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# CHANGING THE CONSTITUTIONAL GUARANTEE OF VOTING RIGHTS FROM COLOR-CONSCIOUS TO COLOR-BLIND: JUDICIAL ACTIVISM BY THE REHNQUIST COURT

*Carroll Rhodes**

## I. INTRODUCTION

The decisions of the United States Supreme Court in *Shaw v. Reno*[1] and *Miller v. Johnson*[2] have sparked a national firestorm within the civil rights community over minority voting rights. Both *Shaw*[3] and *Miller*[4] dramatically altered long-standing constitutional voting rights jurisprudence. The firestorm created by the decisions calls into question the moral conviction of the nation to adhere to the principles embodied in the Fourteenth and Fifteenth Amendments to the United States Constitution. This Article will discuss the nucleus of that firestorm — the Supreme Court's recent activism in changing constitutional voting rights jurisprudence from color-conscious to color-blind.

The analysis begins with a historical review of how pre-Civil War America viewed minority voting rights. This will be followed by a discussion of the purpose for creating the constitutional guarantee of minority voting rights. Then, the Article will address voting rights protected by the Civil War Amendments as interpreted by the United States Supreme Court for more than a century. Finally, the Article will address the Rehnquist Court's re-interpretation of voting rights protected by the Civil War Amendments.

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1. 113 S. Ct. 2816 (1993).
2. 115 S. Ct. 2475 (1995).
3. 113 S. Ct. 2816 (1993).
4. 115 S. Ct. 2475 (1995).

## II. HISTORICAL REVIEW OF HOW PRE-CIVIL WAR AMERICA VIEWED MINORITY VOTING RIGHTS

The history concerning constitutional guarantees of voting rights for racial minorities[5] can be traced to Colonial days. When Africans[6] first arrived in

5. The phrase "racial minority" refers to a racial group that historically has been dominated socially, economically, and politically by another racial group. Such a minority group is not a "racial minority" simply because members possess similar physical characteristics or share a common cultural background. Nor is the group necessarily a minority in a purely numerical sense. For instance, Mississippi's population was majority black for a century—from 1840 until 1940. MISSISSIPPI POPULATION 1800-1970 (1974) (on file with the Mississippi Department of Archives & History). Yet, the state's black population was viewed as a minority group during this period. VERNON L. WHARTON, THE NEGRO IN MISSISSIPPI 1865-1890 (1947); NEIL R. MCMILLEN, DARK JOURNEY (1989). "Racial minorities" are minorities because they share a common historical social, educational, economic, and political heritage and maltreatment because of that heritage by another racial group exercising power in social, educational, economic, and political affairs. The Supreme Court in Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), stated why African-Americans are viewed as a racial minority group. There, the Court said:

> They had for more than a century before been regarded as beings of an inferior order; and altogether [sic] unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

*Id.* at 407.

The Thirteenth Amendment was proposed and ratified to end the scourge of slavery. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872); Civil Rights Cases, 109 U.S. 3, 24 (1883); United States v. Gaskin, 320 U.S. 527 (1944); Pollock v. Williams, 322 U.S. 4, 7-8 (1944). The Fourteenth Amendment was proposed and ratified to give the newly freed slaves and their descendants the same citizenship rights, privileges, and immunities as those enjoyed by white citizens, Slaughter-House Cases, 83 U.S. 72, 73-74 (1872); Hodges v. United States, 203 U.S. 1, 19 (1906); United States v. Wong Kim, 169 U.S. 649, 675-676 (1898), and grant them equal protection of the laws, Virginia v. Rives, 100 U.S. 313 (1879); Strauder v. West Virginia, 100 U.S. 303, 305-306 (1879) ("It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."). And the Fifteenth Amendment was proposed and ratified to grant the newly freed slaves and their descendants the right to vote. Neal v. Delaware, 103 U.S. 370, 389 (1881); United States v. Harris, 106 U.S. 629, 637 (1883); *Ex Parte* Yarbrough, 110 U.S. 651, 665 (1884).

Although the Fifteenth Amendment was the primary constitutional vehicle used to guarantee voting rights to racial minorities, the Fourteenth Amendment has been utilized to ensure that their voting strength in apportionment matters is treated as equally under the law as white voting strength. White v. Regester, 412 U.S. 755, 765-770 (1973).

For a century, the Supreme Court has interpreted the Fourteenth Amendment guarantees as protecting, *inter alia*, the voting rights of minorities. Minorities in this context meant racial minorities only. Recently, however, the Court held that political parties may raise constitutional challenges to districting schemes under the Fourteenth Amendment. Davis v. Bandemer, 478 U.S. 109, 143 (1986). Political minorities until recently were not protected by the Fourteenth Amendment. In Colegrove v. Green, 328 U.S. 549 (1946), a divided Supreme Court held that (congressional) apportionment matters were political questions not protected by the Fourteenth Amendment. The "political questions" doctrine had been crafted by Chief Justice Roger B. Taney in Luther v. Borden, 48 U.S. 1, 39-47 (1849), before ratification of the Fourteenth Amendment. Nevertheless, the doctrine was used by the courts to skirt Equal Protection arguments made by political minorities until 1962 when Baker v. Carr, 369 U.S. 186 (1962), was decided. In *Baker*, the Court distinguished between political questions and federalism questions. *Id.* at 210. Political questions, the Court reasoned, relate to separation of powers issues involving co-equal branches of government on which the judiciary generally gives deference. *Id.* However, apportionment relates to federalism issues involving the relationship of state action to the federal Constitution on which the judiciary does not defer. *Id.* at 209-10; THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 651-52 (Kermit L. Hall ed., 1992) [hereinafter THE OXFORD COMPANION]. Prior to BAKER, any Fourteenth Amendment voting rights belonged to racial minorities. *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1879); Smith v. Allwright, 321 U.S. 649, 661-62, 664 (1944). It was only after Baker v. Carr, 369 U.S. 186, 237 (1962), that the Court recognized that political parties may claim voting rights protection under the Fourteenth Amendment.

This Article focuses on the constitutional guarantees of voting rights for racial minorities.

6. The Fourteenth Amendment protects the voting rights of African-Americans, Mexican-Americans, and other racially identifiable minorities historically suffering from *de jure* and *de facto* discrimination. White v. Regester, 412 U.S. 755, 757-70 (1973). However, this Article addresses the constitutional protection of voting rights for African-Americans—the group to which the constitutional guarantees of the Civil War Amendments were originally extended.

Colonial America in 1619,[7] they were not given the same rights, privileges, or immunities as whites.[8] Native Americans were driven from Colonial America into tribal conclaves.[9] Mexican-Americans, Puerto Ricans,[10] Asian-Americans,[11] and other racial minorities had not become a significant part of Colonial America.[12] During the Colonial Period, however, the status of free blacks "was fairly high."[13] Even during the Revolutionary War, the status of free blacks remained high.[14] "After that time, however, their status deteriorated until toward the end of the slave period the distinction between slaves and free Negroes had diminished to a point that in some instances was hardly discernible."[15] White

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7. Twenty Africans were left at Jamestown, Virginia, in 1619 marking the beginning of the most horrific practice in this nation's history — slavery. JOHN H. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 71-111 (1969).

8. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 19-312 (1978). In his book, Judge Higginbotham traces the legal treatment, or more appropriately the legal maltreatment, of blacks in Colonial America from 1619 to the Revolutionary War. *Id.* This mistreatment includes the "Black Codes" enacted after the Revolutionary War to ensure subordination of blacks to whites. FRANKLIN, *supra* note 7, at 187-90.

9. The Supreme Court in *Scott v. Sandford*, noted:

> The situation of this population [African-American] was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor Colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory . . . .

Scott v. Sandford, 60 U.S. (19 How.) 393, 403-4 (1856).

Historians have written about this policy of excluding Native Americans from colonial life:

> The only extenuation of American policy toward the natives of North America is that it continued an old-world process of one race or people pushing a weaker one out of an area that it wanted. . . . Monroe's administration bowed to demands of the West by adopting a removal policy.

THE OXFORD HISTORY OF THE AMERICAN PEOPLE 445 (Samuel E. Morison ed., 1965).

10. ARNOLD ROSE, THE NEGRO IN AMERICA 20 (1964) ("In the United States the minority groups — except the Indians and the Negroes — are relatively recent immigrants, who were, for a long time, welcomed into the country."). Historian George Brown Tindall wrote about the arrival of people of Latin descent to the United States:

> On the other hand the law left the gate open to new arrivals from Western Hemisphere countries, so that an ironic consequence was a great increase in the United States' Hispanic Catholic population. The legal arrivals from Mexico peaked at 89,000 in 1924. Lower figures after that date merely reflect policies of the Mexican government to clamp down on the outflow of labor and stronger American enforcement of old regulations like the 1882 exclusion of those immigrants likely to become public charges. Uncounted illegal immigrants continued to come, however, in response to southwestern agriculture's demand for "stoop" labor. People of Latin American descent (chiefly Mexicans, Puerto Ricans, and Cubans) became the fastest growing ethnic minority in the country.

G. B. TINDALL, 2 AMERICA: A NARRATIVE HISTORY 987 (1984).

11. Historian George Brown Tindall writes:

> By the 1850s the sudden development of California was bringing in Chinese who, like the Irish in the East, did the heavy work of construction. Infinitesimal in numbers until 1854, the Chinese in America numbered 35,500 by 1860.

G. B. TINDALL,1 AMERICA: A NARRATIVE HISTORY 455 (1984).

12. It appears that significant numbers of non-European racial minorities did not begin arriving in the United States until the 1850s — more than one-half century after the formation of the new government. *See* TINDALL, *supra* notes 10 and 11.

13. FRANKLIN, *supra* note 7, at 217.

14. FRANKLIN, *supra* note 7, at 217.

15. FRANKLIN, *supra* note 7, at 217-18.

America viewed African-Americans, at least from the Revolutionary Period until after the Civil War, as inferior beings[16] not entitled to the same rights, privileges, and immunities as white Americans.[17]

Even during the Revolutionary War, Peter Salem and other blacks ironically fought for this nation's freedom[18] while some were held in bondage.[19] After the

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16. *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856). *See also supra* note 5. The views of African-Americans held by white America from the Colonial Period until the decision of Scott v. Sandford, did not die with the Civil War. In fact, those views were noted eighty years after the Civil War by Gunnar Myrdal in his book AMERICAN DILEMMA. Arnold Rose, in his condensed version of Gunnar Myrdal's book entitled THE NEGRO IN AMERICA writes:

> If white Americans can believe that Negro Americans belong to a lower biological species than they themselves, this provides a good reason for saying that the white race should be kept pure. The theory of the inborn inferiority of the Negro people is, accordingly, used as an argument for the anti-amalgamation doctrine. This doctrine, in its turn, has, as we have seen, a central position in the American system of color caste. The belief in biological inferiority is thus another basic support of the system of segregation and discrimination. White Americans have an interest in deprecating the Negro race in so far as they identify themselves with the prevailing system of color caste.
>
> Those who need to rationalize and defend the caste system specify that the following statements shall be held true:
>
> (1) The Negro people belongs to a separate race of mankind.
> (2) The Negro race has an entirely different ancestry.
> (3) The Negro race is inferior in as many capacities as possible.
> (4) The Negro race has a place in biology somewhere between the white man and the anthropoid apes.
> (5) The Negro race is so different both in ancestry and in characteristics that all white peoples in America, in distinction to the Negroes, can be considered as one race.
> (6) The individuals in the Negro race are very similar to one another and all of them are definitely more akin to one another than to any white man.
>
> The major observation is that the six points stated above not only represent the ordinary white American's theory on the Negro race, but also that this theory is *needed* to rationalize the American caste situation.

ROSE, *supra* note 10, at 37.

17. Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856). *See also supra* note 6.

18. Celebrated historian John Hope Franklin writes of Salem's bravery in battle:

> In May, 1775, the Committee on Safety — commonly known as the Hancock and Warren Committee — took up the matter of the use of Negroes in the armed forces, and came to the significant conclusion that only freemen should be used, since the use of slaves would be "inconsistent with the principles that are to be supported." It is doubtful that this policy was adhered to, for evidently slaves, as well as free Negroes, fought in the Battle of Bunker Hill. Furthermore, many slaves were manumitted in order to serve in the army. Indeed, one of the outstanding heroes of the battle, Peter Salem, had, shortly before battle, been a slave in Framingham, Massachusetts. One story not thoroughly substantiated says that Salem won the admiration of his comrades in arms by shooting the British Major Pitcairn. Mounting the redoubt and shouting, "the day is ours," Pitcairn received the full force of Peter Salem's musket as he fired on the British leader who displayed more valor than judgment. The death of Pitcairn was a part of the moral victory won by the patriots on June 17, 1775.
>
> Peter Salem was not the only Negro who succeeded in distinguishing himself at Bunker Hill. Another, Salem Poor, a soldier in a company and regiment made up largely of white men, won the praise of all his superiors who said that in the battle he "behaved like an experienced officer as well as an excellent soldier."

FRANKLIN, *supra* note 7, at 131.

