's creation in 1992. THE ALMANAC OF AMERICAN POLITICS 1224 (2000). Along with Eva Clayton of the first district, he represents the first African American from North Carolina in Congress in over ninety years. *Id.* Watt's district has been challenged throughout the *Shaw* line of cases. Watt hopes that his redrawn district is upheld, even though it does give preference to a black candidate. David G. Savage, *Lines of Scrimmage*, A.B.A. J., Dec. 2000, at 36.

[57] In *Shaw III*, the Court held that the issue whether the North Carolina state legislature drew its congressional redistricting plan with impermissible racial motive is a triable issue of fact. 526 U.S. at 551-52.

[58] *See* Hunt v. Cromartie, 34 F. Supp. 2d 1029, 1029 (E.D.N.C. 1998).

[59] 426 U.S. 229 (1976).

[60] *Shaw III*, 526 U.S. at 551-52.

[61] Theriot v. Parish of Jefferson, 185 F.3d 477 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2004 (2000).

signal to at least go a little easier on these *Shaw* challenges and not be so eager to strike down race-based districting plans.

At least in North Carolina, the really difficult problem we will encounter in this next round of challenges is how partisanship and incumbency protection can be untangled from race. In a state like ours, and I think this is true of many states around the country, there is such a correlation between partisan preference and race that it is almost impossible to tell whether a legislature is drawing lines on a racial basis or on a partisan basis. I believe it will be particularly difficult to protect incumbents who have been elected under plans that were infected too much by race, for example, people like Mel Watt and Eva Clayton in my state.[62]

In the *Shaw III* case, the plaintiffs made a "fruit of the poisonous tree" argument, that you could protect any incumbent except for one who had been elected through a majority-minority district, what they call a racial gerrymander. In other words, you can protect white incumbents, but you cannot protect any minority incumbents. That should strike most of us, I think, as outrageous. Fortunately, the plaintiffs in that case did not get any attention from the Supreme Court on that argument. But they certainly did raise a fear in many of us on the other side that someone would actually take that argument seriously and have this sort of double standard for when you can protect incumbents and when you cannot. I think that is going to be a very significant issue in the round of redistricting we will see after the round of litigation, after the 2000 redistricting.

Mr. Still

Let me follow up on that for just a moment and then I want to call on Penda Hair. I am involved in a congressional challenge in Florida, a legislation challenge in Alabama, and two county level challenges in Georgia, where in each case I am representing black intervenors who are defending the present plan.[63]

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[62] *See supra* note 56 (explaining that Mel Watt and Eva Clayton are the first black members of Congress representing North Carolina in over ninety years).

[63] Fouts v. Harris, 88 F. Supp. 2d 1351 (S.D. Fla. 1999), *aff'd sub nom.* Chandler v. Harris, 529 U.S. 1084 (2000) (representing a *Shaw* challenge to three

We are late in the cycle now because we will take the census in less than a month, around April 1, and the census figures will be made public a year after that. Thus, it seems that either explicitly or implicitly one of the strategies of the plaintiffs in the redistricting cases now is simply to change the benchmark,[64] change what the plan is right now so that you cannot use that as the incumbent protection rationale anymore, because we will have changed Mel Watt's district so much.

I think the same thing is happening in the challenges I am participating in in Florida, Alabama, and Georgia. Fortunately, noone is making the fruit of the poisonous tree type argument, but I expect that argument to be resurrected.

Professor Saunders

That poisonous tree argument also has Section 5 ramifications.[65] If the plan is invalidated, then the argument cannot be used as the benchmark for the retrogression argument after *Miller*.[66]

South Florida congressional districts on grounds of laches); Kelley v. Bennett, 96 F. Supp. 2d 1301 (M.D. Ala. 2000), *vacated and remanded*, 121 S. Ct. 446 (Nov. 27, 2000) (dismissing a *Shaw* challenge to Alabama legislative districts for lack of standing); Sanders v. Dooly County, Ga., No. 98-CV-412 (M.D. Ga. May 11, 2000) (dismissing a *Shaw* challenge to county commission and school board for laches, currently on appeal to the 11th Circuit); Clark v. Putnam County, 168 F.3d 458 (11th Cir. 1999) (representing a *Shaw* challenge to county commission's districting plan).

[64] The "benchmark" is the prior practice against which a submission for pre-clearance under Section 5 of the Voting Rights Act is compared. Justice Department regulations define the benchmark practice as the "last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. § 51.54 (2000).

[65] 42 U.S.C. § 1973(c) (2000) (requiring pre-clearance by the United States District Court of the District of Columbia or the United States Department of Justice of proposed voting law changes in historically discriminatory jurisdictions).

[66] Miller v. Johnson, 515 U.S. 900, 925-26 (1995) (holding that Congress' intent in enacting Section 5 was to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities).

Mr. Still

That is correct. We are facing that same argument right now, that plaintiffs are actually picking up one or two lines out of the *Bossier II* decision[67] and arguing that since that means the case is not moot, that also means the case has to be decided in their favor, which is a rather strange theory.

Now, Penda, how do you see the possibilities of creating the minority opportunity districts in this next round of redistricting, if these *Shaw* challenges are looming and are folded into the Section 2 litigation that we bring as plaintiffs' lawyers?[68] How will we draw these districts?

Ms. Hair

I believe we will be able to hold on and probably increase minority representation in the next redistricting if we take steps to explain to the American people the benefits of creating minority opportunity districts – districts where minorities can have an opportunity to elect representatives and participate in democracy.

But I would like to step back a little because we plunged right into *Shaw v. Reno*, and I think it is important to talk about how we ever got to that case.[69] Some of you who are students here may have been in middle school or high school in 1990, before we had approximately forty African Americans in Congress. Thus in your adult lives you have not known the situation that we faced immediately before the last round of redistricting. Therefore, I would like to lay that out a little. To the best of my recollection in the entire deep south, as of 1990, there were two African American members of Congress. Is there another one?

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[67] 120 S. Ct. 866 (2000).

[68] 42 U.S.C. § 1973(b). Major Section 2 litigation includes *Thornburg v. Gingles*, 478 U.S. 30 (1986), *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368 (5th Cir. 1999) and *Goosby v. Town Bd. of the Town of Hempstead*, 180 F.3d 476 (2d Cir. 1999).

[69] 509 U.S. 630 (1993).

Mr. Still

No.

Ms. Hair

John Lewis held the seat in Atlanta that originally elected Andrew Young.[70] William Jefferson from Louisiana was elected as a result of litigation brought in the 1980s under the Voting Rights Act.[71] In Texas, there was one African American representative coming out of the district that was originally created in the 1970s and first held by Barbara Jordan. But, in many states across the South, there were simply no African American members of Congress even though in the deep south African Americans make up a large percentage of the population.

