

Symposium

John Hart Ely and the Problem of Gerrymandering: The Lion in Winter

Pamela S. Karlan[†]

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[†] Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. Many of the ideas in this essay come from a series of conversations and projects with my longtime coauthor Sam Issacharoff, to whom I am grateful beyond measure. Others come from a series of arguments, in print and out, with John Hart Ely himself, who paid me the great if sometimes disconcerting compliment of taking my work seriously and disagreeing with it vociferously. Finally, Viola Canales, as usual, offered trenchant suggestions that vastly improved and sharpened my analysis.

INTRODUCTION

John Hart Ely was not one for sentiment. And yet, some real feeling creeps into the passage in *Democracy and Distrust* in which he claims that Alexander Bickel's career reflected an ultimately fruitless quest for a set of values "sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts."¹ John recounts choking at Bickel's memorial service when Robert Bork suggested that Bickel in his final years resolved the tension between his political liberalism and his jurisprudential conservatism. John saw no contradiction in the first place:

I've calmed down, though, and now I can see how *someone who started with Bickel's premise*, that the proper role of the Court is the definition and imposition of values, might well after a lifetime of searching conclude that since nothing else works—since there isn't any impersonal value source out there waiting to be tapped—one might just as well "do the right thing" by imposing one's own values. It's a conclusion of desperation, but in this case an inevitable desperation. No answer is what the wrong question begets.²

What makes the passage so haunting is not only the fact that Ely replaced Bickel as "probably the most creative constitutional theorist of the past twenty years"³ only then to replace him as a scholar who died too soon,⁴ but that Ely, in what turned out to be the last years of his career, also came to impose his own values, and in precisely the arena in which his greatest work had argued for a neutral approach: policing the process of representation.

During the period when Ely was writing *Democracy and Distrust*, constitutional litigation over legislative apportionment revolved around questions of malapportionment and racial vote dilution. Part I of this essay describes the implications of Ely's theory of representation-reinforcing judicial review for these issues. Inspired by the famous *Carolene Products*

1. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 71 (1980) (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 55 (1962)).

2. *Id.* at 72 (footnote omitted).

3. *Id.* at 71.

4. In a footnote, Ely described Bickel's career in words that describe his as well: "'Tragically foreshortened' is too trite for Alex, who was never trite, in intellectual or personal style." *Id.* at 71 n.*.

footnote four,⁵ Ely articulated both an anti-entrenchment and an antidiscrimination rationale for judicial intervention. He used the Warren Court's "Reapportionment Revolution" as the central example of the anti-entrenchment strand of judicial review. But ironically, given his focus on questions of representation and political structure, Ely essentially ignored the jurisprudence of racial vote dilution, whose focus on geographically insular minority groups and majority prejudice provides an equally powerful example of the antidiscrimination strand of judicial review.

In recent years, by contrast, constitutional litigation over legislative apportionment has revolved around a very different set of questions. During the 1990s, in *Shaw v. Reno* and its progeny,⁶ the Supreme Court held that excessive race consciousness in drawing majority-nonwhite legislative districts can run afoul of the Equal Protection Clause. Part II of this essay considers Ely's final work—a trilogy⁷ that defended the Court's *Shaw* jurisprudence, essentially as a wedge for attacking political gerrymandering more broadly.⁸ I show how contemporary districting practices reveal an implicit tension within the Elysian approach: While the anti-entrenchment and antidiscrimination rationales may have dovetailed during the years of *Democracy and Distrust*, today they can operate at cross-purposes. Precisely because the racial vote dilution jurisprudence of the 1970s and 1980s opened up the political process to far more effective participation by previously excluded groups, the protection of minority interests is now often best served not by judicial scrutiny of legislative outcomes but by judicial deference to plans that allocate power to politicians elected from minority communities. Ely's final trilogy oscillates between ignoring and denigrating the role that minority-elected officials play. As Oscar Wilde once observed, "Romance lives by repetition"; as we "can have in life but one great experience at best, . . . the secret of life is to reproduce that

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

6. 509 U.S. 630 (1993). The later cases in the sequence include *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (per curiam); and *Easley v. Cromartie*, 532 U.S. 234 (2001).

7. John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489 (2002) [hereinafter Ely, *Confounded by Cromartie*]; John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607 (1988) [hereinafter Ely, *Gerrymanders*]; John Hart Ely, *Standing To Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997) [hereinafter Ely, *Standing*].

8. Last Term, the Court confronted, but essentially dodged, the question whether excessive partisan gerrymandering violates the Constitution. See *Cox v. Larios*, 124 S. Ct. 2806 (2004); *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004). For a discussion of these cases, see Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 554-69 (2004).

experience as often as possible.”⁹ In the end, Ely’s trilogy may reflect his romance with the Warren Court, which saw discrete and insular racial minorities essentially as the objects of judicial solicitude, rather than as efficacious political actors in their own right.

I. *DEMOCRACY AND DISTRUST*: REPRESENTATION REINFORCEMENT, THE REAPPORTIONMENT REVOLUTION, AND MINORITY VOTE DILUTION

In *Democracy and Distrust*, Ely presented an argument, rooted in footnote four of *Carolene Products* and exemplified by the Warren Court, for “a participation-oriented, representation-reinforcing approach to judicial review.”¹⁰ This approach, Ely claimed, would avoid both the cramped perspective of clause-bound interpretivism and the self-referential value imposition of nontextual theories. It would instead be guided by a recognition that the original structure and subsequent amendment of the Constitution revealed it to be a document concerned with the “process of government,”¹¹ particularly with the allocation of decisionmaking power.

Carolene Products identified three situations calling for judicial intervention: when the challenged legislation (1) “appears on its face to be within a specific prohibition of the Constitution”; (2) “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”; or (3) is directed “against discrete and insular minorities” as to whom “prejudice . . . may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”¹² Ely relied on the second and third prongs of *Carolene Products* to argue that courts should intervene when the political *process*—his italics—is undeserving of trust or judicial deference because

(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.¹³

9. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 223 (Modern Library paperback ed. 1998) (1891).

10. ELY, *supra* note 1, at 87.

11. *Id.* at 101.

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

13. ELY, *supra* note 1, at 103.

In short, Ely derived from *Carolene Products* both an anti-entrenchment and an antidiscrimination rationale for judicial intervention. It is therefore interesting that with respect to judicial review of electoral districts—one of the central determinants of who gets elected, and thus of how governmental power gets exercised—Ely offered an elaborate account of anti-entrenchment-based judicial review, but never really saw the implications of *Carolene Products* for an antidiscrimination-based rationale for judicial oversight.

