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Equal Favoritism Under the Law and Intelligent Design in Redistricting

Cover Page Footnote

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EQUAL FAVORITISM UNDER THE LAW AND INTELLIGENT DESIGN IN REDISTRICTING

*Terry Smith**

Recently, Associate Justice John Paul Stevens was joined on the United States Supreme Court by a new Chief Justice who subscribed to this view about amending section 2 of the Voting Rights Act of 1965:

As Justice Stewart correctly noted in his opinion in *City of Mobile v. Bolden*, incorporation of an effects test in §2 would establish essentially a *quota system for electoral politics* by creating a right to proportional racial representation on elected governmental bodies. Such a result is fundamentally inconsistent with this Nation's history of popular sovereignty.¹

Chief Justice John Roberts's ascension to the Supreme Court augurs a prismatic polarity on the Court between its most junior Justice and its most senior, Justice Stevens, on questions concerning the democratic process. Reasonable people might interpret our nation's history of popular sovereignty quite differently than Roberts did as a young stalwart of the Reagan revolution: Quotas of the worst sort have abounded, creating elective bodies that are disproportionately white and often unresponsive to the concerns of voters of color.

Compositions of multimember offices are seldom random acts of nature; rather, they are nearly always products of someone's design. Justice Stevens's more conservative colleagues on the Court have recognized this reality in the context of the partisan gerrymander.² Yet they have insisted on a race neutrality standard in redistricting that has reinforced a disproportionate quota for white voters and white representatives. Perhaps more than any current member of the Court, Justice Stevens has sought to fashion a coherent melding of the constitutional protections implicated in redistricting and apportionment. As early as 1972, when he was a judge on the United States Court of Appeals for the Seventh Circuit, Justice Stevens argued that all groups with the potential strength to elect their own

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1. Memorandum from John Roberts to the United States Attorney General, *Why Section 2 of the Voting Rights Act Should Be Retained Unchanged* (Dec. 22, 1981), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf>.

2. See *Vieth v. Jubelirer*, 541 U.S. 267, 326 (2004) (Stevens, J., dissenting).

members—whether racial, ethnic, religious, or political—are entitled to the same protections from gerrymandering.³

As a corollary to his insistence on a symmetrical gerrymandering doctrine, Justice Stevens has consistently argued that, when a group in power draws district lines to benefit underrepresented groups, the dominant group does not engage in a form of gerrymandering condemned by the Equal Protection Clause of the Fourteenth Amendment.⁴ These two postulates—purporting to afford interest groups equal dignity in the redistricting process—coexist uncomfortably in the eyes of many. Conservatives on the Court have attacked these propositions as ignoring the special status of race under the Constitution. Progressive voting rights scholars have critiqued Justice Stevens's three-part test for determining the permissibility of a gerrymander (discussed below) as far too deferential to jurisdictions prone to discriminate against minority voters. Relatedly, at a time when section 5 of the Voting Rights Act of 1965 is up for renewal, and when there is doubt to whether Congress and the executive branch will continue to compel states to conduct remedial redistricting, Justice Stevens's approach to constitutional vote-dilution claims may unwittingly license states to further ignore minority interests. Finally, for all Justice Stevens's and commentators' concerns about the legislative gerrymander, there may be an even worse alternative for white voters and voters of color alike—that is, giving voters themselves final say over redistricting plans. The latter course was recently rejected by voters in California who defeated Proposition 77. A brief examination of the foregoing strands of the gerrymandering debate helps map the broader controversies surrounding redistricting.

A perusal of the redistricting cases from the past decade or so reveals a foundational disagreement between Justice Stevens and the Court's conservatives. Justice Stevens imposes a duty on state legislatures to govern impartially in the context of redistricting with respect to all interest groups, by whatever characteristics they are defined.⁵ This duty, derived from the government's broader duty of impartiality under the Equal Protection Clause, is breached when the state "discriminates against a political minority for the sole and unadorned purpose of maximizing the

3. See *Cousins v. City Council of Chicago*, 466 F.2d 830, 852 (7th Cir. 1972) (Stevens, J., dissenting).

4. See *Shaw v. Reno*, where Justice Stevens, writing in dissent, stated, "The duty to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group. That duty, however, is not violated when the majority acts to facilitate the election of a member of a group that lacks such power because it remains underrepresented in the state legislature—whether that group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics." 509 U.S. 630, 677-78 (1993) (Stevens, J., dissenting).