19. Historian Franklin writes:

> Negro patriots saw clearly the implications for their own future in their fight against England. They wanted human freedom as well as political independence. Even before Mrs. Adams pointed to the inconsistency of fighting for independence while adhering to slavery, Negroes spoke out. As early as 1766 Negroes were seeking their freedom in the courts and legislatures. In January 1773 a group of "many slaves" asked the General Court of Massachusetts to liberate them "from a State of Slavery." In 1774 a group of Negroes expressed their astonishment that the colonists could seek independence from Britain yet give no consideration to the slaves' pleas for freedom. Negroes made literally scores of such representations and, in so doing, contributed significantly to broadening the ideology of the struggle to include at least some human freedom as well as political independence.

FRANKLIN, *supra* note 7, at 138.

War, Thomas Jefferson, author of the Declaration of Independence,[20] and other whites formally organized the government of the new nation excluding blacks from consideration in the founding documents.[21] Strikingly, blacks were not con-

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20. Although Thomas Jefferson is generally considered the author of the Declaration of Independence, a Committee of Five was assigned the task of drafting the Declaration. HIGGINBOTHAM, JR., *supra* note 8, at 381. The Committee of Five consisted of Jefferson, Franklin, Sherman, Adams, and Robert E. Livingston. HIGGINBOTHAM, JR., *supra* note 8, at 381. "The committee gave Jefferson the responsibility to prepare the first draft." HIGGINBOTHAM, JR., *supra* note 8, at 381. When Jefferson finally drafted a document that contained language denouncing slavery, the language was redacted from the document by the Continental Congress. FRANKLIN, *supra* note 7, at 129-30. Professor Franklin writes:

> The test of the colonists' regard for slavery came in their reaction to the Declaration of Independence submitted to the Continental Congress by Thomas Jefferson. The formulation of a general political philosophy to justify the drastic step the colonists were taking was generally acceptable, even to the proposition that all men, being created equal, were endowed with "certain unalienable Rights . . . Life, Liberty, and the pursuit of Happiness." Jefferson's specific charges against the king were harsh and uncompromising. Among them were the following:
>
> > He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of *infidel* powers, in the warfare of the Christian king of Great Britain. Determined to keep open a market where MEN should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce; and that this assemblage of horrors might want no fact of distinguished die, he is now exciting these very people to rise in arms among us, and to purchase that liberty of which he deprived them, by murdering the people upon whom he also obtruded them; thus paying off former crimes committed against the *liberties* of one people, with crimes which he urges them to commit against the *lives* of another.
>
> These charges, described by John Adams as the "vehement philippic against Negro slavery" were unacceptable to the Southern delegation at the Continental Congress and were stricken from the document.
>
> The members of the Congress doubtless realized that Jefferson's bold accusations of the king in regard to slavery were at considerable variance with the truth. The slave trade had been carried on not only by British merchants but by the colonists as well, and in some colonies no effort had been made even to regulate it. . . .Those who favored slavery at all realized that if Jefferson's views prevailed in the Declaration of Independence, there would be no justification for the institution once the ties to England were completely cut. It would be better, therefore, to reject the strong language in which the complete responsibility was laid to the door of George III.

FRANKLIN, *supra* note 7, at 129-30.

21. As the Supreme Court held in *Scott v. Sandford*:

> In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).

sidered to be citizens of this new nation[22] although they comprised 19.3 percent of the population.[23]

This dehumanizing stigma of inferiority remained with African-Americans from the Colonial Period to the Civil War Period and beyond. Essentially, civilized white society viewed blacks as inferior beings not entitled to the same rights, privileges, and immunities as enjoyed by white Americans throughout this nation's history.[24] Those views are encapsulated in the celebrated Supreme Court decision of *Scott v. Sandford*.[25] Dred Scott was "a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves."[26] He was a slave himself, according to the defendant.[27] In 1834, his owner, Dr. Emerson, an army physician, took Dred from Missouri, a slave state,[28] "to the military post at Rock Island in the State of Illinois,"[29] a free state.[30] Dred remained in Illinois until 1836 when Dr. Emerson took him to the military post at Fort Snelling located on the west bank of the Mississippi River in the Upper Louisiana Territory above Missouri which had been acquired by the United States from France.[31] Slavery was prohibited in this Upper Louisiana Territory.[32] In 1835, Major Taliaferro, an army officer, took a slave named Harriet to Fort Snelling[33] where Dred Scott was.[34]

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22. The Supreme Court held in *Scott v. Sandford*:

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. We think they [African-Americans] are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can, therefore, claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

*Id.* at 404-05.

23. According to historian Rose: "Negroes were 19.3 percent of the American population in 1790 but only 9.8 percent in 1940. There is no doubt that the heavy immigration of whites from Europe accounts for the largest part of this great decline in the proportion of Negroes until recently." ROSE, *supra* note 10, at 55.

24. FRANKLIN, *supra* note 7 (the struggle of African- Americans from the beginning of the slave trade until the modern civil rights movement in 1965 and white America's views and maltreatment of them); ROSE, *supra* note 10 (a look at the views white America held and maltreatment of African-Americans); MCMILLEN, *supra* note 5 (the history of maltreatment of blacks in Mississippi by whites).

25. 60 U.S. (19 How.) 393, 404 (1856).

26. *Id.* at 397.

27. *Id.*

28. Missouri entered the Union as a slave state in 1821. FRANKLIN, *supra* note 7, at 172.

29. 60 U.S. at 397.

30. FRANKLIN, *supra* note 7, at 174, 267-68 (In 1830, Illinois was a slave-free state.). When Dred Scott was taken to Illinois by Dr. Emerson, the state did not recognize or honor slavery. FRANKLIN, *supra* note 7, at 174, 267-68.

31. Scott v. Sandford, 60 U.S. (19 How.) 393, 397 (1856).

32. Historian Franklin writes: "Dred Scott was a Missouri slave whose master had first taken him to live in free Illinois and subsequently to a fort in the northern part of the Louisiana purchase, where slavery had been excluded by the Missouri Compromise." FRANKLIN, *supra* note 7, at 267-68.

33. *Scott*, 60 U.S. at 398.

34. *See supra* note 32.

At Fort Snelling, Major Taliaferro sold Harriet to Dr. Emerson in 1836.[35] That same year, Dr. Emerson allowed Dred and Harriet to marry there.[36] The newly-weds remained at Fort Snelling until 1838.[37] They had two daughters, Eliza and Lizzie.[38] Eliza was born on a steamboat on the Mississippi River "north of the north line of the State of Missouri."[39] Lizzie "was born in the State of Missouri, at the military post called Jefferson Barracks."[40] In 1838, Dr. Emerson brought Dred, Harriett, and Eliza back to Missouri.[41] Dr. Emerson then sold the Scotts to John F. A. Sandford,[42] a New York citizen.[43]

Sandford physically assaulted and imprisoned the Scott family—Dred, Harriett, Eliza, and Lizzie—in St. Louis, Missouri.[44] Scott sued in federal court on diversity jurisdiction grounds[45] seeking damages[46] for his family and their "freedom on the ground that residence on free soil[47] [from 1836 until 1838] had liberated" them.[48] Sandford filed a plea in abatement of jurisdiction arguing that "Dred Scott [was] not a citizen of the State of Missouri, as alleged in his declaration, because he [was] a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves."[49] The jury agreed with Sandford.[50] The case was ultimately appealed to the United States Supreme Court where it was argued twice.[51]

The central question the Court had to answer was "can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [sic] by that instrument to the citizen[?]"[52] The Court answered the question in the negative, holding that African-Americans were "inferior" to whites,[53] "unfit to associate with" them and had "no rights which the white man was bound to respect."[54] In short, the Court concluded that African-Americans were not United States citizens entitled to all the rights, privileges, and immunities of the Constitution as were whites.[55]

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35. *Scott*, 60 U.S. at 398.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* Apparently Lizzie was not born yet. Lizzie was born in Missouri after her parents were brought back to the state from slave-free Fort Snelling. *Id. See* FRANKLIN, *supra* note 7, at 267-268.
42. Scott v. Sandford, 60 U.S. (19 How.) 393, 398 (1856).
43. *Id.*
44. *Id.*
45. *Id.* at 400.
46. *Id.*
47. *See supra* notes 30 and 32.
48. FRANKLIN, *supra* note 7, at 268.
49. Scott v. Sandford, 60 U.S. (19 How.) 393, 396-97 (1856).
50. *Id.* at 398-99.
51. *Id.* at 399.
52. *Id.* at 403.
53. *Id.* at 407.
54. *Id.*
55. *Id.* at 404.

The Court's decision kindled the national debate about slavery and contributed to the Civil War.[56] The great War Between the States was fought and won, in part, to grant African-Americans the same freedoms, liberties, rights, privileges, and immunities as enjoyed by whites—the full rights of citizenship.[57] The guarantee of those rights was written into the contract between the federal government and African-Americans as the Thirteenth,[58] Fourteenth,[59] and Fifteenth[60] Amendments to the Constitution.

## III. THE PURPOSE OF THE CIVIL WAR AMENDMENTS

Even before the Civil War formally ended, Congress debated whether to submit to the states constitutional amendments abolishing slavery and granting the newly freed slaves and their descendants the same rights, privileges, and immunities as white citizens. The Thirteenth Amendment which abolished slavery[61] was proposed on December 18, 1863.[62] The Civil War formally ended in 1865.[63]

On May 31, 1864, Representative Morris from New York eloquently petitioned Congress for a constitutional amendment abolishing slavery. He argued that the Constitution granted "authority directing the people (the federal government) to alter and abolish any law or constitution whenever the public interests demand it."[64] The public interest demanded a constitutional amendment prohibiting slav-

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56. FRANKLIN, *supra* note 7, at 267-68.
57. FRANKLIN, *supra* note 7, at 271-323.
58. The Thirteenth Amendment abolished slavery. U.S. CONST. amend. XIII.
59. The Fourteenth Amendment granted the newly freed slaves full rights, privileges, and immunities of citizenship and guaranteed to them due process and equal protection of the laws. U.S. CONST. amend. XIV. It has been said that the Fourteenth Amendment was "the most important of the additions made to the Constitution in the period following the Civil War." STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART I 181 (Bernard Schwartz ed., 1970) [hereinafter STATUTORY HISTORY].
60. The Fifteenth Amendment granted the newly freed slaves voting rights. U.S. CONST. amend. XV.
61. The text of the Thirteenth Article of Amendment to the United States Constitution reads as follows:

> Amendment XIII
>
> Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1, 2.
62. STATUTORY HISTORY, *supra* note 59, at 803.
63. FRANKLIN, *supra* note 7, at 294 (the Confederate Army surrendered in 1865 ending the Civil War).
64. CONG. GLOBE, 38th Cong., 1st Sess. 2614 (1864).

ery because it was socially and politically reprehensible as well as morally wrong.[65] As Representative Morris stated:

> Once more: our fathers permitted slavery from a supposed necessity. This was their first error. They expected it would become extinct under the workings of the Constitution. This was a second error. Others followed, and since the formation of our Government millions have been enslaved. An entire race has been deprived of all social rank, barred our schools, shut out from the gospel, and then held to be inferior for not rising in spite of their hindrances to an equality with the Saxon in the enjoyment of each of these privileges. Under our Government the African is a nondescript; he is not a man, nor yet is he a brute; he has not the rights nor the protection of either; he has no resting place, no refuge within this land of liberty and Christianity, and yet he is the only innocent party within its entire boundaries. Tell me where he may rear the home altar and enjoy unmolested the companionship of wife and children. Up to this hour, such is the force of prejudice, that if, rising above and forgetting the inhuman treatment of our Government, the colored man enters our armies and imperils his life in its defense, he is denied not only the pay but the protection of a soldier. And yet we crave Heaven's blessing.[66]

Slavery was abolished on February 1, 1865, when Senate Resolution Number 16 was ratified and signed by the Speaker of the House of Representatives, the Vice-President, and the President.[67] The Thirteenth Amendment was ratified to abolish slavery permanently while the Fourteenth Amendment was ratified to grant citizenship to the newly freed slaves and to provide them, *inter alia*, with due process and equal protection of the laws.[68] It was proposed on June 16, 1866

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65. As the Supreme Court stated in the *Slaughter-house Cases*:

> In that struggle [Civil War] slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal Government succeeded in that purpose. The Proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal Government were not content to permit this great act of emancipation to rest on the actual results of the contest or the Proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the 13th article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

Slaughter-house Cases, 83 U.S. (16 Wall.) 36, 68-69 (1872).

66. CONG. GLOBE, 38th Cong., 1st Sess. 2614-15 (1864).

67. CONG. GLOBE, 38th Cong., 2d Sess. 532 (1865).

68. Portions of the text of the Fourteenth Amendment to the United States Constitution relevant to the discussions in this article read as follows:

> Amendment XIV
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

and ratified on July 28, 1868.[69] After the Civil War, but before ratification of the Fourteenth Amendment, blacks were treated as badly as before the Civil War.[70] Thus, the Fourteenth Amendment was passed by Congress and ratified by the states to grant African-Americans the same rights, privileges, and immunities of citizenship as those enjoyed by whites and to secure for them due process and equal treatment under the law.[71]

Having been made free and granted rights of citizenship, the newly freed slaves needed to exercise that freedom in determining their political destiny. Thus, the Fifteenth Amendment was proposed and ratified. The purpose of the Fifteenth Amendment was to make the Negro "a voter in every State of the Union."[72] After all, "laws were administered by the white man alone."[73] African-Americans, it was believed, "could never be fully secured in their person and their property without the right of suffrage."[74]

The Civil War Amendments were ratified to make blacks free citizens of the United States with all of the rights, privileges, and immunities as white citizens including the most preservative of those rights—the right to vote.[75] These Amendments were unique in scope—unlike any constitutional amendments before or since. Each of these amendments contained an enforcement clause.[76] None of the Bill of Rights[77] contained an enforcement clause.[78] Moreover, the Bill of Rights granted substantive and procedural rights[79] to citizens protecting

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69. STATUTORY HISTORY, *supra* note 59, at 184.