A. *The Central Role of One Person, One Vote in Combating Entrenchment*

Nothing provides a better model of anti-entrenchment judicial review than the Warren Court's reapportionment cases.¹⁴ The legislative apportionments the Court confronted were textbook examples of the systematic restriction of the political process. States refused to redraw congressional and state legislative boundaries for decades on end despite huge shifts in population, and their legislatures were backwater relics of past political deals. Across the country, legislatures were instruments of minority control rather than majority rule.¹⁵ It cannot have escaped the Court's attention that much of its workload—particularly in the area of civil rights, where extremist politicians from underpopulated and disenfranchised "Black Belt" regions were at the forefront of massive resistance—was an indirect consequence of malapportionment's hold on state legislatures.¹⁶

14. The cases included *Baker v. Carr*, 369 U.S. 186 (1962), which held that malapportionment claims were justiciable under the Equal Protection Clause; *Wesberry v. Sanders*, 376 U.S. 1 (1964), which imposed a requirement of equipopulous districts for congressional elections under Article I, Section 2; and *Reynolds v. Sims*, 377 U.S. 533 (1964), and several companion cases decided the same day, which imposed a requirement of equipopulous districts for state legislative districts under the Equal Protection Clause.

15. To my mind, there was always something disquieting about Bickel's stress on the "counter-majoritarian difficulty" of judicial review, BICKEL, *supra* note 1, at 16, given his reservations about the reapportionment revolution, *see id.* at 189-97. In 1962, there was no reason to believe that legislative majorities in many states corresponded at all to popular majorities. *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 12 n.37 (1991) (describing how small minorities of the population were capable of electing a majority of the state legislature in a wide range of states).

16. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 415 (2004); Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207, 219 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 541 (1997). As Anthony Lewis remarked at the time, an "important secondary effect" of malapportionment was that cities turned to the federal government for solutions because state legislatures wouldn't help them. Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1065 (1958). In making this point, Lewis quoted Senator Paul H. Douglas's observation that "those who complain most about Federal encroachment in the affairs of the States are most often the very ones who deny to the urban majorities in their States the opportunity to solve their problems through State action"—given the context, almost certainly

Apportionment thus involved questions “(1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo.”¹⁷

In defending the Warren Court’s solution, which required states to equalize populations among districts—the so-called “one person, one vote” rule—Ely emphasized that administrability was “its long suit, and the more troublesome question is what else it has to recommend it.”¹⁸ One person, one vote, he recognized, might initially seem an extraordinarily intrusive judicial intervention into the apportionment process, imposing nationwide a rigid mathematical test plucked out of nowhere in the constitutional text.¹⁹ But any more nuanced rule, he concluded, would ultimately be more intrusive, or at least more subject to judicial value imposition, because it would require “difficult and unseemly inquiries into the power alignments prevalent in the various states whose plans came before it.”²⁰ In short, the great thing about one person, one vote was not just its property of periodically clearing the channels of political change,²¹ but its aura of neutrality.

B. *The Overlooked Role of Racial Vote Dilution Doctrine in Combating Discrimination Against Discrete and Insular Minorities*

Both the Warren Court and Ely recognized that one person, one vote—which is really a majoritarian principle dressed in individual rights rhetoric—doesn’t necessarily protect minorities against majority oppression.²² This led Ely, in the final chapter of *Democracy and Distrust*,

conservative members of Congress, including Southerners who opposed *Brown v. Board of Education*. *Id.* at 1065 n.44 (internal quotation marks omitted). According to Ely himself, “Chief [Justice Warren] used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary.” JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996).

17. ELY, *supra* note 1, at 117.

18. *Id.* at 121.

19. Indeed, plucked out of two nowheres: With respect to congressional districts, the Court held that the requirement of one person, one vote was derived from Article I, Section 2’s requirement that members of the House of Representatives be chosen “by the People of the several States”; with respect to state legislative (and later, local government) bodies, the requirement stemmed from the Equal Protection Clause of the Fourteenth Amendment. *See* cases cited *supra* note 14.

20. ELY, *supra* note 1, at 124.

21. One person, one vote requires decennial redistricting, because the Census always reveals population shifts that require revisiting legislative boundaries.

22. *See* Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (recognizing that even if a redistricting plan complied with one person, one vote, “[i]t might well be that, designedly or otherwise,” a particular “apportionment scheme, under the circumstances of a particular case, would operate to

to turn to a second basis for judicial intervention: an antidiscrimination rationale. He argued for heightened judicial scrutiny of laws motivated by “prejudice” against the kind of distinctive groups that *Carolene Products* had described as “discrete and insular minorities.”²³ For Ely, as for the Warren Court, the “core case” of a group deserving such special judicial solicitude was blacks.²⁴ In some sense, the rationale for this form of heightened judicial scrutiny was procedural: Failures in the political process provided the explanation for why laws targeting these groups are subject to more searching judicial review than laws that focus on what other groups receive. But ultimately the courts’ response is substantive: A reviewing court applying the antidiscrimination prong of Ely’s theory would strike down the offending law, rather than seeking to revamp the political process that produced it.

Ironically, with the exception of a few sentences on how *Gomillion v. Lightfoot*²⁵ and *Wright v. Rockefeller*²⁶ illustrate the relevance of unconstitutional motivation to judicial review,²⁷ Ely did not discuss any voting rights or vote dilution cases in that last chapter on “Facilitating the Representation of Minorities.” Because he treated the structure of the political process and the treatment of minorities as essentially distinct issues, Ely did not connect the two *Carolene Products* rationales for judicial intervention.²⁸

This failure is particularly surprising given that while Ely was writing *Democracy and Distrust*, the Burger Court was developing a theory of

minimize or cancel out the voting strength of racial or political elements of the voting population”); ELY, *supra* note 1, at 135.

23. See ELY, *supra* note 1, at 145-70.

24. *Id.* at 148.

25. 364 U.S. 339 (1960).

26. 376 U.S. 52 (1964).

