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The Supreme Court and the Undoing of the Second Reconstruction

At the height of the First Reconstruction in the 1870s, over 300 African Americans were elected to the state legislatures and the U.S. Congress from the eleven states that had seceded during the Civil War. By 1880, however, violence, intimidation, ballot-box stuffing, poll-tax and voter-registration laws, and gerrymandering had reduced the number of blacks elected to those offices by more than two-thirds.

But the whitening of southern politics was less abrupt and more the product of legal and institutional changes than in the usual textbook picture. Typically, one development fed another: politicized violence allowed the upper-class-dominated Democratic party to control the polls and invent election returns. Legislators elected by fraud could then pass laws that made it more difficult for their opponents, especially blacks, to vote and to elect candidates they favored. In a partly shrunken electorate with Republicans or Populists at a disadvantage because of legal as well as extra-legal machinations, Democrats could eventually pass state constitutional amendments that entirely disfranchized African Americans and poor, uneducated whites, thus rendering irrelevant the parties they supported.

These processes could have been short-circuited at any point by congressional or judicial actions. But northern Democrats, mainly for partisan reasons, joined their southern party allies to block further federal voting-rights laws. No Democrat in Congress voted for a single civil-rights law or constitutional amendment from 1865 through 1920. And despite the U.S. Supreme Court's constitutional duty to enforce the Fourteenth Amendment's equal-protection clause and the Fifteenth Amendment's ban on biased voting laws, the justices openly acquiesced in widespread black disfranchisement. From 1908 through 1962, no black held a state legislative office in the South. The exclusion of blacks from southern congressional delegations lasted from 1900 through 1972.

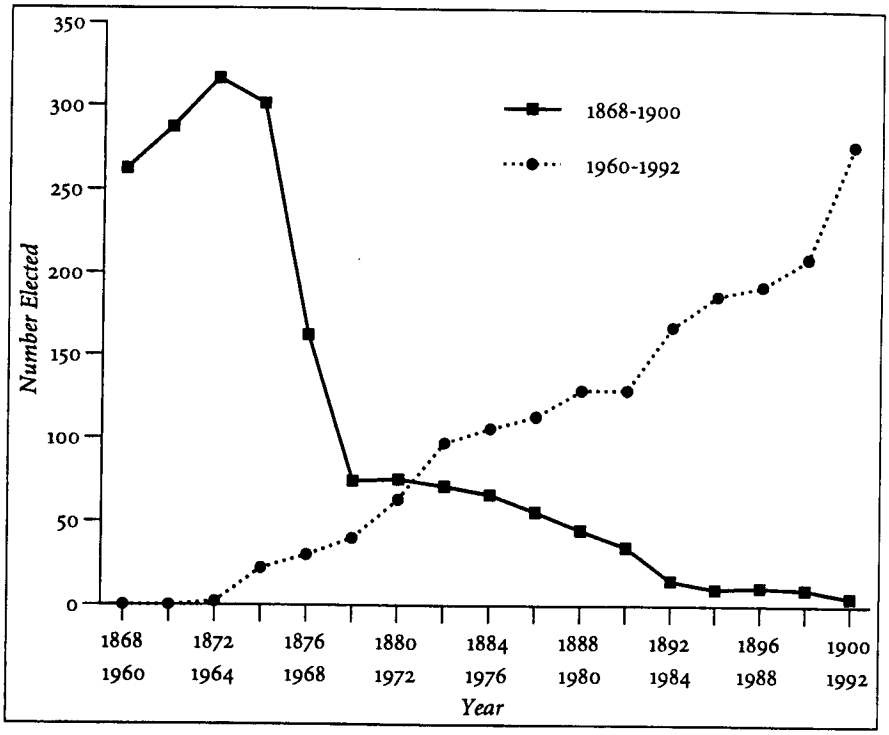
As more African Americans moved north, where they could vote much more freely and pressure Congress to alleviate southern racial conditions, and as the Supreme Court moved from shielding large corporations from regulation to protecting minorities from discrimination, the nation launched a Second Reconstruction.

