Tulsa Law Review

Volume 31
Issue 3 *Practitioner's Guide to the October 1994 Supreme Court Term*

Spring 1996

Backlash: The Court Protects the Entrenched Advantages of the Majority

Gary D. Allison

Louis W. Bullock

BACKLASH: THE COURT PROTECTS THE ENTRENCHED ADVANTAGES OF THE MAJORITY*

Gary D. Allison† and Louis W. Bullock‡

I. INTRODUCTION

The October 1994 Term's equal opportunity cases dramatically weakened the ability of government to provide equal opportunity in three very important areas of life. In *Missouri v. Jenkins*,[1] the Court limited the power of federal courts to help victims of unconstitutionally segregated public schools. In *Adarand Constructors, Inc. v. Pena*,[2] the Court significantly reduced the ability of Congress to use race as a factor in enacting equal opportunity business programs. Finally, in *Miller v. Johnson*,[3] the Court intimated that it may never be constitutional to create congressional districts in which a racial minority constitutes a majority, or near majority, of the voters. Each case bitterly split the Court five to four and spawned at least four opinions offering sharply contrasting views as to how much equality government may constitutionally promote among the races.[4]

---

* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1994 Supreme Court Term*, at The University of Tulsa College of Law, November 17, 1995. Analysis by Gary D. Allison and Louis W. Bullock as annotated and edited by Gary D. Allison.

† Professor of Law, University of Tulsa College of Law. B.S., University of Tulsa (1968); J.D., University of Tulsa College of Law (1972); L.L.M., Columbia University School of Law (1976).

‡ Bullock & Bullock, Tulsa, Oklahoma. B.S., Oklahoma A. & M.; J.D. University of Oklahoma (1975).

1. 115 S. Ct. 2038 (1995).
2. 115 S. Ct. 2097 (1995).
3. 115 S. Ct. 2475 (1995).
4. In each case, the majority consisted of the hard conservative trio of Justices Rehnquist, Scalia, and Thomas joined by the moderately conservative swing duo of Justices O'Connor and Kennedy; and the dissent consisted of the liberal trio of Justices Stevens, Ginsburg, and Breyer joined by the moderately liberal swingman Justice Souter. Four opinions, including one concurrence and two dissents, were filed in *Miller*. *Miller*, 115 S. Ct. at 2482. Five opinions, including two concurrences and two dissents, were filed in *Jenkins*. *Jenkins*, 115 S. Ct. at 2042. *Adarand* produced the most fractious outcome with six opinions being filed, three for the judgment and

II. *MISSOURI V. JENKINS*: SEPARATE BUT UNEQUAL?

> In a country where there is "no distinction of class," Lord Acton wrote of the United States 130 years ago, "a child is not born to the station of its parents, but with an indefinite claim to all the prizes that can be won by thought and labor. It is in conformity with the theory of equality . . . to give as near as possible to every youth an equal state in life." Americans, he said, "are unwilling that any should be deprived in childhood of the means of competition."
>
> It is hard to read these words today without a sense of irony and sadness. Denial of "the means of competition" is perhaps the single most consistent outcome of the education offered to poor children in the schools of our large cities . . . .[5]

Jenkins is the latest chapter in a federal district court's eighteen year attempt to remedy the effects of unconstitutional segregation in the Kansas City, Missouri, School District (KCMSD). In 1977, Missouri, several federal agencies, and surrounding school districts (SSDs) were charged in federal court with perpetuating racial segregation in Kansas City area schools.[6] In 1984, after a long litigation process, the United States District Court for the Western District of Missouri found the KCMSD and Missouri guilty of maintaining an unconstitutionally segregated school system.[7] However, the federal agencies and the SSDs were exonerated.[8] The court has since struggled to remedy three broad effects of the illegal segregation: (1) segregation of minority children in racially identifiable schools,[9] (2) unquantified system-wide reduction in student achievement,[10] and (3)

---

three against it, none of which commanded a majority of the justices. *Adarand*, 115 S. Ct. at 2101.

5. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 83 (1991) (quoting in part George A. Hickrod, *Reply to the 'Forbes' Article*, J. SCH. FIN. (1987)).

6. *Jenkins*, 115 S. Ct. at 2042. The case was based on the fact that twenty years after the United States Supreme Court declared *de jure* segregation of public schools to be unconstitutional in Brown v. Board of Education, 347 U.S. 483 (1954), 39 of KCMSD's 77 schools had student bodies that were at least 90% African-American, and over 80% of KCMSD's African-American students attended these schools. *Jenkins*, 115 S. Ct. at 2074 (Souter, J., dissenting).

7. Jenkins v. Missouri, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984) [hereinafter *Initial Jenkins*].

8. *Id.* at 1488, 1490.

9. The district court found that even as late as 1984, 25 of KCMSD's schools had student bodies that were 90% or more African-American. Jenkins v. Missouri, 639 F. Supp. 19, 36 (W.D. Mo. 1985) [hereinafter *Jenkins Remedy I*].

10. *Id.* The U.S. Supreme Court noted that "[t]he District Court made no particularized findings regarding the extent that student achievement had been reduced or what portion of that reduction was attributable to segregation." *Jenkins*, 115 S. Ct. at 2042.

severe physical deterioration of KCMSD's facilities.[11] *Jenkins* concerns Missouri's latest challenges to the scope of remedies chosen by the district court.[12]

Integrating the KCMSD, with its 68.3% African-American student population, has been the court's greatest problem.[13] Having exonerated the SSDs, the court could not constitutionally order transfers of white students from the SSDs to the KCMSD.[14] The court declined to order mandatory intradistrict student transfers, fearing such transfers could hamper desegregation by causing further white flight.[15] Instead, the court initiated a process to make KCMSD schools outstanding enough to attract non-minority students from private and SSD schools.[16] Accordingly, the court ordered Missouri and the KCMSD to:

* establish magnet programs at half of KCMSD's elementary schools and all of its high schools and middle schools at a cost of $448 million;[17]
* undertake a capital improvement program for renovating fifty five schools, shutting down eighteen schools, and constructing seventeen new schools at a cost of over $540 million;[18]
* implement ambitious remedial quality education programs at every KCMSD school at a cost of $220 million;[19] and

---

11. *Jenkins Remedy I*, 639 F. Supp. at 40.