27. See ELY, *supra* note 1, at 139-40.

28. My difference with Ely here may reflect a generational divide. His assumption that racial minorities were to be protected by searching judicial review of legislative outputs, rather than by restructuring the political process to enable them to participate more effectively in the pluralist process, was widely shared by his contemporaries. See, e.g., Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1296 (1982) (arguing that judicial intervention on behalf of racial minorities was necessary to prevent “not only . . . the nonprotection of the victim group, but also . . . the deflection and perversion of other public purposes”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147 (1976) (terming blacks “the wards of the Equal Protection Clause” and arguing that courts had to protect their substantive interests because the political process would not). By contrast, for me, the effective enfranchisement and empowerment spurred by the Voting Rights Act of 1965 has often meant that blacks, even as a discrete and insular minority still hampered by prejudice, have achieved more equality through the political process than the current Supreme Court has been prepared to accord them as a matter of constitutional law. See Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 39, 47-50 (2003). Ironically, the last time I saw John was at a conference celebrating Fiss’s work, when he moderated the panel at which Sam and I presented this argument.

racial vote dilution that sought to enhance the political representation of discrete and insular minorities who had suffered a history of exclusion. If the political processes ordinarily to be relied upon to protect minorities instead shut them out, then the courts would reconfigure the process to include them. In the formative case, *White v. Regester*,²⁹ the Court struck down Texas's state legislative reapportionment, despite its compliance with "one person, one vote,"³⁰ because the use of multimember districts in Dallas and San Antonio gave black and Mexican-American voters less opportunity than white voters to participate in the political process and to elect legislators of their choice.³¹ One of the factors on which the Court relied in concluding that Texas's plan was unconstitutional was precisely the nonresponsiveness of elected officials to the particular concerns of minority communities.³² The remedy was to replace those multimember districts with a single-member district plan containing some majority-nonwhite districts from which minority voters could elect candidates. Presumably those representatives could then champion minority interests within the legislature through coalition politics.

As the case law evolved, the analysis of racial vote dilution came essentially to unpack *Carolene Products*'s antidiscrimination rationale for judicial intervention—the presence of "prejudice" against "discrete and

29. 412 U.S. 755 (1973). The Court's analysis in *White* was soon distilled into a multifactor test for determining the presence of racial vote dilution by the Fifth Circuit, which oversaw the bulk of early racial vote dilution cases. See *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd per curiam sub nom. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

Prior to *Washington v. Davis*, 426 U.S. 229 (1976); *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the so-called *White-Zimmer* factors were essentially treated as a definition of when the challenged system unconstitutionally diluted minority voting strength. After *Davis*, *Nevett*, and *Bolden* articulated a requirement that plaintiffs prove a discriminatory purpose as well as a discriminatory effect, the factors were used as circumstantial evidence of discriminatory purpose. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 623-27 (1982).

In 1982, Congress amended section 2 of the Voting Rights Act of 1965 to forbid the use of election procedures that have a racially discriminatory result, regardless of the motivation behind them. In describing the forbidden effect, the legislative history identified nine "[t]ypical factors" probative of dilution. These criteria were explicitly derived from the *White-Zimmer* factors: the history of voting-related discrimination in the jurisdiction; the presence of racial bloc voting; the use of practices that enhance the opportunity for discrimination, such as majority-vote requirements and anti-single-shot rules; minority access to candidate slating processes; the relative socioeconomic status of minority group members; the presence of overt or subtle racial appeals in campaigns; the extent of minority electoral success; the responsiveness of elected officials to minority concerns; and the strength of the justification for the challenged practice. See S. REP. NO. 97-417, at 27-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 204, 204-07.

30. *White*, 412 U.S. at 763-64.

31. *Id.* at 765-70.

32. *Id.* at 767, 766-67 (noting that the slating organization in Dallas that controlled candidate nominations "did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community"); *id.* at 769 (noting "evidence that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests").

insular minorities.” In part, this was reflected in the Court’s imposition of a discriminatory purpose requirement³³—a showing, in essence, of prejudice on the part of the government officials who adopted or maintained the challenged plan. More fundamentally, it was reflected in the two central factual inquiries in vote dilution cases: Was voting within the relevant jurisdiction racially polarized, and was the minority group sufficiently numerous and geographically compact so as to be able to constitute a majority in a fairly drawn single-member district?

Racial bloc voting is the linchpin of a racial vote dilution case.³⁴ Racial bloc voting is almost by definition about discreteness: It occurs when minority and nonminority voters have distinct preferences and support different candidates. And it may well be about prejudice as well. Often, bloc voting reflects the inability or refusal of white voters to “apprehend” the “overlapping interests that in fact exist” and that should lead to cross-racial political alliances.³⁵ Moreover, the presence of racial bloc voting is the mechanism by which minorities are rendered unable to protect themselves through the usual political processes, because “[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race.”³⁶ Rather than being able to build coalitions that can “bind them into a majority,”³⁷ racial bloc

33. In dissenting from the Court’s requirement in *Bolden* that plaintiffs prove a discriminatory purpose as well as a discriminatory effect, Justice Marshall relied on Ely, quoting a lengthy passage from John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160-61 (1978), that would soon be incorporated wholesale into *Democracy and Distrust*:

The danger I see is . . . that the Court, in its newfound enthusiasm for motivation analysis, will seek to export it to fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). . . . However, *where what is denied is something to which the complainant has a substantive constitutional right*—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—the reasons it was denied are irrelevant. It may become important in court what justifications counsel for the state can articulate in support of its denial or nonprovision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional.

Bolden, 446 U.S. at 121 n.21 (Marshall, J., dissenting) (omissions in original) (internal quotation marks omitted); see ELY, *supra* note 1, at 145 (reprinting this passage with minor differences).

34. For a discussion of the relationship between *Carolene Products* and racial bloc voting, see Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

35. ELY, *supra* note 1, at 153.

36. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

37. ELY, *supra* note 1, at 153.

voting leaves racial minorities permanently on the outside. As Justice Marshall succinctly observed the same year *Democracy and Distrust* was published, “The vote-dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political factions to ignore them.”³⁸

Not every dilution of minority voting strength is amenable to amelioration, at least not within a system of geographically based representation. And so courts have imposed a second requirement on minority plaintiffs: They must show that the group of which they are members is sufficiently large and geographically compact as to be able to constitute a majority in a fairly drawn legislative district.³⁹ This is another way of saying that racial vote dilution theory protects minority groups that are physically discrete and insular—a group that is geographically integrated cannot show that its lack of political power stems from the way districts are drawn.

Thus, although Ely did not discuss the emerging jurisprudence of racial vote dilution in *Democracy and Distrust*, the tack the Supreme Court took was entirely consistent with his theory. Indeed, because the racial vote dilution cases arguably rested on all three strands of *Carolene Products*, evoking as they did the Fifteenth Amendment’s prohibition on denial or abridgement of the right to vote on account of race⁴⁰—a “specific prohibition of the Constitution”—as well as the more general concerns with process failure and the plight of discrete and insular minorities, they serve as a particularly powerful example of participation-oriented, representation-reinforcing judicial review.