The Voting Rights Act and the principle of race-conscious redistricting resulted from the situation where African Americans were locked out of representation, not only in Congress, but also at the state, city council, and local levels. This exclusion occurred primarily for two reasons: (1) the way districts were drawn – either large districts were created so that African American voters were submerged into a white majority district or the districts were gerrymandered so that African Americans could not have representation; and (2) a large number of whites would not vote for African American candidates.

In order to provide representation and open up democracy, we needed a remedy. The remedy that voting rights advocates and the courts came up with was the creation of so-called majority-minority districts, or districts where there are enough minority voters to

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[70] Andrew Young is currently the mayor of Atlanta. THE ALMANAC OF AMERICAN POLITICS 541 (2000). From 1972 to 1977, he served in the House of Representatives as one of the few African-American Congressmen in Georgia to ever win a white-majority district. *Id.* at 349.

[71] Chisom v. Roemer, 501 U.S. 380, 396-403 (1991) (holding that state judicial elections are included within the Voting Rights Act). The Supreme Court confirmed that the Voting Rights Act shall be interpreted broadly in combating racial discrimination. *Id.* at 403.

ensure that those voters actually have a realistic chance of electing their candidate of choice.

After the 1990 round of redistricting, large numbers of African American and Latino representatives were elected. For example, in North Carolina, previously there had been no African American members of Congress.

Professor Saunders

For a hundred years.

Ms. Hair

The year 1901 was the last time North Carolina had sent an African American to Congress. After the 1990 redistricting, there were two.[72] In Georgia, two additional African American representatives were elected.[73] In Louisiana, a second majority African American seat was added, sending Cleo Fields to Congress. Mississippi, Florida and South Carolina all sent African Americans to Congress for the first time in almost one hundred years.

I would like to talk briefly about the 1980s round of redistricting in Georgia and Louisiana. In Louisiana, the white legislators met in the basement of the capitol and excluded the small number of African Americans who were in the legislature. They then came

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[72] George White, leaving office in 1901, was the last African American elected to the House from North Carolina until after the 1990 round of redistricting. PBS Online, *The American Experience: America 1900*, *at* http://www.pbs.org/wgbh/amex/1900/peopleevents/pande7.html (last visited Mar. 9, 2001). In 1992, both Mel Watt and Eva Clayton were elected to the House as Representatives from North Carolina. *Id.*; *see also* Richard Rubin, *New Voting Districts Continue to Receive Criticism From Both Sides*, THE CHRONICLE ONLINE, *at* http://www.chronicle.duke.edu/story.php?articleID=9325 (last visited Mar. 9, 2001).

[73] Cynthia McKinney and Sanford Bishop, both African Americans, were elected in 1992 to represent Georgia in Congress. *See* U.S. House of Representatives, *Biography of Cynthia McKinney*, *at* http://www.house.gov/mckinney/bio.htm (last visited Feb. 20, 2001); U.S House of Representatives, *Biography of Congressman Sanford Bishop, Jr.*, *at* http://www.house.gov/bishop/bio.html (last visited Feb. 20, 2001).

up with a plan that created no African American congressional districts. A federal court found that the legislature created a district shaped like the head of a duck,[74] splitting every single precinct in New Orleans in order to make sure that the African American population in New Orleans was arranged in such a way that it could not elect its own representative. Yet, in the *Shaw* line of cases, the Supreme Court held that what was wrong with the 1990s round of districting was that we had not respected traditional districting practices.[75] There is no racially untainted tradition we can look to.

In Georgia in the 1990s round, the legislators actually used the "N" word, which I will not use –

Professor Saunders

Louisiana too.

Ms. Hair

And created majority white districts for which they were sued.[76]

In North Carolina, Jesse Helms, as late as 1990, when running against Harvey Gant, used an ad on TV that was called the "white hands" ad. That spot showed a pair of white hands with plaid shirt sleeves, crumpling up what was clearly a job rejection, and saying that Harvey Gant supported Jesse Jackson's quota bill taking away this white person's chance for a job. And Jesse Helms defeated Harvey Gant in an election where race clearly played a defining role.

That brought us to a situation where remedies were put in place whereby for the first time African Americans had a real opportuni-

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[74] Major v. Treen, 574 F. Supp. 325, 335 (E.D. La. 1983) (finding that one of the reapportioned districts resembled the head of a duck, with its bill protruding into a contiguous African-American community).

[75] *See Shaw II*, 517 U.S. at 907; *Bush*, 517 U.S. at 957; *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw I*, 509 U.S. at 642.

[76] *Miller*, 515 U.S. at 906-08 (Georgia); United States v. Hays, 515 U.S. 737, 739-40 (1995) (Louisiana).

ty for representation. Then came *Shaw v. Reno*. It is true that the districts that were created sometimes looked funny. There is no doubt that they looked, as the Supreme Court said, "bazaar."[77] But as voting rights activists continually pointed out, many majority-white districts across the country also looked bazaar and had never been challenged as racial gerrymanders.[78] I think what *Shaw* did, in addition to creating a new unjustified constitutional standard, was to taint the public's understanding of what the Voting Rights Act was designed to do.

The *Shaw* opinion used words such as "racial gerrymandering" to describe the districts that were challenged.[79] The Court called these districts an "uncomfortable resemblance to political apartheid."[80] The *Shaw* decision held that these districts threatened to "balkanize" us into competing racial factions.[81] In addition, during oral argument in the North Carolina and Texas cases, Justice Scalia said that the districts were herding black voters into districts separate from whites and that was similar to requiring them to ride in separate railroad cars.[82] The analogy was to the facts of the infamous 1896 *Plessy v. Ferguson* case.[83]

With that kind of rhetoric used by the Supreme Court, it has been very difficult to regain the moral high ground that the Voting Rights Act has had since the march over the Edmond Pattis bridge and the Act's enactment in 1965.

I am particularly concerned that we not talk in just technical terms about the Voting Rights Act, but that we tell stories and try

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[77] 509 U.S. at 655.

[78] *Id.* at 650-55.

[79] *Id.* at 647-48.

[80] *Id.* at 647.

[81] *Id.* at 647-48.

[82] *Bush*, 517 U.S. at 1002 (Texas) (Thomas, J., concurrence in which Justice Scalia joined) (explaining that the challenged district "would not have existed but for its affirmative use of racial demographics"); *Shaw I*, 509 U.S. at 647 (North Carolina) (holding that a plan that puts individuals into a district solely based on race "bears an uncomfortable resemblance to political apartheid").

[83] 163 U.S. 537, 550 (1896) (upholding Louisiana's state segregation law, reasoning in part that the legislature "is at liberty to act with reference to the established usages, customs, and traditions of the people" in imposing race-based rules).

to educate the American people about the reasons behind this very important remedy and its significance to democracy.

Mr. Still

Well, how do we actually go about drawing these districts? Let us assume that in my case I will be representing black voters, Penda probably will be doing the same thing, Melissa will be representing a state, and Gerry will be representing the Democratic Party. How, from each one of our perspectives, do we actually try to draw the districts? Where do we start, what kind of data do we look at? Gerry, why don't you answer that first?