SECOND RECONSTRUCTION

Southern blacks had lost the suffrage gradually, and they regained it gradually. After outlawing the white primary and challenging many state discriminatory registration procedures, black leaders successfully pressured Congress to overcome the white southern filibusters that had prevented the passage of any national civil-rights legislation since 1875. When the 1957 and 1960 Civil Rights Acts proved slow and weak, the Civil Rights Movement and bipartisan northern outrage at the suppression of southern black voting power produced the most significant legal development in minority voting rights since disfranchisement — the 1965 Voting Rights Act. That law not only outlawed literacy tests, but it also condemned the discriminatory administration of seemingly neutral political regulations and facilitated legal attacks on any electoral laws that had discriminatory effects.

While black voter-registration percentages surged, the number of black representatives or even of whites who were very sympathetic to the special concerns of the country's most-discriminated-against group at first only inched upward. Anti-black diehards passed laws shifting from district to at-large elections, requiring runoff elections in majority-white, racially-polarized areas, and annexing largely white suburbs to increasingly black cities. Foes packed African Americans or Latinos into as few districts as possible or scattered them thinly to dilute their influence, while erstwhile friends often concentrated just enough minorities in election districts to ensure white Democratic victories, but not enough to encourage serious minority ethnic candidates to run. Such practices were not confined to the South. From Brooklyn to Los Angeles, from Chicago to Memphis, from North Carolina to Texas, discrimination against minorities in shaping electoral structures persisted.

Figure 1



Sources: Congress (1868-1901): Smith 1940.

State legislatures, First Reconstruction (years in parentheses): *Alabama*—Wiggins 1977, 147-51 (1868-78); Taylor 1949 (1880-1900). *Arkansas*—Caldwell 1990. *Florida*—Brown 1995. *Georgia*—Conway 1966, 161 (1868); Foner 1993, passim (1870); Shadgett 1964, 28, 52 (1872-74); Work 1920, 63-119 (1876-78); Bacote 1955, 524-25 (1880-1900). *Louisiana*—Vincent 1976, 228-38 (1868-76); Uzee 1950, 203-4 (1878-1900). *Mississippi*—Harris 1979, 264, 428, 479 (1870-74); Wharton 1947, 202 (1876-92). *North Carolina*—Padgett 1937, 483-84 (1868-88); Work 1920, 63-119 (1890-92, 1900); Edmonds 1951, 116 (1894-98). *South Carolina*—Holt 1977, 97 (1868-76); Tindall 1952, 309-10 (1878-1900). *Tennessee*—Cartwright 1976, 20, 66, 103, 105 (1871-83, 1889-1900); Work 1920, 63-119 (1885-87). *Texas*—Barr 1986, 340-52 (1870); Smallwood 1974, 406-11 (1872-74); Barr 1971, 27 (1876); Rice 1971, 100-111 (1878, 1894-1900); Brewer 1935, 127-28 (1876; 1894-1900). *Virginia*—Blake 1935, 137, 182, 232, 252, (1869-71, 1879, 1891); Buni 1967, 4, 8 (1881); Wynes 1961, 45, 49 (1889); Jackson 1945, 1-43 (1873-77, 1883-87).

Congress and state legislatures: 1964-66—Bass and DeVries 1976, 152; U.S. Commission on Civil Rights 1968, passim. 1968—Southern Regional Council 1968, iii. 1970-92—U.S. Department of Commerce, *Statistical Abstract of the U.S.*, various years.

Two examples indicate the scope and nature of this discrimination. In Los Angeles County, California, the nation's largest county government was presided over by five supervisors elected by districts. No Latino supervisor was elected from 1874 through 1990. After a bitter contest in 1958 required four recounts to decide that a conservative Anglo Democrat, Ernest Debs, had beaten the county's most popular Latino politician, Edward Roybal, for the Third Supervisorial District post, the Board of Supervisors repeatedly redrew its districts, beginning suspiciously in 1959, just a year before a new census was to be taken. Each of the five times that the Board redistricted between 1958 and 1981, it reduced the Latino percentage of the Third District by adding largely Anglo territory. As the burgeoning Latino population swelled south and east after 1960, that district's boundaries spurted north and west. The supervisors again and again rejected proposals to change the direction of growth of the Third District, because, as one of Debs' staff remarked of the district's northwest migration in

1971, the Anglos who lived in that direction were "our kind of people." Only a suit by civil rights groups and the Justice Department uncovered the discriminatory pattern of the county government's repeated redistricting and forced the county into a fair reapportionment, which resulted in the election of a Latina supervisor, Gloria Molina, in what was by 1991 a 37-percent Latino county.

