COMMENTARY

NOT "WRONGFUL" BY ANY MEANS: THE COURT'S DECISIONS IN THE REDISTRICTING CASES

*Carol M. Swain**

It is an honor to be here at the University of Houston Law Center and to have been chosen to serve as a commentator for Professor Pamela Karlan's very incisive paper in which she criticizes the United States Supreme Court for its lack of a coherent theory of politics.[1] In keeping with the tenor of Professor Karlan's own work, I will try in my remarks to offer a few crisp, cogent arguments.

Professor Karlan by no means is alone in her concerns about the Court's inability to expound adequate theories to explain what many believe to be conflicting decisions. A number of other legal scholars are likewise troubled by the Court's decisions in the voting rights cases. Anthony Peacock, for example, argues that the Court is in a quandary because of its inability to reconcile the "results-oriented" Voting Rights Act with the protections afforded individuals under the more "race-neutral" Equal Protection Clause of the Fourteenth Amendment.[2] It is the Court's inability to reconcile competing notions of equality that has led to the string of five to four decisions against race-conscious districting that began with *Shaw v. Reno* (*Shaw I*).[3]

---

* Associate Professor of Politics and Public Affairs, Woodrow Wilson School, Princeton University; B.A., Roanoke College, 1983; M.A., Virginia Polytechnic & State University, 1984; Ph.D., University of North Carolina, 1989.

1. *See* Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289 (1997).

2. *See* Anthony A. Peacock, Shaw v. Reno *and the Voting Rights Conundrum: Equality, the Public Interest, and the Politics of Representation*, *in* AFFIRMATIVE ACTION AND REPRESENTATION: SHAW V. RENO AND THE FUTURE OF VOTING RIGHTS (forthcoming 1997).

3. 509 U.S. 630 (1993).

Professor Karlan is on the mark when she draws parallels between the issues at stake in *Romer v. Evans*,[4] the gay and lesbian rights case, and those that consumed the Court in *Gomillion v. Lightfoot*.[5] In these cases, the majority group was about to strip voters of political rights that they already had exercised under the law.[6] For the Court to have ruled against the plaintiffs would have led to major retrogressions in the political status of both groups.

While I agree with many of Professor Karlan's arguments, we part company on the redistricting issues. I do not agree that the redistricting cases have been decided wrongfully, that the Court has been as inconsistent on these matters as many hold, or that minority voters somehow have been harmed by the Court's decision to subject racial gerrymandering to strict scrutiny.[7] In my opinion, the Court has dealt no fatal blows to minority voters. On the contrary, I believe that its decisions in the voting rights area have enhanced the likelihood that blacks and Hispanics will obtain more meaningful representation from a much broader group of elected officials.

Indeed, there is much to applaud in the Court's recent voting rights decisions, and one fact must be established beyond a doubt: contrary to what many civil rights lawyers and activists have predicted, the Court has not moved to invalidate the Voting Rights Act of 1965.[8] Rather, in *Bush v. Vera*,[9] the Court explicitly affirmed its support for that legislation and for the creation of majority-minority districts that meet its criteria as outlined in *Thornburg v. Gingles*.[10] Under the *Gingles* criteria, states are compelled to create majority-minority districts whenever and wherever a geographical area contains a large, compact minority population of sufficient size to constitute a majority in a single-member district.[11] The group must vote in a politically cohesive

4. 116 S. Ct. 1620 (1996).

5. 364 U.S. 339 (1960).

6. *See Romer*, 116 S. Ct. at 1623-24 (addressing the constitutionality of Amendment 2 to the Colorado Constitution, which was passed essentially to overturn the voting successes of gays and lesbians "in various Colorado municipalities"); *Gomillion*, 364 U.S. at 340-42 (discussing the validity of Local Act No. 140, passed by the Alabama Legislature in 1957, which redefined the boundaries of the City of Tuskegee for the purpose of disenfranchising black voters).

7. *See Shaw I*, 509 U.S. at 644-49 (stating that Supreme Court precedent supports the conclusion "that redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race'" requires strict scrutiny analysis (quoting Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977))).

8. 42 U.S.C. § 1973 (1994).

9. 116 S. Ct. 1941 (1996).

10. 478 U.S. 30 (1986).

11. *See id.* at 50.

manner and be able to demonstrate that its candidates of choice have been defeated regularly by white voters who vote in blocs.[12]

In *Vera*, the Court reaffirmed its support for the nonretrogression standard articulated in *Beer v. United States*,[13] which has been interpreted to mean that an electoral change cannot leave minority voters worse off than they are now.[14] Therefore, *Vera*'s value to minority voters and incumbents is unmistakable. In those regions of the country where dwindling populations have meant the loss of congressional seats, minority incumbents are afforded an extra measure of protection from being redistricted out of their seats, even when their districts have lost significant population. Far from striking down the Voting Rights Act, the Court majority in *Vera* reaffirmed its support for that legislation and for the nonretrogression standard that serves to protect minority incumbents.[15]

Beginning with the first *Shaw* case, the Court has struck down majority-minority districts that have failed the first prong of the *Gingles* test. The districts invalidated have been those that have sprawled for miles and miles, from one end of the state to the other, collecting pockets of minority voters while carefully avoiding enclaves of whites.[16] The jagged contours of the invalidated districts indicated to the Court that a compact minority population simply was not present.[17]

Proponents of the invalidated districts have tried unsuccessfully to sway the Court with "yes, but" arguments—yes, the challenged districts are not geographically compact, they have argued, but, if it were not for our desire to adhere to other districting criteria, we might have drawn more compact districts that could have met the *Gingles* test.[18]

---

12. *See id.* at 51.