II. DISTRUST OF DEMOCRACY: *SHAW* AND THE PROBLEMS OF POLITICAL GERRYMANDERING

Chief Justice Warren, to whom *Democracy and Distrust* was dedicated, thought that *Reynolds v. Sims*⁴¹ was his most important opinion precisely because of its representation-reinforcing quality: The decision, he believed, “insured that henceforth elections would reflect the collective public

38. *Bolden*, 446 U.S. at 122 (Marshall, J., dissenting).

39. This requirement was articulated most clearly in a case brought under section 2 of the Voting Rights Act, *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), but it was implicit in the Court’s preceding constitutional cases.

40. Despite the undeniable presence of both the words “denied” and “abridged” in the Fifteenth Amendment, the Supreme Court has refused to hold that purposeful racial vote dilution implicates the Fifteenth Amendment. See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000). So much for Justice Scalia’s textualism. See also *infra* text accompanying notes 88-89 (noting that Ely also treated redistricting cases as implicating the Fifteenth Amendment).

41. 377 U.S. 533 (1964).

interest—embodied in the ‘one-man, one-vote’ standard—rather than the machinations of special interests.”⁴² That assumption turned out to be wildly overoptimistic.⁴³ As Robert Frost once wrote, “The trouble with a total revolution / . . . [i]s that it brings the same class up on top,”⁴⁴ and forty years after the Reapportionment Revolution, apportionment is still subject to the machinations of special interests and the entrenchment of the powerful. Indeed, if anything, we have moved from entrenchment through inaction to a perhaps even more pathological phenomenon of entrenchment through nonstop action.⁴⁵

That’s not to say that politics hasn’t changed since the Reapportionment Revolution. It has. Two of the biggest developments—and they’re connected in a host of ways—are the effective enfranchisement of blacks and Latinos in the South and Southwest and the rise of two-party politics in those regions.⁴⁶

These developments collided in the post-1990 round of redistricting. And while the “quantitative” jurisprudence of the one-person-one-vote cases and the “qualitative” jurisprudence of the minority vote dilution

42. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 337 (1982).

43. For a more extensive discussion of this point, see Issacharoff & Karlan, *supra* note 8, at 541-42, 545-54, 572-77.

44. ROBERT FROST, *A Semi-Revolution*, in THE POETRY OF ROBERT FROST 363, 363 (Edward Connery Lathem ed., 1969).

45. For a particularly pointed example, consider Texas. Between 1933 and 1963, Texas redrew its congressional districts only once and then, despite huge shifts in population, left twelve of twenty-two districts exactly the same and scarcely changed any of the others. See *Bush v. Martin*, 224 F. Supp. 499, 507 & n.14 (S.D. Tex. 1963), *aff’d*, 376 U.S. 222 (1964). Recently, however, Texas was one of several states to redraw congressional district boundaries mid-decade when partisan control of the state legislature shifted. See *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex.) (three-judge court), *vacated and remanded sub nom. Jackson v. Perry*, 125 S. Ct. 351 (2004) (sending the cases back to the district court in light of the Court’s decision in *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004), regarding claims of unconstitutional political gerrymandering). In Colorado, where the state supreme court ultimately rejected the attempt to redistrict mid-decade, see *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), *cert. denied sub nom. Colo. Gen. Assembly v. Salazar*, 124 S. Ct. 2228 (2004), the Republican president of the state senate explained the rationale for redrawing the boundaries of closely contested districts this way: “The Democrats’ failure to win either seat in 2002 was small comfort. The numbers were going to favor them in time. America is better served by Congress as it is. To help keep it that way, we set our sights on correcting . . . [the existing] map” John Andrews, Op-Ed, *Districts Remapped in Public Interest*, ROCKY MTN. NEWS (Denver), June 9, 2003, at 30A.

46. For my explanation of the connection, see Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 314 (1997) (suggesting that the identification of minority enfranchisement with the national Democratic Party contributed to white flight to the Republican Party). See also Chuck Lindell, *GOP-Drawn Map Aims To Reshape National Parties*, AUSTIN AM.-STATESMAN, Oct. 11, 2003, at A1 (quoting a white Democratic congressman from Texas as charging that the Republican-drawn map, which preserved the seats of black and Latino Democratic incumbents while carving up the districts of white Democrats, was designed to send the message that “‘Democrats are only interested in minorities’” and that “[o]nly minorities represent and speak for all Democrats”).

cases⁴⁷ could operate in relative harmony, the new jurisprudence that the post-1990 redistricting spawned created some tension between the second and third *Carolene Products* concerns.

While the Democrats still controlled the redistricting process in much of the old Confederacy, they were losing ground among white voters. At the same time, political pressure from minority voters, the Supreme Court's pro-plaintiff interpretation of the 1982 amendments to section 2 of the Voting Rights Act of 1965,⁴⁸ and aggressive enforcement of the preclearance provision of section 5 of the Act⁴⁹ combined to demand the drawing of significant numbers of new majority-nonwhite congressional and state legislative districts. In order both to protect white Democratic incumbents—who almost everywhere in the South required a significant black or Latino presence in their districts in order to get reelected—and to draw new majority-nonwhite districts, map drawers had to get pretty creative in shaping the lines. Moreover, even in jurisdictions where race played little or no role in the redistricting process, changes in the technology of redistricting made it possible to craft ever more sophisticated gerrymanders. If democracy is supposed to be about citizens picking their representatives, there was something troubling about the post-1990 (and even more, the post-2000) redistricting, about which it often seemed more accurate to say that representatives picked their constituents.

In *Shaw v. Reno*, the Supreme Court pushed back, at least with respect to race-conscious redistricting.⁵⁰ Prior to *Shaw*, there had been basically two types of voting rights injuries: disenfranchisement and dilution. *Shaw* identified a new, “analytically distinct”⁵¹ form of equal protection claim:

47. The quantitative/qualitative distinction was coined by the Fifth Circuit in its influential decision in *Nevelt v. Sides*, 571 F.2d 209, 215-16 (5th Cir. 1978). Compare *Avery v. Midland County*, 390 U.S. 474, 510 (1968) (Stewart, J., dissenting) (“[T]he apportionment of . . . government[] is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic.”), with *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971) (explaining that a linchpin of the inquiry in minority vote dilution cases was “the quality of representation” the plaintiff group received).

48. See *Thornburg v. Gingles*, 478 U.S. 30 (1986). For an extensive discussion of *Gingles* and subsequent doctrinal development, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 748-813 (rev. 2d ed. 2002).

49. Section 5 of the Voting Rights Act provides that before a “covered jurisdiction”—that is, a jurisdiction with a specified history of depressed political participation, as set out in section 4 of the Act, 42 U.S.C. § 1973b (2000)—can use any new procedure with respect to voting, it must show that the procedure was not used “for the purpose and or with the effect of denying or abridging the right to vote on account of race or color . . . or in contravention of the guarantees [protecting language minorities].” *Id.* § 1973c.

