Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle

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REPLY

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In his characteristic easy-going manner, Judge Sentelle leads off his discussion of the complex and contentious issue of race and redistricting by proclaiming that Shaw v. Reno1 was completely "unremarkable and unsurprising."2 Insofar as Shaw is read to hold only that claims of racial gerrymandering are subject to federal constitutional scrutiny, Judge Sentelle is clearly correct. That proposition was established long ago in Gomillion v. Lightfoot,3 in which the Supreme Court condemned the "uncouth twenty-eight-sided" boundaries of Tuskegee, Alabama, as nothing more than an attempt to fence blacks out of a white preserve.4

To this unsurprising development, Judge Sentelle adds another line of unmistakably correct constitutional pedigree: exacting scrutiny attaches whenever state authorities set about classifying citizens by race. Combining these two strains of thought leads in turn to the unremarkable proposition that the Constitution is presumptively offended when states use racial criteria to engage in such first-order political decisions as assigning electoral districts.

Given the tremendous constitutional force of these arguments, it takes little more effort to seal the terms of debate by invoking the twentieth century horrors attributable to unbridled state racialism. From Nazi Germany to South African apartheid—and, by implication to the Jim Crow South as well—the defining feature of these odious forms of oppression

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4. Id. at 340.
has been the license granted state authorities to distinguish, reward, punish, and even execute according to some racial mandate.

In replying to this direct and forceful argument, I clearly want to cede to the moral force of arguments against racial license in official decision-making. Nonetheless, the world of politics that I see playing itself out in the redistricting battles is more pluralistic, less ordered, and less governed by clear-cut standards of neutral or proper rules of engagement than the model Judge Sentelle proposes. In his view, the impetus toward racial gerrymandering arises out of a departure from well-established norms for allocating electoral opportunity. In my view, the world of jockeying for electoral advantage is nastier and more complex. Its very complexity blurs the high moral ground claimed by Judge Sentelle and threatens to blemish all actors who intervene, most notably federal judges lacking a clear constitutional mandate for the daunting task of judging politics.

At bottom, Judge Sentelle appears to find order in redistricting, marred only by the imposition of questionable racial commands. By contrast, I see in the redistricting battles a rather naked descent into pluralist politics with race serving as one among many of the axes along which political opportunity is allocated. As a result, I join this debate not so much to defend race-based districting as to challenge the high-ground defenders of a redistricting status quo ante claim. Redistricting, in my view, is as it always has been: a nasty, brutish power grab. The fact that there are new players and that they have an array of new computer tools at their disposal does not carry the day for me as it does for Judge Sentelle.

I. **Pluralist Battles and State-Sponsored Goods**

Despite the apparent simplicity of the non-discrimination command applied to the political arena, judicial intervention into the “political thicket” of regulating elections has been ensnared on one inescapable point. The problem arises from the need to give meaning to Chief Justice Warren’s declaration in *Reynolds v. Sims* that the purpose behind constitutional oversight of the reapportionment and redistricting process was the guarantee of “fair and effective representation.” However formulated in subsequent opinions, the guarantees of fairness and effectiveness have repeatedly forced confrontations with the fact that how the political process is set up goes a long way toward determining what the outcomes

5. Colegrove v. Green, 328 U.S. 549, 556 (1946) (affirming the district court’s dismissal of a suit claiming unfair apportionment and finding such issues for the legislature to address).
7. *Id.* at 565.
of elections shall be. The question emerges even from Judge Sentelle's limited invocation of "traditional principles of redistricting, such as compactness, contiguity, and the preservation of the boundaries of political subdivisions." I could take issue with the extent of the traditional commitment to these principles, as evident by the abandonment of compactness as a redistricting criterion in the Reapportionment Act of 1929. But I want to raise what I find to be a more troubling question: how is the state to divide political goods available through the redistricting process?

Judge Sentelle aptly criticizes the racial component unleashed once race is introduced as a variable in redistricting. But what are the alternatives? It is not as if there is a neutral redistricting process into which race is injected as a stray and irrelevant criterion. Rather, redistricting conducted by political operatives is a contested process in which the actors are exquisitely aware of the distributive consequences of each line imposed on the map. As political scientist Robert Dixon once aptly stated, in essence, all redistricting is gerrymandering. Even if no racial considerations were introduced, the "traditional practices" of redistricting amount to an invitation to manipulate district lines to reward friends and punish foes. What is key, and what reviewing courts have recognized uniformly, is that the consequences of redistricting practices are fully predictable and that political actors enter the redistricting battles with a clear agenda of partisan gain.