13. 425 U.S. 130 (1976).

14. *See* Miller v. Johnson, 115 S. Ct. 2475, 2483 (1995).

15. *See Vera*, 116 S. Ct. at 1963 (plurality opinion) (interpreting the nonretrogression standard to require "that the minority's *opportunity* to elect representatives of its choice not be diminished . . . by the State's actions").

16. *See Vera*, 116 S. Ct. at 1954-60 (plurality opinion) (describing three unusually shaped legislative districts in Texas); Shaw v. Hunt (*Shaw II*), 116 S. Ct. 1894, 1900-01 (1996) (stating that North Carolina's District 12, which was drawn on the basis of race, was "dubbed the least geographically compact district in the Nation"); Miller v. Johnson, 115 S. Ct. 2475, 2484-85 (1995) (noting that a Georgia redistricting plan "split" and "gouged" certain voting populations in an effort to create majority-black districts).

17. *See, e.g.*, *Vera*, 116 S. Ct. at 1958-59 (plurality opinion).

18. *See, e.g., id.* at 1960-64. In *Vera*, the State of Texas proffered "three compelling interests" to justify its creation of three majority-minority districts: "[T]he interest in avoiding liability under the 'results' test of VRA § 2(b), the interest in remedying past and present racial discrimination, and the 'nonretrogression' principle of VRA § 5 (for District 18 only)." *Id.* at 1960. In a plurality opinion, the Court

Professor Karlan points out that minorities confront a special disadvantage in drawing compact districts because other interests control the redistricting process. "Within the political sphere," she argues, "the Court's decisions in *Vera* and *Shaw II* do to blacks and Hispanics something very much like what Colorado tried to do to gays."[19] Because minorities traditionally have not controlled the redistricting process, it is unlikely, she fears, that they will be positioned to draw their districts before other more powerful interests intervene.[20] I am sympathetic with her concerns on this matter. Still, they may be overblown.

The Court's ruling in *Vera* gives minorities stronger standing to assert their claims for compact minority districts. By ruling that state governments have a "compelling state interest" to comply with section 2 of the Voting Rights Act,[21] the Court has established a basis for accountability in those geographical areas where districts can be drawn that will meet the *Gingles* criteria. In the next round of redistricting, therefore, minority voters should be able to assert their legal rights and demand that states comply with the law by drawing reasonably compact minority districts in places where the size and distribution of the minority population warrants it. The incumbency protection crowd that dominated the redistricting process in states like North Carolina and Texas, and prevented the drawing of minority districts, should lose much of its force in the future. State governments that desire to comply with the law of the land will draw their minority districts first. Drawing minority districts first should not be a major problem in the South, where Republicans, now in control of many state governorships and legislatures, are especially fond of minority districts.[22]

Voting rights activists, I believe, have overstated their case against the Court. African-Americans and Hispanics have not been harmed by the Court's redistricting decisions. Despite dire predictions to the contrary, Congress has not been "'bleach[ed].'"[23] Minority legislators, in fact, performed much

---

rejected these arguments and struck down the Texas districts as unconstitutional. *See id.* at 1964.

19. *See* Karlan, *supra* note 1, at 308.

20. *See id.*

21. *See Vera*, 116 S. Ct. at 1960 (plurality opinion).

22. *See GOP Victory Will Keep DOJ in Mainstream*, DOJ ALERT, Dec. 5, 1994, at 7, 7-8.

23. *See* Kevin Sack, *Victory of 5 Redistricted Blacks Recasts Gerrymandering Disputes*, N.Y. TIMES, Nov. 23, 1996, at Y1, Y8 (1996) (quoting Laughlin McDonald, the director of the Southern regional office of the ACLU, who predicted that the Supreme Court's decisions in *Shaw II* and *Vera* would cause a "'bleaching of Con-

better than was predicted during the 1996 elections, as black Democrats who stood for re-election in invalidated districts were returned to office by respectable margins. It is significant that Georgia Representatives Cynthia McKinney and Sanford Bishop avoided runoff primaries and garnered a third of the white vote in their general elections;[24] indeed, Bishop and McKinney won about the same percentage of the white vote that other Georgia Democrats won.[25] According to University of Georgia political scientist Charles Bullock III, black Georgia Democrats now perform about as well as white Georgia Democrats.[26] Louisiana Representative Cleo Fields, the only black Democrat not to be re-elected,[27] chose not to run for re-election in his new district.[28]

Every indication suggests that racial polarization in the United States is declining, even in the South. Given the predominance of black voters in Democratic primaries, black candidates stand a realistic chance of winning Democratic nominations and attracting enough white votes to win general elections. The prospects, therefore, of electing additional minority candidates from majority-white constituencies is anything but dismal.

