

# THE PRACTICE OF REDISTRICTING

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Professor Eid asked me to focus my comments for these sessions on my experiences in the last redistricting cycle. Almost a decade ago, I served as Vice-Chairman of the Colorado Reapportionment Commission and as special master in Colorado's federal redistricting case.<sup>1</sup> I am happy to draw on these experiences, if for no other reason than it gives me the rare opportunity to speak as a practitioner rather than as an academic. I will try to make four or five fairly straightforward points.

## I. REDISTRICTING COMMISSIONS V. LEGISLATIVE REDISTRICTING

First, there is a vibrant discussion across the country about the relative effectiveness of independent redistricting commissions compared to the traditional legislative process. Colorado's Constitution creates an independent reapportionment commission, comprised of eleven members, appointed by representatives of all three branches of state government.<sup>2</sup> The Commission's proposals for state legislative districts become final after public hearings and review by the Colorado Supreme Court.<sup>3</sup> The state legislature is thus left out of the direct line-drawing process.

Colorado also constitutionalizes traditional districting principles: districts must be compact and contiguous, and to the extent possible, cities, counties, and communities of interest must be kept whole.<sup>4</sup> Approximately ten other states

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1. See *In re* Reapportionment of the Colo. Gen. Assembly, 828 P.2d 185 (Colo. 1992).

2. See COLO. CONST. art. V, § 48.

3. See *id.*; see also *Reapportionment*, 828 P.2d at 185.

4. See COLO. CONST. art. V, § 47.

have similar schemes;<sup>5</sup> North Carolina is presently considering whether to join this minority.<sup>6</sup>

The big question, of course, is whether independent commissions de-politicize the process, or at least reduce the influence of politics, leading to cleaner, less manipulated districts. Having worked almost consecutively in both the independent commission process (for state districts) and the legislative process (for federal congressional districts), I am inclined to believe that independent redistricting commissions are less political than their legislative counterparts. To put numbers on it, I would say the process in the Colorado legislature last time was 100 percent political, and the process in the Colorado Reapportionment Commission was about 98 percent political. That is likely not good news, of course, to Common Cause and the League of Women Voters—the sponsors of the Colorado initiative creating the commission.<sup>7</sup>

But the appointment process for commissioners is intensely political (except, on occasion, the Chief Justice's four appointments).<sup>8</sup> In truth, any committee in which the majority and minority leaders of both houses and the governor's political consultant play dominant roles is going to be highly charged. To diminish politicization, it would be necessary to alter the appointment process. A good starting point would be to prohibit members of the legislature from serving on the commission, thus drawing their own districts. Such a move would seem consistent with the theory of independent commissions in the first place. I understand, of course, that political partisans, activists, and surrogates would still be appointed. But, under the current system, the Speaker of the

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5. See Jeffrey C. Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 841–43 (1997).

6. See Wade Rawlins, *Redistricting Panel Proposed by Republicans*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 28, 2001, at A3. It is quite clear, unfortunately, that North Carolina will not adopt an independent commission. The legislature, unsurprisingly, has no desire to relinquish control over redistricting. And unlike Colorado, North Carolina does not have the initiative process. Having lived in Colorado for many years where the initiative is heavily employed, I feel more secure about my civil liberties in a state without initiative powers. I am also, however, far less optimistic about the possibilities for political reform.

7. The Colorado redistricting scheme was adopted by initiative in 1974. See *Reapportionment*, 828 P.2d at 185; see also COLO. CONST. art. V, § 48.

8. Chief Justice Luis Rovira's 1991 appointments included the Chancellor of the University of Denver and the Dean of the University of Colorado School of Law.

House and the Majority Leader of the Senate, as well as their counterparts in the minority party, feel a duty to protect the political careers of the incumbent members in a way quite unlike anyone else. They also have more power to pull it off.

A smaller, simpler, but still useful move would be to actually, rather than merely formally, require that the commission's staff be independent from the legislature. Staff members who report the rest of the year to the Speaker of the House or the Majority Leader of the Senate would be idiots to treat all commission members as equals. And our staff members clearly were not idiots. In a process in which commission members are immensely and correctly skeptical of their colleagues' motives, and in which no commission member fully understands the studies, gadgetry, jargon and software that the redistricting process requires, it is a mistake to have a staff beholden to the legislature.