The practical realities that coincide with redistricting raise a significant problem when the knowable consequence of how lines are drawn is racial exclusion. Where is the legitimacy conferred on the known, predictable distribution of opportunity when no black districts are created? What happens when, as the Harvard Law Review commented at the time of Shaw, one stares at the portrait not of the cartographic fantasies currently under attack, but of the all-white North Carolina congressional delegation of 1900-1990, the product of historic exclusion of blacks from politics and the persistent patterns of racially polarized voting? Are we really so confident that aberrant line-drawing on a map is a greater evil than the continued predictable exclusion of representatives preferred by North

8. Sentelle, supra note 2, at 1252.
Carolina's still-embattled black population, a group commanding over twenty percent of the state's population?\textsuperscript{13}

I find these to be the persistent and disabling questions in the redistricting context. Let us take an alternative rendition of the North Carolina post-1990 redistricting fights. As a result of the post-1990 reapportionment, North Carolina was entitled to twelve congressional districts.\textsuperscript{14} Although the state was twenty percent black, and despite the fact that no black representative had been elected to Congress from North Carolina in this century, the state created only one district likely to send a black representative to Congress.\textsuperscript{15} This districting configuration was the product of political accords within the Democratic Party which sought to preserve the power bases of incumbent congressmen from the heavily black southeastern part of the state.\textsuperscript{16} Republican partisans in North Carolina were frustrated in their attempt to use the creation of black power bases to topple some Democratic incumbents. This led to a look to Washington, since all North Carolina redistricting had to be precleared by the Attorney General under Section 5 of the Voting Rights Act.\textsuperscript{17} Following an objection by the Department of Justice, then led by a Republican Attorney General, with abundant hints in North Carolina and elsewhere of partisan considerations infusing the preclearance decisions of the Attorney General, the state faced a direct confrontation between incumbent Democratic power and black electoral opportunity. Through astute compromise and even more clever cartographic manipulation, the state finessed this dilemma by creating the much-maligned 1-85 district.\textsuperscript{18} Subsequently, this district survived constitutional challenge in front of a three-judge district court comprised of a majority of Democratic appointees.\textsuperscript{19} In turn, a Supreme Court comprised of a majority of Republican

\begin{itemize}
\item \textsuperscript{13} Shaw v. Reno, 509 U.S. 630, 634 (1993).
\item \textsuperscript{14} Id. at 633.
\item \textsuperscript{15} Id. at 633-34.
\item \textsuperscript{16} Part of this history is recounted by Justice White in dissent. See id. at 673 n.10 (White, J., dissenting).
\item \textsuperscript{17} 42 U.S.C. § 1973(c) (1994). Section 5 of the Voting Rights Act provides that in certain jurisdictions, such as North Carolina, before any change in voting qualifications or voting practices or procedures may be implemented, it must be approved in a declaratory judgment action before the U.S. District Court for the District of Columbia or precleared by the Attorney General. Id.
\item \textsuperscript{18} For descriptions of the political meanderings underlying Shaw, see Timothy G. O'Rourke, Shaw v. Reno: The Shape of Things to Come, 26 Rutgers L.J. 723 (1995); Richard Briffault, Race and Representation After Miller v. Johnson, 1995 U. Chi. Legal F. 23, 35-37.
\end{itemize}
appointees forced reconsideration under strict scrutiny in Shaw I.\textsuperscript{20} In turn, a majority-Democratic appointed district court found that the challenged district survived strict scrutiny even under the exacting standards articulated by Justice O'Connor in Shaw I.\textsuperscript{21} Not surprisingly, the Supreme Court overturned the I-85 district rather summarily in Shaw II.\textsuperscript{22}

It may properly be argued that the focus on partisan considerations does not directly address the issue of the use \textit{vel non} of racial determinants in redistricting. It is beyond dispute, however, that even where race is a central consideration in redistricting, the point of departure in all line drawing is a highly fractious partisan battle over turf. Geography may or may not represent the natural divisions of political influence.\textsuperscript{23} Moreover, even if race were removed from the equation, the choice among potential geographic districts implicates the state in deciding among proper interests to advance. In the district court opinion in \textit{Hays v. Louisiana},\textsuperscript{24} for example, the court found objectionable the aggregation of different agricultural interests, specifically soy bean versus sugar cane farmers,\textsuperscript{25} within a district. While the reason why agricultural diversity should trump diversity in racial representation was left unclear, the point remains that district lines ultimately require governmental intrusion and a "non-neutral" allocative decision.