5. See *Vieth*, 541 U.S. at 326 (Stevens, J., dissenting) ("In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders." (internal quotations omitted)).

power of the majority.”⁶ But the majority’s decision to enhance the power of a political minority—even a racial one—involves no unconstitutional self-dealing. Where the political minority is a racial one, Justice Stevens’s mandate of impartiality becomes a warrant for equal favoritism:

If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause. . . . A contrary conclusion could only be described as perverse.⁷

What Justice Stevens sees as a perversion, however, is the very predicate of the Court’s wrongful districting cases from *Shaw v. Reno* forward, and of the conservatives’ differentiation between the justiciability of partisan and racial gerrymanders. How can such a wide gulf exist between what we hope are intelligent jurists of good intentions? Conservative justices make three assumptions that simultaneously explain and discredit their approach to redistricting.

Their principal assumption is that race is different from all other characteristics in the redistricting process.⁸ This argument flows from general equal protection doctrine under which racial categories are deemed to be the most suspect.⁹ But here, the conservatives on the Court are doing nothing more than using the nation’s history of racial discrimination against its most visible victims. The conservatives argue, in effect, that since our nation’s past has rendered it necessary to make race a generally prohibited criterion, efforts to rectify the effects of that history will be subject to the same scrutiny as conduct that reflects that history. This contortion of reason has been lambasted by fellow Justices¹⁰ and scholars alike,¹¹ but in the redistricting context its consequences are especially pernicious.

Districting that is other than random—which would describe most districting—is necessarily about favoritism for some groups based on group characteristics. The other contexts in which race-based equal protection concerns arise, such as employment and higher education, do not, we hope,

6. *Id.*

7. *Shaw*, 509 U.S. at 679 (Stevens, J., dissenting).

8. Justice Stevens writes,

[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country’s long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race[]—would seem to compel the opposite conclusion.

Id. at 650 (citations omitted); see also *Vieth*, 541 U.S. at 292-93 (plurality opinion).

9. *Shaw*, 509 U.S. at 650 (Stevens, J., dissenting).

10. See *Adarand Constructors v. Peña*, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting).

11. See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245 (1997).

reflect a similar endeavor. Since group favoritism is the coin of the realm in redistricting, doctrines which impede equal favoritism, as color blindness does, are inherently discriminatory.

The Supreme Court's conservatives also harbor an abiding yet naive belief that they are capable of distinguishing race from politics as such in redistricting. As Justice Scalia recently stated in his plurality opinion in *Veith v. Jubelirer*, which held partisan gerrymanders to be nonjusticiable,

the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered. Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive [e.g., politics] as to invalidate it.¹²

Justice Scalia assumes that the disproportionate number of white elective districts across our nation lack a racial identity, and that redistricting criteria that are not explicitly racial—e.g., political conservatism, anti-affirmative action, antisocial programs, anti-busing—can be untethered in each instance from their racial origins.¹³ Yet politics on the ground reveal a very different story.

Lee Atwater, the former chairman of the Republican National Committee and the architect of George H. Bush's highly racialized presidential campaign against Michael Dukakis, spoke candidly about the linkage between modern conservatism and old-style segregation:

You start out in 1954 by saying "Nigger, nigger, nigger." By 1968 you can't say "nigger"—that hurts you. Backfires. So you say stuff like forced busing, states' rights, and all that stuff. You're getting so abstract now [that] you're talking about cutting taxes, and all these things you're talking about are totally economic things and a by-product of them is [that] blacks get hurt worse than whites. And subconsciously maybe that is part of it. I'm not saying that. But I'm saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me—because obviously sitting around, "we want to cut this," is much more abstract than even the busing thing and a hell of a lot more abstract than "Nigger, nigger."¹⁴

Atwater was describing a process of "rearticulation" in which racial regression merges with broader concerns of economic stagnation and cultural malaise to produce a new nomenclature for anti-black rhetoric.¹⁵

12. *Vieth*, 541 U.S. at 286 (plurality opinion).