Mr. Hebert

Well, one of the problems with the plans that the Supreme Court has invalidated and with these racial gerrymandering challenges is that all the plans drew districts down at the census block level, which is the smallest geographic unit available. The Supreme Court, however, has pretty much invalidated uniformly, each time it has had an opportunity to do so, a redistricting plan that has been drawn using census block data.[84]

Now, most of the times redistricting plans have been drawn at the census block data level. The reason for this was that really small numbers were needed in order to comply with the one-person, one-vote requirement and place precisely equal numbers of people in each district, particularly at the congressional level where mathematic exactitude is required.[85] What we will do in the post-2000 era is recommend that states not draw districts using census blocks. The Supreme Court has found census blocks problematic, because the only data available at that level have been racial data.[86]

We want to go up a level to precinct level, for example, which displays political numbers as well as racial numbers, so that simply

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[84] *See Bush*, 517 U.S. at 982; *Shaw II*, 517 U.S. at 907.

[85] *See* Reynolds v. Sims, 377 U.S. 533, 559-61 (1964).

[86] *Bush*, 517 U.S. at 970-71.

by using a different level of geography to build districts that are slightly larger than census blocks, a state can measure the political outcome of a district and thereby have a better chance to defeat the ultimate challenge alleging that it used race as the predominant factor. By drawing a district through the use of precincts or even census tracts, which are basically based on neighborhoods or communities of interest, a state has a fighting chance in court and can argue that race was not the predominant feature.

As a result of not using blocks, the districts do not have those little jagged edges that – as the Supreme Court held and Penda pointed out – suggest that voters have been separated along racial lines with minorities on one side of the line and Anglos or whites on the other.

Mr. Still

Melissa, you were involved in the *Shaw III* case in North Carolina, where you argued in the Supreme Court that the North Carolina legislature had drawn a plan based on precincts and had used political data, yet some analysis was made about the racial impact of those precinct decisions.[87]

What is your take, from a practical perspective, about how we draw a district if we want to come up with as many black majority districts as we can?

Professor Saunders

Well, I think we learned two things from our experience this last time, about how to achieve that in practical terms. One, as Gerry was suggesting, is that you want to make sure you do not have racial data in your computer that are more specific than the partisan data you have. If you do that, the courts are not likely to believe that you actually used partisanship – rather than race – as the predominant factor in drawing your district lines.

The other thing I think we learned is not to rely on results in racially charged elections for your partisan data. That came back

[87] 526 U.S. 541 (1999).

to bite us. For instance, we used the results of the Helms-Gant Senate race to predict the partisan outcomes of lines that we were drawing. And the *Shaw I* plaintiffs argued successfully that this showed our partisan data was just a proxy for race, that we were claiming we were drawing our lines using such data based on who voted Democrat and who voted Republican, but really we were doing so based on race, because this was a racially charged election.[88]

So I think you have to be careful about which kinds of elections you select, which obviously makes life very difficult for a preclearance state like North Carolina that must make a Section 5 submission to the Department of Justice, a submission that obviously involves racial data.[89] Apparently you must draw your lines with partisan data, and then check them against the Voting Rights Act with race.

Mr. Still

Penda, what is your take on this?

Ms. Hair

We do have to pay attention to the shapes of districts. It is informative to look at why some of the districts ended up so bizarrely shaped the last time around. Part of the reason was not race but, as Gerry has pointed out, incumbency protection. The minority districts were the last to be drawn and so in some sense they got the leftovers, because new minority districts had to be created out of territory that had been previously held by incumbents, both Republican and Democrat.

For example, with respect to the new majority black district – District 30 in Dallas – we showed, and the Court found, that there was a large, concentrated, compact black population anchored in South Dallas. That population could have been included in a

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[88] 509 U.S. at 649.

[89] 42 U.S.C. § 1973(c) (2000) (requiring pre-clearance by a United States District Court or the United States Department of Justice of any proposed voting law changes in historically discriminatory political subdivisions).

district that would have allowed African Americans in Dallas to elect their candidate of choice to Congress.[90] Previously that large population had been split between two white Democrats, both of whom were very strongly attached to those voters and felt that they were the most dependable voters in their respective districts.

As a result, some of that black population had to be siphoned off and given to the two white Democrats, extending the district's reach far out to North Dallas, to the airport, and to other places in order to bring in enough population to replace the population that had been given to the white Democrats. Most of the population that was brought in by those tentacles was white, but the districts were drawn to bring in African Americans wherever possible.

Thus the district was bizarrely shaped, not because the districts were drawn to create a majority black district per se but because the districts were drawn to accommodate a number of different interests, including white incumbents.

My suggestion this time around is that, where some district has to be irregularly shaped in order to accommodate a number of interests, it should be the majority-white district. That would really throw the Supreme Court for a loop because it has consistently said it would not review majority white districts that are bizarrely shaped. Yet this country has a history of explicitly drawing districts for white incumbents, for white ethnic groups that are identified as Catholic districts or Polish districts, and the Supreme Court has said that is permissible.[91]

Second, I think we need to involve grass roots communities in the districting process for many reasons, including the fact that people who know their own communities can help make a record

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[90] *Bush*, 517 U.S. at 969-70.

[91] *Id.* at 958 (holding that strict scrutiny analysis is not triggered merely because redistricting is performed with consciousness of race, but that race must be the predominant factor motivating the drawing of district lines to trigger strict scrutiny). *Bush* holds that race consciousness is still allowed: states are not prevented from being race-conscious when they redraw district lines, as long as race does not become the predominant factor. *Id.* at 958-59. Thus, if race is heavily considered, but so are such traditional objectives as protecting incumbents, keeping communities of interest together, using county and precinct lines, and not diluting the voting strength of other ethnic groups, the plan may survive. *Id.* at 960-61.

that the districts really unite people on grounds other than race. They can go to the legislature and testify about the patterns of church attendance, school boundaries, and other common interests. Many times you find that those interests do cross racial lines.

The North Carolina district that keeps getting struck down is District 12, which is a labor district. District 12 remains a labor district in a state that is anti-union for the most part. It includes all the places along Interstate 85 where unions were organized in the mills going back to the early 1900s and where violent labor disputes had occurred, involving white and African American workers. All those labor sites were put in the same district along Interstate 85.

Yet, the Supreme Court sort of dismissed that evidence.[92] Voting rights advocates believe that if the community of interest and non-racial evidence were included in the legislative record early, rather than going out and finding it after the state has been sued, there is a strong likelihood that the courts will not be able to just throw out all this evidence.

Mr. Still

I think part of the problem is that North Carolina, of course, grew by one congressional district last time. Georgia also grew by one congressional district. The latest projections are that Texas, Georgia, and Florida will each gain one or two congressional districts. I am not sure whether North Carolina is on the list of potential gainers or not; probably not because it gained one last time.