To criticize the racial dimension of districting policies is not to establish any independence from ulterior motives in districting, even were racial considerations to be muted. In \textit{Gaffney v. Cummings},\textsuperscript{26} the Supreme Court recognized that the purpose of districting was to achieve an altered and hopefully "more fair" distribution of representation than would obtain if elections were simply left at-large.\textsuperscript{27} But this objective unleashes a broad array of governmental outcome-oriented intrusions into the constitutive phases of the political process. This outcome-oriented regulation is present whenever districts are created to reward one group but not another. At some level, incumbent governmental powers decide what is to be an agricultural district, a Republican district, an urban district, etc. And with each outcome-oriented districting decision comes the inevitable problem of the "filler people"—those individuals who are assigned to dis-

\textsuperscript{23} See Briffault, supra note 18, at 43-44 (noting the influence of modern technology as blurring geographic lines).
\textsuperscript{24} 862 F. Supp. 119 (W.D. La. 1994).
\textsuperscript{25} \textit{Id.} at 127.
\textsuperscript{26} 412 U.S. 735 (1973).
\textsuperscript{27} \textit{Id.} at 752.
tricts to meet the one-person, one-vote requirements of apportionment, but who have no realistic hope of ever having their preferred candidate win. It is not, as Judge Sentelle slyly implies, that in the absence of racial considerations, elections are left to the free and unfettered will of the voters. Rather, the claims of whites assigned to black-majority districts are along a continuum of frustrated parties locked into minority status in territorially-based districts. Whether the lines of demarcation are urban-rural, Democratic-Republican, or black-white, the heavy hand of state distribution is never far from the heart of the system of representation.

There is no escaping the fact that the consequences of imposing a race-neutral template on redistricting, without altering any other facet of how representative elections are held, threatens to undo the most significant vehicle to date for bringing heretofore excluded minorities into the halls of elective politics. Race-conscious districting has been the centerpiece of the desegregation of representative office in the United States overall, and the South in particular. Concededly, it comes at a price, including the very significant one of racial identities being locked in by the state. This has been the heart of criticisms of race-conscious districting from voices as diverse as Abigail Thernstrom, Justice Thomas, and Lani Guinier. Whether the price is worth paying depends greatly on the alternatives. I have proposed elsewhere, and I will simply reiterate now, that we have come too far to allow legislative bodies lacking meaningful minority representation to claim political legitimacy. Despite the aspirations for the day that race can be put behind us, I agree with Professor Pamela Karlan's bottom-line:

We have to face the fact that some form of racial politics and thus some need for race-conscious representation devices is here to stay, at least for the foreseeable future. The only real question is how to achieve fairness in the present while struggling for justice in the future.

33. Pamela S. Karlan, Our Separatism? Voting Rights as an American Nationalities Pol-
It may, of course, be argued that race is different, especially since racial classifications trigger the core concerns of the Equal Protection Clause. The difficulty comes with holding race out to be, for all intents and purposes, the only basis on which redistricting preferences may not be afforded. If, as I contend, the redistricting process is rife with self-dealing and outcome-oriented manipulations, then where is the great moral divide that separates oddly drawn districts designed to afford historically-excluded minorities enhanced representation and districts drawn to reward the entrenched powers that be? This was the ultimate point reached by Justice Stevens in his dissent in the Texas congressional redistricting case, *Bush v. Vera*:\(^{34}\)

By minimizing the critical role that political motives played in the creation of these districts, I fear that the Court may inadvertently encourage this more objectionable use of power in the redistricting process. Legislatures and elected representatives have a responsibility to behave in a way that incorporates the "elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." That responsibility is not discharged when legislatures permit and even encourage incumbents to use their positions as public servants to protect themselves and their parties rather than the interests of their constituents.\(^{35}\)

II. **The Plight of the Judiciary**

Although my central focus is on the inevitable question of official distribution of political opportunity that of necessity accompanies redistricting, I want to raise an additional concern before concluding with some speculations about where the ultimate resolution of the *Shaw* problem might lie. My additional concern is with the institutional competence of the judiciary to adjudicate claims under the current *Shaw/Miller* test for unconstitutional racial aims in redistricting. I make two assumptions about the current state of the law and the role of the judiciary. The first is that *Shaw* and *Miller* have engendered a tremendous amount of confusion both in the courts and among the various federal and state actors who oversee the process of redistricting. While both *Shaw* and *Miller* express evident disdain for some rather dramatic uses of racial considerations in the drawing of district lines, neither case prohibits the use of ra-

\(^{34}\) 116 S. Ct. 1941 (1996).