13. For a discussion of how the Court has failed to acknowledge the racial dimension of the two-party political system in the United States, see Terry Smith, *A Black Party?* Timmons, *Black Backlash, and the Endangered Two-Party Paradigm*, 48 Duke L.J. 1, 25, 40-41 (1998).

14. Alexander P. Lamis, *Southern Politics in the 1990s*, at 8 (1999) (alteration in the original).

15. See Michael Omi, *Shifting the Blame: Racial Ideology and Politics in the Post-Civil Rights Era*, 18 *Critical Scientology* 77, 92 (1991). Rearticulation of traditional racism is not

This process cannot be dismissed as merely anecdotal, for “a sizable body of research suggests that direct measures of racism are, in fact, strongly correlated both with opposition to affirmative action and conservatism.”¹⁶ To be sure, social scientists continue to debate the degree to which racial predispositions affect policy preferences,¹⁷ but amidst this debate it is simply intellectually dishonest to assume the race neutrality of white districts. The public opinion data simply do not support such a presupposition. On matters concerning race, black/white differences of thirty-five percent to fifty percent are the norm.¹⁸ Even on nonracial issues, such as government social welfare and education spending, black/white differences of twenty percent are typical.¹⁹ Thus, districts created along a conservative-liberal axis are likewise divided along a racial axis.

The same is true of partisan gerrymandering, particularly in the South. It is now an uncontroversial proposition that partisan realignment occurred in the South because conservative whites abandoned the Democratic Party in reaction to its embrace of civil rights.²⁰ How, then, can Republican districts in the South, the situs of the Court’s efforts to dismantle majority-black districts, be considered race neutral? The history of partisan realignment after 1964 is not an “original sin” irrelevant to constitutional analysis.²¹ That realignment’s effects continue today, and “[t]he end result is that racial attitudes have become a dominant axis of cleavage in the contemporary American party system.”²² Moreover, in its rash of decisions during the 1990s striking down newly created majority-minority congressional districts, the Supreme Court made clear that a state may not perpetuate the impermissible uses of race by basing a redistricting plan on districts that

limited to politics. Modern judicial conservatism’s opposition to race-based remedies, among other tenets, can reasonably be challenged as a pretext for racial regression. Cf. Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 *How. L.J.* 1, 64 (1995) (arguing that the Supreme Court’s rejection of affirmative action is “an act of racial discrimination” because it allows conservative jurists to “appropriate societal resources allocated by the political process to racial minorities and reallocate them to the white majority”).

16. Christopher M. Federico & Jim Sidanius, *Racism, Ideology, and Affirmative Action Revisited: The Antecedents and Consequences of ‘Principled Objections’ to Affirmative Action*, 82 *J. Personality & Soc. Psychol.* 488, 489 (2002).

17. See Vincent L. Hutchings & Nicholas A. Valentino, *The Centrality of Race in American Politics*, 7 *Ann. Rev. Pol. Sci.* 383, 389 (2004) (“The ensuing debate over the impact of racial attitudes on policy preferences has been among the most contentious in all of public opinion research.”).

18. See *id.*

19. See *id.*

20. Jonathan A. Cowden, *Southernization of the Nation and Nationalization of the South: Racial Conservatism, Social Welfare and White Partisans in the United States, 1956-92*, 31 *Brit. J. Pol. Sci.* 277, 278 (2001).

21. See *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (“[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.”).