The effort to minimize black political power in Memphis, Tennessee, was more blatant and less effective than the anti-Latino actions in Los Angeles. After a half-century in which one man, Edward Hull Crump, had effectively dictated local political outcomes, Memphians awoke in the 1950s to more vigorous politics in which even African Americans had a chance to win office. What gave blacks an opportunity was the fact that the City Commission, the School Board, the county's state legislative delegation, and the county Democratic Executive Committee were elected at-large in a free-for-all system. In 1955, for example, sixteen candidates ran for four school board posts, with the top four candidates being declared winners, however small their percentages. Since people could vote for from one to four candidates, blacks could potentially elect their choice if whites split and blacks cast all their ballots for a single candidate — "single-shot" ballots. When black candidates were nearly elected through single-shotting for the school board in 1955 and for the state legislative delegation in 1958, the white leadership pushed bills through the state legislature requiring each candidate to run for a designated post – one of four school board seats, for instance – effectively ending the possibility of a black victory through single-shotting.

The bills neglected, however, to add majority-vote provisions. If one black candidate faced several popular whites and whites split their votes, the African American might win, even in a designated-post system. This almost happened in 1959, when blacks coalesced behind Harvard Law School graduate and black civil rights lawyer Russell Sugarmon, Jr. The local white newspapers, civic organizations, and elected leaders had great difficulty forcing some candidates to withdraw, yet they still organized a bandwagon for one of the remaining whites. Although Sugarmon lost, the specter of blacks in office haunted two major election "reform" efforts in the 1960s. In 1962, white leaders proposed to consolidate the city government with the surrounding rural and suburban areas of Shelby county, where Memphis is located. The new government's officials were to be elected at-large by designated posts in a complicated system that made black election to any of the seats extremely unlikely. Many whites whose offices would have been abolished opposed the changes, along with black leaders, who vociferously demanded smaller districts in which less-affluent whites and African Americans would have a chance to elect their choices. The proposal failed in a referendum. Four years later, another semi-official reform committee convinced the voters to adopt a less sweeping change that gave the black third of the electorate the chance to elect two or three of thirteen members on an expanded Memphis city council. The rest of the seats would be filled in at-large runoff contests or in safely white-controlled districts. A runoff provision for mayor defeated every black candidate for that office until a federal court suit threw it out as racially discriminatory in 1991, resulting in the election of the first black mayor in the city's history, Willie Herenton.

As the judicial resolutions of the discriminatory electoral structures in Los Angeles and Memphis imply, the courses of the First and Second Reconstructions differed in no small part because courts, led by the U.S. Supreme Court, acted differently. In the First Reconstruction, the Supreme Court had first gutted the primitive federal voting-rights laws of the period and then had invented excuses for failing to intervene to protect African Americans from disfranchisement. Given a second chance, however, the Supreme Court did not look the other way again. In the 1969 case of *Allen v. Board of Elections*, the Court interpreted the Voting Rights Act to apply not only to changes in laws affecting individuals' rights to vote, but also to alterations in electoral structures, such as switching from elective to appointive offices and racial gerrymandering, that had the effect of disadvantaging racial minorities. In 1973, the Court went further. In *White v. Regester*, it unanimously condemned at-large elections that effectively diluted minority votes. And while *Allen* had been based on an easily altered federal law, *White* was grounded in the U.S. Constitution. Moreover, congressional leaders and authoritative congressional reports explicitly endorsed *Allen's* interpretation of the Voting Rights Act, and the lawmakers employed *White v. Regester's* "totality of the circumstances" evidentiary standard when they overwhelmingly passed the most far-reaching extension of the Voting Rights Act, that of 1982. A century after the passage of the Fifteenth Amendment, Congress and the Court seemed to be working in tandem to ensure that the Second Reconstruction fulfilled the promises of the First.

Spokespersons and allies of the Reagan Administration who testified against the expansion and extension of the Voting Rights Act in the 1981-82 hearings warned that it would lead to more districts in which the majority of the population was composed of one or more

ethnic minority groups. Congress heard their pleas, but decided that guaranteeing what *White v. Regester* had referred to as an "equal opportunity to participate in elections and to elect candidates of their [minorities'] choice" overrode such concerns. In its 1986 decision in *Thornburg v. Gingles*, the Supreme Court interpreted the 1982 amendments in a way that seemed to imply that if it was possible to create a "majority-minority" district, a state or local jurisdiction that failed to do so would violate the Voting Rights Act. Throughout the country, those who drew new district lines in 1991-92 accepted that interpretation of the law. The result was the largest increase in the number of minorities elected to Congress and state legislatures since the 1870s.