> The specific problems include[d]: inadequate lighting; peeling paint and crumbling plaster on ceilings, walls and corridors; loose tiles, torn floor coverings; odors resulting from unventilated restrooms with rotted, corroded toilet fixtures; noisy classrooms due to lack of adequate acoustical treatment; lack of off street parking and bus loading for parents, teachers and students; lack of appropriate space for many cafeterias, libraries, and classrooms; faulty and antiquated heating and electrical systems; damaged and inoperable lockers; and inadequate fire safety systems . . . .

Jenkins v. Missouri, 672 F. Supp. 400, 403 (W.D. Mo. 1987) [hereinafter *Jenkins Remedy III*].

12. *Jenkins*, 115 S. Ct. at 2042.

13. *See Jenkins Remedy I*, 639 F. Supp. at 38.

14. In Milliken v. Bradley, 418 U.S. 717 (1974), the U.S. Supreme Court held that interdistrict remedies are valid only to cure "interdistrict segregation directly caused by the constitutional violation." *Id.* at 745.

15. *Jenkins Remedy I*, 639 F. Supp. at 38.

16. *See Jenkins*, 115 S. Ct. at 2042-46.

17. *Id.* at 2043 (discussing the substance of the district court's unpublished remedial order of November 16, 1986).

18. *Jenkins Remedy III*, 672 F. Supp. at 408; *Jenkins Remedy I*, 639 F. Supp. at 40-41. *See Jenkins*, 115 S. Ct. at 2044 (discussing the cost estimate).

19. *Jenkins*, 115 S. Ct. at 2043. The quality remedial education programs included improvements in the regular academic program sufficient for KCMSD to receive the state's highest academic rating, substantial reductions in class sizes, expanded opportunities programs such as full day kindergarten, before and after school tutoring, an expanded summer school program, and effective school grants. *Jenkins Remedy I*, 639 F. Supp. at 26, 28-43. *See Jenkins*, 115 S. Ct. at 2043 (explaining the cost of these programs).

* maintain high quality academic faculty and support staff through salary assistance programs costing over $200 million since 1987.[20]

The KCMSD's desegregation program is the most expensive ever ordered judicially, with an annual cost far exceeding KCMSD's taxing authority under Missouri law.[21] Not surprisingly, Missouri challenged the orders to provide salary assistance and to continue the remedial quality education programs, contending they were not narrowly tailored to reverse the effects of illegal segregation.[22]

Both the district court and the U.S. Court of Appeals for the Eighth Circuit rejected Missouri's arguments. Each found the salary assistance was necessary to promote the KCMSD's "desegregative attractiveness"[23] in order to reverse white flight.[24] Additionally, they supported the continuation of the remedial quality education programs because KCMSD student achievement indicated that the negative effect of segregation on student performance had not yet been eradicated.[25]

The U.S. Supreme Court reversed the lower courts' judgments. Writing for the majority, Chief Justice Rehnquist characterized the district court's salary adjustment order and other remedies as "focused on 'desegregative attractiveness,' coupled with 'suburban comparability.'"[26] He also noted that the district court's desegregation plan is "not designed solely to redistribute the students within the KCMSD . . . to eliminate racially identifiable schools . . . . Instead, its purpose is to attract nonminority students from outside the KCMSD schools."[27] Thus, the Court found that the district court's remedies exceed the constitutionally permitted scope of desegregation remedies in three ways:

(1) they seek to attract students from other districts, thereby doing indirectly what the Supreme Court has forbidden district courts to do directly—seek transfers of nonminority students from other districts in absence of an interdistrict violation;[28]

20. *Jenkins*, 115 S. Ct. at 2044-45.
21. *Id.* at 2045.
22. *Id.* at 2045-46.
23. *See id.* at 2045 (quoting App. to Pet. for Cert. at A-90).
24. Jenkins v. Missouri, 11 F.3d 755, 767 (8th Cir. 1993).
25. *Id.* at 761-62.
26. *Jenkins*, 115 S. Ct. at 2050.
27. *Id.* at 2051.
28. *Id.* at 2051-54. Here, the Court extended its Milliken v. Bradley, 418 U.S. 717 (1974), holding that court ordered transfers of students across district lines are unconstitutional where

(2) their "desegregative attractiveness" rationale "is not susceptible to any objective limitation" strictly concerned with restoring "the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct;"[29] and

(3) they contain no "limits to the duration of the District Court's involvement," in violation of the requirement that federal courts must strive to return control to state and local authorities, because the KCMSD has been unable to identify how to pay for the remedial and magnet programs without special state aid that Missouri will not provide absent district court compulsion.[30]

Similar considerations caused the Supreme Court to overturn the lower courts' decisions requiring Missouri to continue paying for the remedial quality education programs. The Court found that the district court had adopted national student achievement norms as the measure of whether KCMSD student achievement had improved sufficiently, but had failed to make findings as to the precise effect segregation had on student achievement.[31] Therefore, said the Court, national student achievement norms are not appropriate tests for determining "whether the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable."[32]

---

there has not been an interdistrict violation to court ordered improvements of segregated districts designed to lure students from other districts in the absence of an interdistrict violation. *Jenkins*, 115 S. Ct. at 2051-54.

29. *Jenkins*, 115 S. Ct. at 2054. The requirement that desegregation remedies must be designed to put the victims of illegal segregation back into the position they would have occupied in absence of segregation was articulated forcefully in Milliken v. Bradley, 418 U.S. 717, 746 (1974).

30. *Jenkins*, 115 S. Ct. at 2054. The requirement that federal district courts must strive to return control over school districts to state and local authorities was articulated most strongly in Milliken v. Bradley, 433 U.S. 267, 280-81 (1977).

31. *Jenkins*, 115 S. Ct. at 2055-56.

32. *Id.* The Court expressly ruled that the KCMSD and Missouri could not be held responsible for curing any negative affects on student achievement being caused by factors external to the operation of the KCMSD schools unless those factors resulted from illegal segregation. *Id.* at 2056.