22. Cowden, *supra* note 20, at 278.

were originally conceived with a predominately racial motive.²³ Absent some seismic event that has purged the southern Republican Party of its original racial *raison d'être*, when Republican districts are today created in the South, state governments in effect relent to the race-influenced policy and partisan preferences of whites.²⁴ If these districts do not violate the Equal Protection Clause of the Fourteenth Amendment, then black, Latino and Asian districts created to mirror these constituencies' policy and partisan preferences do not either.²⁵

The Supreme Court's conservatives, however, have ensnared themselves in an implosive double standard. They have had no difficulty de-racializing white voters, but they have become recalcitrant when voters of color have sought similar treatment. In *Easley v. Cromartie*,²⁶ the State of North Carolina explained the forty-seven percent black composition of a congressional district on grounds that blacks were disproportionately Democratic, and the state sought to create a reliable Democratic district.²⁷ Ever suspicious of a black district that exists by virtue of anything other than residential segregation, Justice Thomas boasted an ability to untangle race from partisanship, and he would have found the district an unconstitutional racial gerrymander because race predominated in its creation.²⁸ Setting to one side the thin evidence on which Justice Thomas's conclusion rests,²⁹ the problem for him and other conservatives on the Court is their crude, stereotyped view of voters of color as being defined by their race rather than a set of common political interests.³⁰

23. See *Abrams v. Johnson*, 521 U.S. 74, 90 (1997) (“[T]he unconstitutional predominance of race in the provenance of the Second and Eleventh Districts of the 1992 precleared plan caused them to be improper departure points . . .”).

24. This argument should sit well with so-called “originalists.” Originalists cannot repair to historical understandings when doing so grandfathers racial inequality but disregard history when it relays a story that justifies remedial action by the state.

25. The foregoing critique is applicable to regions outside the South, though to a lesser extent. Since 1964, white partisans outside the South have shown a statistically significant gap in their racial liberality. Cowden, *supra* note 20, at 297. Nationally, party identification has become increasingly predictive of racial attitudes. See *id.* at 295 (stating that by 1992, “the probability of identifying as a Republican increases by 23 per cent as one moves across the race issue scale in a conservative direction, while the probability of identifying with the Democratic party declines by the same amount”).

26. 532 U.S. 234 (2001).

27. See *id.* at 242 (“[North Carolina] has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated.”).

28. *Id.* at 259 (Thomas, J., dissenting).

29. See *id.* at 262-67.

30. The portrayal of black and Latino politics as nonideological and race based is not limited to conservatives. New York City was last among major American cities to elect a black mayor and remains the only not to have reelected one. So-called moderate white politicians do not hesitate to race-bait when pitted against a black opponent, as Rudolph Giuliani did in defeating New York Mayor David Dinkins. Giuliani accused Dinkins of repairing “into black victimization” to excuse his performance as mayor. Todd S. Purdum, *Giuliani Ousts Dinkins by a Thin Margin; Whitman Is an Upset Winner Over Florio*, N.Y. Times, Nov. 3, 1993, at A1. Moreover, news media and commentators accessed by the news media—who are overwhelmingly white—similarly paganize black and Latino politics.

Suppose the State of North Carolina sought to draw a congressional district that would elect a representative who would support such issues as reparations, affirmative action, and statehood for the District of Columbia? Since polling and other evidence shows that there is appreciably greater support for such issues among black voters than among whites,³¹ surely it would make sense to include large numbers, if not a majority, of black voters. Would such a district be a race-based district? If the answer is affirmative merely because the underlying issues themselves have to do with race, then once again, a number of Republican, conservative districts would have to be dismantled—particularly in the South—for surely race-based concerns are often part of the issue mix that yields political conservatism.³² Moreover, the censoring of voters' political interests—i.e., some concerns deserve protection in redistricting, others do not—threatens to run afoul of the First Amendment's freedoms of association and speech. Yet the conservatives on the Court consistently dissemble white political interests as something other than racial, and censor minority political interests by myopically focusing on the racial compositions and configurations of black and Latino districts. The result is that whites can empower their ideologies through the redistricting process while black and Latino efforts to do the same are either suspect or prohibited.

A variation on the foregoing heuristic will amplify the point. While it is true that the black/white opinion divide on issues directly implicating race is substantial, imagine the existence in one state of a large number of white "black sympathizers." Like black voters in *Shaw*, these black sympathizers are dispersed throughout the state such that drawing a congressional district in which they are a majority will necessarily entail drawing a less compact district. The state does so anyway. Could *Shaw's* "analytically distinct"

Recently, when billionaire Michael Bloomberg, who is white, won reelection as mayor of New York City against a Latino opponent, political analysts touted Bloomberg's reelection "as a triumph of competence over the ideology, ethnic politics, and partisan appeals that were at the heart of the campaign of Mr. [Fernando] Ferrer." Patrick D. Healy, *Ferrer Defeated: Democrats Are Locked Out of City Hall for 4th Straight Term*, N.Y. Times, Nov. 9, 2005, at A1.