THE REHNQUIST COURT AND MINORITY VOTING RIGHTS

That increase was too much for the "conservative" justices of the Supreme Court who had been appointed by Presidents Reagan and Bush. In a series of radical, not conservative, "racial gerrymandering" decisions beginning with *Voinovich v. Quilter* and *Shaw v. Reno* in 1993, the same five justices, usually over the biting dissents of the other four members of the Court, sought to sharply reverse the course of minority voting-rights laws, even to return to the days before the 1965 Voting Rights Act. Taken as a whole, the majority's opinions were blatantly contradictory, cynically unprincipled, as full of racial and partisan double standards as they were of inflammatory and misleading rhetoric, and based on a bizarre and distorted version of the history of American race relations. These are strong contentions, which require brief analyses of several Supreme Court opinions. (For a much more detailed argument and evaluation, see my book, *Colorblind Injustice.*)

The usually ignored *Quilter* case, issued just three months before the more widely noted *Shaw* opinion, sheds important light on the motives of the five-person Supreme Court majority. A Republican-dominated redistricting board in Ohio claimed that the Voting Rights Act forced it to increase the percentages of African Americans in state House districts that had previously overwhelmingly elected black incumbents, thereby reducing African American percentages in surrounding districts, which made it easier to elect Republicans in those adjacent districts. The board freely admitted its racial purposes in these actions and claimed that affirmative action gerrymandering should override state constitutional requirements that districts be compact. When a lower federal court headed by a former NAACP general counsel condemned the Ohio plan for packing blacks unnecessarily and thus diluting their overall influence in the political process, the Supreme Court, in an opinion by Justice Sandra Day O'Connor, overturned the lower court decision and praised the Ohio board for elevating its extreme interpretation of the Voting Rights Act over the traditional mandates of state law.

However, O'Connor adopted a very different stance toward a congressional plan for North Carolina endorsed by black leaders and passed by a Democratic legislature under pressure from the Justice Department. North Carolina had not elected a black member of Congress in the twentieth century. In periods when blacks had seen voted fairly freely in the state — from 1868 through 1900, and again after 1965 — a chief goal of redistricting there had been to minimize black political power. For example, in 1872, in the first redistricting after blacks were enfranchised, Democrats who had come to power in a Klan-dominated election packed African Americans into an irregularly-shaped and over-populated congressional district known from then until 1901 as the "Black Second." More recently, in 1981, a fight to preserve the seat of the state's last plantation Democratic congressman by reducing the African American percentage in the most heavily black district, still the Second, stymied the state legislature for six months. Only vigorous Justice Department intervention managed to keep the black proportion in the district the same in the 1980s as it had been in the 1970s, and campaigns full of racial appeals kept the seat in white hands throughout the eighties. In 1991-92, the state legislature drew two ungainly congressional districts for three reasons: to remedy previous anti-black racial gerrymandering, to satisfy the strictures of the Voting Rights Act, and to elect the largest number of Democrats possible, taking into account other constraints. For the first time in the history of North Carolina, two congressional districts had slight majorities of black registered voters — 51 and 54 percent.

In *Shaw v. Reno*, O'Connor bitterly condemned these districts, disingenuously omitting to include the actual black percentages or to note that their percentages were smaller than those in several of the approved Ohio districts, as efforts "to segregate the races for purposes of voting . . . to classify and separate voters by race . . . [to] balkanize us into competing racial factions . . . political apartheid." Without any evidence whatsoever, O'Connor asserted that the North Carolina (but presumably not the Ohio) districts reinforced racial stereotypes, could "exacerbate . . . patterns of racial bloc voting," and would cue legislators elected from those districts to pay attention to only the black part of their constituencies. And completely ignoring the state's long history of parti-

san and (anti-black) racial gerrymandering, O'Connor pronounced the challenged districts violative of such "traditional districting principles" as compactness.