70. Slaughter-house Cases, 83 U.S. (16 Wall.) 36, 70 (1872). There the Court stated:

> The process of restoring to their proper relations with the Federal Government and with the other States those which had sided with the rebellion, undertaken under the Proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal Government, be almost as bad as it was before. Among the first Acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal Government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.
>
> They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

*Id.*

71. *Id.* at 70-71.

72. *Id.* at 71.

73. *Id.*

74. *Id.*

75. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

76. *See supra* notes 61, 69, and 73.

77. "The Bill of Rights is commonly viewed as consisting of the first ten articles of Amendments to the Constitution of the United States of America." THE OXFORD COMPANION, *supra* note 5, at 70.

78. U.S. CONST. amend. I-X. Although none of the Bill of Rights contain an enforcement clause, neither does the Eleventh or Twelfth Amendment of the United States Constitution.

79. THE OXFORD COMPANION, *supra* note 5.

them against the federal government.[80] Those rights were granted only to white citizens.[81] The Fourteenth Amendment granted African-Americans those same rights[82] and, unlike the Bill of Rights, forbade the States from interfering with those rights.[83] In part, because the "southern states and localities enacted Black Codes to regulate the status and conduct of the newly freed slaves,"[84] the Fourteenth Amendment contained an enforcement clause when it was proposed in 1866.[85] The Fifteenth Amendment, which was proposed and ratified to make the African-American "a voter in every State of the Union,"[86] contains an enforcement clause as well.[87] Congress wasted no time in enacting enforcement legislation after ratification of the Fifteenth Amendment in 1870.[88] Congress immediately passed the Enforcement Act of 1870[89] "to suppress the K.K.K. [Ku Klux Klan] and protect Negroes in their rights under the three Amendments."[90] The Civil War Amendments and the Enforcement Act of 1870 guided the Supreme Court in its initial interpretations of minority voting rights.[91]

## IV. VOTING RIGHTS PROTECTED BY THE CIVIL WAR AMENDMENTS

### *A. The Reconstruction Era*

The Supreme Court's view of voting rights protected by the Civil War Amendments has primarily mirrored the national political view on race. During the Reconstruction Era (1865-1876), a Republican-led national government pushed the Civil War Amendments and enacted federal laws protecting minority voting rights.[92] The national political view was that the newly freed slaves were citizens of their respective states, entitled to the same rights as whites, including

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80. Barron v. Baltimore, 32 U.S. 243 (1833) (holding that the Bill of Rights did not apply to the states), *modified by* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"). The *Gitlow* decision marked the development of the Supreme Court's incorporation doctrine whereby the rights guaranteed citizens in the Bill of Rights, which the federal government could not intrude on, were incorporated into the Fourteenth Amendment prohibiting the states from intruding on those rights as well. *See Gitlow*, 268 U.S. at 666.

81. *See supra* note 21.

82. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72-80 (1872).

83. *Id.* at 80.

84. THE OXFORD COMPANION, *supra* note 5, at 309.

85. THE OXFORD COMPANION, *supra* note 5, at 309-10.

86. Slaughter-House Cases, 83 U.S. at 71.

87. *See supra* note 73.

88. JAMES S. ALLEN, RECONSTRUCTION: THE BATTLE FOR DEMOCRACY 1865-1876 187 (1937).

89. Enforcement Act of 1870, Ch. 177, 16 Stat. 114 (1870) (codified at 42 U.S.C. § 1971 (Supp. 1993)).

90. ALLEN, *supra* note 88.

91. "Minority voting rights" in the context of this article means "racial minority voting rights." *See supra* note 5.

92. *See* Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—and Beyond*, 57 MISS. L.J. 591, 595 (1987) ("Following a substantial gain of strength by Republicans in the election of 1866, Congress took over the direction of Reconstruction and shifted its focus so that black male suffrage became the cornerstone of the program."); *see also* ROBERT S. HENRY, THE STORY OF RECONSTRUCTION 500-570 (1938); Allen, supra note 88, at 1-180; JOHN R. LYNCH, THE FACTS OF RECONSTRUCTION (1913).

the right to vote.[93] The Supreme Court, in the first case interpreting the Civil War Amendments in 1873, held the same view.[94] The Court, in the *Slaughter-House Cases*,[95] explicitly noted that the Civil War Amendments were color-conscious, designed to give African-Americans the same rights as whites, including the right to vote.[96]

The Reconstruction Era was a turbulent time politically as well as socially for the nation.[97] The Era began to crumble with the rise of white terrorism orchestrated primarily by the Ku Klux Klan[98] to intimidate blacks into not exercising their political rights.[99] The Era ended with the Hayes-Tilden compromise of 1877.[100] The compromise effectively ended federal protection for minority voting rights.[101] Supreme Court decisions during this period reflected the national political view of minority voting rights. The Court narrowly defined those protected constitutional rights[102] to mean the right of African-Americans to be free from discrimination in voting.[103] In this regard, the Constitution was color-conscious.

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93. *See supra* note 92.

94. 83 U.S. (16 Wall.) 36 (1872).

95. *Id.*

96. *Id.*

97. W. E. B. DUBOIS, BLACK RECONSTRUCTION (1992) (a history of how African-Americans fared during the Reconstruction Era); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 1880-1910 (1974) (detailing how Reconstruction Era politics affected political behavior in the South).

98. "The Ku Klux Klan was started by a group of former officers of the Confederate army in the small town of Pulaski, Tenn., in 1865." ALLEN, *supra* note 88, at 185 n.*. *See also* A. W. TRELEASE, WHITE TERROR (1971) (detailing the birth, rise, purpose, and work of the Ku Klux Klan during the Reconstruction Era).

99. See supra note 98. See also DUBOIS, supra note 97; HENRY, supra note 92, at 386, 544-70. Historian John Hope Franklin writes this about the end of the Reconstruction Era:

> Reconstruction did not end abruptly as the result of Congressional or Presidential action. Rather it came to a gradual end as restraints were relaxed and stringent legislation repealed. Just as Reconstruction began long before the war was over, so it drew to a close long before the final withdrawal of troops from Southern soil.

FRANKLIN, *supra* note 7, at 328-29.

100. Stavis, *supra* note 92, at 601. Attorney Stavis writes in note thirty-three of his article:

> The presidential election of 1876 was fraught with violence and fraud and in a few critical southern states, with conflicting certifications as to who had won the election. The inconclusiveness of the election resulted in the congressional appointment of a bipartisan electoral commission to settle the matter. D. BROWN, THE YEAR OF THE CENTURY: 1876 333 (1966). Extensive negotiations produced a deal by which the Republican Rutherford B. Hayes was elected President upon his commitment effectively to put an end to federal protection of the rights of blacks in the South. *Id.* at 323-28.

Stavis, *supra* note 92, at 601 n.33. *See also* FRANKLIN, *supra* note 7, at 328-29 (the Reconstruction Era did not end abruptly but ended over an extended period of time).

101. *See supra* note 100.

102. The Court held in Minor v. Happersett, 88 U.S. 162 (1875), that women were not guaranteed voting rights by the Fourteenth Amendment. This holding was, of course, nullified by ratification of the Nineteenth Amendment. *See* Breedlove v. Suttles, 302 U.S. 277 (1937); U.S. CONST. amend. XIX.

103. United States v. Reese, 92 U.S. 214, 217 (1875) ("The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude."); United States v. Cruikshank, 92 U.S. 542 (1875) (implying the Fourteenth Amendment's Privileges and Immunities Clause relates to rights of national citizenship which does not include the right to be free of violence).

### *B. The Benign Years*

The national political view on race became somewhat benign toward the end of Reconstruction. In 1872, Congress passed the Amnesty Act granting amnesty to "former Confederate leaders."[104] Those leaders aligned themselves with the Democratic Party and began an effort to regain control of the governments of the southern states[105] through violence and intimidation of African-American voters.[106] By 1890, white Democrats had regained political power in the South and continued their relentless campaign of disenfranchising black voters.[107] Supreme Court decisions during this period reflect this emerging national view that whites could regain control of southern governments by any means.

The Court, in two cases decided in 1875, sent signals that intimidation against black voters was permissible. In one case, *United States v. Reese*,[108] the Court held that the Enforcement Act of 1870[109] was unconstitutional because it included more offenses than were punishable under the Fifteenth Amendment.[110] In the other case, *United States v. Cruikshank*,[111] the Court held that the indictments alleging voter intimidation and murder by whites were not specific enough to charge that the defendants acted in a racially discriminatory manner against African-Americans in the exercise of their right to vote in a federal election.[112]

In these two cases, the Supreme Court was interpreting the power of Congress to enforce the Fifteenth Amendment. And in both cases, the Court decided that Congress had gone too far. However, in rendering the decisions, the Court noted that the Fifteenth Amendment was color-conscious, designed to restrain the states or the United States "from giving preference" in voting matters "to one citizen of the United States over another on account of race, color, or previous condition of servitude."[113]

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104. ALLEN, *supra* note 88, at 189.
105. ALLEN, *supra* note 88, at 187-93.
106. ALLEN, *supra* note 88, at 197-204 (detailing the reign of terror of the K. K. K. and other white supremacist groups in murdering, threatening, and intimidating black and white Republican voters in the southern states to keep them from voting in the elections of 1872, 1874, and 1876).
107. FRANKLIN, *supra* note 7, at 326-43 (detailing how white Southern Democrats regained control of political power and implemented a strategy of disenfranchising almost all African-Americans).
108. 92 U.S. 214 (1875).
109. *See supra* note 92.
110. United States v. Reese, 92 U.S. 214, 217-18 (1875).
111. 92 U.S. 542 (1875).
112. *Id.* at 557-59.
113. *Reese*, 92 U.S. at 217.

After these decisions, the reign of terror escalated,[114] and protection of African-American voting rights declined in importance as a national goal. Congress, in 1894, repealed part of the Enforcement Act of 1870.[115] The southern states, led by Mississippi, disenfranchised, *en masse*, African-Americans by ingenious constitutional measures[116] such as the poll tax, head tax, and the literacy test.[117] The Court, during the 1890s and early 1900s, turned its back and hid its face from the pleas of blacks for constitutional protection.

In *Williams v. Mississippi*,[118] the Court considered whether the systematic exclusion of blacks from jury rolls in Mississippi by disenfranchising them through such ingenious devices as poll taxes, head taxes, and literacy tests violated the Fourteenth Amendment.[119] The Court held that the disenfranchising devices "[did] not on their face discriminate between the races, and it [had] not been shown that their actual administration was evil, only that evil was possible under them."[120] This holding "is viewed by historians as effectively representing the Supreme Court's approval of the Mississippi disenfranchisement plan."[121] This plan, embodied in Mississippi's Constitution (1890), used racially neutral language[122] to disenfranchise blacks although it was drafted for a racially discriminatory purpose.[123]

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114. Historian James S. Allen writes that the reign of terror in Mississippi's statewide elections in 1875 became known as the "Mississippi Plan." ALLEN, *supra* note 88, at 200-01. As Mr. Allen stated:

> What followed came to be known as the "Mississippi Plan for the restoration of home rule." It was nothing but outright terror and massacre of the now defenseless Negroes. On election day they were kept from the polls. In Yazoo, for example, the Republican vote in 1873 was 2,427 and in 1875 it was seven. The Democrats gained a large majority in the legislature, elected nearly all county officials and chose four out of six congressmen. President Grant characterized the new regime as follows: "Mississippi is governed today by officials chosen through fraud and violence such as would scarcely be accredited to savages, much less to civilized and Christian people."
>
> Typical of the ferocity of the counter-revolution was the fate of five Reconstruction leaders of the state who were active since the first "Black-and-Tan Convention." One was assassinated on the streets of Clinton; another was hanged by the Klan; one was shot in broad daylight and still another was shot in the courthouse at Yazoo City, while a fifth was found dead in a waterhole. The Boutwell Committee, appointed by Congress, investigated the Mississippi elections. It had to admit that the Democratic victory was due to terror and outrages against the Negroes, that the legislature thus elected was not a legal body and that the state was "under the control of political organizations composed largely of armed men whose common purpose is to deprive the Negroes of the free exercise of the right of suffrage and to establish and maintain the supremacy of the white-line Democracy."

ALLEN, *supra* note 88, at 200-01.