50. 509 U.S. 630 (1993).

51. *Id.* at 652.

[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.⁵²

Plaintiffs in *Shaw* cases were not required to prove any of the *Carolene Products* factors that had informed earlier vote dilution cases: They didn't have to show that they'd been denied the right to vote, they didn't have to show that the political process had been restricted in some other way (as would be true in either quantitative or qualitative vote dilution cases where the "ins" were clogging the political channels to keep themselves in power), and they didn't have to show that they were part of a discrete and insular minority. Nearly all the plaintiffs in *Shaw* cases were white voters whose claim was simply that they objected to the reliance on race in the redistricting process.

Indeed, in *Shaw* itself, the Supreme Court seemed to require no showing of injury at all for plaintiffs to invoke judicial review of a state's redistricting decisions. Several of the plaintiffs did not live in either of the majority-black districts they had challenged. Nor did the plaintiffs have to show the kind of post-electoral nonresponsiveness that had animated the racial vote dilution cases.⁵³ On its face, *Shaw* seemed to embrace a previously rejected notion of citizen standing: Any individual who objected to the state's use of race in the redistricting process could bring an equal protection lawsuit.⁵⁴ And while the Court backed off somewhat from this position in *United States v. Hays*, requiring plaintiffs actually to live in the districts they challenged,⁵⁵ it remained circumspect about what precisely the constitutionally cognizable injury was in a *Shaw* lawsuit.

The *Shaw* cases deeply divided the Court for nearly a decade⁵⁶ and spurred a deluge of scholarship, most of it highly critical.⁵⁷ Ely's *Shaw*

52. *Id.* at 649.

53. See, e.g., State Appellees' Brief at 31, *Shaw v. Hunt*, 517 U.S. 899 (1996) (Nos. 94-923 & 94-924), available at 1995 WL 632461 (quoting deposition testimony of plaintiff Shaw in the remand proceedings after the decision in *Shaw v. Reno* ("I would think that the majority of the time, yes, [Representative Watt] would represent me." (alteration in original))).

54. I examine the question of standing at length in Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Pamela S. Karlan, *All over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 278-83; and Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287 (1996) [hereinafter Karlan, *Still Hazy*].

55. 515 U.S. 737, 739 (1995).

56. *Shaw v. Reno* was decided 5-4, and was followed by a series of other 5-4 decisions, including *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Abrams v. Johnson*, 521 U.S. 74 (1997); and *Easley v. Cromartie*, 532 U.S. 234 (2001).

trilogy, by contrast, was markedly enthusiastic about the *Shaw* cases. What's particularly striking about Ely's work was the reason he ultimately expressed for his enthusiasm. While the Court saw *Shaw* as a vindication of color blindness—an antidiscrimination rationale⁵⁸—and ultimately contrasted the illegitimate use of race with the permissible protection of incumbent politicians, Ely saw in *Shaw* an opening wedge into combating contemporary forms of entrenchment.

A. *The Shaw Cases as a Tool To Combat Discrimination?*

Ely's first contribution to the debate, *Standing To Challenge Pro-Minority Gerrymanders*,⁵⁹ was in significant part an attack on arguments that Sam Issacharoff and I had made in a series of articles critiquing the *Shaw* cases.⁶⁰ Rather than rehash that debate here, I want to highlight an aspect of Ely's argument that relates to his theory of representation-reinforcing judicial review. The reason white voters assigned to majority-black districts—so-called “filler people”⁶¹—had standing, Ely argued, was “basically because they've been deprived of a meaningful shot at helping to elect a representative whose race is the same as theirs.”⁶² Ely saw this as a constitutionally cognizable harm:

To favor pro-minority gerrymanders and at the same time deny the filler people standing to challenge them is to engage in a profound inconsistency, that of supposing the right of a black citizen to cast an effective vote for someone of his own race to be terribly

57. For citations to many of the major pieces, see ISSACHAROFF, KARLAN & PILDES, *supra* note 48, at 906-07.

58. The *Shaw* cases also represent a further triumph of an individualist approach to equal protection claims. See FISS, *supra* note 28 (explaining the distinction between a conception of the Equal Protection Clause that sees the central vice as the use of race to classify individuals and a conception that sees the central vice as the subordination of traditionally excluded groups, and arguing for the latter).

59. Ely, *Standing*, *supra* note 7.

60. The articles include T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1993); Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47 (1996); Karlan, *supra* note 46; Karlan, *Still Hazy*, *supra* note 54; and Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201 (1996). We replied to Ely's attack in Issacharoff & Karlan, *supra* note 54.

61. The term “filler people,” which Sam Issacharoff coined, refers to the fact that because one person, one vote requires that all districts have the same population, while the need to avoid “packing” means that most deliberately drawn majority-nonwhite districts are somewhere between fifty-one and sixty-five percent nonwhite, a substantial number of other people (usually members of the white majority, but sometimes members of other racial or ethnic groups) must be assigned to these districts in order to top off the total population at a constitutionally acceptable level. See Karlan, *Still Hazy*, *supra* note 54, at 292.

62. Ely, *Standing*, *supra* note 7, at 594.

important, while maintaining that withholding from a white citizen the right to cast an effective vote for someone of *his* own race doesn't even count as a deprivation.⁶³

But why? Ely's argument rests in some sense on the idea that the only pathology at issue in redistricting cases is entrenchment. He never really confronts the idea that the deliberate creation of majority-nonwhite districts is a central technique for combating the prejudice against discrete and insular minorities to which the third prong of *Carolene Products* was addressed.

In *Democracy and Distrust*, after all, Ely had argued for a "one-way ratchet" with respect to judicial scrutiny of racial classifications,⁶⁴ suggesting that there was little danger that the majority would deny its members their right to equal concern and respect, certainly not on the basis of race. Put in terms of race-conscious redistricting, the argument might go like this: When members of a discrete and insular racial minority are unable to elect candidates of their own race, and when racial bloc voting means that members of that minority group are unable to win elections to representative legislative bodies, the *Carolene Products* concerns are likely to be triggered. Elected officials can ignore with impunity the interests of the minority community. But where the white majority cedes some political power to the racial minority, the fact that some white voters are unable to elect candidates of their own race does not threaten either restriction of the political process generally or any danger that their interests *as white people* will be discounted by the legislative process. Democracy is, in fact, working.