III. *ADARAND CONSTRUCTORS, INC. V. PENA*: PRESUMING EQUALITY IN AN UNEQUAL WORLD

> [T]here are those who say . . . that even good affirmative action programs are no longer needed . . . because there is no longer any systematic discrimination in our society.
>
> . . . [L]et us consider the facts. The unemployment rate for African Americans remains about twice that of whites. The Hispanic rate is still much higher. Women . . . still make only 72 percent as much as men do for comparable jobs.
>
> The average income for an Hispanic woman with a college degree is still less than the average income of a white man with a high school diploma.
>
> According to . . . the glass ceiling report sponsored by Republican members of Congress, in the nation's largest companies only six-tenths of 1 percent of senior management positions are held by African Americans, four-tenths of a percent by Hispanic Americans, three-tenths of a percent by Asian Americans. Women hold between 3 and 5 percent of these positions. White males make up 43 percent of our work force but hold 95 percent of these jobs.
>
> . . . [B]lack home loan applicants are more than twice as likely to be denied credit as whites with the same qualifications, and . . . Hispanic applicants are more than 1/2 times as likely to be denied loans as whites with the same qualifications.
>
> Last year . . . the federal government received more than 90,000 complaints of employment discrimination based on race, ethnicity or gender; less than 3 percent were for reverse discrimination.[33]

Mountain Gravel and Construction Co. (Mountain) was awarded a highway construction contract by the U.S. Department of Transportation (DOT).[34] The contract fell under the Surface Transportation and Uniform Relocations Assistance Act (STURAA)[35] requirements that "'not less than 10 percent' of the appropriated funds 'shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.'"[36] Accordingly, the contract contained an incentive clause offering Mountain a small

33. President Clinton, Address defending the need to continue some affirmative action programs (July 19, 1995), *in 'Give All Americans a Chance . . .,'* WASH. POST, July 20, 1995, at A12.

34. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2102 (1995).

35. Surface Transportation and Uniform Relocations Assistance Act (STURAA), Pub. L. No. 100-17, 101 Stat. 132. (codified at scattered sections of 23 U.S.C. (1994)).

36. *Adarand*, 115 S. Ct. at 2103 (quoting STURAA § 106 (c)(1), 101 Stat. 132, 145).

bonus for awarding subcontracts to Disadvantaged Business Enterprises (DBEs).[37]

Mountain awarded a subcontract for installing guardrails to the Gonzales Construction Co., a certified DBE, despite Adarand Constructors, Inc. (Adarand), a non-DBE, submitting the lowest low bid.[38] Adarand would have won the subcontract but for the incentive available to Mountain for selecting a DBE subcontractor.[39]

Adarand filed suit contending that three federal regulatory schemes for certifying persons as DBEs—the Small Business Administration (SBA) DBE certification regulations under Sections 8(a) and 8(d) of the Small Business Act, and DOT DBE certification regulations issued to implement STURAA—contained race-based presumptions of disadvantage that violated its equal protection rights under the Fifth Amendment of the United States Constitution.[40] Persons entitled to the presumptions are automatically designated as socially and/or economically disadvantaged unless they are shown not to be disadvantaged by clear and convincing evidence offered by challengers during a certification or review process.[41] Persons not of a presumptively disadvantaged racial and ethnic ancestry may receive DBE certification only by presenting regulators with clear and convincing evidence of their disadvantaged backgrounds.[42]

The critical issue was determining which standard of constitutionality should be applied to congressionally authorized racial classifications. Adarand contended that the race-based presumptions were

37. The incentive equaled 10% of the sum of all DBE subcontract amounts not to exceed 1.5% of the prime contract when one DBE subcontract is awarded or 2% of the prime contract amount if two or more DBE subcontracts are awarded. *Id.* at 2104.

38. *Id.* at 2102.

39. *Id.*

40. *Id.* at 2102-04. Persons are presumed to be disadvantaged socially if they are Black, Hispanic, Asian Pacific, Subcontinent Asian, Native American, or other minorities designated by the SBA as disadvantaged. 13 C.F.R. §§ 124.105(b)(1), 124.106(b) (1994) (§ 8a and § 8d regulations respectively). These groups plus women are presumed to be disadvantaged under STURAA regulations. 49 C.F.R. § 23.62 and pt. 23, subpt. D, App. C (1994). STURAA regulations extend the presumptions to both the socially and economically disadvantaged. *Id.* However, each person must individually prove economic disadvantage under the § 8a program. 13 C.F.R. § 124.106(a) (1994). It is not clear whether individualized showings of economic disadvantage are required under the § 8d program. *Compare* 13 C.F.R. § 124.106(b) (1994) (requiring individual showings) *with* 48 C.F.R. §§ 19.001, 19.703(a)(2) (1994) (requiring no individual showings).

41. *See* 13 C.F.R. §§ 124.105(b)(1), 124.106(a)(b) (1994) (certification is automatic for persons enjoying a presumption of disadvantage). *But see* 13 C.F.R. §§ 124.111(c),(d), 124.602(a) (§ 8a program); 13 C.F.R. §§ 124.601-.609 (§ 8d program); 49 C.F.R § 23.69 (STURAA program); in which presumptions are rebuttable.

42. 13 C.F.R. § 124.105(c) (1994) (§ 8a program); 13 C.F.R. § 124.105(c) (1994) and 48 C.F.R. § 19.703(a)(2) (1994) (§ 8d program); 49 C.F.R § 23.62 (1994) (STURAA program).

unconstitutional under the strict scrutiny test of *Richmond v. J.A. Croson Co.*,[43] which requires state authorized racial classifications to be narrowly tailored to meet a compelling governmental interest,[44] because they were not designed to remedy the effects of specifically identified government discrimination.[45]

Stating they were bound by *Metro Broadcasting, Inc. v. FCC*,[46] because the race-based presumptions were congressionally authorized, both the district court and court of appeals used *Metro's* intermediate scrutiny test.[47] *Metro* permits congressionally authorized benign racial classifications to be found constitutional, whether or not they are designed to remediate specific governmental or society-wide discrimination, provided they are substantially related to serving important governmental interests.[48] Applying this test, each court upheld the constitutionality of the race-based DBE certification processes because they:

(1) contained mechanisms to insure that minorities enjoying the presumptions of disadvantage were both disadvantaged and qualified to perform contracts under the program;[49]

---

43. 488 U.S. 469 (1989). *Croson* is the first case in which the U.S. Supreme Court produced a majority for the proposition that courts should use a strict scrutiny standard to determine the constitutionality of racial classifications used by state and local governments to remediate the effects of discrimination under the Equal Protection Clause of the Fourteenth Amendment. *Id.* 493-94. *See also Adarand*, 115 S. Ct. at 2108-10 (discussing the U.S. Supreme Court's struggle to secure a majority view regarding the standard to be used in determining the constitutionality of race-based classifications used for remedial purposes).

44. *Croson*, 488 U.S. at 491-92.

45. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1542 (10th Cir. 1994) [hereinafter *Adarand Circuit*]. Here, Adarand relied on *Croson's* requirement that there is no compelling state interest in using racial classifications absent a showing of specific governmental discrimination. *See Croson*, 488 U.S. at 491-92.

46. 497 U.S. 547 (1990).

47. *Adarand Circuit*, 16 F.3d at 1543-45; Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 242-44 (D. Col. 1992) [hereinafter *Adarand District*].

48. *Metro*, 497 U.S. at 563-66. In *Metro*, the Court justified treating congressionally authorized racial classifications differently than state authorized racial classifications because:

* Congress is owed deference in these matters as "a co-equal branch charged by the Constitution with the power to 'provide for the ... general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." *Id.* at 563 (quoting Fullilove v. Klutznick, 448 U.S. 448, 472 (1980)); and
* "the Federal Government is unlikely to be captured by minority racial or ethnic groups and used as an instrument of discrimination" while "'[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States' because of the 'heightened danger of oppression from political factions in small, rather than large, political units.'" *Id.* at 566 (quoting *Croson*, 488 U.S. at 522-23 (Scalia, J., concurring)).

49. *Adarand District*, 790 F. Supp. at 244.

(2) did not prevent disadvantaged non-minorities from receiving benefits,[50] and
(3) induced, rather than compelled, the use of DBEs.[51]

A very divided U.S. Supreme Court reversed the judgments of the lower courts[52] and *Metro's* standard of constitutional review by holding that "all racial classifications, imposed by whatever federal, state or local governmental actor, . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[53] Writing for the Court, Justice O'Connor noted how difficult it had been prior to *Croson* for the Court to produce a majority view as to the correct standard to apply in judging the constitutionality of state authorized benign racial classifications under the Equal Protection Clause of the Fourteenth Amendment.[54] She expressed her view that the Court had taken great care prior to *Metro* to treat all racial classifications, whether authorized by the states or Congress, with:

* skepticism: meaning they all should be regarded as inherently suspect;
* consistency: meaning the standard of review should be the same no matter what the race is of those burdened; and
* congruence: meaning that the equal protection analysis should be the same whether it is conducted under the Equal Protection Clause of the Fourteenth Amendment or the equal protection notions of the Fifth Amendment.[55]

Justice O'Connor then opined that *Metro*, the first case questioning what standard of review applied to congressionally authorized racial classifications after *Croson*, should be overturned because it undermined the Court's prior dedication to the principles of skepticism, consistency, and congruence.[56] The Court did not find the race based presumptions to be unconstitutional, however, because the lower

50. *Adarand Circuit*, 16 F.3d at 1547.
51. *Id.*
52. Adarand Constructors Inc., v. Pena, 115 S. Ct. 2097, 2102, 2118 (1995).
53. *Id.* at 2113. Note, the Court produced these results without an opinion which commanded a majority of the justices. Justice O'Connor wrote an opinion described as the judgment of the Court, but it was joined fully only by Justice Kennedy. *See id.* at 2101. Chief Justice Rehnquist and Justice Thomas joined the opinion except a portion dealing with *stare decisis*. *See id.* However, Justice Scalia joined the opinion only to the degree to which it agreed with his separate concurring opinion. *Id.* at 2118-19.
54. *Id.* at 2108-10.
55. *Id.* at 2111.
56. *Id.* at 2111-13.

courts had not judged it by the strict scrutiny standard.[57] Accordingly, the Court remanded *Adarand* to the court of appeals for a strict scrutiny review of the DBE certification processes.[58]

IV. *MILLER V. JOHNSON*: A TYRANNY OF THE MAJORITY?

> Although race-conscious districting is their apparent target, . . . critics [of the Voting Rights Act] have fixed their aim on a deeper message—that pressing claims of racial identity and racial disadvantage diminish democracy. We all lose, the theory goes, when some of us identify in racial or ethnic group terms.
>
> . . . [C]ritics of race-conscious districting have misdirected their fire. . . . [They] fail to confront directly the group nature of representation itself, especially in a system of geographic districting. Perhaps unwittingly they also reveal a bias toward the representation of a particular racial group rather than their discomfort with group representation itself. In a society as deeply cleaved by issues of racial identity as ours, . . . a system of representation that fails to provide group representation loses legitimacy.[59]

The 1990 Census gave Georgia an additional congressional district, so it had to undertake reapportionment.[60] As a jurisdictional state under § 4(b) of the Voting Rights Act of 1965 (VRA),[61] Georgia's redistricting plan had to receive either U.S. Justice Department (DOJ) preclearance or federal district court approval.[62] The DOJ twice rejected reapportionment plans containing two majority-minority congressional districts.[63] Ultimately, Georgia's General Assembly received DOJ approval of a reapportionment plan—labeled the max-black plan[64]—which provided for three majority-minority districts.[65] This plan gave African-American candidates from Georgia a greater opportunity to be elected to the U.S. House of Representatives in proportion to Georgia's African-American population (27.27% to 26.96%).[66]

---

57. *Id.* at 2118.

58. *Id.*

59. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 120-21 (1994) (footnotes omitted).

60. Miller v. Johnson, 115 S. Ct. 2475, 2483 (1995).

61. 42 U.S.C. § 1973b(b) (1994).

62. *Miller*, 115 S. Ct. at 2483.

63. *Id.* at 2483-84. Majority-minority districts are those in which a minority group constitutes a majority of the voting age population. *Id.* at 2483.

64. *Id.* at 2484.

65. *Id.* at 2483.

66. Johnson v. Miller, 864 F. Supp. 1354, 1378, 1385-86 (S.D. Ga. 1994).

The max-black plan was challenged by white voters in the new Eleventh Congressional District,[67] who "alleged that Georgia's Eleventh District was a racial gerrymander and so a violation of the Equal Protection Clause."[68] These claims relied on *Shaw v. Reno*,[69] a recent case in which the U.S. Supreme Court held that:

> [A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.[70]

In *Shaw*, the Supreme Court further held that redistricting plans dominated by race considerations are constitutional only if they are narrowly tailored to meet a compelling governmental interest.[71]

By a two to one vote, a three-judge district court declared Georgia's reapportionment plan to be unconstitutional.[72] The court interpreted *Shaw* to require that reapportionment plans be subjected to strict scrutiny if it is shown "that the legislature (a) was consciously influenced by race, and (b) . . . race was the *overriding, predominant force* determining the lines of the district."[73] It then found race to be the "overriding, predominant force" in influencing Georgia's adoption of the max-black plan.[74] Finally, the court held that Georgia's reapportionment plan was not narrowly tailored to meet a compelling governmental interest.[75]