Historian Neil R. McMillen characterizes these efforts to disenfranchise black voters as the "First Mississippi Plan." MCMILLEN, *supra* note 5, at 39. The First Mississippi Plan was followed by a "Second Mississippi Plan." McMillen, supra note 5, at 39-48. The purpose of the Second Mississippi Plan was to draft a state constitution disenfranchising blacks without stating that purpose in the document itself. MCMILLEN, *supra* note 5, at 39-48.

Other southern states copied the Mississippi Plan, devising schemes to disenfranchise black voters beginning in 1895. FRANKLIN, *supra* note 7, at 339-43; Stavis, *supra* note 92, at 606.

115. Ch. 25, 28 Stat. 36 (1894).

116. *See supra* note 114.

117. Historian Tindall notes that "since the Fifteenth Amendment made it impossible to disfranchise Negroes as such, the purpose was accomplished indirectly with devices such as poll taxes, head taxes, and literacy tests." TINDALL, *supra* note 10, at 719.

118. 170 U.S. 213 (1898).

119. *Id.* at 219.

120. *Id.* at 225.

121. Stavis, *supra* note 92, at 608.

122. MCMILLEN, *supra* note 5, at 41-42 (The suffrage provisions of the Mississippi Constitution (1890) did not mention race).

123. MCMILLEN, *supra* note 5, at 39-42 (stating the purpose of the Constitutional Convention of 1890 was to disenfranchise blacks).

The Court looked only at the face of the constitutional or statutory provision being challenged to determine whether it passed muster. If the challenged law contained racially neutral language, it was upheld as constitutional.[124] If, however, the face of the challenged law referenced differential treatment because of race, it was struck down as being unconstitutional.[125] This "eyeball test of discrimination"[126] was limited only to voting.

In the area of public accommodations, the Supreme Court held that a state could constitutionally enact a statute treating the races differently so long as they were treated equally.[127] This "separate but equal doctrine" announced by the Supreme Court in *Plessy v. Ferguson*[128] was not a unanimous pronouncement from the Court.[129] Justice Harlan, in an eloquent dissent, stated that "[o]ur Constitution is color-blind."[130] The color-blind argument did not carry the day in *Plessy*,[131] and "separate but equal" remained the law of the land in the area of public accommodations and education until 1954 when the Court decided *Brown v. Board of Education*.[132]

Although the "separate but equal" doctrine did not directly apply to voting matters, it served notice on America of the Court's view of racial discrimination in any aspect of American life including voting. In *Plessy*, a majority of the Court held that if enforced separation of the races "stamp[ed] . . . a badge of

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124. Williams v. Mississippi, 170 U.S. 213, 225 (1898).

125. Strauder v. West Virginia, 100 U.S. 303 (1879) (declaring unconstitutional a statute excluding blacks from jury service).

126. The phrase "eyeball test of discrimination" refers to judges looking no further than the cold words of a challenged statute or constitutional provision or the lines on a map to determine whether or not a challenged law or plan is racially discriminatory.

127. Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that separate but equal treatment of blacks on railroads was constitutionally permissible); *overruled by* Brown v. Board of Education, 347 U.S. 483 (1954) (holding that the "separate but equal doctrine" violated the Equal Protection Clause of the Fourteenth Amendment). The "separate but equal doctrine" was nothing more than a sham to disguise the efforts of white supremacists to again subjugate African-Americans to the will of whites. As Professor Franklin writes, "[a]n inescapable conclusion running through all the studies is that the treatment of the Negro is America's greatest scandal, and the almost universal rejection of the Negro is America's outstanding denial of its own profession of faith in the equality of mankind." FRANKLIN, *supra* note 7, at 569.

128. 163 U.S. 537 (1896).

129. The decision was seven to one with Justice John Marshall Harlan dissenting, THE OXFORD COMPANION, *supra* note 5, at 637, and Justice David Josiah Brewer not participating. Plessy v. Ferguson, 163 U.S. at 564.

130. 163 U.S. at 559 (Harlan, J., dissenting). The complete context within which Justice Harlan stated his view that the Constitution is color-blind is the following:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case.*

*Id.*

131. *Id.* at 537.

132. 347 U.S. 483 (1954).

inferiority"[133] on African-Americans, it was so "solely because the colored race [chose] to put that construction upon it."[134] The Court in *Williams* acknowledged that African-Americans could be excluded from voting rolls because of alleged characteristics of presumed inferiority.[135] These cases indicate that the Court accepted societal discrimination against blacks as axiomatic and constitutionally permissible if legislation was directed toward characteristics rather than race itself. By aiming legislation at characteristics rather than race, states could keep most but not all blacks off the voting rolls. Therefore, whites could control state government. If legislation was directed at blacks, as a race, then all blacks, no matter how able, would have been kept off voting rolls. This, the Court would not permit.

During this period, the Court was not willing to go beyond this limited exception to what was believed to be permissible discrimination. After all, the Court was unwilling to become entangled in the electoral process. The Court felt ill-equipped to supervise local elections. In *Giles v. Harris*,[136] the Court held that even if racial discrimination in suffrage matters could be proven, there was no equitable judicial remedy available.[137] The Court rejected challenges to discriminatory actions by state officials affecting the right of blacks to register and vote where the state constitutional or statutory provision being challenged was racially neutral in language.

In essence, the Court applied the eyeball test of discrimination. If the state constitutional or statutory provision being challenged did not contain language referencing differential treatment because of race, it was constitutional. If the challenged language referenced differential treatment because of race, it was unconstitutional. A case which best illustrates this eyeball analysis is *Guinn v. United States*.[138] There, the Court held that a state constitutional provision giving differential treatment in suffrage to persons entitled to vote on January 1, 1866 — before enactment of the Fifteenth Amendment — contravened that Amendment.[139]

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133. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
134. *Id.*
135. Williams v. Mississippi, 170 U.S. 213, 222-23 (1898).
136. 189 U.S. 475 (1903).
137. *Id.* at 487-88.
138. 238 U.S. 347 (1915).
139. *Id.* at 367.

In all of these cases, however, the Court recognized that the constitutional guarantees of voting rights[140] were color-conscious,[141] designed to protect the voting rights of African-Americans.[142]

The problem plaguing the Court was how to recognize efforts by recalcitrant public officials to discriminate against African-Americans in their quest to gain and exercise voting rights. Justice Frankfurter wrote in *Lane v. Wilson*[143] that the Fifteenth Amendment "nullifie[d] sophisticated as well as simple-minded modes of discrimination."[144] Yet, the Court was unwilling to employ a more analytical approach than the eyeball test to evaluate voting discrimination claims. Because of the Court's reluctance to be more analytical, the onerous literacy test[145] was upheld in *Lassiter v. Northampton County Board of Elections*.[146] That decision was short-lived. It was overruled six years later in *Louisiana v. United States*.[147]

In 1927 in *Nixon v. Herndon*,[148] the Court held that when a state statute on its face discriminated against black voters by barring them from participating in white-only primary elections, it was unconstitutional.[149] The Court later restricted this holding to elections where state officials controlled the party primary process.[150] In *Grovey v. Townsend*,[151] the Supreme Court decided that the constitutional guarantee of freedom from voting discrimination did not apply to discriminatory acts of private individuals who were not state officials.[152] However, nine years later in *Smith v. Allwright*[153] the Court overruled Grovey, holding that the right to vote in a primary[154] or general election free from racial discrimination was constitutionally protected when the election process was state controlled.[155] The Court was struggling to adopt a reasoned analysis for voting discrimination.

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140. The Court had held that "[t]he Fifteenth Amendment does not confer the right of suffrage upon any one." United States v. Reese, 92 U.S. 214, 217 (1875). Nevertheless, the Court recognized that "the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out." Guinn v. United States, 238 U.S. 347, 363 (1915). These cases clearly indicate the Court's view that although the Fifteenth Amendment did not confer the right to vote on anyone, by striking down a discriminatory provision, the Court could in effect make voters of citizens who had been disqualified as voters under the unconstitutional provision. Consequently, the common mischaracterization that the Fifteenth Amendment granted the right to vote has continued until today.

141. In all these cases, Guinn v. United States, 238 U.S. 347 (1915), Giles v. Harris, 189 U.S. 475 (1903), Williams v. Mississippi, 170 U.S. 213 (1898), United States v. Cruikshank, 92 U.S. 542 (1875), United States v. Reese, 92 U.S. 214 (1875), the Court recognized that the constitutional guarantees of freedom from racial discrimination in voting protect African-Americans from discrimination by governmental officials.

142. The Supreme Court in 1939 held that the Fifteenth Amendment "hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." Lane v. Wilson, 307 U.S. 268, 275 (1939).

143. 307 U.S. 268 (1939).

144. *Id.* at 275.

145. In Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), *overruled by* Louisiana v. United States, 380 U.S. 145 (1965), the Court did not find the literacy test racially discriminatory.

146. 360 U.S. 45, 53-54 (1959).

147. 380 U.S. 145, 153 (1965).

148. 273 U.S. 536 (1927).

149. *Id.* at 541.

150. *See* Grovey v. Townsend, 295 U.S. 45 (1935), *overruled by* Smith v. Allwright, 321 U.S. 649 (1944).

151. 295 U.S. 45 (1935).

152. *Id.* at 53.

153. 321 U.S. 649 (1944).

154. In *Grovey v. Townsend*, the Supreme Court held that exclusions of blacks from all-white Democratic Party Primary elections did not contravene the Constitution. 295 U.S. at 55.

155. Smith v. Allwright, 321 U.S. 649, 661-65 (1944).

The common thread running through the quilted patchwork of Supreme Court decisions in the area of minority voting rights between Reconstruction and the Warren Court era was that the constitutional protections were color-conscious. The difficulty the Court had was in recognizing voting discrimination in any form other than a written legislative admission.[156] The Court employed a simple analysis to determine whether a challenged law was constitutional. If the law on its face referenced different treatment because of race, it was unconstitutional. If, however, the law on its face did not reference different treatment on account of race, it was constitutional. The Court did not critically analyze the purpose of the law nor its application. To determine whether or not a law was discriminatory, the Court looked no further than the face of the law itself. Even so, the Court still recognized that the constitutional protections of voting rights were color-conscious.

### *C. Era of the Warren Court*

After Chief Justice Vinson's death, Earl Warren was appointed Chief Justice of the Supreme Court by President Eisenhower in 1953.[157] This appointment ushered in a change of analytical approaches in racial discrimination claims. The new approaches began with the May 17, 1954 decision in *Brown v. Board of Education*.[158] For more than a decade, civil rights legal forces had been marshalled to formulate a plan of attack to strike down segregated education in this country.[159] The plan came together in *Brown*[160] where the Court looked at the purposes and effects of segregation laws in the field of education and struck them down as being inconsistent with the commands of the Fourteenth Amendment.[161] The decision polarized the nation.[162] But it also signaled that the

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156. The Court's holdings that certain laws unconstitutionally discriminated against black voters were based on self-evident statutes and constitutional provisions. In those laws, state officials tacitly admitted that blacks, as a race, were being excluded from either the process or the substantive right to vote.

157. ROBERT J. DONOVAN, EISENHOWER: THE INSIDE STORY 161 (1956).

158. 347 U.S. 483 (1954).

159. GENNA R. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 136-55 (1983).

160. As noted in THE OXFORD COMPANION, "'Brown was the beginning,' Alexander M. Bickel later wrote — the beginning not only of substantive changes in the American social structure but also in the nature and expectations of how the Supreme Court interpreted the Constitution." THE OXFORD COMPANION, *supra* note 5, at 93.

161. The Court held in *Brown I*:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> > "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)(alterations in original).

162. Stavis, *supra* note 92, at 615 ("*Brown* was greeted by determined resistance from a wide range of white leadership throughout the South. One hundred and one southern senators and members of Congress signed the 'Southern Manifesto' which attacked the *Brown* decision as the substitution of 'naked power' for 'established law.'").

Supreme Court would more critically analyze laws and actions of state officials in addressing racial discrimination claims. The Court was ready to move beyond the eyeball test in analyzing racial discrimination claims.[163] It was a precursor of the landmark constitutional voting rights decisions of the 1960s and 1970s.

Although *Brown*[164] indicated the Court's willingness to move beyond eyeball analysis in racial discrimination claims, the Court was reluctant to do so in *Lassiter v. Northampton County Board of Elections*.[165] The Court did not make a dramatic move until the 1960s. In a string of revolutionary decisions pertaining primarily to apportionment and boundary matters[166] as well as to the right to register to vote — *Gommillion v. Lightfoot*,[167] *Baker v. Carr*,[168] *Gray v. Sanders*,[169]

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163. The Court probably employed the eyeball test for analyzing racial discrimination claims because of the history surrounding ratification of the Fourteenth Amendment. As Chief Justice Rehnquist wrote in THE SUPREME COURT: HOW IT WAS, HOW IT IS:

> At the close of the Civil War, Congress propounded and the states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The principal reason for the inclusion of this language in the amendment was to deal with the so-called Black Codes enacted by the states of the former Confederacy, which explicitly and in no uncertain terms prevented blacks from voting, serving on juries, being witnesses in court, possessing firearms, and acquiring liquor.