But in those places, as Penda said, the concerns of the incumbents must be taken into account. If you put the concerns of the incumbents first, they are all going to say that they only want to give up a little bit of their territory to create another one. Thus, if you start out with twenty-five congressional districts and you want to increase that number to twenty-six, you must fit that twenty

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[92] *Shaw II*, 517 U.S. at 907 (holding that the state's consideration of traditional race-neutral principles "does not in any way refute the fact that race was the legislature's predominant consideration" when drawing the district lines).

sixth district in somewhere, which means that it will be almost by definition sort of a leftover territory.

Everyone must shift a little to make room for the new district. But the situation is different if you say that you intentionally want to draw a majority-black district or a black opportunity district. The question then is how to make the incumbents who generally have enough clout in the legislature give a little of their territory.

Gerry, how can we achieve that, to get those incumbents to give up a little to be able to draw the kind of plan that Penda is talking about?

Mr. Hebert

Well, the incumbents I primarily work with, of course, are Democrats, so the first thing you want to do is make sure that they at least agree with the general proposition that you want to put party over personality. This means that if they are in a district they are winning 80/20, they ought to recognize that their next door neighbor, who may be winning 52/48, might be helped by gaining some of the traditionally voting Democrats in the first incumbent's district.

In the 1990 redistricting round, there was a paucity of minority elected officials in the congressional delegations, for example, in the deep South. Republicans and Democrats alike knew there would be tremendous opportunities to create minority opportunity districts in the 1990 round. Republicans actually went to the civil rights community and tried to create districts that were as heavily minority as they could, hoping that they would siphon off, as shown by the Dallas example, traditionally voting Democrats from adjoining districts held by white Democrats and, therefore, make those white Democrat seats more vulnerable to Republican attack. The civil rights community to its credit did not bite on that particular offer and instead focused not so much on the partisanship issues but more on empowering racial and ethnic minorities.

To answer your question, the one thing I do is tell the incumbents I represent that there are two different ways to achieve redistricting. The first is that you have to avoid what I call the Titanic approach. If you all try to get in the lifeboat at the same

time, nobody is going to make it and we are all potentially going to drown.

The second point is that the civil rights community's thought process with regard to the approaching 2000 round of redistricting will be different in one sense that is important. The focus will now be on the protection of the minority incumbents. Therefore, the Democratic Party's position on this has to be that we will protect and respect minority incumbent office holders at least as much as we protect and respect white incumbent Democratic office holders.

If we do not, we cannot really have the credibility to go to minority incumbents and convince them that in the long run it is in their best interest, and their constituents' best interests, to create districts that ultimately empower the party that does look out for minority voters.

Mr. Still

Following up on that point, I believe that Mel Watt's and Eva Clayton's districts in North Carolina are no longer majority black.

Professor Saunders

I believe Eva's is slightly over fifty percent African American, and Mel's is down to thirty-two percent or something like that.

Mr. Still

And then Cynthia McKinney's[93] and Sandford Bishop's[94] districts in Georgia, two of the three black districts, are now majority white districts.

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[93] Cynthia McKinney was elected to Congress in 1992 after serving as a Georgia state legislator from 1988 to 1992. *See* U.S. House of Representatives, *Biography of Cynthia McKinney*, *at* http://www.house.gov/mckinney/bio.htm (last visited Feb. 20, 2001).

[94] Sanford Bishop was first elected to Congress in 1992 after serving in the Georgia House of Representatives from 1977 to 1990 and the Georgia Senate from 1991 to 1992. *See* U.S. House of Representatives, Biography of Sanford Bishop, Jr., *at* http://www.house.gov/bishop/bio.html (last visited Feb. 20, 2001).

All of those people have won re-election based on the fact that they are incumbents. Alcee Hastings[95] won in a district on Florida's East Coast that is neither majority white nor majority black. It is, however, a majority Democratic district. As a result, he can win the Democratic primary and then the general election because the white Democrats will stick with him.

Will someone other than Cynthia McKinney be able to win her district if she retires, gets another job, takes an ambassadorial post, or something like that? Will someone else be able to win that district, or is it so specific to the incumbent that we are putting too many eggs in the basket by protecting that incumbent and not doing enough in creating a real minority opportunity district?

Mr. Hebert

I think ultimately that is the big question, and the answer is to carefully draw the districts so that not only a Cynthia McKinney would get re-elected, but also black voters in that district can continue to elect a candidate of their choice even without Cynthia McKinney.

For example, if you draw a district that is thirty percent Republican and seventy percent Democratic, and let us assume that district is forty percent black overall, that means that black voters will make up four sevenths of the Democratic primary electorate.

A black candidate will prevail, even in a racially polarized election, even against a white opponent, assuming there was one. And the black candidate will ultimately be the Democratic nominee. When you are the Democratic nominee – and I know this may apply at the congressional level more than it does at the state legislative level and even more so, of course, at the local level – in a seventy percent Democratic district and forty percent of the voters are black, you happen to be black, and there is racially polarized voting in that election, then you really do not have to get

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[95] Alcee Hastings, an African American, was first elected in 1992 to represent Florida's twenty-third congressional district. *See* U.S. House of Representatives, *Biography of Alcee Hastings*, *at* http://www.house.gov/alceehastings/bio.htm (last visited Feb. 20, 2001). Hastings was reelected in 1994, 1996, and 1998. *Id.*

a great many more votes in the general election in order to prevail, just as a matter of math. Even if thirty percent of the people will not vote for the Democratic candidate because they are Republicans, the Democrat nominee really needs only a very small proportion of what is left in the district to win. If we can draw minority opportunity districts in a way that would result in more voters willing to reach out and vote for a black candidate, or voters who are Democrats in that district, then that will empower Cynthia McKinney as well as her successor.

The best statistic I can offer to minority incumbents and to Democratic white incumbents is by using Georgia as an example. In 1992, when the districts were drawn, Georgia had one Republican in the delegation – Newt Gingrich[96] – and the rest were Democrats. After redistricting, when three heavily black districts were drawn, there were eight white Republicans and three black Democrats in that congressional delegation. McKinney's and Bishop's districts got struck down and they were redrawn down to around thirty-five percent black. When those districts were redrawn in 1996, everyone had to run in the new districts. Again the districts continued to elect eight white Republicans and three black Democrats. But, let us look at the political numbers.

Bill Clinton carried Georgia in 1992, but he only carried three congressional districts, which were the three heavily black districts. When those three districts were struck down in 1995 and the heavily black districts were unpacked and redrawn, some of the traditionally voting Democrats, who happen to be black in this example, were shifted to other districts. In 1996, Bill Clinton lost Georgia but he carried five congressional districts. The point here is this: the districts were drawn in a way that continued to provide three opportunities for minority voters and yet provide a greater opportunity for Democrats.