\(^{35}\) *Id.* at 1992 (Stevens, J., dissenting) (footnote and internal citations omitted); see also Kristin L. Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 Tex. L. Rev. 913 (1996) (challenging the use of incumbency to obtain rewards through redistricting).
cial considerations nor relieves states of the statutory obligation under the Voting Rights Act to prevent the dilution of minority voting strength. The strongest articulation of the Court’s concern comes from Miller, but provides little direct affirmative guidance to the states or to courts as how to redistrict:

[T]he essence of the equal protection claim recognized in Shaw is that the State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so did we recognize in Shaw that it may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual or national class."'\(^{36}\)

The problem is that once districts are of equal population, there is no clear individual component to districting decisions. If state redistricting bodies are held to the command of insuring fairness greater than would be the case in at-large elections, they cannot do so without looking to systems of aggregation that necessarily reach beyond individuals. As Justice Powell expressed, "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."\(^{37}\)

The second assumption is that the judiciary is an unlikely institution for the delicate balancing of the political and distributional concerns that underlie the redistricting process. There is ample authority for this proposition, which ultimately rests on the argument that the judiciary, empowered with "neither the purse nor the sword,"\(^{38}\) should avoid squandering its limited moral capital on political battles.

I raised this concern directly with Judge Sentelle when we debated the legacy of Shaw at the University of Texas School of Law last year. He responded, unexpectedly from my vantagepoint, by invoking the judicial involvement in school desegregation in cases such as Swann v. Charlotte-


Judge Sentelle's point was that if the judiciary had to be the institution of last recourse to break the resistance of racialism in one walk of institutional life (i.e., schools), why could it not serve the same role in breaking the affliction of racial classifications in another, to wit, the political process? The invocation of school busing as the predicate for Shaw provoked a look of extreme discomfort on the face of my colleague, Professor Lino Graglia. But the point is a serious one: if racialism has infected the state processes of redistricting, what other institution but the judiciary should undertake its dismantling?

The response must begin with precisely the experience of relatively unguided judicial interventions in an area such as busing. I would contend that as a general matter the Court's experience with broad-scale remedial interventions is most successful when there are some clear commands directing the terms of engagement. The Court's commands to date, either in the form of Shaw's condemnation of departures from traditional districting principles or Miller’s challenge to race as the “predominant” factor in redistricting, fall far short of a bright-line rule, such as one-person, one-vote.

We are now six years into the decennial redistricting cycle and the avenues of exit for the courts are nowhere readily apparent. Since Shaw I and Miller, the Court has decided congressional redistricting cases from North Carolina (again) and from Texas. Behind them are several more cases now forming a queue for further Court review. This ongoing and indecisive entry into the tangled world of redistricting exacts real institutional costs. The complex world of redistricting defies any expectation that this is an area in which the Court can provide "a cue to a fellow

41. Professor Graglia's opposition to school desegregation decrees is summarized in Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and Schools (1976).
42. Miller recast Shaw as follows:

Our circumspect approach and narrow holding in Shaw did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

constitutional actor” through a broad articulation of constitutional principle.\textsuperscript{43} Too many political actors will seize upon any ambiguity in the Court’s commands in order to revisit lost political battles in the judicial forum. There is a genuine cost to judicial legitimacy when the federal judiciary interferes with the core of the political process under a jurisprudence formed by what Judge Augustus Hand once termed a “judicial hunch.”\textsuperscript{44} The absence of identifiable, guiding constitutional principles threatens the integrity of judicial review over the political process and threatens to expose the judiciary as simply one more political actor entwined in the political thicket.

III. WHERE WILL THIS LEAD?

Thus far, I have identified three main areas of disagreement with Judge Sentelle. First, I see redistricting as a more complex, disorganized, and ultimately factionalized process than he does. Second, I see much less clarity and operational resolution in the Court’s commands in \textit{Shaw} and \textit{Miller}. Finally, I see a growing potential for compromising the role of the judiciary through repeated and largely standardless interventions into the constitutive steps of the political process.

My interpretation is no doubt a bleaker picture than that portrayed by Judge Sentelle. I want to conclude, however, by proposing possible avenues of development for the Court’s voting rights jurisprudence. Perhaps in this fashion I can try to preserve some of the general tone of optimism and faith in common sense that give Judge Sentelle’s views such allure.