W. H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 315 (1987) [hereinafter THE SUPREME COURT]. Chief Justice Rehnquist writes further that "the problem at which the amendment was directed — the Black Codes — is bound to shed some light on what Congress meant and the states understood by the words 'equal protection of the laws.'" *Id.* at 316. Black Codes were

> a body of laws . . . which covered every aspect of the life of the slave. There were variations from state to state, but the general point of view was the same in most of such legislation. The point of view was that slaves were not persons but property; and laws should protect the ownership of such property, should protect the whites against any dangers that were likely to arise from the presence of large numbers of Negroes, and should maintain a position of due subordination on the part of the slaves in order that the optimum of discipline and work could be achieved.

FRANKLIN, *supra* note 7, at 187-88. The Black Codes were laws that, on their face, treated blacks, as a class, differently. Under these Codes, discrimination was easy to see. One only had to look at the face of the laws themselves to determine whether or not blacks were being treated differently and unequally to whites.

164. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

165. 360 U.S. 45 (1959), *overruled by* Louisiana v. United States, 380 U.S. 145 (1965).

166. The Warren Court formulated its constitutional analysis for discriminatory voting rights beginning with the discriminatory municipal boundary case of Gomillion v. Lightfoot, 364 U.S. 339 (1960). In that case, the Court discussed the concept of vote dilution. *Id.* at 346. Vote dilution has its origins in Lane v. Wilson, 307 U.S. 268 (1939), and is the guiding concept in the one-person one-vote principle first alluded to in Baker v. Carr, 369 U.S. 186 (1962), and fine tuned in Reynolds v. Sims, 377 U.S. 533 (1964). The concept of vote dilution was inimical to the development of the one-person one-vote population equality principle. The principle is more stringently applied when analyzing congressional apportionment schemes than when analyzing state legislative districting schemes. *See* Gaffney v. Cummings, 412 U.S. 735 (1973). In *Gaffney*, the Court said "[T]here are fundamental differences between congressional districting under Art. I and the *Wesberry* line of cases on the one hand, and, on the other, state legislative reapportionments governed by the Fourteenth Amendment and Reynolds v. Sims . . . and its progeny." *Id.* at 741-42.

The *Wesberry v. Sanders* line of cases requires the achievement of absolute population equality in congressional apportionment. Wesberry v. Sanders, 376 U.S. 1 (1964); Kirkpatrick v. Priesler, 394 U.S. 526, *reh. denied* 395 U.S. 917 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969). The *Reynolds* line of cases allows *de minimis* deviations, usually no greater than ten percent from absolute population equality, in state and local legislative apportionment. Abate v. Mundt, 403 U.S. 182 (1971); Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968); Kilgarlin v. Hill, 386 U.S. 120 (1967); Swann v. Adams, 385 U.S. 440 (1967); Reynolds v. Sims, 377 U.S. 533, 577-81 (1964). The requirement for population equality is, thus, more exacting in congressional apportionment than it is in state and local legislative apportionment. Gaffney v. Cummings, 412 U.S. 735, 741-47 (1973).

167. 364 U.S. 339 (1960).

168. 369 U.S. 186 (1962).

169. 372 U.S. 368 (1963).

*Reynolds v. Sims*,[170] *Wesberry v. Sanders*,[171] *Louisiana v. United States*,[172] and *Mississippi v. United States*[173] — the Supreme Court analyzed voting discrimination cases employing vote dilution analysis[174] as well as vote denial analysis.[175]

In *Gomillion*,[176] the Supreme Court analyzed the effect of state action in altering a municipality's boundaries so as to exclude all but four or five of the city's four hundred black citizens.[177] Upon analysis, the Court held that whenever "a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."[178] The statute on its face realigned municipal boundaries by employing racially neutral language.[179] However, the Court looked beyond the language to the "unequal weight in voting distribution"[180] in reaching its decision. This decision indicated the Court's willingness to employ vote dilution analysis in voting discrimination claims.

The *Gomillion* decision was followed the next term by *Baker v. Carr*.[181] There, the Court held that voters had standing to bring a vote dilution claim based upon the debasement of their voting power.[182] *Baker* was significant because it evidenced the Court's willingness to become involved in state election matters, but only where the United States Constitution was implicated. The decision inaugurated the most important achievement of the Warren Court—the apportionment revolution.[183]

*Baker*[184] was followed by *Gray v. Sanders*[185] where the Court held that "[i]f a State in a statewide election weighted . . . the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable."[186] Then the Court in 1964, in *Reynolds v. Sims*,[187] applied vote dilution analysis and announced the one person/one vote principle,[188] holding that "the Equal Protection Clause require[d] that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[189]

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170. 377 U.S. 533 (1964).
171. 376 U.S. 1 (1964).
172. 380 U.S. 145 (1965) (overruling Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959)).
173. 380 U.S. 128 (1965).
174. *See* MINORITY VOTE DILUTION (Chandler Davidson ed., 1989) (defining the concept of minority vote dilution).
175. Most Supreme Court voting rights decisions until the 1960s focused on an outright denial of voting rights. *See supra* notes 105, 110-15, 138-61 and accompanying text.
176. Gomillion v. Lightfoot, 364 U.S. 339 (1960).
177. *Id.*
178. *Id.* at 346.
179. *Id.* at 347.
180. *Id.* at 346.
181. 369 U.S. 186 (1962).
182. *Baker* was filed as a class action "on behalf of all voters of the State of Tennessee." *Id.* at 204-05.
183. THE OXFORD COMPANION, supra note 5, at 57.
184. Baker v. Carr, 369 U.S. 186 (1962).
185. 372 U.S. 368 (1963).
186. *Id.* at 379. The Court also held that "[t]he Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote." *Id.*
187. 377 U.S. 533 (1964).
188. The Court concluded that "[w]hatever the means of accomplishment [of population equality], the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579.
189. *Id.* at 577.

The *Reynolds* decision is significant because it marks the Warren Court's expansion of the class of people protected by the Fourteenth Amendment's Equal Protection Clause to include all citizens—not just racial minorities.[190] However, the decision did not state that the Fourteenth Amendment extended any new citizenship rights or protections to whites. Nor did the decision indicate that the goal of population equality was more important than the goal of not discriminating against African-Americans in apportionment matters. After all, it was axiomatic when *Reynolds* was decided that the Constitution and the Bill of Rights guaranteed white citizens certain rights.[191] The Fourteenth Amendment was proposed and ratified only to give blacks the same rights as whites.[192] At the time of the decision, African-Americans were still struggling to obtain the right to vote on an equal footing with whites.[193] *Reynolds* was revolutionary in that it extended equal protection in apportionment to all citizens. It did not take away from any rights guaranteed African-Americans by the Civil War Amendments. More importantly, the decision did not give whites any rights they did not already have. The decision only allowed the Fourteenth Amendment's Equal Protection Clause to be used by all voters to ensure voting districts contained equal population.

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190. In *Reynolds*, the Court held that "[s]ince the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators." *Id.* at 565-66.

191. *See supra* notes 5, 6, 16, 20, 21, 22, 24, 59, 66, and 71. The legislative histories to the Voting Rights Act of 1965 and the 1982 amendment of the Act document the continuing discrimination against African-Americans in suffrage matters. That history details how blacks have been systematically excluded from the political process through ingenious schemes of discriminatory devices before 1965 and beyond. *See* H.R. REP. NO. 439, 89th Cong., 1st Sess. 1 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437; S. REP. NO. 417, 97th Cong., 2d Sess. 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. (96 Stat.) 177.

192. *See infra* note 199.

193. FRANK R. PARKER, BLACK VOTES COUNT (1992) (detailing the struggle of Blacks to obtain full voting rights after 1965). *See also* Reynolds v. Sims, 377 U.S. 533 (1964).

The Warren Court's[194] voting rights decisions in the early 1960s, culminating with *Reynolds*, created some tension between the Fourteenth and Fifteenth Amendments. Those decisions expanded the class of people guaranteed voting rights protection by the Fourteenth Amendment's Equal Protection Clause[195] while reiterating that both the Fourteenth and Fifteenth Amendments guaranteed blacks the right to participate in the political process free from discrimination.[196] These decisions demonstrate that population equality must be achieved in apportionment but not at the expense of minority voting rights. *Reynolds* did not indicate that the constitutional guarantees of voting rights had suddenly become color-blind. At the Court's next term in *Fortson v. Dorsey*,[197] the Court indicated that it had not retreated from being color-conscious in reviewing the constitutional guarantees of voting rights. The Court stated:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.[198]

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194. Courts are often referred to by the name of the Chief Justice during the tenure of such Justices. Therefore, the Warren Court is comprised of all the Associate Justices plus Chief Justice Warren during his tenure. The Justices and the years of service during Chief Justice's Earl Warren's tenure are as follows:

| Justice's Name: | Years of Service & President Appointing |
|---|---|
| Earl Warren, Chief Justice | 1954-1969 - Eisenhower |
| Robert H. Jackson, Associate Justice | 1941-1954 - F. Roosevelt |
| Sherman Minton, Associate Justice | 1949-1956 - Truman |
| Thomas Clark, Associate Justice | 1949-1967 - Truman |
| Stanley F. Reed, Associate Justice | 1938-1957 - F. Roosevelt |
| Harold H. Burton, Associate Justice | 1945-1958 - Truman |
| William O. Douglas, Associate Justice | 1939-1975 - F. Roosevelt |
| Hugo L. Black, Associate Justice | 1937-1971 - F. Roosevelt |
| Stanley F. Reed, Associate Justice | 1938-1957 - F. Roosevelt |
| Felix Frankfurter, Associate Justice | 1939-1962 - F. Roosevelt |
| John M. Harlan, II, Associate Justice | 1955-1971 - Eisenhower |
| William Brennan, Jr., Associate Justice | 1957-1990 - Eisenhower |
| Charles E. Whittaker, Associate Justice | 1957-1962 - Eisenhower |
| Potter Stewart, Associate Justice | 1958-1981 - Eisenhower |
| Byron R. White, Associate Justice | 1962-1993 - Kennedy |
| Arthur J. Goldberg, Associate Justice | 1962-1965 - Kennedy |
| Abe Fortas, Associate Justice | 1965-1969 - L. Johnson |
| Thurgood Marshall, Associate Justice | 1967-1991 - L. Johnson |

Chief Justice Warren was appointed by President Eisenhower on October 2, 1953, and took his oath of office on October 5, 1953. This was a recess appointment. He was not confirmed by the Senate until March 1, 1954. He took the oath of office after being confirmed on March 2, 1954.

The information obtained for the date of resignation or retirement was obtained from public records and newspaper accounts.

THE OXFORD COMPANION, *supra* note 5, at 965-87.

195. Reynolds v. Sims, 377 U.S. 533, 567-69 (1964)(All voters are protected by the Equal Protection Clause.).

196. The Court in Mississippi v. United States, 380 U.S. 128 (1965) and Louisiana v. United States, 380 U.S. 145 (1965), held "that the Attorney General has power to bring suit against a State and its officials to protect the voting rights of Negroes guaranteed by . . . the Fourteenth and Fifteenth Amendments." Louisiana v. United States, 380 U.S. at 151. The Court in Hadnott v. Amos, 394 U.S. 358, 364 (1969), held that "[u]nequal application of the same law to different racial groups has an especially invidious connotation" under the Fifteenth Amendment.

197. 379 U.S. 433 (1965).

198. *Id.* at 439 (Harlan, J., concurring).

That same term, in striking down Louisiana's literacy test, the Court held "that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[199] A significant indication that the Court had not retreated from the long-held view that constitutional protections of voting rights are color-conscious came in *Burns v. Richardson*.[200] There, the Court opined:

> Where the requirements of *Reynolds v. Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[201]

In essence, the Warren Court recognized that the goal of population equality in apportionment matters must yield to the goal of non-discrimination when the two conflicted. The conflict had to be resolved in a manner that achieved both goals without subordinating the goal of non-discrimination. The Court recognized that the tensions created between the expanded classes of people protected by the Equal Protection Clause and the rights of African-Americans to be free from discrimination must be resolved in a manner that protected African-Americans' voting rights. The constitutional protections of voting rights were still color-conscious.

### *D. The Burger Court*

When Chief Justice Warren resigned in 1969,[202] President Nixon appointed Court of Appeals judge Warren E. Burger Chief Justice.[203] "Contrary to expectations, while Burger was Chief Justice,[204] the Supreme Court consolidated most of the major initiatives of the Warren Court (such as civil rights and reapportionment), although the pace of change became more moderate."[205] The Burger

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199. Louisiana v. United States, 380 U.S. 145, 154 (1965).
200. 384 U.S. 73 (1966).
201. *Id.* at 88 (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).
202. THE OXFORD COMPANION, *supra* note 5, at 982.
203. THE OXFORD COMPANION, *supra* note 5, at 104.
204. Chief Justice Burger served in that capacity from June 23, 1969 until he retired on September 26, 1986. THE OXFORD COMPANION, *supra* note 5, at 982.
205. THE OXFORD COMPANION, *supra* note 5, at 104-05.

Court[206] essentially began slowly to apply the brakes to the freedom train of minority voting rights. Those rights remained on track, but the goal of reaching the station was once again slowly becoming out of reach for many racial minorities. Their rights remained protected throughout the Burger Court years, but those protections were increasingly more difficult to maintain.

