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Constitutional Law: Racial and Political Gerrymandering--Different Problems Require Different Solutions

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Constitutional Law: Racial and Political Gerrymandering — Different Problems Require Different Solutions

The end of a decade is, in many respects, a noteworthy event, particularly when the end of a decade is also the end of a century and millennium. Much will undoubtedly be celebrated and written about such a historical event. For political office holders and pundits, however, the most anticipated event will likely be reapportionment of legislative districts.[1] This process, though routine, nevertheless has significant ramifications for political power in the United States. The reapportionment process begins with a census and ends — in most states — with the state legislature drawing district lines for congressional as well as State House and State Senate seats. Reapportionment has long been the subject of controversy. However, in recent years that controversy has heightened in part due to a technological explosion that provides district designers with more information than ever before.[2] This has increased the perceived risk of gerrymandering.

This comment discusses the gerrymandering problem, focusing on its two most significant varieties: racial and partisan gerrymandering. Part I of this comment looks at the history of reapportionment and gerrymandering in general and briefly reviews the historical Supreme Court approach to these problems. Parts II and III examine the seminal precedents dealing with political or partisan gerrymandering on the one hand and racial gerrymandering on the other. In doing so, these parts illustrate the Court's different approaches to these two related, but distinct problems. Moreover, this comment examines the Court's approach when confronted with a mixed gerrymandering case — that is, one that includes evidence of both political and racial gerrymandering. Finally, part IV of this comment suggests what the proper role of the judiciary should be in such disputes and urges the state legislature in Oklahoma to initiate action to establish a process that will forestall costly litigation and avoid future court intervention.

Throughout, a particular emphasis will be placed on how these issues confront Oklahoma. To outside observers, Oklahoma's political landscape must seem peculiar. On the one hand, Oklahoma's legislature is firmly ensconced — as it has been since statehood — in the hands of the Democratic Party.[3] On the other hand, Oklahoma also has the largest all Republican delegation in the U.S. Congress.[4] Because the

1. *See generally* BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE (1984)

2. For a description of the computer data available for redistricting, see Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word or Constitutional Principle? The Case in Maryland*, 54 MD. L. REV. 242, 245-46 (1995).

3. The Democrats currently hold a 64-37 edge over Republicans in the State House of Representatives and a 39-15 edge in the State Senate. For a description of the historical dominance of the Democrat Party in Oklahoma, see generally SAMUEL A. KIRKPATRICK ET AL., THE OKLAHOMA VOTER: POLITICS, ELECTIONS, AND PARTIES IN THE SOONER STATE (1977).

4. Both of Oklahoma's U.S. Senators and all six of Oklahoma's U.S. Representatives are Republican.

state legislature has the responsibility of drawing district lines, Republicans are naturally viewing the upcoming apportionment process with concern. Democrats will undoubtedly try to protect their domination of the state legislature. Additionally, they may attempt to place at least a couple of the Republican incumbents in Congress at increased risk of losing their congressional seat, perhaps even forcing them to run against one another. Regardless, a highly charged, partisan political atmosphere is virtually certain to prevail if changes in the redistricting process are not made.

I. History

A. Redistricting

Often, the terms apportionment and reapportionment are used synonymously with districting and redistricting. For the purposes of this comment, these terms will be used interchangeably because they are closely linked within the overall process. However, from a technical standpoint, the words apportionment and reapportionment apply to the allocation of a finite number of representatives among a fixed number of pre-established areas, while districting and redistricting refer to the actual drawing of district lines.[5]

Article I, Section 2 of the United States Constitution requires that members of the House of Representatives be apportioned among the states every ten years.[6] However, there is not a textual requirement for redistricting. States must redistrict either due to population shifts or as a result of gaining or losing congressional seats during reapportionment.

The historical practice of assigning responsibility to the state legislature for the redistricting of congressional seats, as well as the apportionment and redistricting of state seats, remains the dominant practice today. In forty-eight states, the state legislature draws the congressional lines.[7] Hawaii and Montana are the only two states which assign final approval authority for drawing congressional lines to appointed reapportionment commissions rather than the state legislatures.[8] In forty states, the state legislature is responsible for the drawing of state district lines.

Controversy over the apportionment process dates back to the earliest days of the republic. In fact, on April 5, 1792, President George Washington issued the country's first presidential veto in response to legislation which reapportioned seats in Congress based on the census of 1790.[9] Washington felt the bill allocated a disproportionate share of seats in Congress to the north and not enough to his native south.[10] The

5. *See* Bernard Grofman, *Criteria for Redistricting: A Social Science Perspective*, 33 UCLA L. REV. 77, 78, n.6 (1985) [hereinafter *Criteria for Redistricting*].

6. *See* U.S. CONST. art. I, § 2.

7. *See Criteria for Redistricting*, *supra* note 5, at 99-100 n.92-93.

8. *See* HAW. CONST. art. IV, § 3; MONT. CONST. art V, § 14.

9. *See* OFFICE OF THE SECRETARY OF THE SENATE, S. PUB. 102-12, PRESIDENTIAL VETOES, 1789-1988, at 1 (1992).

10. *See* DAVID C. WHITNEY, THE AMERICAN PRESIDENTS: BIOGRAPHIES OF THE CHIEF EXECUTIVES FROM WASHINGTON TO CLINTON 13 (8th ed. 1993).

House of Representatives was unable to override the veto and several months later passed another version of the plan that was acceptable to the President.[11]

The actual drawing of district lines, which is the task following apportionment, was bound to engender controversy as well. It soon did — in the form of the gerrymander.

B. Gerrymander

Judges and academics have defined political gerrymandering a number of different ways. Justice Powell defined it as "the deliberate and arbitrary distortion of district boundaries and populations for partisan and personal political purposes."[12] Another scholar defined it as "gaining through discretionary districting an unjustifiable advantage for one political party as opposed to the others."[13] A variety of other definitions have been offered by numerous authorities. Regardless of the source, the definitions all agree on one common idea, namely that "gerrymandering is the intentional manipulation of districting lines for political advantage."[14] An agreed upon definition is important. Ultimately, how one defines the problem will determine what constitutes a violation that may justify judicial intervention.

Controversy over the gerrymandering of district lines, like the controversy over apportionment discussed earlier, is certainly not a new phenomenon. In fact, the practice of drawing district lines in order to realize a political advantage dates back to at least the early nineteenth century. The term itself originated in 1812. That year, the Massachusetts legislature passed a plan to divide the state into districts for the election of state senators. The governor of Massachusetts at that time, Elbridge Gerry,[15] was accused of designing the district plan in order to benefit his political party, the Democratic-Republicans, and to defeat the opposition party, the Federalists.

Gerry designed a districting plan that grouped together certain counties which had substantial Federalist majorities. Under his plan, the Federalists would win some districts by huge margins; however, the Democratic-Republicans would win many more seats, even though by smaller margins. One of the districts was especially odd in shape. Some people described it as resembling a salamander. Thus, the term gerrymander was coined by combining the governor's name, Gerry, with the word salamander.[16]

There are a variety of techniques for partisan gerrymandering, but modern methods are remarkably similar to those employed by Governor Gerry in 1812. The goal of the party designing the district lines is to waste or stack the opposing party's votes

11. *See id.*

12. Karcher v. Daggett, 462 U.S. 725, 786 (1983) (Powell J., dissenting).

13. Charles Backstrom et al., *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN L. REV. 1121, 1129 (1978).

14. *See Criteria for Redistricting*, *supra* note 5, at 100 n.94.

15. Elbridge Gerry also served as vice-president of the United States under President James Madison in 1813 and 1814. In addition, he was a signer of the Declaration of Independence, a member of the Continental Congress, and a delegate to the Federal Convention of 1787. GEORGE A. BILLIAS, ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN 1-10 (1976).

16. *See id.* at 317.

(or more accurately the opposing party's registered voters). This is accomplished by designing districts where the opposition party forms majorities of substantially more than the 50% necessary to carry elections on straight party voting.[17] This practice is often referred to as "stacking" or "packing." Then, a large number of districts are created which are relatively safe for the majority party (perhaps 55% registration). Thus, the opposition party's votes are split in such a way that even if it wins a majority of the votes statewide it may fall short on claiming a majority of the legislative seats.[18] The latter practice is referred to as "cracking" because the majority party's registered voters are dispersed in such a way as to achieve maximum effectiveness.

Racial gerrymandering uses similar techniques and devices as partisan gerrymandering. It differs only in the factors employed by district designers. In racial gerrymandering, the determinative factor is the voter's race or ethnicity rather than what political party the voter has registered with.

In contrast to partisan gerrymandering, however, racial gerrymandering is a more recent phenomenon. It was first used, in addition to a variety of voter registration obstacles, as a way of depriving minorities of the opportunity to vote. More recently, states have used racial gerrymandering in the exact opposite form. That is, state district designers, with encouragement from the Justice Department, have constructed districts in which a majority of the voters are from a racial minority class. This ensures that — in a situation where racial bloc voting occurs — racial minorities have enough votes to elect a member of their own race to office. Advocates for this form of racial gerrymandering claim that it is an indispensable method for remedying past discrimination.