And yet, Ely strenuously resisted applying the one-way ratchet to race-conscious redistricting. He offered three reasons for his resistance. Underlying each of them is Ely's consistent failure to see that majority-minority districts may be a quintessentially processual remedy for the plight of discrete and insular minorities.

First, Ely argued that the usual defense of affirmative action depends on the fact that the challenged practice "was authorized by a legislature that was not itself the product of affirmative action."⁶⁵ Otherwise, there is a risk of the sort of "self-serving racial motives" that spurred the imposition of strict scrutiny.⁶⁶ So "[o]nce we start using affirmative-action programs of any sort to constitute the legislature, this account begins to attenuate."⁶⁷

63. *Id.* at 595.

64. ELY, *supra* note 1, at 170.

65. Ely, *Standing*, *supra* note 7, at 578 n.8.

66. *Id.*

67. *Id.* (emphasis omitted). Ely repeats essentially the same arguments in Ely, *Gerrymanders*, *supra* note 7, at 630-32.

But this argument highlights a deep irony in the entire enterprise of strict scrutiny. While strict scrutiny is ostensibly designed to protect racial minorities—and certainly Ely’s defense assumes that as its central function⁶⁸—it has done virtually nothing to protect black people. As a temporal matter, strict scrutiny was the consequence, not the cause, of the Supreme Court’s decisions outlawing racial discrimination. It wasn’t until 1964, after the Court had largely finished the job of striking down explicit racial classifications, that the Court “both articulated *and* applied a more rigorous review standard to racial classifications.”⁶⁹ In contemporary times, strict scrutiny has been essentially superfluous to the kind of equal protection cases minorities have brought.⁷⁰ Because these cases generally involve challenges to facially neutral laws, plaintiffs must prove first that the government “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”⁷¹ in order to trigger strict scrutiny. But proof of that race-conscious and invidious motive by itself strips a law of its presumptive legitimacy. There’s little work left for strict scrutiny to do. By contrast, strict scrutiny has proved invaluable in the assault on race-conscious affirmative action designed to benefit minorities.⁷²

Applying strict scrutiny to the intentional creation of majority-nonwhite districts has the ironic consequence of disabling racial minorities from pluralist politics—thereby setting the two prongs of Ely’s theory on a collision course. In the political process, members of racially defined groups can occupy a position similar to that of many other socially and politically cohesive groups, such as “union oriented workers, the university community, [and] religious or ethnic groups occupying identifiable areas of

68. See ELY, *supra* note 1, at 145-48.

69. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991) (referring to *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

70. The only recent exception comes in the Court’s decision in *Johnson v. California*, 125 S. Ct. 1141 (2005). The Ninth Circuit had upheld California’s policy of temporarily segregating all inmates on the basis of race, employing the deferential standard of review normally applied to decisions by prison officials. The Supreme Court reversed, holding instead that strict scrutiny should apply because California was using a racial classification. The Court then remanded the case for reconsideration using strict scrutiny, at least hinting strongly that the standard of review might make a difference. Prior to *Johnson*, the only pro-minority decision applying strict scrutiny of which I am aware is the now-ancient *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down Virginia’s criminalization of interracial marriage. It is hard to believe that by 1967 rationality review would not have accomplished the same end: What conceivable state purpose for banning interracial marriage would the Supreme Court have found “legitimate”?

71. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

72. I develop this point—and the recent relaxation of both the trigger for and application of strict scrutiny—in more detail in Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1569-71 (2002).

our heterogeneous cities and urban areas.”⁷³ Most politically salient, geographically concentrated groups strive to get districts that will allow their members to elect representatives. Applying strict scrutiny to deliberately created majority-nonwhite districts—while generally deferring to the political process’s intentional creation of districts designed to represent suburbanites, groups with shared economic interests, and gay men and lesbians⁷⁴—makes it harder for blacks and Latinos to obtain the kind of political power that other social groups can acquire.⁷⁵ As I suggest in the next Section, Ely’s preoccupation with political gerrymanders makes him willing to condemn what he calls “pro-minority gerrymanders” as a subspecies of generally undesirable gerrymanders. What Ely does not acknowledge is that the Supreme Court’s unwillingness to extend its skepticism of gerrymanders as broadly as he would have it do has the consequence of leaving discrete and insular minorities at an even greater disadvantage within the political process as it actually exists.

Given the fact that redistricting by its very nature is about the allocation of political power to groups, it is hard to see why, in the absence of any showing of racial vote dilution, the courts should intervene to protect members of the white majority against the decision to distribute political power more broadly. In short, it was not simply the fact that white legislators’ motives in the pre-*Reynolds* era were “self-serving”⁷⁶ that warranted strict scrutiny. After all, an awfully high percentage of all legislative actions are likely to be self-serving. *Democracy and Distrust* did not condemn *all* self-serving actions, but only those that “chok[e] off the channels of political change to ensure that [the ins] will stay in and the outs

73. *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971). Indeed, in *Whitcomb*, the Court treated black voters in Indianapolis as essentially a political, rather than a racial, bloc. *See id.* at 152-53. Thus, it saw the plaintiffs’ claim of vote dilution as essentially identical to the claims of Democratic voters generally.

74. *See* Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?*, 14 CARDOZO L. REV. 1175, 1211 (1993) (noting that public testimony during the redistricting of the New York City Council led, among other things, to “the creation of a ‘gay’ district in Manhattan’s lower west side and Chelsea”).

75. Earlier, Ely noted that “[o]f course the pluralist model does work sometimes, and minorities *can* protect themselves by striking deals and stressing the ties that bind the interests of other groups to their own,” but he argued that “the single example of how our society has treated its black minority (even after that minority had gained every official attribute of access to the process)” provided the justification for antidiscrimination-oriented judicial review. ELY, *supra* note 1, at 135. But the redistricting process, at least as it has operated in recent years, reflects a substantial degree of black success in striking deals and using “the ties that bind the interests of other groups”—particularly the Democratic Party—“to their own.” *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461, 469-74 (2003) (describing such a deal). Ely became so wedded to the primacy of anti-entrenchment when it came to the political process that he seemed either to ignore, or actually to indict, this pluralist bargaining.

76. Ely, *Standing*, *supra* note 7, at 578 n.8.

will stay out”⁷⁷ and those that reflect a pervasive failure of empathy. Neither is the case when the longtime ins—the white majority—cede what usually turns out to be (not even quite) proportionate representation to the longtime outs. Ely provides no reason to think that minority representatives have either the desire or the ability to produce the kind of process failure that warrants judicial intervention.⁷⁸

Ely’s second argument against treating race-conscious redistricting like other forms of affirmative action was that, while most affirmative action plans do not disproportionately affect a particular white ethnic subgroup, some such groups are geographically concentrated. Thus, “when it is *geographical* lines that are being manipulated . . . the neighborhoods of such subgroups are likely to be bisected by the redistricting, disproportionately reducing their political power.”⁷⁹ So, in Ely’s view, race-conscious redistricting pits racially defined discrete and insular groups against one another.