Indicative of the Court's continued protections of minority voting rights is the *White v. Regester* decision.[207] There the Court affirmed a lower court decision striking down a state legislative reapportionment plan which diluted minority voting strength as unconstitutional under the Civil War Amendments.[208] In *United Jewish Organizations v. Carey*,[209] the Court upheld the creation of districts containing a racial minority population of sixty-five percent in order to "afford fair representation to the members of those racial groups who [were] sufficiently numerous and whose residential patterns afford[ed] the opportunity of creating districts in which they [would] be in the majority."[210] These decisions support the conclusion that the Burger Court recognized that the constitutional protections of voting rights were color-conscious.

In spite of these decisions, however, an ominous cloud appeared on the horizon in 1978. That is when a fractured Court[211] decided *Regents of the University of California v. Bakke*.[212] Although *Bakke* was not a voting rights case, the decision created a tidal wave in civil rights law which eventually sent rippling effects into the voting rights area. In Bakke, a disgruntled white applicant for medical school at the University of California at Davis campus brought an action claiming that his medical school application had been rejected and less qualified minority applicants had been accepted under a special admissions program reserved for

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206. The Burger Court consisted of the following Justices:

| **Justice's Name:** | **Years of Service & President Appointing** |
|---|---|
| Warren E. Burger, Chief Justice | 1969-1986 - Nixon |
| Thurgood Marshall, Associate Justice | 1967-1991 - L. Johnson |
| Byron R. White, Associate Justice | 1962-1993 - Kennedy |
| Potter Stewart, Associate Justice | 1958-1981 - Eisenhower |
| William Brennan, Jr., Associate Justice | 1957-1990 - Eisenhower |
| John M, Harlan, II, Associate Justice | 1955-1971 - Eisenhower |
| William O. Douglas, Associate Justice | 1939-1975 - F. Roosevelt |
| Hugo L. Black, Associate Justice | 1937-1971 - F. Roosevelt |
| Harry A. Blackmun, Associate Justice | 1970-1993 - Nixon |
| Lewis Powell, Jr., Associate Justice | 1972-1987 - Nixon |
| William H. Rehnquist, Associate Justice | 1972- - Nixon |
| John P. Stevens, Associate Justice | 1975- - Ford |
| Sandra D. O'Connor, Associate Justice | 1981- - Reagan |

The dates of resignation or retirement from the Court were obtained from public documents and newspaper accounts. THE OXFORD COMPANION, *supra* note 5, at 965-87.

207. 412 U.S. 755 (1973).

208. *Id.* at 769-70.

209. 430 U.S. 144 (1977).

210. *Id.* at 168. In upholding the creation of election districts containing a minority population of sixty-five percent, the Court indicated an awareness that the constitutional protections of voting rights are color-conscious. The Court held that "[T]he Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5." *Id.* at 161.

211. As Justice Brennan wrote in his opinion, concurring in part and dissenting in part, with the majority's decision, "no single" Justice spoke "for the Court" in Regents of the Univ. of Cal. v. Bakke. 438 U.S. 265, 325 (1978).

212. *Id.* at 271-72.

minorities in violation of Equal Protection rights secured to him under the Fourteenth Amendment.[213] Essentially, Bakke alleged that the University of California had engaged in reverse discrimination[214] against him in favor of less qualified minority applicants simply because he was white.[215] A majority of the Court, in striking down the special admissions program as an unconstitutional quota,[216] debased the purpose of the Fourteenth Amendment and ignored our nation's history on race[217] and the continuing and contemporary societal discrimination against African-Americans.[218] In diminishing the historical and contemporary plight of African-Americans in this country, the Court held that "[t]he guarantees of the Fourteenth Amendment extend[ed] to all persons."[219] That holding was predicated upon the reasoning that "equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[220] The Court ignored the fact that whites have always controlled power in this country whether it was in government, politics, education, or public accommodations. The Equal Protection Clause was extended only to those groups — minorities in the exercise of power — needing protection from domination by whites. If whites controlled not just the seats of power but also the apparatus that made the law, then what protections did they need from groups powerless to change or control the law? Considering our national and constitutional history surrounding racial discrimination and the Fourteenth Amendment, the reasoning of the majority is questionable.

Four Justices — Brennan, White, Marshall, and Blackmun — in an opinion, concurring in part and dissenting in part, noted that the principal of equality did not come into being for African-Americans until ratification of the Fourteenth Amendment, and it has been an unfulfilled promise since then.[221] As Justice Brennan poignantly stated, "[a]gainst this background, claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality."[222]

The Court's holding that the Fourteenth Amendment's Equal Protection Clause provided protections to whites as well as blacks was based upon the fallacious assumption that African-Americans have the same inherent rights as whites under the Constitution and Bill of Rights. While in the abstract this is true, historical and current evidence shows that blacks were not considered citizens until 1865,[223] and they still suffer from the evil of discrimination and the evil's lingering effects.[224]

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213. *Id.* at 276-78.
214. *Id.* at 269-80.
215. *Id.* at 288-90.
216. *Id.* at 287-320.
217. *See supra* note 5 and accompanying text.
218. S. REP. No. 417, 97th Cong., 2d Sess. 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. (96 Stat.) 177.
219. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).
220. *Id.* at 289-90.
221. *Id.* at 326-28 (Brennan, J., concurring in part and dissenting in part).
222. *Id.* at 327.
223. *See supra* note 5 and accompanying text.
224. The legislative history of the Voting Rights Act Amendments of 1982 mentions aspects of discrimination and lingering effects of discrimination blacks still suffer in the exercise of the franchise. *See* S. REP. No. 417, 97th Cong., 2d Sess. 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. (96 Stat.) 177.

Despite *Bakke*, the Burger Court continued to recognize the principle that constitutional protections of voting rights are color-conscious. In another fractured decision[225] — *Mobile v. Bolden*[226] — a plurality of the Court reaffirmed the Court's previous holdings that "legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities."[227] The plurality noted, however, that racial minorities must prove that the challenged apportionments were created or maintained for a racially discriminatory purpose.[228] A racially discriminatory purpose in the creation or maintenance of an apportionment plan may be proven by either direct evidence of a racially discriminatory intent[229] — a smoking gun, or by circumstantial evidence including the "historical background of the decision,"[230] the "specific sequence of events leading up to the challenged decision,"[231] "[d]epartures from the normal procedural sequence,"[232] and the "legislative or administrative history."[233]

The Court, in effect, placed a more stringent barrier for minority voters to overcome in proving their voting discrimination claims. The Warren Court expanded analysis of voting rights claims from eyeball analysis to vote dilution analysis. The Burger Court then articulated a heightened standard of proof required of racial minorities and a heightened analysis of vote dilution claims by the courts to determine whether or not voting discrimination had occurred. Courts could no longer look at the results of a challenged electoral scheme. They now had to delve into the minds of the framers of the schemes to ascertain their purpose for creating it.[234] Regardless, the Court did not retreat from the long held principle that protection of minority voting rights is color-conscious. Indeed, the Burger Court recognized that the constitutional protections of voting rights were color-conscious. The Court only reasoned that racial minorities had a difficult burden of proving that state and local governments had denied them those protections.

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225. Justice Stewart delivered an opinion joined by Chief Justice Warren and Justices Powell and Rehnquist. Mobile v. Bolden, 446 U.S. 55, 58-80 (1980). Justice Blackmun, in a separate opinion, concurred in the results. *Id.* at 80-83. Justice Stevens, in a separate opinion, concurred in the judgment. *Id.* at 83-94. And Justices Brennan, White, and Marshall, in separate opinions, dissented. *Id.* at 94-141.

226. 446 U.S. 55 (1980).

227. *Id.* at 66.

228. *Id.* at 66-69.

229. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977).

230. *Id.* at 267.

231. *Id.*

232. *Id.*

233. *Id.* at 268.

234. Mobile v. Bolden, 446 U.S. 55, 67 (1980) ("More recently, in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, . . . the Court again relied on Wright v. Rockefeller to illustrate the principle that '[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'").

## V. THE REHNQUIST COURT'S RE-INTERPRETATION OF GUARANTEED VOTING RIGHTS FROM COLOR-CONSCIOUS TO COLOR-BLIND

### *A. Changing of the Guard and Direction of the Court*

Chief Justice Burger retired in 1986, and President Reagan elevated Associate Justice William H. Rehnquist to the position of Chief Justice,[235] thus creating a vacancy in the Associate Justice's position. President Reagan then appointed Appeals Court Judge Antonin Scalia to fill the Associate Justice vacancy,[236] giving him two appointments to replace one retiring Chief Justice.

In all, President Reagan filled four vacancies on the Court by appointing Rehnquist as Chief Justice and Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy as Associate Justices.[237] More than any other President since Franklin Roosevelt, Reagan[238] sought to control the judicial philosophy and decisions[239] of the Court by appointing activist jurists.[240] His appointees both to the Supreme Court and lower federal courts had to pass a litmus test of conservative values.[241] Those values included dismantling any special protections guaranteed to minority voters in apportionment matters.[242]

Of course, President Reagan's success at packing the Court with activist judges is grounded in the Republican Party's efforts, beginning in 1964, to realign its constituency and philosophy.[243] Until then, the Party, in theory rather than practice, supported civil rights for racial minorities. During the 1960 presidential election, both the national Republican and national Democratic Parties supported civil rights.[244] However, that changed in 1964 when Senator Barry Goldwater

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235. THE OXFORD COMPANION, *supra* note 5, at 965-82.

236. THE OXFORD COMPANION, *supra* note 5, at 756, 982.

237. THE OXFORD COMPANION, *supra* note 5, at 756, 982.

238. JAMES M. BURNS, ROOSEVELT: THE LION AND THE FOX 291-316 (1956) (discussing President Franklin Roosevelt's court packing plan); S. SHULL, A KINDER, GENTLER RACISM? THE REAGAN-BUSH CIVIL RIGHTS LEGACY 165 (1993) (discussing President Reagan's success in appointing Supreme Court Justices in 1981 and 1986 who were "activists for his agenda and conservative on civil rights").

239. W. EDEL, THE REAGAN PRESIDENCY 112-24 (1992) (discussing President Reagan's attempt to change the philosophy and direction of the Court). Mr. Edel writes that "President Reagan made no secret of his desire to completely reshape the character and philosophy of the federal courts." *Id.* at 112. It has been noted that Reagan had a "profound impact on the judiciary" because "in two full terms, he named about half the federal judges." SHULL, *supra* note 238.

240. Political scientist Glendon Schubert has given the following possible definitions of judicial activism:

> One possible definition of judicial activism is that it consists of any attempts of justices to change the policies of the Court. Thus, when a majority of the justices agree upon the direction of change that they deem desirable in regard to a particular policy, the position of the Court is activist. . . .
>
> An alternative functional theory of judicial activism and restraint defines activism in terms of disharmony, and restraint in terms of harmony, between the policy of the Court and that of other decision-makers. We define "other decision-makers" quite broadly, to include (1) Congress, the President and administrative agencies, and lower national courts, and (2) the analogous officials of state governments. . . .

GLENDON SHUBERT, JUDICIAL POLICY-MAKING 153, 154 (1965).

241. EDEL, *supra* note 239, at 112-24.

242. EDEL, *supra* note 239, at 112-24.

243. KEVIN P. PHILLIPS, THE EMERGING REPUBLIC MAJORITY 206-207 (1970) (discussing realignment of conservative and Southern voters from the Democratic Party to the Republican Party after 1964).

244. INSIDE POLITICS: THE NATIONAL CONVENTIONS, 1960 55-98 (P. Tillett ed., 1962) (detailing the struggle and success of Richard Nixon, the Republican nominee for President in 1960, and Nelson Rockefeller to include a liberal civil rights plank in the Republican Party Platform, and detailing the struggle and success of John Kennedy, the Democratic nominee for President in 1960 to include a liberal civil rights plank in the Democratic Party Platform).

became the Republican standard bearer.[245] The Party's "Southern Strategy,"[246] passage of and enactment of the Voting Rights Act of 1965[247] by the Democratic Congress, and the Johnson Presidency drove many poor southern white voters to the Republicans.[248] With this new constituency, the Republican Party became increasingly conservative and non-supportive of civil rights. The Party's metamorphosis from supporter to dismantler of civil rights was hastened by the election and re-election of Ronald Reagan as President in 1980 and 1984.[249] Many conservative Republicans rode his coattails to Congress, including the Senate, the body which confirmed his appointments to the Court and Cabinet and sub-Cabinet level Justice Department positions.[250] President Reagan appointed conservative officials to high level Justice Department positions who, in turn, carefully screened judicial nominees to ensure that their philosophy on civil rights was compatible with his.[251]

While President Reagan's election victories hastened the Republicans' metamorphosis, President Bush's election in 1988 completed it. He did not substantially deviate from his predecessor's judicial selection policies.[252] Two vacancies occurred on the Court during his Presidency. Justices Brennan and Marshall retired in 1990 and 1991 respectively.[253] President Bush appointed Appeals Judge David Souter to replace Justice Brennan and Appeals Judge Clarence Thomas to replace Justice Marshall.[254] With these appointments, the Court packing plan started under President Reagan was now complete.