II. Types of Gerrymandering

A. Political

1. Background

Historically, courts have avoided intervening in political gerrymandering cases.[19] One reason is pragmatic. Because most states place the responsibility for reapportionment in the hands of state legislators, the reapportionment process is inherently political in nature. The United States Supreme Court has only recently entered the "political thicket."[20] Over the last forty years, the Court has become more engaged in this area, although mostly in terms of ensuring population equality between districts.

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17. *See* ELMER C GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 21 (1907).

18. *See id.*

19. *See generally* BERNARD GROFMAN, POLITICAL GERRYMANDERING AND THE COURTS 11-25 (1990).

20. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946). This term was included in Justice Frankfurter's warning that judicial oversight of the political process was not possible.

For example, in *Reynolds v. Sims*,[21] the Supreme Court invalidated, under the Equal Protection Clause, the apportionment plan for Alabama, which created electoral districts with significant disparities in population.[22] The wide disparity in population between districts meant that some individuals' votes were worth more than others'.[23] The Court said that the right to vote is a fundamental matter in a democratic society and helps preserve other basic and civil rights.[24] Therefore, the Court established the one-person, one-vote principle and made clear that it would tolerate only minimal deviation from this standard.[25] This initial foray into the "political thicket," although on a strictly quantitative level, encouraged those who believed the next step should be judicial review of state apportionment plans using qualitative standards.[26]

Notably, Oklahoma had its apportionment plan invalidated as well. In fact, the state was one of the most malapportioned in the country, with rural interests dominating urban areas.[27] Despite a pitched battle over apportionment within the Oklahoma Democratic Party, the state did not remedy the apportionment problem until compelled to by the courts.[28]

The plaintiff in *Gaffney v. Cummings*[29] sought to invalidate Connecticut's 1971 apportionment plan on other than strictly numerical grounds, alleging the plan was a purely political gerrymander that violated the Fourteenth Amendment's Equal Protection Clause.[30] The Court rejected the opportunity to rule on partisan gerrymandering grounds, commenting that "[p]olitics and political considerations are inseparable from districting and apportionment."[31] On the other hand, the Court said that redistricting plans were not entirely immune from judicial scrutiny under the Fourteenth Amendment and that a plan which "fenced out" political groups by invidiously minimizing their voting strength could be vulnerable.[32]

In 1982 the Court considered the case of *Karcher v. Daggett*.[33] The plaintiffs in *Karcher* alleged blatant partisan gerrymandering in the construction of New Jersey's districting plan.[34] The Court affirmed a lower court's invalidation of the New Jersey

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21. 377 U.S. 533 (1964).

22. *See id.* at 566.

23. *See id.* at 559.

24. *See id.* at 562.

25. *See id.* at 568.

26. This decision had the effect of invalidating many state laws similar to Alabama's that led to malapportionment. *See* RICHARD D. BINGHAM, REAPPORTIONMENT OF THE OKLAHOMA HOUSE OF REPRESENTATIVES: POLITICS AND PROCESS 3 (1972) (identifying Oklahoma as one of the worst-apportioned states in the nation at the time of the Supreme Court malapportionment decisions).

27. *See* JAMES R. SCALES & DANNEY GOBLE, OKLAHOMA POLITICS: A HISTORY 303 (Univ. of Oklahoma Press 1982).

28. *See id.* at 322-33.

29. 412 U.S. 735 (1973).

30. *See id.*

31. *Id.* at 752-53.

32. *See id.* at 754.

33. 462 U.S. 725 (1983).

34. This was actually the plaintiff's alternative argument. The primary argument the plaintiff's made was that the redistricting plan violated Article I, Section 2 of the Constitution. *Karcher*, 462 U.S. at 744-45 (Stevens, J., concurring).

legislature's apportionment plan, but did so on the basis of a very minor population deviation, not on partisan gerrymandering grounds.[35] Nonetheless, the Court attached copies of the districting map to their opinion and commented disapprovingly on the bizarrely shaped districts.[36]

2. Davis v. Bandemer

Four years later, the court confronted the issue of partisan gerrymandering anew in the landmark case of *Davis v. Bandemer*.[37] In *Davis*, the United States Supreme Court, for the first time, found justiciable a purely political gerrymandering claim.[38] Furthermore, the Court determined that partisan gerrymandering of district lines resulting in vote dilution may be found unconstitutional under the Equal Protection Clause.[39]

In *Davis*, the plaintiffs challenged Indiana's 1981 reapportionment plan under the Fourteenth Amendment's Equal Protection Clause.[40] The plaintiffs argued the plan, although it satisfied the technical requirements of the one-person, one-vote principle,[41] was intended to, and did, constitute a political gerrymander designed to disadvantage Democrats.[42] In their view, the specific design of the districts as well as the mix of single voter and multimember districts violated their right to equal protection.

The Indiana plan was a result of the 1981 apportionment process.[43] At that time, Republicans controlled both chambers of the Indiana legislature, known as the General Assembly.[44] The governor of the state was also a Republican.[45] The Conference Committee, formed to complete the redistricting plan, likewise consisted entirely of Republicans. Although the Democrats were allowed to submit an alternative redistricting plan, the Republican proposal passed on a party line vote and was signed into law by the governor.[46] The redistricting plan was thus undeniably constructed and passed on a strictly partisan basis.

In 1982, the first elections under the apportionment plan were held. The Democrats, despite receiving 53.1% of the vote for state house races statewide, won only 43 of 100 seats.[47] In addition, in two counties that the Republicans had formed

35. *See id.* at 725-26.
36. *See id.* at 744.
37. 478 U.S. 109 (1986).
38. *See id.* at 113.
39. *See id.* at 124.
40. At the time there were Republican majorities in the Indiana House and Senate. The governor was also Republican. *Davis*, 478 U.S. at 113.
41. The population deviation for state senate seats was 1.15% and for the House was 1.05%. *Id.* at 114.
42. *See id.* at 115.
43. *See id.* at 113.
44. *See id.*
45. *See id.* at 113-14.
46. *See id.* at 114 n.2.
47. *See id.* at 115.

into multimember districts, Democrats won only three of twenty-one possible seats despite drawing over 46% of the vote.[48]

In 1984, a divided three-judge district court panel sustained the Democrat plaintiffs' equal protection challenge, finding that the 1981 apportionment plan unconstitutionally diluted the votes of Indiana Democrats.[49] The district court majority reasoned the 1982 election results supported the notion that the apportionment plan had a built-in bias in favor of Republicans.[50] The court also ordered the legislature to prepare a new plan.[51] The Supreme Court reversed, finding insufficient evidence to sustain the district court's conclusion that the plan constituted an illegal gerrymander.[52]

Justice White, writing for the Court, addressed the justiciability issue first. The plaintiff's claim was described as whether "each political group in a State should have the same chance to elect representatives of its choice as any other political group."[53] In finding such a claim justiciable, White reasoned that the Court had long accepted racial gerrymandering cases and found no basis for finding one type of gerrymandering claim justiciable and the other not.[54]

In addition, White noted that the Court had consistently adjudicated equal protection claims in the legislative districting context with regard to inequalities in population between districts.[55] In Justice White's view, the mere absence of a mathematical formula, such as the one-person, one-vote principle the Court fashioned to deal with malapportionment cases, did not make purely partisan gerrymandering cases non-justiciable.[56]

Justice White stressed, however, that the intentional drawing of district boundaries for partisan ends and for no other reason did not in and of itself, violate the Equal Protection Clause.[57] The court found that a partisan political gerrymander violates the Equal Protection Clause only when there is evidence of "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[58]

The Court acknowledged that there was evidence to support a finding of discriminatory intent in the Indiana plan.[59] However, Justice White found that the district court erred in its analysis of the effects prong of the test for discriminatory gerrymandering. The Court stated: "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole."[60] Here, the Court

48. *See id.*
49. *See id.*
50. *See id.* at 116.
51. *See id.* at 115.
52. *See id.* at 113.
53. *Id.* at 124.
54. *See id.* at 125.
55. *See id.* at 118.
56. *See id.* at 123.
57. *See id.* at 138.
58. *Id.* at 127.
59. *See id.*
60. *Id.* at 132.

disapproved of the lower court's reliance on a single election to prove that the Indiana redistricting plan was unconstitutional.[61] Instead, the Court said a finding of unconstitutionality "must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."[62] Thus, "a prima facie case of illegal discrimination in reapportionment requires a showing of more than a *de minimis* effect."[63] The effects must be "sufficiently serious" in order to justify federal court intervention.[64]

The court further commented that an apportionment plan is not unconstitutional just because it makes winning elections more difficult. "[A] failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause."[65] Thus, while finding the plaintiffs' gerrymandering claim justiciable and finding evidence of discriminatory intent, Justice White nevertheless concluded that the district court erred in not applying a sufficiently exacting standard for testing whether an unconstitutional gerrymander had occurred in the instant case.