31. A June 2003 Gallup Poll asked, "Do you generally favor or oppose affirmative action programs for racial minorities?" Seventy percent of blacks responded that they favored such programs, while only forty-four percent of whites so responded, a gap of twenty-six percent. See PollingReport.com, Race and Ethnicity, <http://www.PollingReport.com/race.htm> (last visited Jan. 28, 2006). A January 2002 CNN/USA Today/Gallup Poll asked, "Do you think the government should or should not make cash payments to black Americans who are descendants of slaves?" Fifty-five percent of the black respondents supported such reparations, while only six percent of the white respondents did. *Id.* Although there was no available polling data on the question of statehood for the District of Columbia—a predominantly black city—bills proposing statehood or providing it with congressional representation have languished in Congress for decades. District statehood is a racially charged yet racially coded political issue. Senator Charles Robb of Virginia accused his opponent, Oliver North, of playing racial politics when North derided the idea of District statehood, saying "I'm not going to be Marion Barry's lap dog." *Virginia: Injecting Race into the Race*, The Hotline, Oct. 28, 1994. Marion Barry, who is black, was the District's mayor at the time.

32. See *supra* notes 20-25.

claim of race predominance apply to a group of white voters who have been aggregated in the same district based on their support of black issues? If the answer is yes, then whites aggregated based on their hostility to black concerns—whether implicit or express—must be subject to *Shaw* as well. If the answer is no, then there is no reason to treat dispersed black voters, aggregated to advance their mutual interests, any differently than the white sympathizers.

The complexities involved in sorting politics from race should commend to the Court a different approach. Justice Stevens has long been cognizant of the inextricable relationship between race and politics, and between other group characteristics and politics. The intertwined nature of these phenomena led him, as an appellate judge, to observe,

[I]t is the parallel character of the voting of members of the group—rather than the source of their common interests—that motivates the gerrymander. Thus the motivation for the gerrymander is a function of the *political* strength of the group at which it is directed. That motivation is unaffected by the kind of characteristic—whether religious, economic, or ethnic—that gives the group political cohesion.³³

By shifting its focus away from vote dilution—or what Justice Stevens describes above as political strength—in *Shaw* to a motivational analysis, the Court renders vulnerable to constitutional attack large numbers of white electoral districts. In failing to apply the same motivational analysis to white districts as to majority-minority districts, the conservatives on the Court render vulnerable their judicial—indeed racial—impartiality.

Justice Stevens's attempt to apply gerrymandering protections to all interest groups equally creates an inviting target for the charge of proportional representation. Both Justice Stevens and his more conservative colleagues, however, have disavowed any right to proportional representation under the Constitution.³⁴ Thus, the third conservative premise about redistricting is one which Justice Stevens appears to share.

33. *Cousins v. City Council of Chicago*, 466 F.2d 830, 852 (7th Cir. 1972) (Stevens, J., dissenting). In *Rogers v. Lodge*, 458 U.S. 613, 651-52 (1982), Justice Stevens, writing again in dissent, stated,

It would be unrealistic to distinguish racial groups from other political groups on the ground that race is an irrelevant factor in the political process.

Racial consciousness and racial association are not desirable features of our political system. We all look forward to the day when race *is* an irrelevant factor in the political process. In my opinion, however, that goal will best be achieved by eliminating the vestiges of discrimination that motivate disadvantaged racial and ethnic groups to vote as identifiable units. Whenever identifiable groups in our society are disadvantaged, they will share common political interests and tend to vote as a "bloc." In this respect, racial groups are like other political groups. A permanent constitutional rule that treated them differently would, in my opinion, itself tend to perpetuate race as a feature distinct from all others; a trait that makes persons different in the eyes of the law.