The district court's conclusion that racial factors dominated the design of Georgia's reapportionment plan was supported indirectly by evidence showing the Eleventh District's African-American population did not have any significant non-racial community of interest—80% of the Eleventh District's African-American population came "from carefully divided counties on its distant fringes,"[76] lived in areas

67. *Miller*, 115 S. Ct. at 2485.
68. *Id.*
69. 113 S. Ct. 2816 (1993).
70. *Id.* at 2828.
71. *Id.* at 2832.
72. Johnson v. Miller, 864 F. Supp. 1354, 1359 (S.D. Ga. 1994).
73. *Id.* at 1372.
74. *Id.* at 1375-77.
75. *Id.* at 1378-92.
76. *Id.* at 1376. Georgia got these predominantly African-American fringe areas into the 11th District by:

> * Connecting the predominately African-American areas of three widely separated cities [Atlanta, Augusta, and Savannah] to the 11th District with thin land bridges through predominately white areas, *Id.* at 1375-76;

far apart geographically, and had very different economic, social, cultural, and educational backgrounds.[77] In addition, the district court cited DOJ objection letters seeking purely racial revisions,[78] and testimony from Georgia legislators and members of the reapportionment plan design staff indicating that the desire to comply with DOJ demands was the sole reason for the Eleventh District including Savannah instead of Macon.[79]

Georgia unsuccessfully sought to justify its reapportionment plan by arguing that it was designed to:

(1) provide Georgia's African-American population with the opportunity to achieve proportionate representation in the U.S. House of Representatives;
(2) satisfy VRA requirements; and
(3) remedy the effects of past discrimination.[80]

In response, the district court first held it would be unconstitutional to require states to provide each race with proportionate congressional representation.[81] It then held that states have no compelling interest in remedying past discrimination separate from doing what is necessary to comply with the VRA,[82] and that attempts to comply with the VRA are constitutional only if they do no more than what the VRA minimally requires.[83]

In the end, the district court found Georgia's reapportionment plan to be unconstitutional because it was not narrowly tailored to meet the requirements of the VRA.[84] Although, the plan did create single-member, contiguous districts satisfying one person-one vote requirements, the court found that, "every factor that could realistically

* Adding the more distant Savannah to the 11th District so it could be a majority-minority district without the nearby Macon, with its large African-American population; then using Macon to make the Second District a majority-minority district, *Id.* at 1376-77;
* Excising the African-American areas of Savannah "from [their] traditional economic place in the 'coastal' region of Georgia," *Id.* at 1377; and
* Splitting 26 counties. *Id.* at 1367, 1377.

77. *Id.* at 1375-76.
78. *Id.* at 1363-69, 1377.
79. *Id.* at 1377-78.
80. *Id.* at 1378.
81. *Id.* at 1379 (rejecting proportionality because to require it is to require the establishment of racial quotas).
82. *Id.* at 1380 (noting that the VRA "formalizes, codifies, and universally imposes a 'compelling state interest' to redress historically persistent discriminatory voting practices" and tying the compelling interest in eradicating voting discrimination to the VRA keeps remedies narrowly tailored to meet the problem).
83. *See id.* at 1381-83.
84. *Id.* at 1383-93.

be subordinated to racial tinkering in fact suffered that fate," thereby producing an Eleventh District that "disregards economic boundaries, and . . . ignores county and precinct lines at will when needed to reach black neighborhoods."[85] Given that the rejected plans would have increased the number of congressional districts in which African-Americans would have realistic opportunities to be elected from one to two, the pre-cleared plan exceeded what was necessary to avoid retrogression of African-American voting power.[86] Moreover, the court found the Eleventh District was not narrowly tailored to avoid diluting the power of the African-American vote because "[t]he record fail[ed] to demonstrate compactness, chronic bloc voting, or reasonably necessary black voter percentages in the Eleventh Congressional District."[87]

The U.S. Supreme Court upheld the district court's judgment in every material respect. Writing for the majority, Justice Kennedy held that reapportionment plans must be subjected to strict scrutiny if race is the predominant factor in setting district boundaries.[88] Adopting almost verbatim the district court's factual findings, the Supreme Court then affirmed that race was the predominant factor influencing the crafting of Georgia's reapportionment plan.[89] Finally, the Supreme Court held that Georgia's reapportionment plan failed the strict scrutiny test because it "was not required by the Voting Rights Act under a correct reading of the statute."[90]

---

85. *Id.* at 1384.

86. *Id.* at 1384-85.

87. *Id.* at 1392. The district court again found that the 11th District could not be deemed compact because its African-American populations were too distant from one another geographically and too different economically, culturally, and educationally. *Id.* at 1389-90. To the court, data about racial polarization was not very accurate and tended to indicate that there had been a significant degree of racial cross-over voting with black and black-preferred candidates doing reasonably well in past local and statewide elections. *Id.* at 1390-91. Thus, the court stated that "the very lack of solid evidence of black vote cohesion or rampant bloc voting . . . contributes to our conclusion that the . . . Eleventh District was not an appropriate [dilution] remedy." *Id.* at 1391. The court also found flaws in data concerning the percentage of African-Americans of voting age required to give African-Americans in the 11th District reasonable opportunities to elect African-American or African-American preferred candidates. *Id.* at 1391-92. Accepting data showing that the African-American percentage of 11th District persons of voting age was 57%, the Court said African-American candidates in the 11th District had an approximate 73% probability of winning, much higher than the 50% probability minimally required by the VRA. *Id.* at 1392.

88. Miller v. Johnson, 115 S. Ct. 2475, 2487-88 (1995).

89. *Id.* at 2488-90.

90. *Id.* at 2491.

The Court's VRA compliance analysis focussed exclusively on the non-retrogression principle.[91] Finding the plans offering two majority-minority districts were ameliorative, and concluding that the race neutral reasons Georgia gave for not originally adopting the max-black plan were constitutionally adequate, the Court held it was unnecessary for Georgia to adopt the max-black plan to satisfy the VRA.[92]

V. DISCUSSION

A. *Louis Bullock*

If you look at this Term as a litigator, you get weak knees and wonder whether you can go forward at all. There is just no question that this Term the Supreme Court moved toward a very dark night for affirmative action. But in studying the opinions, I came away with the conclusion that neither we nor the Court really know what is next.