The first, and most apparent option, is for the courts to simply muddle along. This is a real possibility given the ongoing division in the Supreme Court and Justice O’Connor’s critical role as the pivotal vote in the Court’s equal protection cases. At the core of Justice O’Connor’s opinions are the competing concerns between racial factionalism that Judge Sentelle identifies and an understanding that a categorical prohibition on race-consciousness would forestall the remaining tasks of remediation directed toward disadvantaged minorities. Unfortunately, such an approach to the highly visible issue of redistricting has yielded fact-intensive inquiries that leave state officials without clear guidance.

\textsuperscript{43} PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 194 (1982) (describing this function as “not the threat of invalidating legislation \textit{per se} so much as the argument for a different construction of the Constitution”).

Alternatively, a second approach might be to force redistricting out of the immediate control of the political process. The danger in redistricting is that insiders will seek to cement their sinecure through manipulation of the electoral lines. Once the insiders legitimate the use of line-drawing to achieve ulterior aims, there is little to bar other groups, including racial and ethnic minorities, from claiming a reward as well. Interestingly, the Supreme Court in the same Term as Miller upheld California's congressional redistricting in DeWitt v. Wilson.\textsuperscript{45} Although DeWitt offered clear racial preferences in drawing majority-minority districts, the Court summarily upheld these districts. The major distinction between California's redistricting plan and Georgia's, we may surmise, is that California used a panel of Special Masters drawn from retired Supreme Court justices to filter demands for group representation. The process could thereby appear less racially charged than what transpired in Georgia, even though the Special Masters who oversaw redistricting were charged with giving the Voting Rights Act "the highest possible consideration."\textsuperscript{46} The use of institutional buffers, such as blue-ribbon commissions, may allow states some compromise position between pure interest-group demands and the risk that race-blind mechanisms will yield the continued exclusion of racial groups. Thus, it is possible that the Supreme Court was endorsing the imposition of a filter on clear interest group demands that would allow a reviewing court, such as the three-judge federal court in California, to conclude, "The Masters did not draw district lines based deliberately and solely on race, with arbitrary distortions of district boundaries. The Masters, in formulating the redistricting plan, properly looked at race, not as the sole criteria in drawing lines but as one of many factors to be considered."\textsuperscript{47}

The third possibility is that redistricting pressures will force states to move away from redistricting in favor of alternative voting systems. Last year, for example, I was asked to testify before the Texas State Legislature on behalf of a bill that would allow school districts to use limited and cumulative voting techniques for school board elections. The impetus for this change came from small, rural school districts in West Texas. These school districts were seeking some way to provide representation to the growing Hispanic communities in that part of the state. At the same time, the school districts desperately wanted to avoid litigation over district lines under either the Voting Rights Act or the Equal Protection Clause. For them, alternative voting systems provided a means for ac-

\textsuperscript{46} Wilson v. Eu, 1 Cal. 4th 707, 714 (1992).
\textsuperscript{47} DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994).
commodating minority concerns without the pressures of racial line-drawing that would arouse the scrutiny of Shaw and Miller.\textsuperscript{48}

A similar pattern can be found in Judge Sentelle's home state of North Carolina. In the aftermath of Shaw I, state Republicans proposed dividing the state's congressional delegation into three areas and electing representatives by cumulative voting from within each of the three areas.\textsuperscript{49} Clearly the import behind the proposal was to accommodate diverse representation while diminishing the inevitable political jockeying that accompanies line-drawing.

IV. CONCLUSION

Whether any of these developments takes hold before the next round of reapportionment and redistricting is, of course, unclear. Much remains in the hands of the Supreme Court which has to date been quite chary about providing direct guidance. Nonetheless, the experience of the 1990s round of redistricting has been too messy and costly for all involved to remain stable. Whereas Judge Sentelle sees interest-group demands as the point of vulnerability, I am more inclined to see the entire system of political redistricting as at risk. Perhaps more critically, where Judge Sentelle sees demands for racial representation as a repudiation of traditional patterns of redistricting, I see such demands as the logical and inevitable heir to state assignment of representational opportunities. In my mind, Judge Sentelle has not proven his bottom-line: whether racial demands for representation constitute anything more than a more cartographically imaginative version of what has always gone on in back-room redistricting.

\begin{itemize}
\item $^{49}$ Peter Applebome, Guinier's Ideas on Voting Rights Gaining Greater Acceptance, Dallas Morning News, Apr. 10, 1994, at 7A.
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