What we are really trying to do is draw the districts in the latter way in the 2000 era rather than in the former way. Republicans once again will push to pack districts that waste influence of

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[96] Newt Gingrich, a Caucasian Republican, served as a member of Congress for twenty years, and served as Speaker of the House of Representatives from 1995 to 1999. *See* Homepage of Newt Gingrich, *Biographical Sketch of Speaker Newt Gingrich*, *at* http://www.newt.org/bio.htm (last visited Feb. 8, 2001).

minority voters and prevent the Democrats from ultimately regaining and controlling the House. The battle for 2000 is for the control of the House. The redistricting battle will determine who controls the House for the next decade.

Mr. Still

I think Penda wants to respond to that.

Ms. Hair

Yes, I just want to say I agree with Gerry on certain points, but I think the Democratic party's relationship with minority voters is more complicated than Gerry has portrayed it to be. I want to go back again a little in history because the Voting Rights Act is really about helping us overcome our history and we cannot address current realities without looking at history.

The people who did the things that I described in terms of drawing majority white districts in the 1980s were Democrats. Minority voters consistently say they do not want to be represented by a white Democrat. Even in Dallas, where two fairly liberal white Democrats were splitting the large concentrated African American population, the overwhelming black view was that even if they have to lose one of their Democrats, they want a representative whom they choose and who comes from their community.

I think the Democratic Party was perceived, even up to the 1990 round of redistricting, as saying in some instances that black and Latino voters ought to be happy with white Democrats representing them and that they should give up having a representative of their choice in order to allow the party to have more representatives overall. Now, with so many African American and Latino Democrats elected, that view is starting to change but there is still a lot of tension left over from very recent actions that have not seemed to be in the interest of minority voters.

I agree with Gerry that you do not need a majority of African Americans in many places in order to allow the African American community to elect its representative of choice. I think in many places something between forty and fifty percent will do. I am very concerned, though, about Cynthia McKinney's and Mel Watt's

districts, where the percentage of African Americans is down to the low thirties. We do not have good data on this. There are ways to collect data that would allow you to look at what happens when you have an African American incumbent, the incumbent leaves, and then you have another African American candidate running against a white candidate. Social scientists could look at how much the goodwill and willingness of whites to vote for an African American carry over to the non-incumbent African American candidate next time around. We do not know that right now, but my experience in voting rights cases and in seeing the racially polarized voting data laid out in case after case after case, makes me very worried about Cynthia McKinney's and Mel Watt's districts.

I think the districts in Texas that I worked on and that ended up being redrawn in the forty percentile range are perfectly fine, particularly because there is a segment of Latino voters in each of those districts, so they are not actually majority white districts. They are plurality districts, and African Americans are the strongest group in those districts.

What percentage is needed for Latinos to be able to elect their candidate of choice is a more difficult question, because a district that is majority Latino in population may not be majority Latino in voting age citizen population. This means that you need to calibrate very carefully how you look at districts in order to continue to preserve and enhance minority opportunity.

Mr. Still

Well, I want to turn to another subject quickly and then we will open the floor up for some questions. When I originally saw the title for this panel, I thought the real question was: "who votes?" Then Gerry talked about Internet voting, about how we get people to vote, and how we empower them. As a result, we really spent most of our time here talking about how we make sure that those votes count effectively toward getting the candidate you want.

But let us go back to the first question, namely, who is disenfranchised in America right now? I brain-stormed up a list by myself, with my staff lawyers, and then with my students in a voting rights class, and here is my short list of people who are still

disenfranchised in America. They include: people under the age of eighteen,[97] non-citizens,[98] and, in many states, people who have been convicted of a felony, even after they have been released from prison.[99]

In addition, people in the District of Columbia get to vote for president but do not get to vote for a voting member of Congress.[100] Then, moving a little further out, in thinking through the next century, I think we might have sentient robots. We will have to face their enfranchisement question sometime in the next hundred years. I also think once we establish some sort of communication with other primates, we will have to deal with the question about whether they vote or not.

My brainstorming has elicited various reactions among the other panel members. Thus, I will allow them to respond. I begin by asking Melissa: which of those groups do you think we ought to be trying to enfranchise right now?

Professor Saunders

Well, my big concern right now is the question of the ex-felons. I think most people do not realize how extreme their situation currently is, and what the racial impact of the felon disenfranchisement laws is, but it is really extraordinarily significant. The felon disenfranchisement provisions, which are very widespread,[101] are interacting with our new "get tough on crime"

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[97] U.S. CONST. amend XXVI, § 1 (providing that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age").

[98] U.S. CONST. amend XXIV, § 1 (providing for "[t]he right of citizens of the United States to vote in any primary or other election").

[99] *See, e.g.*, ARIZ. REV. STAT. § 16-101(2000); GA. CODE ANN § 21-2-216 (2000); MO. REV. STAT. § 115.133 (1999); N.Y. ELEC. LAW § 5-106 (Consol. 2000).

[100] D.C. CODE ANN. § 1-1301 (1998).

[101] George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia,* 46 UCLA L. REV. 1895, 1898 (1999); *see also* Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and the Sentencing Project (Oct. 1998) (explaining that, in the majority of states, felons are prohibited from

measures to disenfranchise a substantial portion of the African American male population in many states.[102]

The numbers are staggering.[103] Numerous felons are disenfranchised for life for having committed one minor felony offense early on in their adolescence. That strikes me as something that we should be very concerned about as a democracy. It is an area in which we are dramatically out of step with the rest of the world. The United States is the only country as far as I know that has lifetime disenfranchisement for felony convictions.[104] As a matter of maintaining a participatory democracy, I think it is something that we really need to address.

There has been some recent publicity about it. For instance, I do not know whether you noticed in the 2000 Gore-Bradley Iowa Democratic Presidential Primary debate when someone asked a question about that. I found the reaction of both candidates rather disturbing. They acted as if this was not really a problem at all and said that of course if someone commits a felony, we ought to be able to take away their right to vote even for life. I think that is something we really need to raise public awareness about. We also need to think of litigation strategies to address this fundamental issue. I do not think it can very easily be addressed by legislation, although John Conyers as you may have seen has had a bill in

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voting while in prison, and that many of those states also prohibit offenders from voting while on parole and probation). In fourteen states, felons are barred from voting for life. Maine, Massachusetts, New Hampshire and Vermont are the only four states that allow prison inmates to vote. *Id.*

[102] Fellner & Mauer, *supra* note 101, at 2-7. There has been a growing racial disparity among disenfranchised felons as a consequence of a significant increase in the number of African Americans incarcerated. Fellner & Mauer, *supra* note 101, at 8. This increase can be attributed to the various states' get tough on crime measures. Fellner & Mauer, *supra* note 101, at 8. Some of these measures include an increase in the number of convictions for drug charges, widespread mandatory minimum sentences, and "three strikes" laws (life imprisonment for third time offenders). Fellner & Mauer, *supra* note 101, at 8.

[103] *See* Fellner & Mauer, *supra* note 101, at 7-8 (estimating that three million nine hundred thousand Americans – including thirteen percent of all African-American men – are currently disenfranchised because of a felony conviction).