The inconsistency between the treatments of the Ohio and North Carolina redistricting plans, the heavily freighted language, borrowed from the Civil Rights Movement but applied to reverse it, the factually incorrect assumption that whites and African Americans did not differ in political values, and the insensitive implication that white officeholders could represent blacks, but not vice versa, were merely the most obvious racial and partisan double standards in O'Connor's *Shaw v. Reno* opinion. More subtly, O'Connor granted to the white plaintiffs standing to sue in the case even though they did not claim to have suffered any individualized injuries, but only a harm to society, whose oracles they apparently considered themselves to be. O'Connor's ruling on standing was in stark contrast to the Supreme Court's insistence that ethnic minorities who claimed that a law or practice discriminated against them had to demonstrate both an illicit intent and a harmful effect to themselves, not just to society as a whole, or the "conservatives'" insistence in 1992 that unless environmentalists were personally harmed by a regulation, they could not sue to enjoin it. *Shaw* created a separate and unequal equal protection clause.

After backing and filling for a year in response to criticisms of O'Connor's opinion from both inside and outside the Court, the *Shaw* five breathtakingly expanded that decision's scope in the 1995 case of *Miller v. Johnson*. Some voting-rights experts had believed or hoped that *Shaw* applied only to extremely contorted districts that contained a majority of minorities, as O'Connor's condemnation of the shapes of the majority-black North Carolina districts as "bizarre," "irregular," and "egregious," her inflated "apartheid" rhetoric, and her assertions about the deleterious consequences of pro-minority racial gerrymandering seemed to indicate. How could a district that was majority white have been set aside for blacks or cue whoever it elected to ignore the wishes of the majority of its population? Other commentators took heart from the fact that O'Connor had stated *fifteen times* in *Shaw* that race had to be the *only* motive for drawing a district to render it constitutionally suspect. Since redistricting was always affected by partisanship, incumbency protection, and a host of idiosyncratic factors, perhaps all that was necessary to limit *Shaw*'s reach was to document the impact of nonracial considerations.

Miller scotched the optimists' hopes. Over even more pointed dissents than in *Shaw*, Justice Anthony Kennedy ruled that district shape was only one indication of whether race had been "the predominant factor" in a legislature's "decision to place a significant number of voters within or without a particular district," and that it was also unconstitutional for redistricters to use "race as a proxy" for voting Democratic. He neither defined "significant" nor indicated how to determine when racial motives predominated or when race had been used, as a proxy or otherwise. After *Miller*, no district in a state containing any appreciable number of minorities was safe from challenge, however regular its appearance or small its minority percentage, if someone could claim that race had played a role, direct or indirect, in even part of its creation. This was judicial activism to make the Earl Warren Court blush.

Shaw and *Miller* opened yawning gulfs in the law that invited further litigation: How important did race have to be in redistricting and how was one to assess its weight? Should or could those who drew districts ignore the dominant social cleavage in American society, as some advocates of what they called "colorblind" redistricting contended? How could minority groups participate in the process of redistricting when their approval of a plan might seem to judges, as it did in *Miller*, to constitute nearly irrefutable evidence that the plan was adopted for a racial purpose? Was the consequent *de facto* exclusion of minorities from a crucial part of the political process a return to separate and unequal? What would be the roles of the Justice Department and of civil-rights groups, central in redistricting for the first time in American history in 1991, in the redistricting of 2001? Could a desire on the part of a legislature to remedy past discrimination or to comply with the Voting Rights Act justify race-conscious redistricting? Since the Voting Rights Act necessarily required taking race into account, was the Act itself unconstitutional, as four of the five *Shaw* justices appeared to believe? What counted as a "traditional districting principle," how were such principles to be identified, and what gave them constitutional significance that outweighed the explicit constitutional mandate of equal protection?