Justice O'Connor, joined by Justice Rehnquist and Chief Justice Burger, concurred in the Court's judgment, but declined to join the plurality's decision because the claim was, in their view, a non-justiciable political question.[66] First, Justice O'Connor explained that the Framers unquestionably intended for issues of partisan gerrymandering to be resolved by the legislative branch.[67] Moreover, O'Connor maintained the equal protection clause does not supply judicially manageable standards for adjudicating purely partisan gerrymandering claims.[68] O'Connor also complained that the Court was starting down a road where there was no clear stopping point short of requiring proportional representation.[69] Justice O'Connor reasoned that "(i)mplicit in the plurality's opinion today is at least some use of simple proportionality as the standard for measuring the normal representational entitlements of a political party."[70] In other words, the Justice believed courts would be forced to examine voter registrations in order to determine whether partisan gerrymandering had occurred.

Justice O'Connor distinguished the claim in *Davis* from the one-person, one-vote apportionment line of cases which the Court had previously ruled justiciable. According to Justice O'Connor the rights asserted in the apportionment cases were individual rights.[71] In contrast, the rights asserted in Davis were "*group* rights to an

61. *See id.* at 135.
62. *Id.* at 133.
63. *Id.* at 134.
64. *See id.*
65. *Id.* at 132.
66. *See id.* at 144 (O'Connor, J., concurring).
67. *See id.*
68. *See id.* at 147.
69. *See id.* at 145.
70. *Id.* at 157.
71. *See id.* at 149.

equal share of political power and representation."[72] Justice O'Connor maintained the Framers of the Fourteenth Amendment never intended to guarantee such a group right.[73]

Justice O'Connor also distinguished the justiciability of racial gerrymandering claims from the purely partisan gerrymandering claim made in *Davis*. Justice O'Connor found racial gerrymandering cases justiciable because of a "stronger nexus between individual rights and group interests, and the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination."[74]

Justice Powell, joined by Justice Stevens, concurred on the justiciability question, but dissented from the judgment. In their view, gerrymandering violated the Equal Protection Clause when the redistricting plan served "no purpose other than to favor one segment — whether racial, ethnic, religious, economic, or political — that may occupy a position of strength at a particular time, or to disadvantage a politically weak segment of the community."[75]

Justice Powell reasoned that the Equal Protection Clause guarantees citizens that their state will govern them impartially.[76] Because the shape of legislative districts may have a powerful impact on a citizen's ability to exercise political influence through his vote, Justice Powell believed that district lines must be drawn in accordance with neutral and legitimate criteria.[77]

The focus of the test for determining whether a redistricting plan was unconstitutional gerrymandering should therefore be "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends."[78] In Justice Powell's opinion this test could be determined by "reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting."[79]

3. Summary of Court's Views on Davis

a) Justice White's Plurality Decision

The plurality decision, representing four Justices' views, found a suit alleging purely political gerrymandering justiciable. Justice White rejected the notion that such a claim was subject to the political question doctrine and compared the partisan gerrymandering claim favorably to apportionment cases and racial gerrymandering cases. Further, the plurality held that partisan gerrymandering of the redistricting process may violate the Equal Protection Clause of the Fourteenth Amendment.

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72. *Id.*
73. *See id.* at 147.
74. *Id.* at 151.
75. *Id.* at 164 (quoting Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring)).
76. *See id.* at 166.
77. *See id.*
78. *Id.* at 165.
79. *Id.*

However, Justice White defined the test for determining unconstitutionality as requiring: (1) a showing of intent; and (2) evidence that the redistricting had an actual effect of depriving a group of political access. The effects prong could not be measured by a single election; rather, plaintiffs must show their group is consistently deprived of political access. Thus, the district court's ruling, which apparently relied on the results of a single election, was overruled.

b) Justice O'Connor's Opinion

Justice O'Connor, as well as two other justices, concurred in the judgment, but denied that a purely partisan gerrymandering claim was justiciable by the Court. O'Connor distinguished the apportionment line of cases and racial gerrymandering cases — which she granted were justiciable — from partisan political gerrymandering cases.

In her view, apportionment cases dealt with the rights of an individual voter. In contrast, she portrayed political gerrymandering claims as dealing with the question of whether a political group has a right to a certain amount of political power.

O'Connor found racial gerrymandering claims distinguishable from political gerrymandering because racial gerrymandering claims had more of a nexus between individual rights and group rights. Also, racial gerrymandering claims included the element of racism which is undeniably justiciable under the Equal Protection Clause. Finally, Justice O'Connor claimed there were no judicially determined standards for resolving political gerrymandering claims. She feared the courts would inevitably require a type of proportional representation.

c) Justice Powell's Opinion

Justice Powell and Justice Stevens agreed with the plurality on the justiciability issue, but disagreed with its characterization of the right guaranteed by the Fourteenth Amendment's Equal Protection Clause. These justices appear to view the drawing of district boundaries for partisan reasons as violating the Equal Protection Clause in and of itself. Thus, they would require states to adhere strictly to neutral criteria in the redistricting process.

4. The Oklahoma Experience

a) Background

The Democratic party has dominated Oklahoma politics for much of the state's history. In fact, the Democrats have drawn every redistricting plan the state has had. Until recently, there was comparably little controversy, however. The supremacy of the Democrats was so complete that it made little difference to their electoral success — and the Republicans lack of it — where the district lines were drawn.[80] That supremacy has changed significantly over the last two decades.

80. *See supra* note 3 and accompanying text.

b) Partisan Gerrymandering

The reapportionment of congressional seats following the 1980 census provides a case study of partisan political gerrymandering. In the 1980 reapportionment plan, Oklahoma Democrats redrew the Fifth Congressional District in an odd way. Prior to 1980, the Fifth Congressional District was confined to Oklahoma County.[81] It was also represented by the state's sole Republican representative — Mickey Edwards.

Following redistricting, the Fifth Congressional District included the heavily Republican areas of Oklahoma County, then proceeded north to the Kansas border before veering east to snare the Republican stronghold of Bartlesville.[82] The apparent motive of the district designers was to make the Fifth District a Republican district by cramming as many Republican voters into the district as possible. The effect of all this was to create one very safe Republican seat, but also theoretically to create safer seats for the remaining Democrat incumbents by increasing the Democratic party registration margin in their favor.[83]

The Oklahoma Republican Party launched an effort to overturn the apportionment plan by pushing an initiative petition which would have rejected the Democrat plan.[84] The voters narrowly rejected this petition by a 52%-48% margin.[85] "That left a collection of districts that look like Rorschach ink blots gone wild."[86] Thus, despite the protests from the Republican party — although not from Representative Edwards, who gained the benefit of a very safe seat — the redistricting plan stood.

The futility of the Democrats' efforts to gerrymander the Fifth Congressional District is evidenced by the current composition of Oklahoma's congressional delegation. The Democrats eventually lost all five "safe" Democrat seats, including "little Dixie" — an overwhelmingly Democrat district comprising most of southeastern Oklahoma.[87] Despite maintaining a substantial advantage in party registration within the state,[88] Oklahoma's Democratic Party today is the largest in the nation that lacks any representation by a party member in the U.S. Congress.

Of interest, Republicans at the national level actually conducted something of their own Oklahoma gerrymander as well.[89] At statehood, Congress had the responsibility of the initial districting. Republicans were the majority party in the U.S. Congress at the time and drew the initial district lines in a way that gave Republicans a chance

81. *See* Kirkpatrick, *supra* note 3, at 161.

82. *See* ATLAS OF OKLAHOMA 129-30 (Tom Wickle ed., 1991).

83. *See* STEFFEN W. SCHMIDT, AMERICAN GOVERNMENT AND POLITICS TODAY (1989) (citing Oklahoma's 5th Congressional District as an example of a gerrymandered district).

84. *See* David Zizzo, *Redistricting to Sketch Fate of State Politics for Decade*, DAILY OKLAHOMAN (Oklahoma City), Oct. 29, 1990, at 1.

85. *See id.*

86. *Id.*

87. This district has a heavily Democratic registration and is also the district which former Speaker of the House Carl Albert represented. *See* CARL B. ALBERT, LITTLE GIANT: THE LIFE AND TIMES OF SPEAKER CARL ALBERT 142-49 (1990).

88. The current registration in the state is 58% Democrat and 35% Republican. Telephone Interview with Oklahoma State Election Board (June 24, 1998).