[104] *See generally* Fellner & Mauer, *supra* note 101 (discussing non-lifetime felon disenfranchisement laws in other countries).

Congress to try to deal with this.[105]t I cannot imagine that such a bill would pass, certainly not in an election year. It is a very difficult argument for anyone to make politically and I do not believe our legislators to be that brave.

I think litigation is probably the way to address this issue. The good news is that an argument can be made under the Voting Rights Act to attack felon disenfranchisement provisions. It has been tried out in a few states so far, sometimes by pro se litigants who have not had the most effective legal representation. A recent case, however, litigated by Yale law students, resulted in an evenly split court. Several judges were recused, so it was a "short court." But at least five judges on the Second Circuit bought the argument that felon disenfranchisement laws raise problems under the Voting Rights Act.[106]

In conclusion, litigation seems to be the most hopeful way of addressing the issue and I think it is something that we really ought to concentrate our efforts on.

Mr. Still

The Conyers bill is of some interest to me because my staff helped in drafting that bill and in gathering the ideas for it.[107] I

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[105] Voting Rights of Offenders Act, H.R. 568, 105th Cong. (1997). On February 4, 1997, Rep. John Conyers (D-MI) introduced the "Voting Rights of Former Offenders Act" in the House of Representatives. H.R. 568, 105th Cong. (1997). On the same date, the bill was referred to the House Judiciary Committee. 1997 Bill Tracking H.R. 568, 105th Cong. (1997). No further activity is reported on that bill. *Id.* On March 2, 1999, Rep. Conyers introduced the "Civic Participation and Rehabilitation Act of 1999" in the House of Representatives. H.R. 906, 106th Cong. (2000). Like the previously introduced Act, this Act "grants persons who have been released form incarceration the right to vote in Federal elections." 145 CONG. REC. H1817 (daily ed. Mar. 2, 1999) (statement of Rep. Conyers). Subsequently, on May 25, 2000, the bill was introduced in the Senate. S. 2666, 106th Cong. (2000).

[106] Baker v. Pataki, 85 F.3d 919, 937 (2d Cir. 1996) (en banc) (holding that "[w]hile a state may choose to disenfranchise some, all or none of its felons based on legitimate concerns, it may not do so based upon distinctions that have the effect, whether intentional or not, of disenfranchising felons because of their race").

[107] H.R. 906, 106th Cong. (1999).

attended a hearing that was held by the House Judiciary Committee on the constitutionality of whether or not this could be done.

What is interesting is that the Republican who was in charge of the subcommittee, Mr. Canady, began by saying that maybe felons should be re-enfranchised after they have completed their sentences. But, he added, the real question is whether or not Congress can do that. The tone of the hearing was very respectful. No one there claimed that we were going to put murderers and rapists in the position of choosing the sheriff, which is the kind of argument you hear a lot. So, we at least got a respectful hearing. I think the very first hearing we had in Congress on the Conyers bill is not going anywhere this year,[108] but as usual you put down a marker and try to do something.

Gerry, I think you wanted to speak in favor of animal rights?

Mr. Hebert

No, I wanted to speak in favor of children voting. And here is how I see it, empowering children, not so much children voting.

I would empower children most by insuring that in the next census they get counted. The last census that was taken in the United States, in 1990, represented the first time in history that we had a more inaccurate census than the census before it.[109] We had always been getting better, sometimes just a little better, but we missed about eight million four hundred thousand people last time.[110] We double counted four million four hundred thousand people, mostly people wealthy enough to have two homes, who received two forms and filled them both out.[111] This had racial

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[108] *Id.*

[109] Editorial, *Poor Americans, Still Discounted*, N.Y. TIMES, July 19, 1991, at A26 (noting that the 1990 census miscount "actually increased from 1980").

[110] Editorial, *Accurate Census Must be Upheld*, THE MORNING CALL (Allentown), Aug. 27, 1998, at A16 (reporting that the "Bureau says that 8.4 million Americans went uncounted in 1990").

[111] *Id.*; *see also* Editorial, *A Much Bigger Census Bill*, N.Y. TIMES, June 7, 1999, at A22 (explaining that "[t]he 1990 Census missed 8.4 million people and double counted 4.4 million, with most of the undercount occurring in poor, urban and minority communities").

consequences, of course, because a disproportionate number of minority people were not counted. But more than half of the people who were left out, four million net people who are not counted – eight million four hundred thousand minus four million four hundred thousand – were children.[112]

Now, those children are out there; they are in overcrowded classrooms, on the streets, and in foster homes. The reason those children were not counted is because the Census Bureau has admitted that it is not capable of counting everyone in a large mobile society like ours.[113] It simply cannot be done in the traditional way of sending forms to people. Many people do not respond to mail-in forms. In addition, the census enumerators cannot find them when they go to their homes because either they are not home or they do not want to answer the door, for whatever reason. As a result, a whole host of people are missing from the census figures.

Here is the political empowerment of the people I am talking about, when I talk about empowering children. When federal money is allocated, it is allocated based on the population figures for the state in numerous federal programs.[114] After the last census, the State of Texas lost over a billion dollars in federal money because of the people who were there but never got counted.[115]

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[112] Robert B. Hill, Editorial, *Census Questions - (Beyond the Forms),* N.Y. TIMES, Mar. 25, 2000, at A18 (stating that "[m]ore than half of the four million people left out in 1990 were children, and children of color are disproportionately missed").

[113] *See* Editorial, *A Much Bigger Census Bill*, N.Y. TIMES, June 7, 1999, at A22 (explaining that "[t]he factors that hindered accuracy in 1990" were "growing immigrant populations, increased mobility, [and] irregular housing patterns"); *see also* Charles L. Schultze, *Which Census For 2000?*, WASH. POST, June 7, 1998 (positing that, "[b]y the census of 1990, the difficulties of physically counting all of the increasingly mobile American population had led to soaring budgetary costs and reduced accuracy").

[114] *See, e.g.*, 31 U.S.C. § 6701 (2000) (setting out qualifications and procedures for distribution of federal funds to state and local governments under the general assistance program). Specifically, § 6709 explains that the information used in allocation formulas is based on the 1990 and 1992 census figures. *Id.* § 6709.

[115] *See* Matt Schwartz, *City to Fight Suits Over Method for Census*, HOUSTON CHRONICLE, Apr. 2, 1998, at A23.

In the next census, the Census Bureau will make a statistical adjustment to the census to correct the historic undercount that has characterized the last census.[116] The Census Bureau will actually use the traditional method and recognize that it under-counted and over-counted people. Then, based on a statistical methodology that has been approved by Census Bureau statisticians as well as the National Academy of Sciences and the mainstream statistical community, it will make an adjustment to that number as necessary to correct for under counts and over counts throughout the United States.[117]

Republicans have said that they would not use the corrected numbers in some states to achieve redistricting, because they think that it is only being adjusted for political purposes.[118] Yet, the same state legislature Republicans are willing to use the adjusted numbers to accept federal money. It seems to me that is an immoral position. It is like keeping change when you go to a store, you give the clerk ten dollars and the clerk gives you change for a twenty. You know that you only gave a ten, and you decide to keep the money that you know does not belong to you.