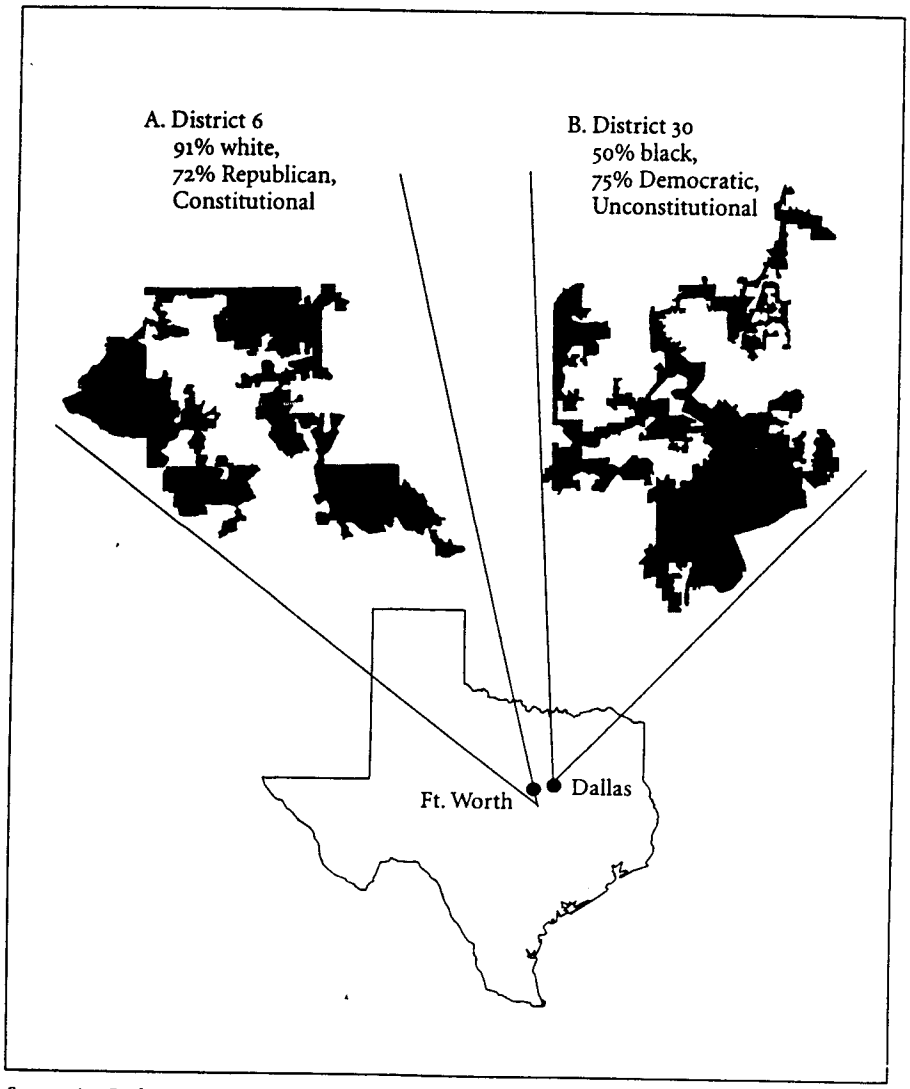
Supreme Court decisions for the rest of the decade and into the next did little to answer those questions clearly. In 1996, *Shaw* returned to the Supreme Court on appeal from a federal district court decision that upheld North Carolina's actions as justified by "compelling state interests." Speaking for the usual five-person majority, Chief Justice William Rehnquist overturned the district court, ruling (without any evidence) that less than a majority of the state legislators was moved by an urge to remedy past anti-black discrimination, that a desire to comply with the Voting Rights Act would save a district from unconsti-

tutionality only if it satisfied the Court's undefined criterion of compactness, and that if there were no districts where a black could win under the previous decade's plan, the Voting Rights Act could not require any increase — a guarantee of continued white dominance reminiscent of the infamous "grandfather clauses" of disfranchisement days. Although the state provided evidence that partisanship, communities of interest, and incumbency protection had been crucial in drawing the challenged districts, the Chief Justice made no effort to weigh the motives of the legislature. His opinion seemed to relegate the Justice Department in subsequent redistrictings to the mere clerical role of comparing the number of minority opportunity districts in the new and old plans and, if they were the same, approving the new plan.

Bush v. Vera, a Texas congressional redistricting case announced on the same day by the *Shaw* majority, was even less coherent, eliciting four separate opinions from the five justices. As in many other states, Texas's "traditional districting principles" were primarily incumbent, partisan, and anti-minority racial gerrymandering. In the prevailing opinion in *Vera*, Justice O'Connor did add incumbency protection to the list of Supreme Court-approved traditional districting principles. But then she ruled that if racial and other data were used to tailor-make a district for a particular minority state legislator or incumbent, that was a racial, not an incumbency matter. Moreover, if minority voters were added to white Democratic districts to buttress whites' chances for election or reelection, that was using "race as a proxy," and was therefore unconstitutional. And while O'Connor and Rehnquist indicated a belief that any compact district was constitutional, whatever the motive in drawing it, thereby undercutting *Miller*'s "predominant motive" language, their three erstwhile allies declared that any intentionally drawn minority-opportunity district, regardless of its shape, was constitutionally infirm, thereby undermining O'Connor's *Shaw* opinion.