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245. Political scientist Kevin Phillips writes:

> Not content with forging evolutionary gains in the Outer South, GOP conservatives set up the "Southern Strategy," which helped achieve the 1964 nomination of Barry Goldwater. Simply put, the idea was to join the South and West in a conservative coalition. What would have happened had the GOP been able to nominate a more moderate conservative will never be known. Instead, the party chose Barry Goldwater, and his platform—quite conservative to begin with — was quickly propagandized as barely disguised racism in the Deep South vein. This image gained so much credence that Goldwater swung the Deep South into the Republican column but sacrificed the rest of the nation, including the Outer South. In essence, Goldwater won where Thurmond had won in 1948, largely for the same reasons. Like Thurmond, Goldwater captured Mississippi, South Carolina, Alabama and Louisiana, and added Georgia — the next-best Dixiecrat state — to the list.

PHILLIPS, *supra* note 243, at 204.

246. PHILLIPS, *supra* note 243, at 204.

247. 42 U.S.C. § 1971 (Supp. 1993).

248. Kevin Phillips writes:

> Displeased by federal intervention on behalf of Negroes, poor whites registered to vote in greatly increased numbers, offsetting enlarged Negro enrollment in many states. For many years, the poor whites of the Deep South had shunned the conservatism of States Rights, Dixiecrat and Republican candidates, but by 1966 they were becoming disillusioned with the stance of the national Democratic Party. . . . The Negro socioeconomic revolution gave conservatism a degree of access to Southern poor white support which it had not enjoyed since the somewhat comparable Reconstruction era.

PHILLIPS, *supra* note 243, at 206.

249. SHULL, *supra* note 238.

250. EDEL, *supra* note 239, at 112-24.

251. EDEL, *supra* note 239, at 112-24.

252. SHULL, *supra* note 238, at 165 (discussing Bush's success at appointing Clarence Thomas to the Court because "[h]e opposed affirmative action, promoted black self-help, and rejected broad class action suits rather than specific cases of discrimination").

253. THE OXFORD COMPANION, *supra* note 5, at 965-82.

254. THE OXFORD COMPANION, *supra* note 5, at 965-82.

### B. *The* Thornburg *Decision*

The first major voting rights case reviewed by the Rehnquist Court[255] was one of statutory construction which did not involve constitutional issues. In 1986, the Court, in *Thornburg v. Gingles*,[256] held that North Carolina's multimember state legislative districts resulted in impermissible dilution of black voting strength in violation of the 1982 amendment to Section 2 of the Voting Rights Act of 1965.[257] As necessary preconditions for proving a vote dilution claim, the Court held that the minority community must demonstrate "that it is sufficiently large and geographically compact to constitute a majority in a single-member district,"[258] that the minority community is "politically cohesive,"[259] and that white bloc voting is legally significant.[260] The "sufficiently large and geographically compact" precondition can be traced to *Reynolds*.[261] There, the Court stated that "a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering."[262] The principle of requiring geographically compact districts in state legislative apportionment plans is one that has been advocated by civil rights activists[263] and applied by the courts.[264] The reason racial compactness is important in apportionment is not because it is constitutionally required — because it is not[265] — but because it is

255. The Rehnquist Court consisted of the following Justices:

| Justice's Name: | Years of Service & President Appointing |
|---|---|
| William H. Rehnquist, Chief Justice | 1986- - Reagan |
| Thurgood Marshall, Associate Justice | 1967-1991 - L. Johnson |
| Byron R. White, Associate Justice | 1962-1993 - Kennedy |
| William Brennan, Jr., Associate Justice | 1957-1990 - Eisenhower |
| Harry A. Blackmun, Associate Justice | 1970-1993 - Nixon |
| Lewis Powell, Jr., Associate Justice | 1972-1987 - Nixon |
| John P. Stevens, Associate Justice | 1975- - Ford |
| Sandra D. O'Connor, Associate Justice | 1981- - Reagan |
| Antonin Scalia, Associate Justice | 1986- - Reagan |
| Anthony M. Kennedy, Associate Justice | 1988- - Reagan |
| David H. Souter, Associate Justice | 1990- - Bush |
| Clarence Thomas, Associate Justice | 1991- - Bush |
| Ruth B. Ginsberg, Associate Justice | 1993- - Clinton |
| Stephen Breyer, Associate Justice | 1994- - Clinton |

The dates of resignation or retirement from the Court were obtained from public documents and newspaper accounts.

The names of Associate Justices, the dates of service on the Court, and the President appointing them are taken from public documents and newspaper accounts.

THE OXFORD COMPANION, *supra* note 5, at 965-87.

256. 478 U.S. 30 (1986).

257. 42 U.S.C. § 1973 (Supp. 1993).

258. Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

259. *Id.* at 50-51.

260. *Id.*

261. *See generally* Reynolds v. Sims, 377 U.S. 533 (1964).

262. *Id.* at 581.

263. *See* Frank R. Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391 (1973) [hereinafter *County Redistricting*]; F. PARKER & B. PHILLIPS, VOTING IN MISSISSIPPI: A RIGHT STILL DENIED (1981); PARKER, *supra* note 193, at 85.

264. Growe v. Emison, 507 U.S. 25, 40 (1993) (holding that a minority group is required to be "sufficiently large and geographically compact to constitute a majority in a single-member district") (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)); Voinovich v. Quilter, 507 U.S. 146 (1993) (holding that *Thornburg* preconditions must be adhered to).

265. The Supreme Court noted in *Shaw v. Reno* that although compactness, continuity, and respect for political subdivisions are traditional districting principles, those principles are not constitutionally required. 113 S. Ct. 2816, 2827 (1993).

an "objective factor[ ] that may serve to defeat a claim that a district has been gerrymandered on racial lines."[266] Although not constitutionally required, the Rehnquist Court treats minority geographical compactness as the most important factor in apportionment when minority districts are created. In other words, the Rehnquist Court considers the *Thornburg* minority compactness precondition to be more important than the constitutional principle of non-dilution of minority voting strength in apportionment matters. For this reason, *Thornburg* is an important case in the revolution of the Rehnquist Court.

### *C.* Shaw v. Reno - *The Revolution Begins*

While the Court's revolution concerning the constitutional guarantees of voting rights began with the Warren Court[267] and continued, to a limited extent, with the Burger Court,[268] it has reached an alarmingly precipitous plateau at a dangerous rate of speed with the Rehnquist Court. While previous Courts may have applied the brakes on the freedom train of minority voting rights, the Rehnquist Court has put the train in reverse throttle at full speed. The Court has finally realized that it "has considerable latitude to interpret the meaning of constitutional language such as . . . 'equal protection of the laws.'"[269] This latitude has lead the Court "to feel that the sky is the limit when it comes to imposing their solutions to national problems on the popularly elected branches of the government and on the people."[270] In doing this, the Court has virtually ignored long established precedent in the area of constitutional minority voting rights.[271]

On June 28, 1993, the Court decided *Shaw v. Reno*.[272] The case involved a challenge by five white voters in Durham County, North Carolina to one of the state's two majority-black congressional districts created after the 1990 Decennial Census.[273] The state's voting age population was seventy-eight percent white, twenty percent black, one percent Native American, and less than one percent other.[274] The black population was "relatively dispersed."[275] Because North Carolina's total population had increased significantly by 1990, the number of congressional seats allotted increased to twelve.[276] The State had not sent an

266. *Id.*

267. The Warren Court ushered in the concept of minority vote dilution analysis and expanded the class of persons guaranteed voting rights by the Fourteenth Amendment's Equal Protection Clause to include all citizens. *See supra* note 203 and accompanying text.

268. The Burger Court ushered in the concept of "reverse discrimination" and heightened analysis for determining minority vote dilution. *See supra* note 217 and accompanying text.

269. REHNQUIST, *supra* note 163, at 316.

270. REHNQUIST, *supra* note 163, at 316.

271. The Court thus far has not uprooted well established voting rights jurisprudence that is statutorily based. *See* Growe v. Emison, 507 U.S. 25 (1993) (applying Section 2 vote dilution analysis to claims involving single-member districts); Voinovich v. Quilter, 507 U.S. 146 (1993) (same); Johnson v. De Grandy, 114 S. Ct. 2647 (1994) (same). *But see* Presley v. Etowah County Comm'n, 502 U. S. 491 (1992) (a case where the Court did not give Section 5 of the Voting Rights Act the liberal interpretation requested by plaintiffs).

272. 113 S. Ct. 2816 (1993).

273. *Id.* at 2821-22.

274. *Id.* at 2820.

275. *Id.*

276. *Id.* at 2819.

African-American to Congress since 1901.[277] The Legislature "enacted a reapportionment plan that included one majority-black congressional district."[278] Since part of North Carolina was covered by Section 5 of the Voting Rights Act,[279] the Legislature submitted its plan to the United States Attorney General for preclearance.[280] The Attorney General objected to the plan noting that a second majority-black district could have been created in the "south-central to southeastern region of the State."[281] North Carolina went back to the drawing board and crafted a revised plan creating a second majority-black district "not in the south-central to southeastern part of the State, but in the north-central region along Interstate 85."[282] This second black district was "unusually shaped" stretching "approximately 160 miles . . . in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobble[d] in enough enclaves of black neighborhoods.'"[283] This second majority-black district contained a black voting age population (BVAP) of 54.71 percent.[284] The Legislature submitted the revised plan for preclearance, and it was precleared.[285] Five disgruntled white voters filed suit alleging that this second black majority district was an "unconstitutional *racial* gerrymander"[286] because the district was "deliberately 'create[d] . . . in which a majority of black voters was concentrated arbitrarily—without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions' with the purpose 'to create Congressional Districts along racial lines' and to assure the election of two black representatives to Congress."[287] Their chief complaint was "that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process."[288] In essence, the five white voters made a claim of reverse voting rights discrimination. A three-judge district court dismissed their claim, and they appealed.[289]

The Supreme Court reversed and remanded the case holding that "[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

277. Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 DIST. COLUM. L. REV. 1, 7 (1995).
278. Shaw v. Reno, 113 S. Ct. 2816, 2819 (1993).
279. 42 U.S.C. § 1973(c) (Supp. 1993).
280. Preclearance of voting changes implemented in jurisdictions covered by Section 5 may be obtained either administratively from the United States Attorney General or judicially from the United States District Court for the District of Columbia. *See* Carroll Rhodes, *Enforcing the Voting Rights Act in Mississippi Through Litigation*, MISS. L.J. 705, 708 n.13 (1987).
281. Shaw v. Reno, 113 S. Ct. 2816, 2820 (1993).
282. *Id.*
283. *Id.* at 2820-21. (quoting Shaw v. Barr, 808 F. Supp. 461, 476-77 (Voorhees, C.J., concurring in part and dissenting in part)).
284. *Id.* at 2840 n.7 (White, J., dissenting).
285. *Id.* at 2820-21.
286. *Id.* at 2821.
287. *Id.*
288. *Id.* at 2824.
289. *Id.* at 2821-22.

their skin, bears an uncomfortable resemblance to political apartheid."[290] The use of the phrase "political apartheid" was ill-advised and inapposite to the facts of the case. Apartheid provides for a complete caste system—a complete separation of racial groups,[291] allowing whites to dominate other racial minorities in every respect.[292] Racial groups in the congressional district challenged by the five white voters were not separated. On the contrary, the district was integrated with fifty-five percent of the voting age population being black and forty-five percent of that same population being white. The black population was "widely dispersed." Also, white voters were not politically dominated by blacks.