Thus, in some states where Republicans control – Arizona, Alaska, Kansas, Colorado – the legislature has passed laws that forbid the use of adjusted census data; corrected census data will not be used in those states in the next round of redistricting.[119] This strikes me as being both irresponsible and short-sighted because the undercount has adverse racial consequences and, even more importantly, a disproportionate number of the undercounted

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[116] *See* Jonathan Peterson, *Clinton Pitches Plan to Use Census Sampling Population*, L.A. TIMES, June 3, 1998, at A12 (noting that statistical sampling is encouraged to remedy the severe undercounting of minorities and children); *see also Supreme Court Agrees to Settle Political Fight Over 2000 Census*, CHI. TRIBUNE, Sept. 11, 1998, at 14.

[117] *See Clinton Eyes 2nd Census*, OMAHA WORLD-HERALD, Jan. 26, 1999, at 1; Robert Schlesinger, *National Academy Backs Sampling in Census 2000*, THE HILL, May 5, 1999, at 4.

[118] *See* Steven A. Holmes, *Partisan Fighting Flares Anew Over Handling of the Census*, N.Y. TIMES, Mar. 9, 2000, at A15; Steven A. Holmes, *The Big Census Issue: Using Sampling in Redistricting*, N.Y. TIMES, Feb. 14, 1999, at 24.

[119] ALASKA STAT. § 15.10.200 (1999); ARIZ. REV. STAT. § 16-1103 (1999); COLO. REV. STAT. § 2-1-100.5 (1999); KAN. STAT. ANN. § 11-301 (1999).

population are children, who are the most treasured resource our nation has.

I think you will see that issue reach the Supreme Court faster in 2000 than any other redistricting issue.

Mr. Still

I would really like to spend an hour talking about that issue alone because we are spending a lot of our resources at the Lawyers' Committee dealing with it. We deal with the issue of the census generally getting a good turnout and getting an accurate count through sampling methods. But I want to open things up now for a few questions. We have about ten minutes left, so if anyone in the audience has a question, please come down to one of these microphones and I will direct your question to any member of the panel you want to address.

Audience Member

Good morning, my name is Angelo Anchetta. I am an attorney and I am also studying here at Harvard's Kennedy School of Business. Much of what you have talked about today has been dealing with the basic binary model that we encounter in the South and to some extent in the Southwest with Latinos. Certainly though, when we look at major urban centers, particularly in California, New York, Chicago and Miami, where the picture is much more complex, where there are multiple minority groups, where segregation is still there, but also where the mix is much more complicated, how do you see that playing out both in terms of redistricting and potential Section 2 intervention after redistricting? It is certainly not an easy question to answer, but do you have any thoughts in terms of how that might be played out?

Mr. Hebert

That is an excellent question, because you are absolutely correct. In the last decade, due to immigration as well as recently naturalized citizens from other countries who are moving into the metropolitan areas and then growing in some of the communities,

we have seen tri-ethnic and multi-ethnic communities in numerous places.

Ultimately though, districts must be created that empower minority groups. Sometimes minority groups will vote cohesively together, even though they represent members of different minorities groups. If they are members of a single language minority group, then chances are a voting pattern will emerge that you can point to in past elections where the minority groups have shown political cohesion.

If you can show that there is a coalition between one of the ethnic or racial groups and others sufficient to form a majority in a reasonably compact district, then you can empower voters in those areas. In order to show that, political cohesiveness levels must be examined not only within that one group, but also across groups. One of the methodological or quantitative problems in doing so is that there are sometimes very few, if any, candidates running from some of the other communities — other than the black and Hispanic communities. A few Asian American candidates have run and been successful in some cases, but there is a paucity of N's out there, to use the statistical term.

Let me just add to that one more complicating factor: the traditional categories of race will not be present. I think there is now a possible combination of sixty-three categories that can be broken down by racial data in the census.[120] From two standpoints of the Voting Rights Act, that will complicate the issue even further.[121]

First, it will be more complicated to show that a minority group, whatever group that happens to be, is large enough to create a minority opportunity district, because some people are two different races, other people are three, and others still are four. Second, I think it will affect the ability to measure whether or not a minority group is proportionally represented in the state. Suddenly, instead of only one or two racial groups, there is a dispersion of several racial categories.

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[120] Linda Lipp, *2000 Census Takes America's Racial Diversity Serious*, KNIGHT-RIDDER TRIB. BUS. NEWS, Mar. 17, 2000.

[121] 42 U.S.C. §§ 1973(b),(c) (2000).

Those are some of the issues I see. I know I did not solve your problem, but I am not sure there is a solution yet.

Professor Saunders

I think you are pointing out a very important problem that we will need to address in this next round of litigation. Most of the doctrine under the Voting Rights Act, particularly with amended Section 2, has been built in states that at the time were binary and the doctrine obviously will have to be adjusted to account for that fact.

As we saw in the *Johnson v. DeGrandy* case, the doctrine does not work so well in a jurisdiction in which there are multiple protected minorities to deal with.[122] This situation exists in many states now – Florida, Texas, California, even North Carolina.

We will have to think carefully and adjust the Section 2 doctrine in particular to handle this problem.

Mr. Still

Penda has described sort of the incumbent protection situation where the black district gets squeezed up. But in Chicago, the so-called earmuff district ended up being created as a Hispanic majority district. The district had two very large population concentrations, but went very far west with a very thin corridor, came around, and then came back to the east to pick up the southern part of that concentration. The reason for that long detour was there had been a traditional black majority district that ran east and west. Thus, the Hispanics were a rather cohesive community, but they were divided by a black community in a black district, which they had to circumvent.

In South Florida most of the Hispanics are Cuban Americans and tend to vote Republican, whereas the blacks tend to vote

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[122] 512 U.S. 997, 1024 (1994) (finding no support for a vote dilution claim by black and Hispanic voters where "both minority groups constitute effective voting majorities in a number of state Senate districts substantially proportional to their share in the population").

Democratic. Carrie Meek's[123] district, a black representative in South Florida, is long and thin and extends down a highway with bulbs picking up concentrations of black voters. Another district, shaped like a sock around a foot, is Ileana Ros-Lehtinen's[124] district. That is the "Little Havana" district. To the west is Lincoln Diaz Balart's district, another Cuban American.[125]

A complicating factor with respect to Hispanic districts, as Penda pointed out, is that often the potential Hispanic voters are not citizens and thus cannot vote. Therefore, the citizenship question becomes a complicating factor. I think that is more of a factor in the southwest than it is in the Cuban American community of Florida, because the immigration laws favor Cuban Americans who are fleeing the Castro dictatorship so much that we make it possible for them to become legal residents and citizens very quickly.