89. *See* SCALES & GOBLE, *supra* note 27, at 31.

to win three of the five seats.[90] This effort also failed, as the Democrats won four of the five races.[91]

B. Racial Gerrymandering

1. Background

Modern Supreme Court jurisprudence regarding race and political power began following World War II as black military veterans returned home and the civil rights movement began. In a renewed effort to block growing black voter registration, many states increasingly resorted to literacy tests or tests which required the interpretation of a section of the State or U.S. Constitution.[92] These twin pressures — increased insistence by minorities that they have political access versus the intransigence of some states in allowing racial minorities electoral opportunity — soon embroiled the federal courts in adjudicating claims that minority voters were intentionally and systematically being deprived of the opportunity to participate in the political process.

In 1960, the Supreme Court considered a case involving the use of racial gerrymandering in denying minorities political access. In *Gomillion v. Lightfoot*,[93] petitioners, registered black voters, challenged a 1957 Act of the Alabama legislature which redrew the city limits of Tuskegee, Alabama.[94] The resulting boundaries changed the appearance of the city limits from a square to an "uncouth twenty-eight-sided figure."[95] In the process, nearly 400 black citizens were removed from the city limits and thus deprived of their right to vote in city elections. In contrast, not a single white voter or resident was removed from the city limits as a result of the Act.[96] Thus, the legislation appeared to be "solely concerned with segregating white and [black] voters."[97] The Supreme Court held that the Alabama Act constituted an impermissible interference with the right to vote guaranteed by the Fifteenth Amendment.[98] The Court also concluded the state's power to draw city boundaries was limited by the individual rights guaranteed by the Constitution.[99]

In 1965, Congress passed the Voting Rights Act[100] (VRA) in an effort to deal with state practices which interfered with the voting rights of minorities. The "VRA," as originally passed, was primarily aimed at ensuring minority access to the ballot

90. *See id.*

91. *See id.*

92. For additional details on these practices and the resulting federal litigation, see United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965); United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd*, 380 U.S. 128 (1965).

93. 364 U.S. 339 (1960).

94. Local Act No. 140, passed by the Alabama legislature in 1957. *Gomillion*, 364 U.S. at 340.

95. *Id.*

96. *See id.* at 341.

97. *Id.*

98. *See id.* at 345.

99. *See id.* at 344-45.

100. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973 bb-1 (1994)).

box by removing the obstacles to minority voter registration and voting.[101] The principal sections of the VRA which accomplished this goal were sections two, four, and five.

Section 2 prohibited certain electoral practices and procedures which infringed on the ability to vote based on race or color.[102] Section 4 struck down any tests or procedures in voter registration which were promulgated by any state with less than 50% of eligible voters registered.[103] This, not coincidentally, included virtually all southern states.[104] Section 5 required states to gain the approval of the U.S. Attorney General or the U.S. District Court for the District of Columbia for "any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting."[105]

Over the next couple of decades, amendments to the VRA extended the Act beyond its original purpose of removing obstacles to minority voter participation. Congress passed amendments to the VRA in 1982 that were aimed at affirmatively ensuring minority political representation.[106] Many interpreted this amendment as requiring the creation of so-called majority-minority districts. Majority-minority districts are those districts whose boundaries are drawn to ensure that a racial minority comprises a majority of the overall population in the district. The extent to which state legislatures went to accomplish this goal following the 1990 reapportionment process has created much of the recent litigation regarding racial gerrymandering.[107]

2. Shaw

The first major case involving the creation of majority-minority districts was *Shaw v. Reno (Shaw I).*[108] Following the 1990 census, North Carolina became eligible for an additional congressional seat. The North Carolina Legislature passed a redistricting plan, but the United States Department of Justice rejected it. The Assistant Attorney General for Civil Rights, acting for the U.S. Attorney General, felt a second majority black district should be created in the state.

Subsequently, North Carolina created a second majority- minority district.[109] The district was described as "approximately 160 miles long and for much of its length no wider than the I-85 corridor. It winds in snake like fashion through tobacco

101. *See* Jeffrey G. Hamilton, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1526 (1994).

102. *See* 42 U.S.C. § 1971 (1994).

103. *See id.* § 1973b(b).

104. 28 C.F.R. 1951 app. to pt. 51 (July 1995) for a complete list of affected jurisdictions.

105. 42 U.S.C. § 1973c (1994).

106. *See* Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

107. *See also* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986) (holding that to prevail on a claim under the Voting Rights Act the plaintiff must show: (1) that the minority group is sufficiently large and compact to constitute a majority in a single-member district; (2) that the minority group is "politically cohesive" and (3) that the white majority votes sufficiently in a bloc to enable it . . . usually defeat the minority's preferred candidate).

108. 509 U.S. 630 (1993).

109. *See id.* at 633-34.

country, financial centers and manufacturing areas until it gobbles up enough enclaves of black neighborhoods."[110] One North Carolina legislator commented that "if you drive down the interstate with both doors open, you'd kill most of the people in the district."[111]

Justice O'Connor wrote for the Court, holding that even so-called "benign" racial gerrymandering may violate the Equal Protection Clause of the Fourteenth Amendment.[112] Without ruling on the merits, the Court held that petitioners, white North Carolina voters, stated a claim by challenging the 1990 North Carolina redistricting plan on racial gerrymandering grounds.[113] The Court clarified its opinion that racial gerrymandering is subject to strict scrutiny whether the motive for the classification is benign, remedial or invidious.[114]

The Supreme Court remanded the case to the district court to consider the petitioners' claim. On remand, the district court determined that, although the North Carolina plan did classify voters based on race, the redistricting plan was nevertheless permissible because it was narrowly tailored to serve compelling state interests.[115] The Supreme Court considered the case again in *Shaw II* and reversed the district court's decision.[116] Chief Justice Rehnquist, writing for the Court, held that the districting plan was not narrowly tailored and therefore violated the Equal Protection Clause.[117]

a) Chief Justice Rehnquist's Opinion

Chief Justice Rehnquist first reiterated that racial gerrymandering schemes, like all laws that classify citizens on the basis of race, are constitutionally suspect, regardless of the motivation for the classification.[118] "Racial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'"[119] However, mere awareness of voters' races by the legislature is not unconstitutional.[120] The constitutional wrong occurs when race becomes the dominant and controlling consideration for assigning voters to districts.[121]

Chief Justice Rehnquist examined several factors in determining that the redistricting plan was explainable only on the basis of race. First, the Chief Justice pointed out the circumstantial evidence, which included the extremely bizarre shape of the districts as well as the obvious racial considerations in the district's

110. *Id.* at 635-36.
111. *Id.*
112. *See id.* at 649.
113. *See id.* at 657.
114. *See id.* at 642-43.
115. *See* Shaw v. Hunt, 861 F. Supp. 408, 417 (E.D.N.C. 1994).
116. Shaw v. Hunt, 116 S. Ct. 1894 (1996).
117. *See id.* at 1899.
118. *See id.* at 1900 (referring to Miller v. Johnson, 115 S. Ct. 2475, 2482-83 (1995)).
119. *Id.* at 1902.
120. *See id.* at 1901.
121. *See id.*

demographics.[122] In addition, the Court noted direct evidence, in particular, North Carolina's acknowledged intent to create a majority black district.[123] North Carolina justified its plan in three ways. First, the state argued the plan was necessary to remedy past and present discrimination.[124] Second, North Carolina perceived a need to create a majority-minority district in order to comply with section two of the amended Voting Rights Act.[125] Finally, the state said its redistricting plan was necessary to comply with section five of the Act.[126]

Chief Justice Rehnquist acknowledged that "(a) State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions."[127] However, the Chief Justice stated that efforts to craft remedies for general societal discrimination are impermissible because such a generalized assertion "provides no guidance to a legislative body to determine the precise scope of the injury it seeks to remedy."[128] Instead, a party must allege an identified instance of discrimination.[129] Beyond that issue, the Chief Justice pointed out the district court's conclusion that ameliorating past discrimination was not the basis on which the second black majority district was created.[130]

Rehnquist also rejected the notion that North Carolina's redistricting plan was required in order to meet the Justice Department's preclearance demands under section five of the Voting Rights Act. The Chief Justice said the creation of a second majority-minority district was not required under a correct reading of the Voting Rights Act.[131] A state cannot violate section five unless the new apportionment plan discriminates on the basis of race or color in a way that violates the Constitution.[132] Rehnquist found no evidence of a racial bias in the initial North Carolina redistricting plan rejected by the United States Department of Justice.[133]

Further, the majority rejected the Justice Department's "expansive" interpretation of section five, which was illustrated with the following comment by an Assistant Attorney General to a North Carolina legislator: "(Y)ou have twenty-two percent black people in this State, you must have as close to twenty-two percent black Congressmen, or black Congressional districts in this State."[134] The Court found that this so-called maximization principle was not properly grounded in section five and therefore the Department of Justice expanded its authority beyond what Congress intended.[135]

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122. *See id.*
123. *See id.*
124. *See id.* at 1902-03.
125. *See id.*
126. *See id.*
127. *Id.* at 1902.
128. *Id.* at 1902-03.
129. *See id.* at 1902.
130. *See id.* at 1903.
131. *See id.*
132. *See id.* at 1904.
133. *See id.*
134. *Id.*
135. *See id.*

Chief Justice Rehnquist next addressed North Carolina's assertion that the creation of a second majority-minority district was necessary to comply with section two of the Voting Rights Act. Rehnquist first articulated the standard for finding a section two violation. "Our precedent establishes that a plaintiff may allege a section 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population."[136]

To prevail on such a claim, the plaintiff must establish: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single member district"; (2) "that the minority group is politically cohesive"; and (3) that the white majority votes as a bloc to defeat the minority's preferred candidates.[137] The majority found the second majority-minority district failed to meet these requirements.