## II. THE SUPREME COURT'S FAILURE TO GIVE CLEAR STANDARDS

My second point is perhaps more overarching and more important. As we look back at the last ten years of voting rights work and contemplate the next ten, it is appropriate to make the case with some energy that the United States Supreme Court has failed in its basic law-making duties. At some point, after five years or ten years or fifteen years, a conscientious legislator, at least with some help from counsel, ought to be able to get a rough grip on what the law demands. In the 1990's round, that was tough—we had only the 1982 amendments and the *Gingles* case.<sup>9</sup> We knew that race could be used. In fact, we heard it said that race had to be used to maximize minority representation. But not much could be said on the other side. We knew that increasing the effectiveness of minority voters mattered; we just did not know if anything else mattered. And it was impossible to find out. What the Justice Department said sounded wrong, and apparently it was.<sup>10</sup>

Now, after a decade of intense litigation, we are more enlightened. We know that race can be used, but it cannot

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9. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

10. *See Shaw v. Hunt*, 517 U.S. 899, 913 (1996) (rejecting maximization theory demanded by Justice Department).

dominate.<sup>11</sup> It can affect, but it cannot subordinate.<sup>12</sup> After a couple of years of redistricting work, those terms mean far less to me than they would have otherwise. You cannot be uncouth, or hook-like, or bug-splatterish, or “serpentine” or a “monstrosity.”<sup>13</sup> You cannot use weird shapes unless you are doing it to protect farmers, or to follow the bizarre outlines of metropolitan Denver<sup>14</sup> or the airport, rather than to empower the intended beneficiaries of the Voting Rights Act and the Fourteenth Amendment. The statute tugs one way, *Shaw* another. One requires you to use race, the other to ignore it. As if to demonstrate the absurdity, the Court gave us six different opinions in *Bush v. Vera*.<sup>15</sup> It understates the problem to say, as I heard counsel for the Democratic National Committee declare a couple of weeks ago, “the extent to which race can be used to draw redistricting plans in the post-2000 cycle without violating *Shaw* is, unfortunately, not clear at this time.”<sup>16</sup>

That means, as Justice Souter has written, it is impossible “to discern any standard . . . to guide state legislatures or to constrain reviewing courts.”<sup>17</sup> Justice Ginsburg’s description is similarly accurate and disheartening. She has concluded that the Court has made redistricting “perilous work”—because you can only know that what you are doing is constitutional after

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11. See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (stating that race can be a factor, but not “the predominant factor motivating the legislative scheme”).

12. See *Shaw*, 517 U.S. at 913 (rejecting previous maximization theories); see also *Miller*, 515 U.S. at 916 (holding that it is illegal to subordinate traditional districting principles to race). I heard Bernie Grofman describe the *Shaw* line of cases this way: “It’s not ‘I know it when I see it,’ it’s ‘I know it when Justice O’Connor sees it.’” *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* (Bernard Grofman & Chandler Davidson eds., Brookings 1992).

13. *Miller*, 515 U.S. at 909 (“monstrosity”); *Shaw v. Reno*, 509 U.S. 630 (1993). See generally the discussion in J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 *GEO. MASON L. REV.* 431, 447–48 (2000); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (fact intensive inquiry).

14. See Hebert, *supra* note 13, at 431.

15. 517 U.S. 952 (1996).

16. Hebert, *supra* note 13, at 431.

17. *Bush*, 517 U.S. at 1058 (Souter, J., dissenting).

litigation is completed.<sup>18</sup> Or, as we discovered in North Carolina, after the decade runs out.<sup>19</sup>

The shortcomings of this pervasive standardlessness are clear and obvious: uncertainty, lawsuits, injunctions, altered elections, new plans, new lawsuits, conflicting signals from different branches of the federal government, and huge attorney fees even for the conscientious. But it is worth adding one more problem to the list. Redistricting, as everyone who has ever gotten close to it says, is thoroughly and relentlessly political. Almost no one involved is interested in playing it straight, in following the rules. Those few lonely souls, in either legislatures or on redistricting commissions, who do believe in applying legal standards first, are powerfully undermined and marginalized by the United States Supreme Court.

There is no music sweeter to the ear of a state party chair than: “nobody knows what the law is” or “just do what we tell you and let the lawyers fight about the rest.” Everyone can ignore legal standards if no one can figure out what they are. And in redistricting, everyone is more than happy to believe there are no rules. For officeholders and their surrogates, the incentives to ignore legal standards literally clear the deliberative field.

Nor, perhaps surprisingly, does the threat of litigation lead to significant cautiousness on the part of many redistricters. Protestations that particular line-drawing ventures violate either constitutional or state redistricting norms are almost universally met with the rejoinder, “that’s what the Attorney General’s office is for.” In my experience, the prospect that the state might be forced to spend hundreds of thousands, or even millions of dollars, to defend redistricting adventurism plays an astonishingly small role in the decision-making process of both legislatures and commissions. There is a certain luxury, no doubt, in spending other peoples’ money.<sup>20</sup>

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18. See *Miller*, 515 U.S. at 949 (Ginsburg, J., dissenting) (“The Court’s disposition renders redistricting perilous work for state legislators. . . . [o]nly after litigation . . . will States now be assured that plans conscious of race are safe.”); see also *Abrams v. Johnson*, 521 U.S. 74 (1997) (Breyer, J., dissenting).