Most interestingly for adherents of "colorblindness," O'Connor specifically ruled in *Vera* that largely white districts could take on any shape, however distorted, and that their perimeters could be drawn to accommodate any non-racial interests whatsoever — partisan, economic, geographical, and so on. By contrast, the justice declared, those districts in which minorities had a chance to elect candidates of their choice, of whatever race, had to be as compact as a "hypothetical court-drawn" district, and *only* racial considerations and municipal or county boundaries could be taken into account in drawing them. Under this ruling, those who wished to draw minority districts could not engage in the same political compromises that had always dominated redistricting politics and that would continue to dominate the drawing of white districts. As one lawyers' brief put it, minorities had become "redistricting pariahs." In *Vera* as in *Quilter*, the Supreme Court majority's amorphous standards could easily be twisted to produce different outcomes for different races and parties, as the justices' personal values dictated.

Figure 2



Source: A—*Bush v. Vera* (1996), 1995; B—ibid., 1965.

After *Miller*, a federal district court redrew the Georgia congressional districts, eliminating two of the three majority-minority seats. When the state again appealed, Justice Kennedy and the other *Shaw* justices once more sided against the minorities, but this time, Kennedy expanded the concept of traditional districting principles in ways that highlighted how cynical the majority had become. Kennedy accepted one excuse that the district court had given for refusing to draw a second majority-minority district, that Georgia had a tradition of separate districts in each of the four corners of the state. The trouble was that this "traditional principle" had been violated in 1981, 1991, and in the district court's own plan. Both the district and the Supreme courts also paid homage to what they described as the state's tradition of having a black-majority district in Atlanta. What they failed to note in print, however, was that it had taken Justice Department disapproval in 1971 and 1981 and a federal court suit in 1982 to establish that tradition. In the suit, the most sensational piece of evidence was a statement by 1981 House Reapportionment Committee chair Joe Mack Wilson, who was quoted as saying, "I don't want to draw n----- districts." Wilson's actions, which reflected the true traditions of the state, were consistent with his statement. Finally, Kennedy severely weakened the ability of minority plaintiffs to prove racial bloc voting, a necessity under the *Gingles* interpretation of the Voting Rights Act, by accepting the contention that if as many as a quarter of whites voted for any black candidates, there was no racial polarization.

In 1998, the North Carolina congressional redistricting case reappeared in the Supreme Court for the third time. When the legislature redrew the districts in 1997, after the second *Shaw* decision, creating white majorities in all twelve congressional districts, the white plaintiffs, still unsatisfied, found a more sympathetic district court, which enjoined the legislative plan just before the 1998 primaries. The legislature was forced to negotiate yet another plan, which reduced the black percentage of registered voters in the spotlighted district from 40 percent to 33 percent. The state appealed, and in May 1999, the Supreme Court remanded the case to the district court, strongly hinting that using race as a proxy for particularly staunch Democratic voters – using racial means for partisan ends — was quite constitutional. Although compatible with *Quilter*, the brief third North Carolina opinion is impossible to square with any of the rest of the racial gerrymandering opinions issued in the 1990s, which have already been shown to have blatantly contradicted each other. It seems to herald another decade of endless redistricting litigation which may, depending on personnel changes on the Court, either reverse the whole line of *Shaw* cases or finish metamorphosing the Fourteenth and Fifteenth Amendments into instruments to deny minorities anything approaching political equality.

THE REHNQUIST COURT'S REVISIONIST HISTORY

In their more lofty moments, when the *Shaw* justices rise above the facts and contentions of particular cases and try to justify their general approach, they deeply misread our nation's history. To them, the lesson of centuries of racial oppression and its continuing legacies in America is that government should be colorblind — blind to current discrimination in society and politics, blind to the real facts of public and private institutions, past and present, noticing only what Justice O'Connor in *Shaw* called official discrimination "*between*" people, not official or unofficial discrimination *against* any group. But slavery, peonage, disfranchisement, and segregation were *group* wrongs, and the Reconstruction Constitutional Amendments were primarily efforts to prohibit discrimination *against* groups of people. From the first elections in which blacks could vote in large numbers, during the First Reconstruction, through the 1980s, many electoral structures throughout the country were designed to discriminate against them as a group. Deep down, even the *Shaw* justices must know that their individualized, "colorblind" revision of American history is a fraud.

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