THE DIRTY LITTLE SECRETS OF *SHAW*

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The racial gerrymandering decisions of the 1990s[1] are widely viewed as a resounding victory for the color-blind Constitution.[2] From a distance, they do appear that way. They are replete with rhetoric about the pernicious effects of race-conscious decision making, and they have invalidated many race-conscious districting plans.[3] All of this is surely cause for celebration by those who believe, with Justice Harlan, that the government should not be permitted to deal with people on the basis of their race.[4]

But a closer look dampens that enthusiasm. The legal rule the Court has announced in these cases—the actual constitutional doctrine—is not consistent with the color-blind ideal. Far from it. The Court has not held that the Constitution forbids the use of race in districting; indeed, a majority of the Court has specifically rejected that proposition.[5] Nor has the Court held

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1. *See* Hunt v. Cromartie, 526 U.S. 541 (1999); Lawyer v. Department of Justice, 521 U.S. 567 (1997); Abrams v. Johnson, 521 U.S. 74 (1997); Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996) [hereinafter *Shaw II*]; United States v. Hays, 515 U.S. 737 (1995); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993) [hereinafter *Shaw I*].

2. For some examples from the popular press, see, Ken Blackwell & Matt Fong, Editorial, *Minority Candidates Don't Need Quotas*, WALL ST. J., July 15, 1996, at A12; Editorial, *Against "Political Apartheid,"* WALL ST. J., June 30, 1993, at A14; Editorial, *Majority Minority*, WASH. TIMES, Nov. 20, 1996, at A16;. On the history of the color-blind ideal, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

3. *See, e.g., Bush*, 517 U.S. at 986 (invalidating three majority-minority congressional districts in Texas); *Shaw II*, 517 U.S. at 918 (invalidating a majority-black congressional district in North Carolina); *Miller*, 515 U.S. at 928 (invalidating two majority-black congressional districts in Georgia).

4. *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

5. In fact, seven of the current Justices have indicated that race is a permissible (albeit a limitedly permissible) factor in districting. *See Bush*, 517 U.S. at 958 (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race." (citing *Shaw I*, 509 U.S. at 646)); *id.* at 993 (O'Connor, J.,

that the Constitution forbids the use of race in districting absent a truly extraordinary justification. Instead, the Court has held that it is presumptively—though apparently not invariably—unconstitutional to use race as the "predominant factor" in districting, by "subordinat[ing] traditional race-neutral districting principles . . . to racial considerations" in drawing district lines.[6] In other words, it is *perfectly permissible* to use race in assigning voters to districts, even in the absence of compelling justification, as long as you do not do too much violence to "traditional districting principles" along the way.[7] That is not a holding that can be squared with Justice Harlan's ideal, and it is not a holding that anyone who believes in the color-blind Constitution should celebrate. For the true disciple of Justice Harlan, to say that the state "may make 'limited' use of race [in districting] is akin to saying one may take a little poison."[8]

If the racial gerrymandering cases cannot be squared with the color-blind ideal, what, then, *is* the explanation for them? What is the Court up to here? Many people have thought long and hard about this question, and many of them have come to the conclusion that the Court's work here is intellectually incoherent. This is not surprising, they reason, because the five-member majority that has produced these decisions consists of two blocs with very different views about the proper role of race in districting. On one side stand the heirs of Justice Harlan (Justices Scalia and Thomas, and, less consistently, Chief Justice Rehnquist and Justice Kennedy), who believe that the

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concurring) ("[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny." (citations omitted)); *id.* at 1008-09 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting) ("[A] majority of this Court has endorsed [the position that n]either the Equal Protection Clause nor any other provision of the Constitution was offended merely because the legislature considered race when it deliberately created . . . majority-minority districts."); *id.* at 1065-66, 1072-74 (Souter, J., joined by Ginsburg, and Breyer, JJ., dissenting).

6. *Miller*, 515 U.S. at 916; *see also Bush*, 517 U.S. at 958-65 (plurality opinion); *Shaw II*, 517 U.S. at 905-07. The Court has described these "traditional districting principles" as "including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests . . . ." *Miller*, 515 U.S. at 916.

7. *Bush*, 517 U.S. at 958-59, 962-63 (plurality opinion); *id.* at 993 (O'Connor, J., concurring); *Miller*, 515 U.S. at 928 (O'Connor, J., concurring).

8. J. HARVIE WILKINSON III, ONE NATION INDIVISIBLE: HOW ETHNIC SEPARATISM THREATENS AMERICA 113 (1997).

government should never be allowed to use race in districting. On the other stands Justice O'Connor, who believes that we must tolerate some use of race in districting, at least for the moment, though she is deeply troubled by the extremely obvious sort of race-conscious districting that followed the 1990 census. The two views are fundamentally incompatible, and the effort to produce opinions that will satisfy both has left us with unintelligible doctrinal mush—the same sort of doctrinal mush that we saw in *Bakke*.[9] *Shaw v. Reno*, these observers conclude, is the *Bakke* of race-conscious districting.