Looking at the social and legal dynamics of the Court, Justice O'Connor appears to be the fifth vote in all three cases. However, she is not a certain vote for the proposition suggested by these cases—that race remedies cannot be used anymore. Justice O'Connor's opinions put her right in the middle. Her *Adarand* opinion reads like the opinions of Justices Scalia and Thomas in discussing the imposition of strict scrutiny on federally created benign racial classifications.[93] Yet, in striving to dispel the notion that strict scrutiny is not fatal in theory

91. *Id.* at 2491-94.

92. *Id.* at 2492. This concludes Professor Gary Allison's summary of this Term's equal opportunity cases. What follows is derived from the remarks of Professor Allison and Louis Bullock.

93. Justices Scalia and O'Connor emphasize individual rights over group rights. Justice Scalia proclaims that "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118 (1995) (Scalia, J., concurring). Justice O'Connor opines that "the Constitution protect[s] *persons*, not *groups*. [Therefore] [i]t follows . . . that all governmental action based on race—a *group* classification . . .—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Id.* at 2112-13 (citation omitted).

Like Justice Thomas, Justice O'Connor emphasizes that all racial classifications are potentially dangerous whether or not the intent behind their creation is benign. Justice Thomas calls affirmative action programs "racial paternalism" that may "engender attitudes of superiority or . . . provoke resentment" among those burdened by affirmative action and "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." *Id.* at 2119 (Thomas, J., concurring). And Justice O'Connor quotes approvingly from Justice Stevens' dissenting opinion in Fullilove v. Klutznick, 448 U.S. 448, 545 (1980), for the proposition that programs of this kind are "perceived by many as resting on an assumption that those who are granted . . . special preference are less qualified in some respect . . . identified purely by race" and "that perception . . . can only exacerbate

but always fatal in fact, Justice O'Connor finds common ground with Justice Ginsburg.[94] She even makes a real attempt to tell us that, in her opinion, there are race remedies which can pass the strict scrutiny test.[95] Unfortunately, with her standing in the middle, we are left without knowing what those remedies are.

Moreover, it is significant that in all three cases the factual findings of the majority and dissenting opinions tell two different stories. Indeed, you get different legal results if you apply the majority's constitutional tests to the facts found by the dissent.[96] This shows the Court does not yet have a majority for the proposition that all racial classifications, benign or malign, are unconstitutional.

For now, we must wait until Justice O'Connor tells us what is satisfactory, where we can have race remedies. Perhaps her next opinion will offer more specific guidelines as to what classifications will survive strict scrutiny.

---

rather than reduce racial prejudice" and "delay the time when race will become a truly irrelevant, or . . . insignificant, factor." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (quoting *Fullilove*, 448 U.S. at 545).

94. In fact Justices O'Connor and Ginsburg are obviously lobbing different openings back and forth to one another. *Compare id.* at 2117-18 (parts III.D. and IV.) *with id.* at 2134-36 (Ginsburg, J., dissenting) (professing to see much agreement among the disparate views of the Court).

95. *See id.* at 2117.

96. In *Jenkins*, the dissenting Justice Souter found that the district court required Missouri to continue with the quality remedial educational programs because Missouri had failed to show what the effects of those programs had been, not because KCMSD students had failed to achieve national norms on achievement tests. Missouri v. Jenkins, 115 S. Ct. 2038, 2078-81 (1995) (Souter, J., dissenting). Justice Souter also found that the district court had ordered certain salary increases to maintain a program for remediating the detrimental effects of segregation on student achievement rather than to attract students from other school districts. *Id.* at 2081 (Souter, J., dissenting). Finally, Justice Souter made a compelling case that it was segregation, not integration, that caused white flight, thereby entitling the district court to use remedies that had interdistrict effects. *Id.* at 2083-87 (Souter, J., dissenting).

In *Adarand*, Justice Stevens' dissenting opinion contains a detailed factual comparison of the DBE programs and the set-aside program approved in *Fullilove* by Justices purporting to use the strict scrutiny standard. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2128-30 (1995) (Stevens, J., dissenting). This factual finding emphasizes that the DBE program: includes nonminorities, excludes minorities that are truly not disadvantaged, provides for reviewability so the program may be wound down as the need to help small business owners from disadvantaged backgrounds recedes, and arises from extensive congressional findings documenting well the need for affirmative action. *Id.*

In *Miller*, Justice Ginsburg's dissent offers a description of Georgia's 11th District that cannot be squared with how it was described by the majority. Miller v. Johnson, 115 S. Ct. 2475, 2502-05 (1995) (Ginsburg, J., dissenting). She notes that the 11th District: is not of bizarre shape, respects the boundaries of political subdivisions better than many of Georgia's other districts, reflects political compromises to accommodate the needs of certain state legislators, is substantially different than the DOJ's max-black plan, and recognizes that African-Americans share many common bonds based on ethnic identity that transcend other bases of identity. *Id.*

B. *Gary Allison*

I agree that strict scrutiny may not be fatal in fact to the DBE programs in *Adarand.* In her *Adarand* dissent, Justice Ginsburg cites statistics showing:

* African-Americans are much more likely to be turned down for home loans and business opportunities than are white persons with the same credentials; and
* women, African-Americans and minorities in general get terrible automobile deals by comparison to the deals offered to white males even when they use the same negotiating script.[97]

So, it is likely that real discrimination can be found to justify the need for the programs at issue in *Adarand.*[98]

I am much more concerned about *Jenkins.* If we really have a commitment to equal opportunity, it ought to be reflected in our schools where we are preparing people to compete.

I very much encourage every person here to purchase Jonathan Kozol's SAVAGE INEQUALITIES.[99] This book documents how the traditional U.S. commitment to funding and controlling public schools at the local level trapped large numbers of children in terribly underfunded inner city schools as people and tax bases moved to the suburbs. Now this may be an inequality of class issue, but increasingly it looks like a race issue when you see who is trapped in the poor inner city districts across the nation. Shamefully, in *San Antonio Independent School District v. Rodriguez,*[100] the U.S. Supreme Court found that the Equal Protection Clause does not contain a remedy for this educational inequality.[101]

97. Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2135 n.4 (1995).
98. *See id.* at 2135.
99. KOZOL, *supra* note 5.
100. 411 U.S. 1 (1973).
101. In *Rodriguez,* the Court refused to apply strict scrutiny review to state educational laws that caused great disparities of educational resources among school districts. *Id.* at 40. The Court then found that the state's educational laws rationally furthered the legitimate state purpose of keeping local control over schools. *Id.* at 55.