The Court reasoned that "[n]o one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race."[138] North Carolina argued that, once a section 2 violation is found, states may draw the majority district anywhere. The Court labeled this argument "singularly unpersuasive."[139] Chief Justice Rehnquist noted that such a position "would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish the goal."[140] He further explained that such a view resulted from a misconception of the right to an undiluted vote as belonging to the minority as a group and not to its individual members.[141]

b) Justice Stevens' Dissent

Justice Stevens began his dissent by stating that the "Court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided."[142] Stevens distinguished between those activities that encourage minority participation in the political process from those that are oppressive or exclusionary.[143]

Stevens also argued that strict scrutiny should not apply when a state adheres to traditional districting principles.[144] Justice Stevens identified two such traditional criteria at work in *Shaw*. First, Stevens asserted that North Carolina had an interest in creating one urban and one rural district.[145] Second, Stevens points out that

136. *Id.* at 1905.
137. *Id.*
138. *Id.* at 1906.
139. *Id.*
140. *Id.*
141. *See id.*
142. *Id.* at 1906 (Stevens, J., dissenting).
143. *See id.*
144. *See id.* at 1915 (citing to Bush v. Vera, 116 S. Ct. 1941, 1962 (1996)).
145. *See id.* at 1916.

partisan gerrymandering was at work as well.[146] Justice Stevens noted that North Carolina Republicans initially submitted a reapportionment plan with two majority-minority districts, but this plan was rejected by the Democrats because it created too many districts with a majority of registered Republicans.[147]

Of note, the majority agreed with Justice Stevens that interests, other than race, were involved in developing North Carolina's districting plan. Nevertheless, the majority held that race was clearly the dominant consideration and as such strict scrutiny applied.[148]

3. Bush v. Vera

Another racial gerrymandering case, *Bush v. Vera*,[149] was released the same day as *Shaw II*. In *Bush*, petitioners challenged several districts created following the 1990 reapportionment in which Texas gained three congressional seats. By the same 5-4 vote, a badly split court found the new district lines were drawn with race as the predominant factor.[150] Therefore, the districts were subject to strict scrutiny. Justice O'Connor reasoned: "[R]acial stereotyping that (has been) scrutinized closely in the context of jury service can pass without justification in the context of voting. If the promise of the Reconstruction Amendments, that our nation is to be free of state-sponsored discrimination, is to be upheld, we cannot pick and choose between the basic forms of political participation in our efforts to eliminate unjustified racial stereotyping by government actors."[151]

The Court considered several factors — the bizarre shape of the districts, the state's intent, the impact of nonracial factors — before concluding that the Texas redistricting plan constituted an impermissible racial gerrymander. One of the districts in question was District 29, which was described as

> a sacred Mayan bird with its body running eastward along the Ship Channel from downtown Houston until the tail terminates in Baytown. Spindly legs reach south to Hobby Airport, while the plumed head rises north almost to Inter-continental. In the western extremity of the district, an open beak appears to be searching for worms in Spring Branch. Here and there, ruffled feathers jut out at odd angles.[152]

The district was constructed with "utter disregard for city limits, local election precincts, and voter tabulation district lines."[153]

A total of 60% of the district residents lived in split precincts which resulted in substantial difficulties in carrying out political activities. "Campaigners seeking to visit their constituents 'had to carry a map to identify the district lines, because so

146. *See id.*
147. *See id.*
148. *See Shaw II*, 116 S. Ct. at 1901.
149. 116 S. Ct. 1941 (1996).
150. *See id.* at 1957.
151. *Id.* at 1956.
152. *Id.* at 1959.
153. *Id.*

often the borders would move from block to block'; voters 'did not know the candidates running for office' because they did not know which district they lived in."[154] Justice O'Connor found the shape of the challenged districts unexplainable in any terms other than race.[155] In District 30, "the intricacy of the lines drawn, separating Hispanic voters from African-American voters on a block-by-block basis, betrays the critical impact of . . . racial data . . . ."[156]

Additionally, she found significant that the computer program used in the redistricting plan was significantly more sophisticated with respect to race, providing racial data at the city block level, than with respect to other demographic data.[157] This, in O'Connor's view, provided substantial evidence that racial considerations dominated traditional districting criteria. Finally, O'Connor cited text from Texas' submission of its redistricting plan to the Justice Department as direct evidence that race was a dominant criteria in the drawing of district lines.[158] Consequently, the Texas redistricting plan was found to be constitutionally infirm.[159]

Texas offered defenses similar to those offered by North Carolina in *Shaw II*, including a defense based on section 5 of the Voting Rights Act. In particular, Texas relied on the "nonretrogression" principle because one of the challenged congressional districts had for two decades been represented by an African-American.[160] Justice O'Connor responded by making clear that the nonretrogression principle "is not a license for the State to do whatever it deems necessary to insure continued electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished."[161]

Justice O'Connor also addressed the dissenting justices' opinion that strict scrutiny was an inappropriate standard for a racial classification that was "benignly motivated" as opposed to involving "racial subjugation."[162] O'Connor stated that the strict scrutiny standard is applied to racial classifications "precisely because that scrutiny is necessary to determine whether they are benign . . . or whether they misuse race and foster harmful and divisive stereotypes."[163]

Notably, however, there was disagreement among the justices who formed the majority over whether strict scrutiny would apply to every intentional creation of a majority-minority district. Justices O'Connor and Rehnquist suggested that strict scrutiny would not apply in all cases, but only to situations where race was "the predominant factor."[164] Justice Kennedy wrote a concurring opinion clarifying that

154. *Id.*
155. *See id.* at 1952.
156. *Id.* at 1959.
157. *See id.* at 1953.
158. *See id.* at 1952-53.
159. *See id.* at 1951.
160. *See id.* at 1963.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 1953.

he would not be bound by such dicta.[165] Justice Thomas, joined by Justice Scalia, wrote that strict scrutiny should be applied to any state-imposed racial classification.[166]

Of interest, Justice O'Connor also wrote a separate concurring opinion that clarified how she viewed the relationship between section 2 of the Voting Rights Act and the *Shaw* and *Bush* decisions on racial gerrymandering.

> Although I agree with the dissenters about section 2's role as part of our national commitment to racial equality, I differ from them in my belief that that commitment can and must be reconciled with the complementary commitment of our Fourteenth Amendment jurisprudence to eliminate the unjustified use of racial stereotypes. At the same time that we combat the symptoms of racial polarization in politics, we must strive to eliminate unnecessary race-based state action that appears to endorse the disease.[167]

Justice Stevens, joined by Justice Ginsburg and Justice Breyer, dissented from the majority's ruling for two reasons. First, Justice Stevens disagreed with the majority's determination on the appropriate level of scrutiny.[168] In his view, the majority focused exclusively on the role of race in the drawing of district lines and ignored the political and geographical considerations that entered into the creation of the new congressional districts.[169] Justice Stevens pointed to several predominantly white congressional districts that were also oddly shaped as a result of the 1990 reapportionment.[170] Given the political and geographical factors at work in the reapportionment, Justice Stevens concluded that the Texas plan was a political rather than a racial gerrymander and that the court should have applied rational basis scrutiny.[171]

Justice Stevens also stated that the Texas plan should have passed Constitutional muster even under a strict scrutiny analysis. "I would find these districts constitutional, for each considers race only to the extent necessary to comply with the State's responsibilities under the Voting Rights Act while achieving other race-neutral political and geographical requirements."[172]

4. The Oklahoma Experience

a) Background

Oklahoma's historical experience, like that of many southern states, includes its own sordid racial politics, including substantial efforts at preventing black voters from participating in the political process. In the elections of 1908, one year after

165. *See Bush*, 116 S. Ct. at 1971 (Kennedy, J., concurring).
166. *See id.* at 1973 (Thomas, J., concurring).
167. *Bush*, 116 S. Ct. at 1969 (O'Connor, J., concurring).
168. *See Bush*, 116 S. Ct. at 1974 (Stevens, J., dissenting).
169. *See id.*
170. *See id.*
171. *See id.* at 1975.
172. *Id.*

statehood, Republicans elected Guthrie's A.C. Hamlin to the State House of Representatives.[173] Hamlin was the first, and for two generations the only, black representative to serve in the Oklahoma legislature.[174] Hamlin's election exemplified the impact of the black vote in the Oklahoma Republican Party during the early years of statehood.