I have a different view of the racial gerrymandering cases.[10] I think the Court's work here, though inadequately explained, is not nearly as incoherent as its critics contend. Instead, it is simply the latest manifestation of a familiar phenomenon, albeit one we tend to associate more with the Warren Court than with the Rehnquist Court: the crafting of sub-constitutional "prophylaxes" around the individual-rights provisions of the Constitution.[11] *Shaw*, I suggest, is the *Miranda*, rather than the *Bakke*, of race-conscious districting.

In *Miranda v. Arizona*,[12] the Court relied upon the Fifth Amendment's privilege against self-incrimination to regulate the interrogation of suspects in custody. The premise of the Court's opinion was that, while custodial interrogation was not per se unconstitutional,[13] it posed a serious threat to Fifth Amendment rights and values.[14] Invoking its power to enforce the Constitution, the Court then promulgated an elaborate set of safeguards for the police to follow when conducting such interrogations, safeguards designed to reduce the risk of unconstitutional compulsion that the Court thought inherent in custodial interrogation.[15] While it conceded that the Constitution did not require the police to comply with these

9. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

10. In the interest of brevity, I will sketch only the broad outlines of my view here. For a more extended treatment, see Melissa L. Saunders, *Reconsidering* Shaw*: The* Miranda *of Race-Conscious Districting*, 109 YALE L. J. 1603 (2000).

11. For more on this phenomenon, see David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

12. 384 U.S. 436 (1966).

13. *See id.* at 478.

14. *See id.* at 445-58, 467.

15. *See id.* at 467-76.

particular safeguards,[16] it directed the lower courts not to admit into evidence any confession obtained in violation of them.[17] In later cases, the Court described this exclusionary rule as resting on an irrebuttable presumption, or per se rule, that any confession obtained in violation of *Miranda*'s safeguards (or some alternative set of safeguards that the Court deemed equally effective at protecting Fifth Amendment rights) had been "compelled" within the meaning of the Fifth Amendment.[18] The Court acknowledged that this rule required courts to exclude some statements that had not really been "compelled" in the constitutional sense.[19] However, it found this overbroad rule appropriate in this context, because it avoided various problems associated with case-by-case assessment of the compulsion issue[20] and because it gave the police an incentive to modify their behavior in a way that might reduce the total number of Fifth Amendment violations that occurred.[21]

I believe the Court has done much the same sort of thing in *Shaw* and its progeny. It has decided that race-conscious districting, at least as has been practiced in recent years, poses a significant threat to Equal Protection rights and values. It is unable or unwilling, however, to read the Constitution as completely forbidding all consideration of race in districting. So it has simply promulgated a *Miranda*-like safeguard for states to follow when they engage in race-conscious districting, a safeguard that is designed to reduce the threat that such districting poses to Equal Protection rights and values. The safeguard is this: the Court will ensure that the districts comply substantially with certain "traditional districting principles." Compliance with these traditional districting principles, the Court insists, is not constitutionally mandated—the principles themselves are not of constitutional stature.[22] But any race-

16. *See id.* at 467, 490.

17. *See id.* at 444, 476, 478-79.

18. *See* Oregon v. Elstad, 470 U.S. 298, 306-07 & n.1 (1985); New York v. Quarles, 467 U.S. 649, 654 (1984).

19. *See Elstad*, 470 U.S. at 306-10; *Quarles*, 467 U.S. at 654-55 & n.5; Michigan v. Tucker, 417 U.S. 433, 442-46 (1974).

20. *See* Berkemer v. McCarty, 468 U.S. 420, 433 & n. 20 (1984).

21. *See Miranda*, 384 U.S. at 444, 467, 478-79.

22. *See Bush*, 517 U.S. at 962 (plurality opinion) (asserting that "[t]he Constitution does not mandate regularity of district shape"); *Shaw I*, 509 U.S. at 647 (asserting that compliance with traditional districting principles like

conscious districting plan that does not comply with them—or, as Justice O'Connor puts it, that "substantially disregards" them[23]—will be presumed to violate the Constitution. In this way, the Court hopes to encourage state and local governments that engage in race-conscious districting to take steps that minimize the constitutional risks associated with such behavior, without having to declare it per se unconstitutional.

To most conservatives, the Court's decision in *Miranda* was (among other things) an illegitimate exercise of judicial power. In their view, Article III of the Constitution does not give the Supreme Court the authority to promulgate sub-constitutional rules of criminal procedure—rules that can be violated without violating the Constitution itself—and impose them on the states.[24] When the Court undertook to do so in *Miranda*, it therefore exceeded the scope of its own power. Worse, it usurped power that rightfully belongs, under the Constitution, to other political actors: to the states and, to a lesser extent, to the political branches of the federal government.

The Court's recent efforts to regulate race-conscious districting can be faulted on precisely the same grounds. As in *Miranda*, the Court has used its power of judicial review as an excuse to regulate at the sub-constitutional level. As in *Miranda*, the Court has exceeded the scope of its own authority under the Constitution. And as in *Miranda*, the Court has usurped power that rightfully belongs to other actors under our constitutional scheme: here, the states' power to control the design of their own electoral districts.[25]

In fact, from the states' perspective, *Shaw* and its progeny are a good deal worse than *Miranda*. The sub-constitutional rules the Court imposed on the interrogation process in *Miranda* and its progeny were relatively clear, and the states have had little

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compactness, contiguity, and respect for political subdivisions is "not . . . constitutionally required").