There is, indeed, reason for optimism. Despite the ugly history of race relations in the South, the first blacks to serve in Congress from that region during this century were elected in majority-white districts. In the early 1970s, Tennessee Representative Harold Ford and Georgia Representative Andrew Young were elected in districts that had clear white majorities, and Texas's Barbara Jordan and her successors were elected in a district that was not majority black.[29] In fact, Barbara Jordan's district had almost equal percentages of blacks, Hispanics, and whites, with no single group constituting a majority.[30] And

---

gress'").

24. *See* Salim Muwakkil, *Holding Pattern*, IN THESE TIMES, Dec. 9, 1996, at 18, 19.

25. *See* Charles S. Bullock, *Incumbency, Not Race, Wins in the South*, NEWSDAY, Nov. 13, 1996, at A41.

26. *See* Charles S. Bullock, *The South in the House*, Extension of Remarks, Dec. 1996 (unpublished paper on file with author).

27. *See* Clarence Page, *Results Are Deceptive in Redrawn Black Districts*, HOUS. CHRON., Dec. 1, 1996, at 3C.

28. *See id.*

29. *See* Jamie B. Raskin, Comment, *Affirmative Action and Racial Reaction*, 38 HOW. L.J. 521, 533 (1995) ("[I]n the history of the United States from the post-Reconstruction era through 1990, only three African Americans—Andrew Young, Barbara Jordan, and Harold Ford—have been elected to the House from a southern district in which whites were in a majority.").

30. *See* Laughlin McDonald, Holder v. Hall*: Blinking at Minority Voting Rights*, 3 D.C. L. REV. 61, 92 & n.219 (1995).

although the eighteenth district of Texas has consistently sent blacks to Congress, voting rights activists sought to increase its black voting-age population to fifty-one percent.[31] No wonder the Court rejected the contention of the voting rights activists that the district needed a black majority to continue to elect black politicians.

Some activists are clinging to the hope that President Clinton will have an opportunity to appoint a liberal judge to the Supreme Court who will help reverse the trend of what they see as a string of hostile antiminority rulings. If this happens, instead of the spate of five to four decisions against affirmative action and racial gerrymandering, we might all look forward to five to four decisions in their favor. Whatever the courts do in regard to redistricting, it is clear that minorities need options that extend beyond the limited number of additional majority-minority districts that can be drawn.

One of these options is to elect more minority politicians in nonpacked minority districts. Policy makers have some latitude concerning the size of the minority population that they place in particular districts. Often districts are packed in a manner that wastes black votes and black influence.[32] Recent research by Columbia University Professors Charles Cameron, David Epstein, and Sharyn O' Halloran demonstrates that black representation in Congress can be maximized by creating districts that are less than fifty percent black.[33] These authors calculated the optimal level of black voting-age population (BVAP) needed to give black candidates and black voters a realistic chance to increase their descriptive and substantive representation.[34] According to their findings, the optimal level of BVAP is forty-seven percent in the South, with the excess voters distributed across other districts;[35] only a twenty-eight BVAP was needed in the northeast.[36] Their findings suggest that creative districting strategies exist that can comply with *Gingles* and simultaneously augment minority representation.

---

31. *See Vera*, 116 S. Ct. at 1950-51, 1958 (plurality opinion) (stating that, in response to the 1990 census, "the Texas Legislature promulgated a redistricting plan that, among other things . . . reconfigured District 18 . . . to make it a majority-African-American district").

32. *See* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 210-11 (1993).

33. *See* Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996).

34. *See id.* at 794, 800-10.

35. *See id.* at 808.

36. *See id.*

Minority representation itself should be viewed by the voting rights community as something much broader than the representation that takes place when voters and legislators share skin pigmentation. The Supreme Court and the Justice Department have never stated that representation requires that politicians share the same skin color as the district majority. Instead, the Court has spoken of enhancing the ability of minorities to impact public policies by electing candidates of their choice. When representation is defined more broadly than shared race, then there is evidence to suggest that political party or, more specifically, whether a Democrat is in office, is as important as the race of the representative. In fact, there is evidence to suggest that this is more important. Given the way minorities define their policy preferences, their substantive interests are best served by the election of more Democrats.[37]

In short, minorities are in a win-win situation when they are positioned to influence more legislators than the handful they can elect when packed in oversized majority-minority districts. Their ability to influence more legislators has been enhanced by the Court's decisions in the redistricting cases. Put simply, the Court's redistricting decisions have not been wrongly decided.

37. *See* SWAIN, *supra* note 32, at 207-25 (discussing "[t]he dependence of African Americans on Democrats for representation of their interests . . . ."); L. Marvin Overby & Kenneth M. Cosgrove, *Unintended Consequences? Racial Redistricting and the Representation of Minority Interests*, 58 J. POL. 540, 540 (1996) (opining that "since the 1960s [the Republican party] has been less sensitive to civil rights issues than has the Democratic party").