I think Ely was wrong about the facts of both redistricting and admissions. With the exception of the always-cited *United Jewish Organizations v. Carey*, in which a Hasidic neighborhood in Brooklyn was divided between two state legislative districts in the course of deliberately creating majority-nonwhite districts,⁸⁰ Ely pointed to no other examples to support his assertion that the creation of majority-black or majority-Latino districts is “likely” to bisect white ethnic neighborhoods. The claim in fact seems quite implausible with respect to the creation of such districts anywhere outside of a few large cities in the Northeast and industrial Midwest that have these kind of ethnic neighborhoods, and those cities have not been the locus of significant *Shaw* litigation in any event.

As for the assertion that the burden of affirmative action on third parties is somehow more diffuse in admissions cases than in redistricting cases, I think Ely missed a key point. In his *Shaw*-related articles, Ely claimed that in *Democracy and Distrust* he “analyzed in detail” the question whether race-conscious admissions burden an identifiable subgroup “and found the objection to be substantially unfounded.”⁸¹ But his claim of a detailed analysis is not exactly true. What Ely purported to show in *Democracy and Distrust* was simply that affirmative action admissions policies do not disproportionately exclude Jewish students. That may well be the case. But the question whether the burden of affirmative action falls on a discrete and

77. ELY, *supra* note 1, at 103.

78. Indeed, he actually acknowledged that minority elected officials were likely to be responsive to the substantive interests of their white constituents. See Ely, *Standing*, *supra* note 7, at 594.

79. *Id.* at 578 n.8.

80. 430 U.S. 144 (1977).

81. Ely, *Standing*, *supra* note 7, at 578 n.8 (citing ELY, *supra* note 1, at 258-60).

politically less powerful subgroup of white applicants is more complicated.⁸² Especially given current research that suggests that parental wealth has a major effect on applicants' prospects,⁸³ not to mention the preferential admissions practices many institutions use with regard to the children of the politically well connected,⁸⁴ it seems quite possible that the white students who do not get in as a result of affirmative action are not a cross section of legislators' constituents, but rather the least well off and least well connected, a group about which Ely himself expressed concern in *Democracy and Distrust*.⁸⁵ That's not to say we should abandon affirmative action—we shouldn't—but simply to suggest that someone who supports affirmative action in higher education, in part because if "we are to have even a chance of curing our society of the sickness of racism, we will need a good many more minority-group members . . . in society's upper strata,"⁸⁶ should not flinch from policies designed to help members of historically excluded groups also gain access to elected governing bodies.⁸⁷

Finally, "at the risk of being labeled a formalist or worse," Ely offered a third argument: Race-conscious redistricting cases implicate not only the Equal Protection Clause, which Ely argued was "concerned with the victimization of minorities," but also the Fifteenth Amendment, which contains a blanket prohibition on denying or abridging the right to vote "on

82. And in California and other multiracial and multiethnic jurisdictions, the issue may be more complicated yet. For example, when the UCLA School of Law abandoned race-conscious affirmative action after the passage of a statewide initiative barring government consideration of race and the adoption of a race-blind admissions process by the Board of Regents, the number of black students plummeted, the number of Latino students declined significantly, and the overall number of Asian-American students increased, although the numbers of certain Asian-American subgroups (e.g., Filipinos and Southeast Asians) declined or remained small. See Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1223-25 (2002).

As Goodwin Liu explains, the burden on any particular rejected applicant is quite minor, given the small effect affirmative action has on any one nonbeneficiary applicant's chance of admission. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002). Concomitantly, other aspects of the admissions process (including, e.g., subjective factors) may pose a far greater barrier to increased Asian-American admissions than race-conscious affirmative action does, given the relatively small number of beneficiaries.

83. See, e.g., Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101, 106 (Richard D. Kahlenberg ed., 2004) ("Seventy-four percent of the students at the top 146 highly selective colleges came from families in the top quarter of the socioeconomic status scale . . .").

84. See, e.g., Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 537 (2002) (discussing a study that showed that UCLA gave "covert" preferences to "children of politicians, donors, alumni, and celebrities, often processed through the office of the chancellor or the fund-raising department").

85. See ELY, *supra* note 1, at 148-49, 162.

86. *Id.* at 170.

87. I explore the similarities between admissions and districting decisions in more depth in Karlan, *supra* note 72.

account of race.”⁸⁸ Ely recognized the argument that race-conscious redistricting does not “abridge” the votes of white citizens but thought that “that is an argument that this Commentary, though directed to the separate issue of standing, seems seriously if indirectly to undercut.”⁸⁹

At the risk of being myself labeled a mere doctrinalist or worse, whatever Ely thought about the Fifteenth Amendment, that’s not the current state of the law. Not since *Gomillion v. Lightfoot*,⁹⁰ which the *Shaw* Court has subsequently reread as a case about equal protection,⁹¹ has the Court relied on the Fifteenth Amendment to address redistricting issues. And even if the Fifteenth Amendment were in play, it’s hard to see, whatever the differences in language, that the Fifteenth Amendment is less clear than the Fourteenth Amendment in having the “historic core purpose of protecting blacks.”⁹²

More important, Ely’s argument begs the question of what “abridgement” means. To say that something has been “abridged” requires, I should think, some notion of what it would be like if it hadn’t been impaired. But Ely never offered a theory of how we should decide which voters get to be in districts from which they can elect the candidates they prefer. And in our system, that is a critical choice: The use of winner-take-all, single-member, geographically defined districts necessarily means that large numbers of voters will find themselves in districts where their votes are wasted.

Moreover, the question of what districts would look like if race had not been taken into account is equally impossible to answer. There are many areas of governmental decisionmaking where it is possible to agree on the criteria that might otherwise be applied: In government contracting, for example, we might go with the lowest bidder, in government employment with the person who scores highest on the exam. Redistricting, however, is not one of these areas: There is no agreement in the first place on what districts should look like and how representational opportunities should be allocated. The lack of any standard for answering these difficult questions, after all, is what led Ely to support one person, one vote, even as he recognized that the Court’s opinion in *Reynolds* was “badly articulated.”⁹³

88. Ely, *Standing*, *supra* note 7, at 578 n.8 (emphasis omitted).

89. *Id.*

90. 364 U.S. 339 (1960).