Id. (Stevens, J., dissenting).

34. See *Rogers*, 458 U.S. at 640 n.21 (Stevens, J., dissenting) ("No group has a right to proportional representation.").

The assumption that proportional representation is antithetical to our constitutional design is a favorite red herring of conservatives on the Court,³⁵ who negatively critique proportional representation while offering no positive vision of political equality.³⁶ Unlike his more conservative colleagues, however, Justice Stevens has shown an ability to prescind the specter of proportional representation and to directly address equality.³⁷ His principle of equal favoritism suggests an appreciation that whatever the fears of proportional representation, disproportionate white representation—even when claimed as an entitlement of majority status—is hardly a superior outcome, let alone one that the Constitution sanctions.

It is one thing to permit a state legislature or local government to district in a politically and racially inclusive manner. It is quite another, however, to set forth the standards of proof that a political or racial minority must meet when it believes it has been the victim of a gerrymander. On this score, Justice Stevens's jurisprudence might be described as inchoate and evolving, at the very least. Justice Stevens originally proposed an analytical framework that led to some curious outcomes, such as his voting to uphold the Mobile, Alabama, commission form of government, under which that city's black citizens had been unable to elect the candidates of their choice.

In *City of Mobile v. Bolden*, Justice Stevens offered a three-prong test to determine the existence of an unconstitutional racial gerrymander. A court must conclude (1) the districting scheme was not the result of a "routine or a traditional political decision," (2) the plan must have a significant adverse impact on a minority group, and (3) the plan must be "unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority."³⁸

Although he rightly condemns the subjective intent inquiry for Equal Protection Clause violations, Stevens's original test for finding

35. For one of the more apoplectic denunciations of proportional representation in the context of remedial districting for minority voters, see *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring) ("We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid.'" (internal citation omitted)).

36. For a critique of the Court's actions in this area, see Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. Rev. 257, 278 (1985). Conservatives' preoccupation with proportional representation is especially peculiar in light of the results conservative Justices have ordained in other voting rights decisions that seem far less consonant with our constitutional design than proportional representation. A high school civics student, for instance, would have a far easier time grasping the idea that political minorities, even when defined in part by their race, are entitled to some representation, than they would comprehending the Supreme Court's disallowing procedures to be established for the counting of votes in Florida's presidential contest. See *Bush v. Gore*, 531 U.S. 98 (2000). The former precept forthrightly promotes equality. *Bush v. Gore*, on the other hand, perpetuated inequality by disenfranchising those voters who voted with the least technologically advanced machinery.

37. See *Rogers*, 458 U.S. at 640 n.21 (Stevens, J., dissenting).

38. *City of Mobile v. Bolden*, 446 U.S. 55, 90 (1980) (Stevens, J., concurring).

unconstitutional racial vote dilution is lacking. First, permitting a government to justify a plan that dilutes minority voting strength because that plan was adopted in a routine or traditional manner may grandfather the practices of jurisdictions that routinely and traditionally ignore minority interests in redistricting.³⁹ Equally objectionable is allowing the government to escape liability by pointing to a so-called neutral justification for its plan, when such justifications can often serve as mere pretext.⁴⁰

These shortcomings in no way obscure Justice Stevens's core commitment to an equal playing field for minorities in the body politic, but they nevertheless underscore a degree of intractability with regard to the gerrymander. Holding political gerrymanders nonjusticiable while acting as an omnipotent cartographer when states gerrymander to benefit racial minorities—an approach advocated by the plurality in *Vieth*—seems itself to offend notions of equal protection. In an effort to rid the Court's districting jurisprudence of this inconsistency, Justice Stevens has more recently advocated applying the predominance test of *Shaw v. Reno* and its progeny to political gerrymandering cases: "Just as race can be a factor in, but cannot dictate the outcome of, the districting process, so too can partisanship be a permissible consideration in drawing district lines, so long as it does not predominate."⁴¹ Because *Shaw* is deeply flawed in its conception of race and the interaction of race and politics, however, basing an all-purpose gerrymandering test on it attains uniformity at too high a cost. Moreover, although Justice Stevens appears correct that the objective of the gerrymander is the same regardless of the characteristics of the group to which it is directed, it is not at all clear that the harms to each group are synonymous. The excesses of gerrymandering may be self-correcting in some instances for some groups when an incumbent loses touch with his district,⁴² but a racial minority whose interests are not part of a district's political calculus to begin with has no such recourse.