This impact was seen in congressional elections as well. The Republicans actually won a majority of the congressional seats (three of five) in 1908, a substantial change in fortune from the election of 1907 when they captured one seat.[175] The Democrats had no difficulty in tracing the resurgence of the Republican Party to the black vote.[176]

Consequently, the Democrats proposed an amendment to the state constitution requiring a literacy test to vote.[177] The real purpose behind the provision was apparent in the grandfather clause which exempted those eligible to vote before January 1, 1866, as well as their descendants.[178] Foreign immigrants were also grandfathered.[179] Thus, as a practical matter, black voters were the only ones subject to the test. "Dredging up the evils of 'black rule' and other imaginary horrors, a shrill and thoroughly racist Democratic campaign," combined with a confusing ballot that required a negative voter to mark through the words "for the amendment," enabled the measure to pass by 30,000 votes.[180]

The U.S. Supreme Court soon struck down this onerous measure as an unconstitutional violation of the Fifteenth Amendment.[181] The Oklahoma legislature responded, however, by passing a state statute with nearly as devastating consequences for black suffrage.[182] This statute stood until 1939.[183]

b) Racial Gerrymandering Case

Oklahoma's 1971 redistricting and apportionment plan was challenged on racial gerrymandering grounds in *Ferrel v. Oklahoma.*[184] However, this case was essentially the converse of the *Shaw* and *Bush* cases. In *Shaw* and *Bush*, white voters challenged the formation of majority-minority districts. In *Ferrel*, black voters challenged the Apportionment Act of 1971 on the ground that the Oklahoma legislature failed to form a majority-minority district in Tulsa County. The plaintiffs noted that approximately 36,000 blacks lived in Tulsa County, with about 32,000 of

173. *See* SCALES & GOBLE, *supra* note 27, at 44.
174. *See id.*
175. *See id.*
176. *See id.* at 46.
177. *See id.*
178. *See id.*
179. *See id.*
180. *Id.* at 46-47.
181. *See* Guinn v. United States, 238 U.S. 347 (1915).
182. Act of Feb. 26, 1916, Oklahoma Laws of 1916, ch. 24.
183. The Supreme Court declared this statute unconstitutional in *Lane v. Wilson*, 307 U.S. 268, 277 (1939).
184. 339 F. Supp. 73 (W.D. Okla. 1972).

them residing in one fairly compact neighborhood.[185] The legislature, rather than assigning this sector to one Senate district — which would have resulted in a majority black district — instead divided the neighborhood between three Senate districts, with the result that the highest percent of black voters residing in any one district was 36%.[186]

The *Ferrel* court found that the apportionment plan did not violate the Equal Protection Clause.[187] The court first concluded that no evidence in the record supported the notion that the district design was a purposeful device to further racial discrimination. Additionally, the court held that the Oklahoma legislature was not required "to create a single senate district in Tulsa County in which [black] citizens constitute a clear majority."[188] The court reasoned that a color conscious approach to apportionment, which the plaintiffs' complaint advocated, was another form of racial segregation and was thus constitutionally impermissible.

The *Ferrel* court also noted that race conscious redistricting would be problematic in any event. The court pointed out that if the legislature were constitutionally mandated to create a district for black citizens, then the legislature would have to carve out seats for other minority groups.[189]

C. The Mixed Motive Gerrymander

The most difficult gerrymandering cases are those involving so-called mixed motives. Mixed-motive cases are those in which there exists evidence to support claims of both political and racial gerrymandering. The question then becomes which predominates. The answer to this issue will establish the level of scrutiny and, thus, may ultimately determine the outcome of the case.

Virtually all gerrymandering cases may be found to have such mixed motives. For example, in *Davis* the Democratic Party brought a political gerrymandering suit and the NAACP brought a racial gerrymandering suit.[190] The plaintiffs in the NAACP suit alleged that the Indiana redistricting plan intentionally fragmented concentrations of black voters.[191] Ultimately, however, the court dismissed the racial gerrymandering claim and found that the plan discriminated against black voters not because of their race, but because of their tendency to vote Democrat. Consequently, the court decided the case based on the merits of the partisan gerrymandering claim.[192]

In contrast, in *Bush*, both political and racial gerrymandering were alleged, yet the Court — while acknowledging the existence of both factors — decided the case on the merits of the racial claim.[193] Justice O'Connor stated that "[s]trict scrutiny

185. *See id.* at 81.
186. *See id.*
187. *See id.* at 82.
188. *Id.* at 83.
189. *See id.*
190. *See Davis*, 478 U.S. at 163 n.2 (Powell, J., concurring in part and dissenting in part).
191. *See id.*
192. *See Davis*, 478 U.S. at 118 n.8.
193. *See Bush*, 116 S. Ct. at 1952.

applies where redistricting legislation . . . is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles . . . ."[194]

Justice O'Connor's plurality opinion in *Bush* provides the clearest indication of the Court's approach to a mixed gerrymander. First, the Justice clarified that the analysis must be conducted at the individual district level, not on the redistricting plan as a whole.[195] The courts will then consider both the racial factors as well as the partisan political factors that went into the drawing of the district lines and make a qualitative assessment on which dominated. Applying the facts of *Bush*, the Justice concluded that, where both factors were in play, race in fact was used as a proxy for ostensibly partisan gerrymandering.[196] Thus, O'Connor determined that racially motivated gerrymandering had a qualitatively greater influence on drawing congressional district lines than politically motivated gerrymandering.[197]

Justice Stevens' dissenting opinions in *Shaw II* (and *Bush*) also address this issue at some length.[198] However, Justice Stevens reaches a different conclusion. Stevens points out that the Republican plaintiffs in *Shaw II* resorted to a racial gerrymandering claim when their partisan gerrymandering claim failed.[199] Stevens also points to political and geographical factors at play in the redistricting.

D. Summary of Court's Views

One commentator has described the state of gerrymandering jurisprudence as "confused."[200] More accurately, it is highly fractured. Therefore, the Court's decision in this area may be subject to change if there are resignations from the court.

The Supreme Court has established that purely partisan gerrymandering claims are justiciable. However, the plaintiff's burden of proof for establishing an unconstitutional political gerrymander is very high. "Unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole."[201] The difficulty in satisfying these criteria is evident in the so-called "Burtonmander," a California plan that confronted the Court in 1989.[202] Despite the fact that California's redistricting plan was widely acknowledged as one of the most blatantly gerrymandered in the country, the Court allowed it to stand.[203]

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194. *Id.* at 1951 (quoting *Shaw I*, 113 S. Ct. at 2824).

195. *See Bush*, 116 S. Ct. at 1952.

196. *See id.* at 1956.

197. *See id.*

198. *See Shaw II*, 116 S. Ct. 1907 (Stevens, J., dissenting).

199. *See id.* at 1908.

200. *See* Jackson Williams, *The Courts and Partisan Gerrymandering: Recent Cases on Legislative Reapportionment*, 18 S. ILL. U. L.J. 563, 564 (1994) [hereinafter *The Courts and Partisan Gerrymandering*].

201. *Davis*, 478 U S. at 132.

202. *See* Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *dismissed*, 109 S. Ct. 34 (1989).

203. *See* Claudia Luther, *Post-Census Redistricting Means Bitter Struggle for House Seats*, L.A. TIMES, Mar. 25, 1989, at 22 [hereinafter *Redistricting*].

Racial gerrymandering claims are also justiciable. In contrast to partisan gerrymandering, however, racial gerrymandering invokes strict scrutiny from the Court. The state must articulate a compelling interest and offer narrowly tailored means to achieve this interest.[204] The Court will examine such circumstantial factors as the shape and demographics of the district, as well as consider direct evidence of legislative intent, in determining whether the measures are narrowly tailored.

In mixed gerrymandering cases, states may not rely on the use of traditional districting criteria as a defense where such criteria were strictly subordinate to racial factors. Thus, the Court will examine both racial and traditional motives and determine which had a qualitatively greater influence. This, in turn, will establish the standard of review.

III. Reflections on Gerrymandering

A. Political Gerrymandering — In Defense of the Thicket

Redistricting is "where the rubber hits the road, and the pavement is hot."[205] Given this characterization, it is predictable that efforts to gain a partisan advantage from the process have ended up in the courts. Most commentators on partisan gerrymandering lament the dual standard[206] and passivity[207] of the Supreme Court.[208] These commentators propose increased intervention by federal courts as the only possible solution to the gerrymandering problem. The argument seems to be that lawyers are imminently more qualified for this line of work than are elected officials.

In a sense, this is not surprising. It has become fashionable to propose the assignment of virtually any kind of public policy dispute to courts, in the belief that apolitical solutions will be fashioned by a benevolent, national judicial oligarchy. Otherwise well intentioned scholars conclude that because elected representatives are unable to efficiently accomplish a particular task, a judge using supposedly objective principles must intervene to do the task properly. In fact, there are several reasons that the courts should steer clear of purely political gerrymandering.