19. Actually, the decade ran out in North Carolina and we are still litigating. See *Hunt v. Cromartie*, 133 F. Supp. 2d 407 (E.D.N.C. 2000), *rev’d*, 532 U.S. 234 (2001).

20. Thanks to Sam Issacharoff for discussions on this point.

But the guiltiest culprit in this drama of standardlessness is the United States Supreme Court itself. Sometimes it is simply necessary to decide what the rules are. That is true even if the questions presented are difficult ones, and even if there are nine strong-willed members on the tribunal. It is even true if some justices think that the other justices are stupid or ill-motivated. The Court's voting rights cases are the rough equivalent of Congress closing the government because it cannot agree on a budget. There is more than one way to fail. In redistricting, not to decide is to fail.

### III. REDISTRICTING AS THE PROTECTION OF INCUMBENTS

Redistricting experiences vary widely from state to state. But my own efforts, with both state and federal line-drawing, indicate that if reapportionment is partly about race and partly about partisan maneuvering, it is almost entirely about protecting incumbents. Democrats and Republicans agree on one thing: everyone in office has the inherent right to try to bend the rules to make his or her own reelection inevitable.

It is one particular kind of civics lesson to see how much time and energy officials will spend seeking to further their own electoral fortunes and disadvantage those of their adversaries. It is more surprising, though, that the United States Supreme Court, in order to carry out its focus on race, has itself embraced incumbency protection.<sup>21</sup> In *Bush v. Vera*, working to reassure the protection of "sitting members" made the list of "legitimate redistricting objectives."<sup>22</sup> That sentiment also extended, somewhat surprisingly, to helping out "functional incumbents."<sup>23</sup> Functional incumbents, for the unschooled, were described as "members of the Texas Legislature who had declared an intention to run for open congressional seats."<sup>24</sup> Even worse, Justice Ginsburg, in one dissent, gave at least limited credence to the "request of an incumbent State Senator regarding the placement of the

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21. "State's goal of incumbency protection . . . is a legitimate redistricting objective." Hebert, *supra* note 13, at 452-453; see also *Bush*, 517 U.S. at 952, 964-65 (1996) (plurality opinion).

22. *Bush*, 517 U.S. at 959, 965.

23. *Id.*

24. *Id.* at 959.

precinct in which his son lived.”<sup>25</sup> I recently heard a consultant applaud this as the Supreme Court’s embrace of “constituent consistency.”<sup>26</sup>

You can almost imagine the refrain. “Now, wait a minute, Your Honor. I wasn’t doing anything wrong. I wasn’t trying to remedy the imbalance of inadequate racial representation. I was just distorting the shape of these districts to make it impossible for anyone to beat me.”<sup>27</sup> Or more selflessly, “I was manipulating the rules to make sure that my boy gets elected.” If it is true, as Justice Stevens has written, that the “duty to govern impartially is abused when a group with power over the electoral process defines legislative boundaries solely to enhance its own political strength at the expense of any weaker group,”<sup>28</sup> then, in the *Shaw* line of cases, the courts are ignoring the larger problem in an effort to deal with the smaller one.

#### IV. RULES FOR THE POWERFUL

In looking at voting rights cases, it is hard not to notice that changes in the rules over the past decade add tools for the powerful to use against those with less power. That is hardly the greatest need in American life. Federal courts folks have been saying for decades that a subjective, value-laden injury standard, unaccompanied by normal requirements of explanation and justification, would lead judges to protect the interests of people like themselves and ignore the claims of those who are different.<sup>29</sup> I have said that myself.<sup>30</sup>

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25. *Miller v. Johnson*, 515 U.S. 900, 942 (1995) (Ginsburg, J., dissenting).

26. Conference on Redistricting and the Voting Rights Act at the University of North Carolina School of Law (Feb. 23, 2001).

27. See *In re* Reapportionment of the Colo. Gen. Assembly, 828 P.2d 185 (Colo. 1992) (Mullarkey, J., concurring and dissenting) (emphasizing drawbacks of incumbency protection); see also Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 151 (1985) (describing incumbent-centered partisan bias as the antithesis of redistricting based on neutral factors and as a prime tool for political gerrymandering).

28. *Shaw v. Reno*, 509 U.S. 630, 678 (1993) (Stevens, J., dissenting).