The Court relied upon *Gomillion v. Lightfoot*[293] to support its conclusion that the challenged districting scheme resembled political apartheid. That reliance, like the phrase "political apartheid," was misplaced. *Gomillion* involved the efforts of a white-controlled government to exclude all but four or five of a town's four hundred black citizens.[294] In other words, *Gomillion* involved the efforts of a white-dominated government to exclude between 98.75 percent and ninety-nine percent of the town's eligible black population. No such efforts could be discerned in *Shaw*.[295] There was no black-dominated government in North Carolina seeking to exclude between 98.75 percent and ninety-nine percent of eligible white citizens from District 12. Even more importantly, the Warren Court analyzed *Gomillion* using vote dilution analysis by looking at the "unequal weight in voting distribution."[296] The Rehnquist Court in Shaw did not look at the weight in voting distribution in the overall apportionment scheme.[297] Blacks constituted twenty percent of the state's population, yet only two of the twelve congressional districts were majority-black.[298] The weight of the voting distribution in *Shaw*[299] was not unequal. The Court's reliance on *Gomillion* was misplaced, and its use of the phrase "political apartheid" was vicious, divisive, and inappropriate.[300]

The Court's holding that districts are suspect in which racial minorities are in a majority but are "widely separated by geographical and political boundaries, and who *may* have little in common with one another but the color of their skin"[301] is

290. *Id.* at 2827.
291. THE APARTHEID REGIME: POLITICAL POWER AND RACIAL DOMINATION 1-2 (R. Price & C. Rosberg eds., 1980) [hereinafter THE APARTHEID REGIME].
292. E. DIVORIN, RACIAL SEPARATION IN SOUTH AFRICA: AN ANALYSIS OF APARTHEID THEORY 56-60 (1952).
293. 364 U.S. 339 (1960).
294. *Id.* at 341.
295. Shaw v. Reno, 113 S. Ct. 2816 (1993).
296. Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960).
297. *Shaw*, 113 S. Ct. 2816, 2838-40 (White, J., dissenting).
298. *Id.* at 2816.
299. *Id.* at 2820.
300. Four Justices, in dissent, thought the "segregate voters" and "political apartheid" phrases were "ill-advised," Shaw v. Reno, 113 S. Ct. 2816, 2840 n.7 (1993) (White, J., dissenting), and misguided, *id.* at 2846 n.4 (Souter, J., dissenting). The Court's categorization of the 12th Congressional District as "political apartheid" has exacerbated racial divisions in this country. As voting rights scholar Frank Parker has written, "The Court's decision has enormous consequences for minority voters seeking to overcome decades of discrimination in the electoral process and under representation in Congress, state legislatures, and local governmental bodies." Parker, *supra* note 277, at 1, 2.
301. *Shaw*, 113 S. Ct. at 2827.

troubling. Seemingly, the overriding concern with the shape of a district elevates compactness as an objective apportionment criteria to a constitutional goal.[302] The compactness requirement makes property more important than people in apportionment. The Shaw decision noted that "[a] reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses."[303] The Warren Court assigned a different level of importance to people in apportionment matters. In *Reynolds*, the Court held that "[l]egislators represent people, not trees or acres."[304] They are not elected by "farms or cities or economic interests" but by voters.[305] After *Shaw*, in order to withstand constitutional challenges by white voters, legislatures would have to resort to drawing square, oblong, rectangular, triangular, or oval districts. Although aesthetically pleasing, such districts are not rooted in reality. Population generally is not evenly dispersed either geographically or racially in this country. *Reynolds* teaches us that. Existing political boundaries often are not neatly drawn.[306] Drawing districts for the sake of appearance could erode the substantial gains made by minorities over the past decade[307] and unnecessarily involves the Court in state apportionment matters.[308]

The *Shaw* decision was revolutionary not only for elevating the importance of compactness as an apportionment criteria, but also for urging the creation of a "'color-blind' electoral process."[309] This was the first time a majority of the Court tacitly recognized the concept of a color-blind electoral process. In requiring a "color-blind electoral process," the Court held that while apportionment legislation is "race-neutral on its face," if it "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that separation lacks sufficient justification," then it violates the Equal Protection Clause.[310]

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302. Although the Court recognized that compactness in apportionment plans is not "constitutionally required," it stated that it is an objective factor "that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, 113 S. Ct. at 2827. In other words, the Court strongly encouraged legislative bodies to draft compact districts to withstand constitutional attacks by disgruntled white voters. That encouragement could have a chilling effect on the efforts of legislative bodies to voluntarily remedy past discriminatory districting schemes that were designed to dilute minority voting strength.

The Rehnquist Court is not the only Court to strongly encourage the creation of compact districts. The Burger Court, in Connor v. Finch, 431 U.S. 407, 425-26 (1977), ordered a three-judge district court in Mississippi to "either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished." However, the encouragement of creating compact districts in the two cases are analytically distinct. First, the *Connor* Court was faced with a districting scheme that split geographically compact areas of black population between majority-white districts. *Id.* at 416-19, 424-25. The *Shaw* Court was not faced with a districting scheme that split geographically compact areas of white population between majority-black districts. Second, the black voting strength in *Connor* was diluted in the challenged districting scheme. The white voting strength was not diluted in *Shaw*.

303. *Shaw*, 113 S. Ct. at 2816, 2826.

304. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

305. *Id.*

306. *See County Redistricting*, supra note 263, at 391 (giving examples of bizarrely shaped political units and subdivisions).

307. *See* Parker, *supra* note 277, at 2-6 (discussing gains made by minorities after the 1990 Census).

308. The Court recognized that "reapportionment is primarily the duty and responsibility of the State." Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995) (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975)).

309. Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993).

310. *Id.* at 2828.

In determining whether or not an apportionment scheme is an attempt to "separate voters into different districts on the basis of race," legislative bodies and the courts must look at minority population concentrations in the plan. The Court stated:

> As *Wright* demonstrates, when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.[311]

If the minority population is sufficiently large and geographically insular such that a compact district could be created where the minority population is in the majority, then the crafted district will not be suspect. If, however, the minority population is geographically dispersed such that a compact district cannot be created unless the plan's drafters distort the shape of an otherwise compact district, then the district is constitutionally suspect.[312] The constitutional analysis to be employed is simple, but not necessarily analytical. The employed analysis is "analytically distinct" from the analysis employed in vote dilution cases.[313]

Under *Shaw*, legislative bodies and the courts would employ the "eyeball test of reverse discrimination."[314] This test is distinctive from the "eyeball test of discrimination." Under the eyeball test of discrimination, the Court looks upon the face of the challenged statute to determine whether virtually all blacks have been treated differently from all whites. Under the eyeball test of reverse discrimination, the Court looks at the shape of the district. If the district is shaped bizarrely, then the Court looks at the supporting population data to determine whether small pockets of minority populations have been grouped together to form a majority in the minority district.[315] If this is so, then the district is presumptively constitutionally infirm.[316] To overcome the presumption of invalidity, the legislative body must offer a rational reason for the district's odd shape and racial makeup.[317] Compliance with recommendations contained in the Attorney General's Section 5 objection letter is not a rational reason for the district.[318] If

311. *Id.* at 2826.

312. *Id.* at 2827. The Court noted that "reapportionment is one area in which appearances do matter." *Id.*

313. *Id.* at 2830.

314. Under the "eyeball test of reverse discrimination," the courts look at the face of the reapportionment plan to determine whether or not white citizens are being classified solely on the basis of their race. *Id.* at 2824-25. Under the Rehnquist Court's analysis, such classifications "threaten to stigmatize [white] individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* at 2824. The problem with the analysis is that white citizens are the dominant group politically as well as numerically in this country. They have never been stigmatized. As the Court said in *Plessy*, "We imagine that the white race . . . would not acquiesce in this assumption." Plessy v. Ferguson, 163 U.S. 537, 551 (1896). It is unlikely that whites would, any time soon, be stigmatized or dominated by any racial minority. *See supra* note 5 for a discussion of racial minorities.

315. Whites comprised forty-five percent of the voting age population in the challenged district. Shaw v. Reno, 113 S. Ct. 2816, 2840 n.7 (1993) (White, J., dissenting).

316. *See id.* at 2824. The Court held in *Shaw* that "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Id.*

317. *Id.* at 2828.

318. *Id.* at 2830-31.

"eradicating the effects of past racial discrimination"[319] is the reason for the bizarre shape of a district, "the State must have a 'strong basis in evidence for [concluding] that remedial action [is] necessary.'"[320] Thus, the Court has created an additional hurdle for a state to overcome in attempting to eradicate past and continuing minority vote dilution by creating majority-minority districts with unusually shaped but contiguous districts.

The *Shaw* decision is circumspect because it does not address the natural tension between the expanded protections to white citizens under the Fourteenth Amendment and the protections guaranteed African-Americans under the Fifteenth Amendment.[321] The Fifteenth Amendment permits states to create additional majority-minority districts to remedy past minority vote dilution.[322] The Warren Court recognized that when racially neutral apportionment efforts under the Fourteenth Amendment collide with guarantees of non-discrimination against African-Americans under the Fifteenth Amendment, the former must yield.[323]

In attempting to create a color-blind electoral system, the Rehnquist Court disregarded the purpose of the Fourteenth and Fifteenth Amendments[324] and their color-conscious application for more than a century. More than that, the Court created a simplistic framework for analyzing the newly created claim of political apartheid against whites. In creating this simplistic analytical framework, the Court extended the class of persons protected by the Fourteenth Amendment to include white persons who needed protection from other white persons (legislators) with noble intentions of creating majority-minority districts. *Shaw* was the shot fired across the bow of the freedom ship signaling that the Court was changing the course of constitutional guarantees of voting rights from color-conscious to color-blind.

The decision is revolutionary for another reason. It presumes discrimination without any direct proof other than the shape of the reapportionment plan.

### *D.* Miller v. Johnson *and Beyond — The Revolution Continues*

The revolutionary *Shaw* decision demands close scrutiny of any apportionment scheme "that is so bizarre on its face that it is 'unexplainable on grounds other than race.'"[325] *Shaw* authorized disgruntled white voters to bring a reverse voting discrimination claim provided they live in the district being challenged.[326] This was a new cause of action analytically distinct from vote dilution or vote denial claims[327] that was untested until 1995 when the Court decided *Miller v.*

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319. *Id.* at 2831.
320. *Id.* at 2832 (alterations in original)(quoting Richmond v. J.A. Croson, 488 U.S. 469, 500 (1989)).
321. *See supra* notes 66-74 and accompanying text.
322. *See* United Jewish Organization v. Carey, 430 U.S. 144 (1977).
323. *Id.* at 165-68.
324. *See supra* notes 66-74 and accompanying text.
325. Shaw v. Reno, 113 S. Ct. 2816, 2825 (1993)(quoting Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977)).
326. United States v. Hays, 115 S. Ct. 2431 (1995).
327. Shaw v. Reno, 113 S. Ct. 2816, 2824-32 (1993).

*Johnson*.[328] There, the Court held that Georgia's congressional districts were drawn in a manner that impermissibly segregated voters[329] on account of race.[330] Before reaching a decision, however, the Court employed the "eyeball test of reverse discrimination."[331] Upon analysis, the Court, relying upon *Shaw*, found that Georgia's congressional apportionment plan was suspect.[332] The Court noted that racial segregation of voters was permissible if it was done to eradicate "the effects of past racial discrimination."[333] However, segregation of voters was constitutionally impermissible if it was done to satisfy a Section 5 objection by the Attorney General.[334] If race was a predominantly motivating factor in the creation of a district, then it was subject to strict scrutiny.[335] Compliance with the Attorney General's Section 5 objection was insufficient justification for the district.[336]

*Miller* is more troubling than *Shaw*. Until *Miller*, it was constitutionally permissible to consider race in drafting apportionment plans.[337] *Miller*, however, has changed that. Now, racial considerations must be subordinated to non-constitutional criteria such as compactness, contiguity, and preservation of political boundaries in developing districting plans. Suddenly, trees and land have become more important than people, or more appropriately, just black people. Districts after *Miller* must be neatly shaped without regard to the political power exercised by the inhabitants. The Court noted in *Miller* that "[o]nly if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race."[338]

While our goal should be a color-neutral society, our history and current social climate instructs us that we are a long way from it. By acting as if the goal could be achieved with the stroke of a pen, the Court has perpetuated that discrimination. It is only when racial minorities can exercise political power in parity with whites that society will move toward becoming color-neutral. Given our history, it is seriously doubtful whether we will ever become color-blind.

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328. 115 S. Ct. 2475 (1995).

329. Impermissible segregation of voters in the context of *Shaw* and *Miller* is any district where black voters constitute a majority of the population that was drawn by banding pockets of black population in a contiguous district that may not be aesthetically pleasing.

330. *Miller*, 115 S. Ct. at 2494.

331. *Id.* at 2489-90. The Court noted that voters bringing a voter segregation claim unlike voters bringing a vote dilution claim, do not have to "make a threshold showing of bizarreness." *Id.* at 2488.

332. *Id.* at 2482.

333. *Id.* at 2490 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2831 (1993)).

334. *Id.* at 2490-94.

335. *Id.* at 2490.

336. *Id.* at 2491.

337. United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977) (holding it is constitutionally permissible to intentionally draw districts that is sixty-five percent black); White v. Regester, 412 U.S. 755 (1973) (holding any apportionment plan should not result in a dilution of minority voting strength).

It is noteworthy that the Rehnquist Court upheld, on statutory grounds, the creation of majority-minority districts in Johnson v. De Grandy, 114 S. Ct. 2647 (1994).

338. Miller v. Johnson, 115 S. Ct. 2475, 2494 (1995).

The Court heard oral arguments in *Shaw v. Hunt*[339] and *Vera v. Richards*[340] on December 5, 1995.[341] The cases involved reapportionment plans in North Carolina and Texas, respectively. In both cases, the Court held that the challenged districts violated the Equal Protection Clause.[342]

## VI. CONCLUSION

For more than a century now, the Supreme Court has recognized that the constitutional guarantees of Equal Protection and freedom from discrimination in voting were color-conscious. In less than three years, the Court has revolutionized that body of law. The course the Court has chosen will eventually burden the federal judiciary with thousands of cases with voters clamoring for a share in political power or total political dominance. The Court has, with the decisions in *Shaw* and *Miller*, not only entered the political thicket, but it has also razed the land. Unfortunately, the revolutionary decisions will result in more racial discord than racial harmony. Although the decisions have changed the constitutional guarantees of voting rights from color-conscious to color-blind, the decisions have also heightened racial tension in apportionment matters and in the exercise of political power.

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339. 861 F. Supp. 408 (three-judge court 1994), *prob. juris. noted* 63 U.S.L.W. 3917 (U.S. 1995).

340. 861 F. Supp. 1304 (three-judge court 1994), *prob. juris. noted* Bush v. Vera & Lawson v. Vera, 63 U.S.L.W. 3915, 3917 (U.S. June 29, 1995).

341. 64 U.S.L.W. 3427 (U.S. 1995).

342. Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1996); Bush v. Vera, 116 S. Ct. 1941, 1964 (1996).