First, if this issue does not fall within the political function exception, it is difficult to imagine an area of the law which does. The Framers clearly intended for the legislative branch to resolve claims concerning the redistricting process.[209] Further, there are no judicially enforceable standards for pruning this "thicket." In short,

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204. *See Shaw I*, 509 U.S. at 643.

205. *Redistricting*, *supra* note 203, at 22.

206. *See* Sally Dworak-Fisher, Note, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131, 168 (1996).

207. *See The Courts and Partisan Gerrymandering*, *supra* note 200, at 581.

208. *See also* Jeffrey G. Hamilton, Comment, *Deeper Into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519 (1994) (urging the Court to intervene more in partisan gerrymandering cases); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993) (describing as inadequate the legal doctrines relating to partisan misuse of the reapportionment process); Kristen Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913 (1996) (describing the Court's approach as "troubling").

209. *See Davis*, 478 U.S. at 144 (O'Connor, J., concurring).

federal district courts are no more capable of drawing non-partisan legislative districts than they are of deciding how to properly employ military forces.[210]

Second, the judiciary itself has been subject to increasing political pressures. One need look no further than recent confirmation hearings to realize that the questioning of judicial nominees is rarely aimed at determining the nominees' lawyerly acumen.[211] Instead, the appointment and confirmation hearings are increasingly marked by litmus tests on a host of public policy issues in the hope of discerning the nominees' political views.[212] Recently, there have even been threats of increased use of impeachment proceedings to rein in federal judges.[213] It cannot be coincidental that all this has occurred since the judiciary has encroached on areas the other branches have traditionally viewed as their own.[214]

If, as virtually all agree, the apportionment process is vitally important to the political process, it requires no stretch of the imagination to envision future judicial nominees tested on their views of how to properly allocate seats in the legislature. As some commentators note, the apportionment process is controlled by politicians. Some groups, like Common Cause, construe this as a conflict of interest. Yet, judicial appointments and confirmations are also made by politicians. Therefore, judicial commandeering of the redistricting function will not immunize districting from political influence; it will merely change the battleground. As a result, such judicial overreach will likely end only in increased politicization of the courts.

Further, even assuming these objections could be overcome, there is no reason to believe courts are capable of distinguishing between legitimate political competition and "obvious gerrymandering."[215] This would require courts to identify and employ a judicially enforceable standard for determining partisan affiliation, a tough chore. This is because party registration does not win elections, votes do. In fact, over the past decade, party registration has proven a dubious harbinger of electoral success in Oklahoma, especially in statewide and congressional races.

The problem is magnified when one takes into account smaller parties, such as the Reform Party or the Libertarian Party, as well as voters who choose not to affiliate with any party at all. Independents constitute an increasing percentage of the overall voter registration. How will the courts ensure these smaller parties are not the victim of a political gerrymander? Even if the courts were able to do so, how would the

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210. *See also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 88-89 (1990) (describing the Supreme Court's reapportionment cases as a "deformation of the Constitution" and discussing his experience in drawing district lines for Connecticut).

211. *See id.* at 271-343 (chapters 14-17).

212. *See id.*

213. *See* Ralph Z. Hallow, *Republicans out to Impeach "Activist" Jurists*, WASH. TIMES, Mar. 12, 1997, at A1.

214. *See id.* (identifying the motive for impeachment proceedings as resentment toward judges who tend to "act like lawmakers, undoing legislation or ballot initiatives they don't like and rewriting laws to suit their ideological predilections").

215. *See, e.g.*, Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1365 (1987) (describing as "largely subjective" the judgments which must be made in order to determine a political party's performance at the polls).

courts classify the so-called Reagan Democrats or Blue Dog Democrats who frequently cross over?

Over a decade of scholarly effort has demonstrated the abject futility of trying to determine the proper measure for partisan affiliation — a necessary, indeed critical, baseline for any remedial action in purely partisan gerrymandering cases. Some of the proposals are: determining the majority party's base strength through low visibility elections, using the "social science" model, employing computer models that compare standard deviations based on preset criteria, ascertaining "swing ratios," relying on empirical research that has shown that the percentage of seats won by two parties is roughly proportional to the cube of their respective vote percentages, examining plan "symmetry," and the famous "totality of the circumstances" standard that seems as good a measure as any when there is no other to be found.[216]

It is time to declare this search a failure, though certainly not for lack of effort.[217] The bottom line is that if the redistricting function is allocated to the courts, the courts will simply end up determining for themselves what the appropriate allocation of partisan seats in the legislature will be.[218]

Finally, the political system already provides a measure of protection from gerrymandering abuse. The district process itself contrasts with a winner take all system that could truly lock out voters from political power. Also, political parties have several means at their disposal to address the gerrymander without resort to the courts. For example, press exposure and legislative maneuvering (such as the use of state referendums) could prevent the worst partisan excesses.[219] Moreover, even the threat of such action could prompt the majority into accepting the opposition party's input into the redistricting plan. Both major political parties are guilty of seeking to invoke the court's intervention in political gerrymandering cases. However, this is a mistake — the cure of court intervention could potentially prove deadlier than the disease of political gerrymander.

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216. For a summary of these methods, see Edward Still, *The Hunting of the Gerrymander*, 38 UCLA L. REV. 1019, 1031-38 (1991) (reviewing BERNARD F. GROFMAN, POLITICAL GERRYMANDERING AND THE COURTS (1990)) [hereinafter *The Hunting of the Gerrymander*].

217. *See* Mark A. Packman, *Reapportionment: The Supreme Court Searches for Standards*, 21 URB. LAW. 925, 947 (1989) (suggesting that the Supreme Court may want to rethink the justiciability of political gerrymandering because of the lack of workable standards).

218. *See The Hunting of the Gerrymander*, *supra* note 216, at 1037 (summarizing Peter Schuck's contribution to BERNARD F. GROFMAN, POLITICAL GERRYMANDERING AND THE COURTS (1990)); *see also The Courts and Partisan Gerrymandering*, *supra* note 200, at 591-92 (stating "there is evidence to suggest that the partisan composition of the reviewing courts is related to its rulings on partisan controversies").

219. The legality of using an initiative petition to overturn the legislature's redistricting plan was resolved in *In re* Petition No. 317, 648 P.2d 1207, 1213 (1982) (holding that "the electorate of Oklahoma are entitled to invoke the initiative against a legislative congressional redistricting act even though the initiative and the legislative enactment occur during the same ten (10) year period and are based upon the same federal census").

B. Racial Gerrymandering — It Is Not Just a Voting Issue

Comparing racial labeling of voters with the alleged hindering of political access for Republicans and Democrats is absurd and denigrates the obstacles racial minorities have faced in gaining political access in this country. State-sponsored classification of a person's vote based on the color of his or her skin easily surpasses the ills found in any supposed denial of access to a member of a major political party, which this observer doubts is possible in any event.

One reason the effects of a racial gerrymander tend to be ongoing is that racial divisions, unfortunately, tend to be persistent.[220] In contrast, the intent and actual effects of partisan gerrymandering can be quite different because the political climate can change rapidly.[221] People can and do change party registration overnight,[222] but voters cannot change the color of their skin.

Furthermore, political power is measured in terms other than just elected office. For example, evidence of political access and power is seen in the plethora of local, state and federal programs designed to benefit the poor and minorities. The Constitution guarantees political access, not proportional representation.

In any event, creating black congressional districts to represent black voters and Hispanic congressional districts to represent Hispanic voters is nothing less than electoral apartheid based on racial stereotyping.[223] Justice Souter and Justice Stevens dispute this point, attempting to distinguish on the basis of inclusion versus exclusion.[224] Their stance is disingenuous. South Africa created black home-rule states within South Africa in order to create the perception of political power while denying the substance. While it is true that creating black majority-minority districts may guarantee black voters the ability to elect members of their race to the U.S. Congress, the question is whether that possibility will result in greater political influence. It is as likely or more that the pervasive use of majority-minority districts will, in effect, deny minorities anything other than a marginal influence on the political process as a whole while reinforcing racial bias and stereotyping.

As Justice Douglass wrote over thirty years ago:

> The principle of equality is at war with the notion that District A must be represented by [an African-American], as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . When racial or religious lines are drawn by the State, the multiracial, multi-religious communities that

220. *See Criteria for Redistricting*, *supra* note 5, at 114.

221. There simply are no guarantees of the result in partisan gerrymandering. Witness the results of Oklahoma's 1982 redistricting plan mentioned earlier. *See supra* notes 80-91 and accompanying text.

222. Of note, three of the six Republican representatives in Congress — Ernest Istook, Wes Watkins, and J.C. Watts — used to be registered as Democrats.