29. See generally JOSEPH VINING, *THE LEGAL IDENTITY* (1978); cf. Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

30. See Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185 (1980–1981); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984); Gene R. Nichol, Jr.,

So it is no great surprise that the Supreme Court's most generous standing decisions allow white plaintiffs to challenge discriminatory alimony schemes,<sup>31</sup> or affirmative action admissions in professional schools,<sup>32</sup> or racial set-aside programs,<sup>33</sup> or the drawing of legislative districts in ways that seek to increase the representation of Blacks and Latinos.<sup>34</sup> The Court, on the other hand, has been at its stingiest in denying standing to minority plaintiffs seeking to challenge exclusionary zoning practices,<sup>35</sup> abusive police practices,<sup>36</sup> tax-exempt status for racially discriminatory private schools,<sup>37</sup> or biased child support enforcement schemes.<sup>38</sup>

And the voting rights cases, on the merits, include wildly overblown rhetoric about "political apartheid,"<sup>39</sup> "caste system," "segregation," "political homelands,"<sup>40</sup> American "balkanization"<sup>41</sup>—steps "repugnant to any nation"<sup>42</sup> issued from "a centralized politburo appointed for life."<sup>43</sup> The programs are vilified as plans that "should not continue. Not for another term, not until the next case, not for another

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*Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986).

31. See *Orr v. Orr*, 440 U.S. 268 (1979).

32. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978).

33. See *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993).

34. "An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than the more tangible or material consequences the action brings about." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993). Traditional standing cases like *Warth v. Seldin*, 422 U.S. 490 (1975), require concrete consequences to trigger judicial power. See Nichol, *Rethinking Standing*, *supra* note 30.

35. See *Warth v. Seldin*, 422 U.S. 490 (1975); see also *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (denying standing to challenge rules for access to emergency hospital care).

36. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

37. See *Allen v. Wright*, 468 U.S. 737 (1984); Nichol, *Abusing Standing: A Comment on Allen v. Wright*, *supra* note 30.

38. See *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

39. See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (Stevens, J., dissenting).

40. *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring in the judgment).

41. *Shaw*, 509 U.S. at 657.

42. *Holder*, 512 U.S. at 905 (Thomas, J., concurring in the judgment).

43. *Id.* at 913.

day.”<sup>44</sup> This hyperbole can seem remarkably misplaced in describing schemes that typically still leave white citizens a voting majority in a disproportionate number of districts. And for most of us, I think, the hardest lesson of Florida has been the reminder that those at the bottom in American society can expect not only worse health care and housing and transportation, worse public education and justice and political representation (because of the influence of campaign finance), but even inferior vote-counting machines and greater barriers to exercising their franchise. We have fallen a long way from the theory of judicial intervention reflected in *Carolene Products* famed footnote.<sup>45</sup>

## V. CONCLUDING THOUGHTS

In this round of redistricting, unlike ten years ago, white plaintiffs will likely be able to challenge districts giving black and Hispanic voters working majorities in Northeast and Northwest Denver and the San Luis Valley. Given the paucity of minority representatives in the Colorado state house, it is impossible to believe such challenges are necessary to protect the Fourteenth Amendment rights of white Coloradans.

It is hard to remember now that when Lyndon Johnson introduced the original Voting Rights Act in 1965, just four months after Bloody Sunday in Selma, he said:

I speak tonight for the dignity of man and the destiny of democracy . . . . But even if we pass this bill, the battle will not be over. What happened in Selma is part of a far larger movement which reaches into every section and State of America. It is the effort of American Negroes to secure for themselves the full blessings of American life. Their cause must be our cause too—because it is not just Negroes but really it is all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome . . . .<sup>46</sup>

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44. *Id.* at 944.

45. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

46. GREAT ISSUES IN AMERICAN HISTORY: FROM RECONSTRUCTION TO THE PRESENT DAY, 1864–1981 459–61 (Richard Hofstadter & Beatrice K. Hofstadter eds., 1982). A “powerfully moving moment, the culmination of a very long road . . . a high point in modern America, probably the nation’s finest hour in civil rights.” JOHN LEWIS WITH MICHAEL D’ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT 361 (1998).

Doris Kearns Goodwin has written that, as Johnson spoke, “in the galleries Negroes and whites, some in the rumpled sports shirts of bus rides from the demonstrations, others in trim professional suits, wept unabashedly.”<sup>47</sup>

The efforts of Colorado, North Carolina, Georgia, Texas and Louisiana to draw strong minority districts in order “to overcome the crippling legacy of bigotry and injustice” are surely closer to the core of the Fourteenth Amendment’s equality command than *Shaw*’s insistence on shapely districts. The greatest American challenge, in a new century, with new mandates, a new census, new demographics, new constitutional principles, and, in a fundamental sense, a new Supreme Court,<sup>48</sup> will be remembering something very old—that we’re all in this together.

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47. DORIS KEARNS, LYNDON JOHNSON AND THE AMERICAN DREAM 229 (1976).

48. I know the faces are the same, but the United States Supreme Court is not the same entity after *Bush v. Gore*, 531 U.S. 98 (2000).