91. See *Shaw v. Reno*, 509 U.S. 630, 645 (1993) (stating that although “[t]he majority resolved [*Gomillion*] under the Fifteenth Amendment,” Justice Whittaker thought the case “was cognizable under the Equal Protection Clause,” and that “[t]his Court’s subsequent reliance on *Gomillion* in other Fourteenth Amendment cases suggests the correctness of Justice Whittaker’s view”).

92. ELY, *supra* note 1, at 152.

93. ELY, *supra* note 16, at 462 n.70.

B. *The Shaw Cases as a Tool To Combat Entrenchment?*

However exercised Ely was about what he called pro-minority racial gerrymanders, he was even more disturbed by partisan gerrymandering. He saw partisan line drawing, particularly its incumbent-protecting version, as a paradigmatic example of *Carolene Products* process failure: “A central theme of our Constitution is the preclusion of self-dealing maneuvers on the part of incumbents (other than by the pursuit of constituent preferences) to perpetuate their incumbency or otherwise promote the fortunes of their political party.”⁹⁴ Thus, he expressed both verbal and visual distress at the way territory was “routinely dissected, nay scrimshawed,”⁹⁵ to produce districts with particular demographic compositions and political profiles. And he was even more upset—feeling “as if I’ve entered Mondo Bizarro”⁹⁶—by the idea that jurisdictions could defend against claims of excessive race consciousness by defending their plans as predominantly partisan.⁹⁷

In fact, the real reason for Ely’s embrace of the *Shaw* cases seems not to have been his concern with racial discrimination against white voters but his sense that *Shaw* might serve as an opening wedge in attacking the broader pathology of political gerrymandering and incumbent protection. That is why Ely was far more attracted to the Court’s initial formulation of the constitutionally cognizable problem—which focused on the bizarre shape of the challenged districts—than to its later articulation of the vice as lying in too great a concern with racial considerations. “[A] bizarre shape test,” he argued, “can be given determinate content.”⁹⁸ And while the Court might be using the test to ferret out overreliance on race, Ely saw a broader benefit. Bizarrely shaped districts are seldom a product solely of racial motivations; they are almost always a joint product of the desire to create a majority-nonwhite district and the partisan imperative to protect incumbents in adjacent areas. Thus, if the courts were to strike down bizarrely shaped districts, they would be striking a blow against partisanship as well.⁹⁹

But as Ely himself recognized, the *Shaw* cases were not *Reynolds v. Sims*.¹⁰⁰ And so he ran through a variety of possible solutions: districting by

94. Ely, *Confounded by Cromartie*, *supra* note 7, at 503.

95. *Id.* at 492.

96. Ely, *Gerrymanders*, *supra* note 7, at 620.

97. *Id.* at 621 (“Why in the name of heaven should the fact that the majority party was rigging the lines ‘simply’ in order to entrench itself count as a *defense* to a charge of prominent racial gerrymandering? Why, indeed, should it not be a separate (and in my opinion more serious) count in the indictment?”).

98. *Id.* at 614.

99. *See id.* at 616-20.

100. *Id.* at 609.

nonpartisan commissions, districting by computer (what Ely, in his characteristically gruff way, called “Grid the Damn Thing”¹⁰¹), lottery voting, and proportional representation. Always one for gadgets, he seemed most taken with various forms of computer-conducted redistricting. But in the end, he wasn’t able to articulate a solution with the “judicial (and legislative) manageability and the saleable sound of constitutional principle”¹⁰² that had made *Reynolds* such a triumph. And so, in the final paragraph of his final article, he wrote:

[G]iven the capabilities of computers, a green light for partisan gerrymandering can easily undo the good that the Warren Court thought (correctly in . . . those pre-computer days) its reapportionment decisions would accomplish. Give a latter-day Elbridge Gerry or Boss Tweed a modern computer, and one person/one vote will seem a minor annoyance.¹⁰³

Sometimes, no answer is what even the right question begets.

CONCLUSION

In thinking about how John approached contemporary problems of race-conscious districting and political gerrymandering, I’m reminded of the unintended consequences of the Reapportionment Revolution. To be sure, one person, one vote opened up the political process by requiring periodic revisitation of how we allocate political power. But in downplaying the role of traditional geographic boundaries and any criteria other than absolute population equality, the Warren Court not only promoted more majoritarian and potentially more fluid politics but also opened the door to ever finer manipulation of district lines. And so the Warren Court’s greatest triumph of representation reinforcement seems to have deterred the Rehnquist Court from even adjudicating gerrymandering claims precisely because it cannot find any standard as “solid,” as “judicially manageable,” and as likely “to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking”¹⁰⁴ as one person, one vote. That John struggled so hard to find some standard for judicial intervention reflected both his optimism, born of his faith in representation reinforcement, and his realism about the limits of courts’ ability to perfect our politics.

101. *Id.* at 635.

102. *Id.* at 609.

103. Ely, *Confounded* by Cromartie, *supra* note 7, at 505 (footnote omitted).

104. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1784 (2004) (plurality opinion).

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As I explained in a companion piece,¹⁰⁵ there's something particularly fitting in applying the adjective "Elysian" to John's work,¹⁰⁶ given his attraction to the heroic aspects of the Warren Court. The dedication to *Democracy and Distrust* after all, was laid out as a kind of quasi-haiku:

For Earl Warren
You don't need many heroes
If you choose carefully.

Perhaps nowhere was the Warren Court quite as heroic—in the many senses of that word—as in its apportionment decisions. It dared greatly, succeeded mightily, and set the stage for the Court's later hubris in seeing "itself, rather than the political process the reapportionment revolution did so much to democratize, as the only guarantor of a free and open process"¹⁰⁷ and the "sole institution capable really of deciding what equality really means generally."¹⁰⁸ And so, in thinking back on John Hart Ely and his work, particularly in these last pieces on gerrymandering, I think of another triplet—this one from another man whose language and thoughts have so influenced my own, Dylan Thomas:

Wild men who caught and sang the sun in flight,
And learn, too late, they grieved it on its way
Do not go gentle into that good night.¹⁰⁹

105. Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695 (2004).

106. In fact, Mike Dorf pointed out to me after the Symposium that John himself expressed a preference for this adjective. See ELY, *supra* note 16, at 466 n.117 ("I'm not sure I get to choose, but I much prefer 'Elysian.'").

107. Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in THE VOTE: BUSH, GORE AND THE SUPREME COURT 77, 97 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

108. *Id.* at 78.

109. DYLAN THOMAS, *Do Not Go Gentle into That Good Night*, in THE COLLECTED POEMS OF DYLAN THOMAS 207, 208 (Daniel Jones ed., 1971).