223. As Justice O'Connor stated, "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *See Shaw I*, 509 U.S. at 647.

224. *See Bush*, 116 S. Ct. at 2002-03 (Souter, J., dissenting).

> our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal it should find no footing here. "Separate but equal" and "Separate but better off" have no more place in voting district than they have in schools, parks, railroad terminals, or any other facility serving the public.[225]

In other words, racial classifications violate the very essence of the lofty ideals of individual equality for which this country strives. The concept of racial classification ought to be repugnant to all Americans. Without question, the United States continues to fall short of realizing the goal of complete race equality. Nevertheless, the issue is what the public policy of the country should be. The answer must be made clear: the public policy of the United States is aimed, unerringly and unapologetically, at exalting the ideal of individual equality without regard to race.

In addition, there are encouraging signs of progress which offer argument against separating our citizens on the basis of their color. Former General Colin Powell, the country's first black Chairman of the Joint Chiefs of Staff, was widely viewed as the strongest potential Republican candidate to oppose the reelection bid of President Clinton.[226] Moreover, black politicians in southern states, such as Rep. J.C. Watts of Oklahoma (a Republican) and former Governor Wilder of Virginia (a Democrat), have shown the ability to attract significant support from across racial lines. Also, worthy of note is the fact that all of the representatives from the former majority-minority districts won reelection despite their districts being redrawn.[227] All of this progress seems lost on those who can only view politics through a racial prism.

Black author Shelby Steele explains this phenomenon:

> There is a real black sentiment in American life, but it is no longer as powerful as we remember it to be. Our memory makes us like the man who wears a heavy winter coat in springtime because he was frostbitten in winter. Every sharp spring breeze becomes a correlative for the enemy of frostbite so that he is still actually living in winter even as flowers bloom all around him. Not only do subjective correlatives cause us to reenact the past, they also rarely brings us the power we seek through them because they are too much based on exaggeration. Worse, they cut us off from the present and its many opportunities by encouraging the

225. Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting).

226. *See Clinton First Pick, Powell Second in National Straw Poll*, WASH. TIMES, Nov. 9, 1995, at A9.

227. *See Majority Minority*, WASH. TIMES, Nov. 20, 1996 at A16. This article also points out that "racial gerrymanders had been the idea of Southern Republicans who wanted to minimalize the number of Democratic Congressional seats by packing black voters (who are overwhelmingly Democrats) into just a few districts." *Id.*

> sort of vision in which we look at the present only to confirm the past.[228]

Similarly, those who insist that we must construct strange and unwieldy congressional districts to remedy past discrimination — districts whose sole redeeming characteristic is that they snare minority neighborhoods all over the state — are living in the past. Such thinking ignores the promising signs of the present. The reasoning and methods are at least a generation too late. These policies will not, in any event, bring the craved political power and, worse, such policies will ultimately hinder the process of creating a more racially harmonious society in the future.

Rather than pursuing such self-defeating policies, the government should begin to look seriously at reducing, if not eliminating, government practices which highlight racial distinctions, including the documentation of race on numerous government forms, most notably the census. The census has become the latest battleground for racial politics. Democrats and minority groups maintain that traditional census taking has missed large amounts of minority voters.[229] Thus, these groups advocate a new counting method known as sampling, which estimates missing responses based on the actual count. House Republicans oppose this method and have filed a lawsuit to force the census bureau to conduct an actual count.[230]

The count is significant for very important political reasons. First, the overall count may determine what states gain or lose seats as a result of apportionment. Second, certain quotas, including affirmative action programs, are based on the census count of minorities. There is even a dispute now as to whether the government should put the term "multiracial" on the form as an option for race.[231] Certain minority groups oppose this term because it has the effect of siphoning off individuals who might otherwise identify themselves as members of their group.[232] Ending the practice of identifying citizens by race on the census would go a long way toward eliminating the data which often perpetuate this madness.

C. The Oklahoma Outlook

Compared to the 1980 debacle, the 1990 apportionment process was calm. However, a return to the acrimonious district designing of the past appears likely for several reasons. First, as mentioned before, the Democrats have been completely swept from congressional offices. Also, the Democratic margin in the state

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228. *See* Shelby Steele, *The New Segregation*, IMPRIMIS, Aug. 1992, at 4.

229. *See* Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1 (1993).

230. *See Republicans Sue to Stop Sampling*, DAILY OKLAHOMAN (Oklahoma City), Feb. 21, 1998, at 2.

231. *See* Paul Craig Roberts, *Racial Spoils and the Census*, WASH. TIMES NAT'L WKLY. EDITION, Nov. 16, 1997, at 30. The author provocatively suggests that the United States is trying to succeed where Nazi Germany and South Africa failed in trying to organize society and law according to racial classification.

232. *See id.*

legislature, while still substantial, has narrowed. Moreover, a significant share of the party's remaining strength is found in rural areas likely to lose seats.

Second, according to early census projections, Oklahoma stands to lose a congressional seat in 2002 as a result of the reapportionment process.[233] This would result in the smallest state delegation since the early years of statehood.[234] Thus, the state is likely to undergo the most significant redrawing of congressional districts since 1950 when the state lost two seats.[235]

Democrats are likely to create at least one winnable Democrat seat in Congress. They may very well construct seats in a way that will force Republicans to run against one another. Of course, if all members of Congress continue to seek office and Oklahoma loses a seat, this is unavoidable in any event. The point is that the Democrats could construct a seat with no Republican incumbent in the district. Democrats will also try to ensure that rural areas maintain as many seats as possible in the state legislature in order to preserve their base strength.

It is important to note, however, that the worst gerrymandering occurs when a single party controls both chambers in the legislature and also controls the governor's office. Given the current political complexion in Oklahoma, both parties could guarantee themselves a voice in the redistricting process. The Democrats have majorities in the State House and State Senate, but the governor, Frank Keating, is a Republican. Also, the Republicans control slightly more than one-third of the state House of Representatives, giving them enough votes to sustain the governor's veto.

Therefore, state legislators meeting to accomplish the next redistricting plan may confront a unique political atmosphere. Oklahoma has never had a divided government during the reapportionment process. This raises several interesting possibilities. First, of course, both sides could conduct redistricting with minimal partisan bickering. On the other hand, the exact reverse seems equally likely. That is, the legislature and the governor may become embroiled in a bitter contest over where to draw the district lines.

Significantly, Oklahoma's Constitution includes a never-before-used provision should the legislature and governor prove unable to pass reapportionment legislation within the allotted time frame. Article 5, section 11 provides, "If the Legislature shall fail or refuse to make such apportionment . . . then apportionment shall be accomplished by an Apportionment Commission composed of the Attorney General, Superintendent of Public Instruction and the State Treasurer . . . ."[236] Resort to this constitutional provision would be regrettable because it would signify that the legislature and governor were incapable of fulfilling their redistricting responsibilities.

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233. *See* Chris Casteel, *State's Census May Eliminate Congress Seat*, DAILY OKLAHOMAN (Oklahoma City), Jan. 2, 1998, at 1.

234. *See id.*

235. *See* SCALES & GOBLE, *supra* note 27, at 279-80.

236. OKLA. CONST. art. 5, § 11A. Notably, all three of the offices are currently occupied by Democrats.

D. Legislature Heal Thyself

The current system is, admittedly, ripe for abuse. Voters deserve better from their elected representatives. Therefore, the preferred alternative is for the legislature to heal itself. From the standpoint of partisan gerrymandering, the single biggest objection to the current reapportionment system seems to be the inability of the minority party to provide any input whatsoever into the redistricting process. One possible solution is to require a super-majority in the legislature to approve the redistricting plan. This solution ensures each party a voice in the final solution, thereby avoiding the worst excesses. The motivation of the majority party in conceding some power over the reapportionment process is simply this: either make changes to accommodate input from the minority party, or face forfeiture of the responsibility for reapportionment to the courts.

The Oklahoma legislature should also adopt criteria in addition to the current Constitutional guidance for redistricting. In terms of race, this criteria should include a clear statement that dilution of minority voting strength is prohibited. At the same time, district designers should be charged with considering the interests of preserving political subdivisions, and geographical criteria in order to avoid racial gerrymandering claims faced by other states.

IV. Conclusion

Courts should distinguish racial gerrymandering cases from political ones. Justiciability in those cases should exist solely on racial grounds. The forlorn search by many academics for synergy between the two concepts is, in large part, misguided. Racial gerrymandering is not just about political power, but also about racial classifications and historical discrimination. Democrats and Republicans, the two parties that form the foundation for all political power in this country, may not make such claims.

Consequently, the Supreme Court should continue to find racial gerrymandering claims justiciable under the Equal Protection Clause of the Fourteenth Amendment. Furthermore, such schemes must be subjected to strict scrutiny as are any other state race based classifications. In contrast, purely partisan gerrymandering claims are the epitome of a political question with no discernible means of ascertaining a solution. Therefore, the Court should withdraw from this quagmire by finding the issue non-justiciable.

Robert Redwine