23. *See Bush*, 517 U.S. at 958-59 (plurality opinion); *Miller*, 515 U.S. at 928 (O'Connor, J., concurring).

24. *But see* Dickerson v. United States, 120 S. Ct. 2326 (2000).

25. The Constitution leaves the states with primary responsibility for the design of both federal and state legislative districts. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."); *see also* Voinovich v. Quilter, 507 U.S. 146, 156 (1993); Growe v. Emison, 507 U.S. 25, 34 (1993); Reynolds v. Sims, 377 U.S. 533, 586 (1964).

difficulty complying with them. Not so here. The sub-constitutional rules the Court has imposed on the redistricting process are so vague and amorphous that even the best-intentioned state actor cannot hope to comply with them. What exactly are the "traditional districting principles" to which the Court refers? How is compliance with them to be measured? What degree of compliance is necessary to avoid a finding that they have been "subordinated" to race? Absent these specifics, telling the states not to subordinate traditional districting principles to race is like telling the police they must warn suspects before interrogating them, without specifying what they should say.

The Court's imprecision has transformed what might have been a positive development—the imposition of significant restraints on gerrymandering for racial purposes—into an unmitigated disaster. States that are forced by federal statutory law to make race a consideration in districting—such as those that are subject to the preclearance requirements of Section 5 of the Voting Rights Act[26] and those whose minority population is large and cohesive enough that amended Section 2 of the Voting Rights Act,[27] as interpreted by the Supreme Court in *Thornburg v. Gingles*,[28] requires them to create a certain number of majority-minority districts—are finding that every congressional and state legislative plan they draw is vulnerable to a colorable challenge under *Shaw*. Their plans are being tied up in litigation for years—litigation whose outcome seems to depend on little more than the personal political predilections of the particular federal judges who happen to be assigned to the case. These states are being ordered to perform the contentious and time-consuming chore of redistricting three, four, and even five times a decade, undermining their political stability and distracting them from the normal business of government. In many states, the legislatures have become so frustrated with the process that they have thrown up their hands and let the federal courts redistrict for them. The upshot of all this can only be described as a hostile takeover of the districting process—a process the Constitution commits to the

26. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1994)).

27. Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (1994)).

28. 478 U.S. 30 (1986).

states—by the federal judiciary. That cannot be good news for anyone who believes, as the Framers did, that preserving the states as strong and autonomous units of democratic self-government is vitally important to the proper functioning of our federal system.

This has been the real legacy of *Shaw* and its progeny: not the abolition of race-conscious districting, but the transfer of authority for designing the nation's electoral districts from the state governments to the federal courts. In its haste to do something about the extreme forms of racial gerrymandering engineered by the U.S. Department of Justice, without having to confront the possibility that portions of the Voting Rights Act might be unconstitutional, the Court has stripped the states of a major portion of their constitutionally-conferred authority to design and maintain their own independent political structures. In the process, the Court has done significant damage to our federal system of government. That the damage has been inflicted by the same "new federalist" Court that pronounced the anti-commandeering doctrine of *New York v. United States*[29] and *Printz v. United States*,[30] imposed stern new limits on the national government's lawmaking powers under the Commerce Clause[31] and the enforcement clauses of the Civil War Amendments,[32] and constitutionalized the doctrine of state sovereign immunity[33]—is nothing short of astounding.

These are the dirty little secrets of *Shaw*, secrets that are seldom acknowledged in conservative circles. For all of their high-flown rhetoric, the racial gerrymandering cases do not promote the color-blind agenda. Indeed, they undermine it, by affirmatively sanctioning the use of race in districting.[34] They constitute the same sort of sub-constitutional lawmaking by the courts that conservatives have long decried in the area of constitutional criminal procedure. And they reflect a callous disregard—indeed, utter contempt—for the autonomy of the states' political processes, a disregard that cannot be squared

29. 505 U.S.144 (1992).

30. 521 U.S. 898 (1997).

31. *See* United States v. Morrison, 120 S. Ct. 1740 (2000); United States v. Lopez, 514 U.S. 549 (1995).

32. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

33. *See* Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

34. *See supra* note 5 and accompanying text.

with basic principles of federalism and democratic self-government. Enough is enough. The time has come for us to recognize, with Dan Lowenstein, that "you don't have to be liberal to hate the racial gerrymandering cases."[35] Conservatives should hate these cases too, perhaps even more than the liberals already do.

35. Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998).

PANEL IV:

ROUNDTABLE DISCUSSION: THE REVITALIZATION OF DEMOCRACY

PANELISTS:

STEVEN G. CALABRESI
CHARLES FRIED
RICHARD A. EPSTEIN
LINO A. GRAGLIA
RICHARD D. PARKER