The Court refused to apply strict scrutiny to the state's educational laws because it found that education was not a fundamental right protected by the Constitution, *id.* at 35, and the education laws did "not operate to the peculiar disadvantage of any suspect class." *Id.* at 28. According to the Court, the relevant class was not suspect because it was large, diverse, and "unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts." *Id.* Thus, said the Court, this class had "none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*

In *Jenkins*, the Court split over the cause of white flight. The majority believed it was caused by integration,[102] but the dissent reinforced the district court's finding that segregation, not its remedy, caused the white flight.[103] In essence, the majority believes whites got upset and left school districts only when they were desegregated.[104] By contrast, the dissent noted that segregation often caused dreadful deterioration of schools serving predominantly minority student bodies.[105] As a consequence, according to the dissent, integration has required districts either to force white children to go to run down schools or to undertake very expensive repairs or replacements of the deficient schools.[106] These circumstances, said the dissent, may have caused many whites to leave segregated school districts for the suburbs, because they did not want to wait and see what integration would produce.[107] This certainly happened in Kansas City, for by the time the first remedial order was entered in 1984, thirty years after the Supreme Court ordered public school desegregation in *Brown*, the KCMSD student population had gone from being predominantly white to predominantly minority.[108] Nevertheless, in a shameful decision, the Court expressly held it is not constitutionally permissible to chase white flight with magnet programs capable of luring whites back to the inner city schools.[109]

I think the *Jenkins* majority was really upset by how the district court judge had found a way to get around *Rodriguez*. He had managed to force Missouri to pump millions of dollars into the KCMSD.[110] The Court cut this funding off, mandating a separate and unequal world, but it was not willing to say so directly.[111]

---

102. Missouri v. Jenkins, 115 S. Ct. 2038, 2052-53 (1995).
103. *Id.* at 2083-87 (Souter, J., dissenting).
104. *Id.* at 2052.
105. *See id.* at 2086 (Souter, J., dissenting).
106. *Id.*
107. *Id.*
108. African-American students constituted 18.9% of KCMSD's enrollment during the 1954-55 academic year, but 1970 was the last year KCMSD was a majority white district. *Initial Jenkins*, 593 F. Supp. 1485, 1492 (W.D. Mo. 1984). By the 1983-84 academic year, African-American students constituted 67.7% of KCMSD's enrollment, and white enrollment had decreased in absolute numbers by over 80% since 1959. *Id.* at 1495.
109. *Jenkins*, 115 S. Ct. at 2051-54.
110. *Id.* at 2043-45.
111. However, in an earlier Supreme Court case involving these parties, Justice Kennedy wrote in a concurring opinion: "It cannot be contended that interdistrict comparability . . . is itself a constitutional command. We have long since determined that 'unequal expenditures between children who happen to reside in different districts' do not violate the Equal Protection Clause." Missouri v. Jenkins, 495 U.S. 33, 76 (1990) (Kennedy, J., concurring) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973)).

One thing I would like you to respond to, Lou, is how Justice Thomas' opinions seem to reflect, in my opinion, almost a pathological self-hatred. He is constantly playing the race card, saying that programs designed to help victims of discrimination in fact have pinned on them the badge of racial inferiority.[112]

C. *Louis Bullock*

Justice Thomas' opinions were very articulate and had a power and a passion you do not see very often in Supreme Court decisions. This is especially true in *Jenkins*, where he began by blasting desegregation orders because he believes they carry an underlying presumption that every thing black is bad and all-black institutions are inferior.[113] He gets really passionate in *Adarand*, using very hot rhetoric to state his belief that affirmative race remedies hurt the very people they are intended to help.[114] In fact, he goes so far as to say that affirmative action is as morally repugnant as the racial discrimination and segregation of the past.[115]

I think Justice Thomas is having an effect. He not only gives more passion to Scalia, who has his own passion in these cases,[116] he seems also to be having a real impact on Justice O'Connor. In the past, Justice O'Connor has said that Justice Marshall had a very profound effect upon her view of racial discrimination in this country.[117] She found it very moving to hear him tell about separate restrooms, towns where there were no hotel rooms for blacks, and the

112. *E.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring); *Jenkins*, 115 S. Ct. at 2062 (Thomas, J., concurring).

113. *Jenkins*, 115 S. Ct. at 2062, 2064-66 (Thomas, J., concurring).

114. *See* quotations from Justice Thomas' *Adarand* opinion *supra* note 93.

115. I believe that there is a "moral [and] constitutional equivalence" . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race . . . to foster some current notion of equality.

. . .

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.

Adarand, 115 S. Ct. at 2119 (Thomas, J., concurring).

116. For example, Justice Scalia closes his *Adarand* opinion by stating:

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id.

117. *See* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217-20 (1992).

type of terror that they faced in southern cities.[118] Now we have Justice Thomas expressing outrage about constitutional remedies Justice O'Connor had thought were helpful to victims of discrimination. When you read her *Adarand* opinion, you begin to see that Justice Thomas' passion may have influenced her to emphasize how race conscious remedies may be dangerous.[119] This explains how we ended up getting strict scrutiny.

Doing psycho-babble on Justice Thomas always makes good after dinner conversation. He is still hurting, clearly, from the bruising of his nomination process and suggestions that he would not have been a Supreme Court Justice but for affirmative action. He seems to take this as personal criticism rather than recognizing that he and other very bright people would not have come to the surface if our racial policies had not changed. But, whatever you think of the man, clearly he is bright and capable.

D. *Gary Allison*

It saddens me that in his *Jenkins* opinion Justice Thomas all but accuses Justice Marshall of pursuing a theory of racial inferiority to win *Brown*.[120] In fact, he almost accuses Justice Marshall of pursuing a plan to mix the races out of belief that anything all black is inferior.[121]

Those who have studied *Brown* know Justice Marshall sought public school desegregation in part because he believed schools attended by minority children would continue to be underfunded unless whites had a stake in their quality.[122] More importantly, he sought integration because he believed segregation imposed a badge of slavery on African-American children, meaning it produced in African-

118. *Id.*

119. *See supra* note 93 for commentary about the area of agreement between Justices Thomas and O'Connor in *Adarand.*

120. *See* Missouri v. Jenkins, 115 S. Ct. 2038, 2062, 2064-66 (1995) (Thomas, J., concurring).