The difficulties surrounding the gerrymander's doctrinal treatment are rivaled handily by problems with proposed legislative and academic solutions. Professor Lani Guinier has proposed substituting districts in local elections for a system of semi-proportional representation, but any such system would replicate at least some of the problems of at-large elections and would in any event require legislative approval. Efforts to make the redistricting process more random or neutral likewise provide no panacea. Limiting redistricting criteria to the preservation of precinct,

39. See Barbara Y. Phillips, *Reconsidering Reynolds v. Sims: The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 How. L.J. 561, 580 n.99 (1995).

40. *Id.*

41. *Vieth v. Jubelirer*, 541 U.S. 267, 336 (2004) (Stevens, J., dissenting).

42. See Robin Toner, *Getting Pumped? Get Real*, N.Y. Times, Nov. 13, 2005, § 4, at 1 (quoting one political operative as saying, "Incumbents who lose touch with their district are going to get beat").

county, and city lines falsely assumes that important communities of interests are formed only on the basis of geography rather than race or some other characteristic. And blind redistricting, wherein the premium is placed on not knowing pertinent information about voters, threatens to produce even less representative, less responsive elective bodies.

Because many view the evil of the gerrymander as the deprivation of voter choice, its opponents have turned to the voters themselves to eliminate the gerrymander.⁴³ These attempts, in California and Ohio, have so far been unsuccessful.⁴⁴ There may be ample reasons to applaud their defeats. California's Proposition 77 would have subjected redistricting plans to voter approval in a statewide referendum. Whatever the attributes of direct democracy, solicitude for minorities has not been one of them. California's very recent history of successful voter initiatives against affirmative action and benefits for illegal aliens are but two examples of direct democracy's hostility to minority interests. Proposition 77 and similar initiatives foreshadow a collision course between efforts to restrain the presumed evil of the legislative gerrymander and Justice Stevens's long insistence on equal dignity in the districting process.

Quite apart from such concerns, the notion that voters are wiser than politicians ignores the reality that voters elect and re-elect politicians.⁴⁵ In placing an emphasis on voter choice, opponents of the gerrymander neglect a long overdue examination of voter rationality.⁴⁶ Groups of voters⁴⁷ enable the current system by ratifying the results of the partisan gerrymander rather than critically evaluating and voting in accordance with their own interests. If there is finally to be intelligent design in redistricting, we should first look to the voter for a measure of accountability before we elicit from them reforms.

43. Richard L. Hasen, *Supreme Court Got It Right In Pa. Redistricting Case*, Roll Call, May 3, 2004 (noting that twenty-four states have an initiative process in which "the voters can make their own decisions about the appropriate role of the parties in the redistricting process").

44. Editorial, *Kaine and Reform*, Richmond Times Dispatch (Va.), Nov. 27, 2005, at E2 (noting the defeats of referenda in California and Ohio to reduce partisan gerrymandering).

45. Cf. Terry Smith, *Race and Money in Politics*, 79 N.C. L. Rev. 1469, 1490 (2001) (arguing that the campaign finance reform and term-limits movements reflected a lack of self-governing capacity on the part of voters, who could "simply not vote for a candidate who offends the principles of these two movements").

46. For an in-depth discussion of how conservative white voters act against their own economic interests, see generally Thomas Frank, *What's the Matter with Kansas? How Conservatives Won the Heart of America* (2004).

47. These are, by and large, white voters. See *id.*; see also Smith, *supra* note 45, at 1490. In the context of campaign finance reform, this author has argued,

Black voters lack the power of a controlling white majority, and, moreover, they often display a political judgment that is substantially at variance with that of white voters. It is difficult, then, to ascribe the same (self-inflicted) harms to them as may be attributed to white voters.

Id. at 1491 (footnote omitted).

Notes & Observations