Mr. Hebert

Your point about Cuban Americans is good, because it shores up the point that I was trying to make earlier. Cuban Americans vote Republican for the most part, so when you unite them with black voters in Representative Carrie Meek's district, who traditionally vote Democratic, you do not create a politically cohesive minority group. Yet, in New York City, for example, you can find Hispanics living next door to black voters, who have a tendency to

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[123] Representative Carrie Meek, an African American, was elected to the United States House of Representatives in 1992 from Florida's seventeenth congressional district. U.S. House of Representatives, *Biography of Carrie P. Meek*, *at* http://www.house.gov/meek/bio.html (last visited Feb. 8, 2001). Prior to her election to Congress, Meek was a member of the Florida House of Representatives and the Florida Senate. *Id.*

[124] Ileana Ros-Lehtinen was the first Hispanic woman elected to the United States Congress, representing Florida's eighteenth congressional district since 1989. U.S. House of Representatives, *Biography of Ileana Ros-Lehtinen*, *at* http://www.house.gov/ros-lehtinen/bio.html (last visited Feb. 8, 2001).

[125] Cuban-born Lincoln Diaz-Balart was elected to the United States House of Representatives in 1992 from Florida's twenty-first congressional district. U.S. House of Representatives, *Biography of Lincoln Diaz-Balart*, *at* http://www-.house.gov/diaz-balart/bio.html (last visited Feb. 8, 2001).

support the same candidates as Asian Americans; you may find there exists the opportunity for drawing districts in a multi-ethnic society because these groups may exhibit a political cohesiveness in their voting patterns.

Mr. Still

We have time for one more question. Do we have someone?

Audience Member

You all talked about the standards to be applied in judging how the districts are drawn and whether they survive, but you have not talked much about the procedure except for the Donald Duck districts.[126] Can you say more about how districts get drawn and what controls are available on the procedures for drawing them, not just for the standards that are applied, in combination after the fact?

Professor Saunders

It is a messy business.

Mr. Still

Yes, it is a messy business and, like all legislation, you can either have a very open process in which a small number of people end up making the decision or you can have a closed process in which a small number of people end up making a decision. With any piece of legislation someone makes a decision as to what is to be done and what goes into the bill. Then everyone has to hold their noses and say they are going to vote for the bill because that is what the leadership wants them to do in order to get this bill and others passed.

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[126] *See* Major v. Treen, 574 F. Supp. 325, 335 (E.D. La. 1983) (finding that one of the reapportioned districts resembled the head of a duck, with its bill protruding into a contiguous African-American community).

However, what you do find among legislators is that they have a high level of self-protection. Thus, they try to shape the process to the greatest extent possible. I have been involved in the defense of the legislative districts in Alabama and about twelve of them are being challenged.[127] Interestingly enough they are all white majority districts, but they are all next door to black majority districts, so the idea is that they knock down the white majority district and then the black majority district next door will have to be redrawn.

The plan was being drawn by a black political leader in Alabama, who very openly was going around and talking to people. He stated that if people voted for his bill, he would put them in and take care of them. To those who would not vote for his bill, it would not do anything for them. That was a fairly open process in comparison to the basement meeting that ended up with the Donald Duck district in New Orleans.

Ms. Hair

Yes, let me just add to that. I think what Ed is making clear is that districting is a political process. There are very few places where an independent commission or a court prepares the initial districting plan. It is done by the legislature. In most cases the legislature is shaping its own future, because it is redistricting itself. So this is probably the area of highest interest to members of the legislature.

When I first started out as a voting rights lawyer, the districts were drawn by hand. You would start a census track and with different color magic markers you would try to create and satisfy various goals, whatever the goals were. But you had to do it all by hand.

In the 1990 round, for the first time, redistricting was done by computer and all the data were in the computer. I think that did affect the process in some negative ways. Instead of a hands-on

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[127] Kelley v. Bennett, 96 F. Supp. 2d 1301 (M.D. Ala. 2000), *vacated*, 121 U.S. 446 (Nov. 30, 2000) (dismissing a *Shaw* challenge to Alabama legislative districts for lack of standing).

process that allows you to have some feel for the communities, redistricting on the computer means entering your political data and having the computer search for people who have particular political views. This makes it very easy to make the districts much more complicated and irregularly shaped than they had been in the past.

In the next round of redistricting, computers will be even more sophisticated. Numerous states are entering different types of data. But ultimately legislators are the ones who have to look at all of the information available to them and decide where the lines go. The requirement is one person, one vote: the districts have to have an equal or roughly equal population.[128] Aside from whatever other criteria the state has in its constitution or other laws, it is political horse trading and negotiating that shapes the districts.

Mr. Still

There is a real arms race going on. We get faster and faster computers. If you drew a plan a decade ago it would take a day or more to get the computer plotter to plot out all the maps. Nowadays we can turn out maps and draw plans much quicker. All we have to do is take the plan somebody else has drawn, enter it into our computer, and our program can analyze it very quickly. The program then would show that according to the data, our clients would not come out very well on this plan and we have to attack it.

As a result, everyone must have computers. We have the capability now to enter all the data on laptops. Gerry could probably draw a plan right now on that computer – and probably is drawing a plan right now on that computer, figuring out where to put Harvard Yard.

Mr. Hebert

It will be in Barney Frank's district.

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[128] Reynolds v. Sims, 377 U.S. 533, 577 (1964) (holding that the "Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as practicable").

Edward Still

Good.

Professor Saunders

One thing that is making redistricting particularly interesting, at least in my state, is the new fact that we have divided government now, at the state level, which is a new phenomenon of the states in the south. Each house is controlled by a different party, which makes the process enormously difficult, as you might imagine because neither party is giving an inch to the other.

Mr. Still

Well, think about Minnesota, for example. Republicans control one house, Democrats control the other, and they have Jesse Ventura of the Reform Party as their Governor. It really is an interesting situation.

Mr. Hebert

It might be an argument against same day registration.

Mr. Still

Yes. Maine has an independent governor[129] and I think Alaska has an independent governor or just recently has had one.[130] I think they have a Republican now, but they had a –

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[129] Angus S. King, Jr. is the independent governor of Maine who is currently serving his second term. He was first elected in 1994 and was re-elected in 1998 in a landslide victory. State of Maine Online, *at* http://www.state.me.us/governor-/office/biography/biography.html (last visited Sept. 19, 2000).

[130] Walter Joseph Hickel served as governor of Alaska as an independent from 1990 to 1994. Compton's Encyclopedia Online (The Learning Company, Inc. 1998), *available at* http://www.comptons.com/encyclopedia/articles/0500/05-069824_Q.html.

Mr. Hebert

Democrat governor now, Republican legislator.

Mr. Still

And then they could all draw a plan. Well, on that note we will end the discussion. I appreciate your attention to everyone on this panel. Thank you very much.