121. Justice Thomas states:

> [I]f separation itself is a harm, and if integration . . . is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a *jurisprudence based upon a theory of black inferiority.*

Id. at 2065-66 (emphasis added).

122. Thus, Justice Marshall stated in his 1952 *Brown* oral argument that separate but equal statutes "were unconstitutional in their enforcement" in part "because they . . . produced . . . inevitable inequalities in physical facilities." ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA 1952-55, at 37 (Leon Friedman ed., 1969).

American children inner feelings of inferiority that negatively affected their performances.[123] Justice Marshall tried to spotlight these effects to show that without integration we do not have a commitment to equal opportunity worthy of our Declaration of Independence.[124]

Finally, about the bantering back and forth in *Miller* between Justice Ginsburg and the majority on the issue of whether race is a permissible political identity; the majority said it is insulting to use race as a major factor in putting together a congressional district because it presumes that people of the same race have identical political views solely because of their race.[125] Justice Ginsburg answered that ethnicity is a matter of self-identity that has a long and storied history in the United States.[126] She further contends that ethnic identity largely transcends other identity factors such as class, social status, or employment.[127] Finally, she asks why every type of identity other than ethnic identity can be used in drawing congressional district lines?[128]

People ought to remember it was the Republican Justice Department that insisted upon the max-black strategy.[129] The strategy was a part of a Republican plan to dilute Democratic votes.[130] The plan has been very effective, because the overall number of Democrats elected to Congress from the South has declined precipitously as the number

123. In his 1952 *Brown* oral argument, Justice Marshall summed up expert testimony introduced at the district court regarding the psychic injuries produced by segregation by stating: "Negro children have road blocks put up in their minds as a result of this segregation, so that the amount of education that they take in is much less than other students take in." *Id.* at 38.

124. Justice Marshall made this point quite forcefully in his 1954 oral arguments in *Brown*, wherein he told the Court:

> [W]e submit the only way to arrive at this decision [against integration] is to find that for some reason Negroes are inferior to all other human beings.
>
> Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why of all of the multitudinous groups of people in this country you have to single out Negroes and give them this separate treatment.
>
> It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man.
>
> The only thing can be is an inherent determination that the people who were formerly in slavery . . . shall be kept as near that stage as is possible. and now is the time . . . that this Court should make it clear that is not what our Constitution stands for.

Id. at 239-40.

125. Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995).

126. *Id.* at 2504-05 (Ginsburg, J., dissenting).

127. *See id.*

128. *See id.*

129. The DOJ precleared Georgia's version of the max-black plan on April 2, 1992. *Id.* at 2484. This was on President Bush's watch.

130. *See* Jim Sleeper, *Rigging the Vote by Race*, WALL ST. J., Aug. 4, 1992, at A14.

of black Democratic Congressmen increased dramatically.[131] We should celebrate the increase in the election of African-Americans to Congress, but we should also realize that Republicans helped cause this through old fashioned political, rather than racial, gerrymandering.

E. *Louis Bullock*

That's right! You must get the most votes to win an election. One way of ensuring this is to get voters who may not vote for you out of your district. That is exactly what they did in *Miller*. The map drawing contest between the majority and the dissent was fun. First the majority gives its description of the Eleventh District, and you see this multi-hydra thing with arms snaking out and say: "Boy, those are some pretty long and skinny arms."[132] But then the dissent compares the Eleventh District to the especially long and skinny district shot down in *Shaw*,[133] and you begin to see the Eleventh District as looking very much like constitutionally drawn political districts look.

Oklahoma districts have looked like the one described in *Shaw*. Oklahoma Democrats historically tried to corral most of the Republican vote into one district (the Fifth Congressional District) by carving the wealthy precincts out of Oklahoma City and connecting them to Bartlesville with a narrow passage way snaking through Edmond, Enid, and Ponca City. Now Republicans are getting even. I think the Court is being a little bit disingenuous when it says Georgia abandoned the traditional ways of districting.

What concerns me most about *Miller* is the Court seeming to do its best to stifle debate about race by killing the outcome of reapportionment or other important activities if race was a significant factor.[134] Georgia's reapportionment plan would have been upheld if it had been viewed as gerrymandering Democrats. However, doing the same thing with African Americans, Chinese, Japanese or Hispanic voters is fatal.

---

131. In 1990, 59 percent of the House members from the 13 states stretching from Virginia to Texas were white Democrats. Now only 28 percent are, and there are none in Georgia and Louisiana. The proportion of seats held by Republicans has grown from 35 percent to 57 percent, while the Democrats who are members of minorities have increased their share from 6 percent to 15 percent.

Kevin Sack, *POLITICS: IN THE SOUTH; A Southern Democrat Resists The Lure of Party Switching*, N.Y. TIMES, Jan. 20, 1996, § 1.

132. *See Miller*, 115 S. Ct. at 2488-89, app. at 2495-96.

133. *See* Justice Ginsburg's description of the 11th District *supra* note 96.

134. *See Miller*, 115 S. Ct. at 2486.

We simply cannot address our race problems without talking about race. If the Court's view prevails, and politicians cannot talk about race, we might feel better temporarily—but racial hostility cannot be covered up in the long run. It is an infection that may lead to our demise, so we must talk about race and pass legislation that gives us all a voice to help bring us together.[135]

135. It appears that the African-American voice in Congress will soon become significantly weaker. For in a recent article, the Washington Post reported that a federal district court had reapportioned Georgia to provide only one majority-minority district, giving rise to fears among voting rights advocates and civil right leaders that *Shaw* and *Miller* will cause the African-American Congressman to become an endangered species. *ACLU to Appeal Decision Remapping Ga. Districts; Plan to Drop Majority-Black Areas 'Retrogressive'*, WASH. POST, December 15, 1995, at A3. The article notes that "[o]f the 37 current black U.S. House members, not including delegates from the District of Columbia and the Virgin Islands, only three represent districts that are not majority black: Reps. Ronald V. Dellums (D-Calif.), Gary A. Franks (R-Conn.) and J.C. Watts (R-Okla.)." *Id.* Under the Court's reapportionment plan, "[i]nstead of three majority-black districts with African American voting-age populations of 60 percent, 57 percent and 52 percent, the new map contains one majority-black district and six districts with black populations ranging from 23 percent to 35 percent." *Id.* According to the Washington Post, "[o]pponents of the plan said . . . the effect of the new map was to dilute black voting strength to make it easier for conservative white Democrats to get elected in Republican strongholds." *Id.*