

The Partisan Impact of Voting Rights Law: A Reply to Pamela S. Karlan

David Lublin* and D. Stephen Voss**

Like pinwheel fireworks, Pam Karlan spins off ideas in radiant bursts of energy. In this ambitious piece, she not only dissects the Supreme Court's voting rights decisions in the context of other decisions involving law and politics, but also attempts the always tricky effort of "looking up the line" to the future of redistricting law. If Karlan is a fortuneteller, her predictions are somewhat grim. She sees chaos and confusion—not to mention much litigation to sort it out—up ahead.¹ Consistent with her past work, Karlan views the line of decisions beginning with *Shaw v. Reno*² as fundamentally misguided. According to Karlan, the Court must reverse, or at least greatly limit, the impact of these decisions if it wishes to return to coherence.³ This view undoubtedly stems from her deeply held belief that majority efforts to share power with minorities should not be subject to the same strict scrutiny as minority vote dilution, but rather should be "hammered out in the political process."⁴ Karlan further remains strongly convinced, despite arguments to the contrary, that these districts assure not just the election of greater numbers of minority representatives, but also legislative bodies that are more responsive to minority interests.⁵

Karlan's juxtaposition of contradictory lines of legal reasoning at the beginning of her article⁶ buttresses her claim that "the courts will become increasingly embroiled in battles over the distribution of political power."⁷

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This reply is based largely on a more detailed analysis of the racial and partisan impact of racial redistricting that we coauthored.

1. See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 731-32 (1998).

2. 509 U.S. 630 (1993).

3. See generally Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287 (1996).

4. *Id.* at 310; see also Karlan, *supra* note 1, at 740.

5. See generally Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291 (1997).

6. See Karlan, *supra* note 1, at 731-33.

7. *Id.* at 733.

However, the practical implications of the Court's redistricting decisions are relatively clear. Confusing legal theory does not necessarily produce confusing political outcomes. On the one hand, states may not make race the "predominant factor"⁸ in the construction of congressional districts through the use of excessively creative cartography.⁹ On the other hand, states may not dilute minority votes by eliminating existing majority-minority districts¹⁰ or failing to draw compact majority-minority districts where racial polarization "operates to minimize or cancel out [the minority group's] ability to elect their preferred candidates."¹¹

Internal contradictions within the Court's decisions result partly from efforts by the Justices to balance competing principles. Specifically, the Court interprets the Equal Protection Clause of the Fourteenth Amendment to mean that government has little business placing citizens into particular congressional districts primarily on the basis of their race.¹² This principle cuts two ways. States should not draft districts with irregular or "bizarre" boundaries, using race as the predominate factor, in order to concentrate minorities into those districts.¹³ However, states also may not dilute compact pockets of minority voting strength because this constitutes a pernicious racial classification.¹⁴ Thus, the Court condones racial classification to the extent necessary under the Fourteenth Amendment to protect compact groups of minorities from vote dilution.

As Richard Pildes convincingly argues,¹⁵ these decisions may be read as consistent with the Court's earlier reasoning in *Thornburg v. Gingles*.¹⁶ The three-pronged test outlined by the Court in *Gingles* suggests that states have an obligation under Section 2 of the Voting Rights Act to draw majority-

8. *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.").

9. *See Shaw v. Reno*, 509 U.S. 630, 641-58 (1993) (concluding that redistricting legislation that is so extremely irregular on its face that it can only be viewed as an effort to segregate the races for the purposes of voting is a justiciable claim).

10. *See Beer v. United States*, 425 U.S. 130, 141 (1975) ("[T]he purpose of § 5 [of the Voting Rights Act] has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities . . .").

11. *Thornburg v. Gingles*, 478 U.S. 30, 48 (1985).

12. *See Miller*, 515 U.S. at 927.

13. *See Bush v. Vera*, 116 S. Ct. 1941, 1960-64 (1996) (striking down majority-black districts because race was the predominate factor in drawing non-compact districts); *Shaw v. Hunt*, 116 S. Ct. 1894, 1906-07 (1996) (same); *Miller*, 515 U.S. at 910-11 (same).

14. *See Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982); *see also Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982) (three-judge court) (finding that redistricting of city council districts in Chicago violated the Fourteenth Amendment because it diluted the voting strength of racial minorities).

15. *See generally* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 *YALE L.J.* 2505 (1997).

16. 478 U.S. 30 (1986).

minority districts if three conditions are met: (1) the minority group is sufficiently numerous and compact that it is possible to draw a majority-minority district; (2) the minority group votes as a bloc; and (3) racial polarization tends to preclude the election of minority-preferred candidates.¹⁷ Nothing in *Shaw* or *Miller* undermines the basic thrust of the Court's decision in *Gingles*. These decisions can be viewed as an effort to rein in overly broad interpretations of the compactness requirement announced in the first prong of *Gingles*. Computer technology had not yet made it possible to construct a district on a block-by-block basis when *Gingles* was decided.

This attempt by the Court to balance the goal of avoiding racial classifications against that of preventing minority vote dilution ignores the fact that territorial systems of representation tend to disadvantage dispersed minorities. The focus on compactness and the use of past plans to judge current ones may simply perpetuate the exclusion of minorities. After all, states with sizeable black populations evenly dispersed around the state are unlikely to be able to draw a district that could survive a *Shaw* challenge.

However, even Pildes agrees that voting rights jurisprudence as presently outlined by the Court's majority seems designed to perplex. The practical implications of the Court's decision may be clear, but the Court may well have paved the road to the hell of "legal incoherence and political chaos"¹⁸ with its good intentions of striking a balance between two worthy goals. The deep divisions within the slender, five-Justice majority that shaped *Shaw* and *Miller* undoubtedly reinforce this tendency toward confusion.¹⁹

Karlan and Pildes may be right that the Court has made a set of internally contradictory principles the basis for many of its recent voting rights decisions. Karlan argues convincingly that the Court's "passion" for objective rules has resulted in decisions that appear idiosyncratic rather than objective or rationally grounded.²⁰ However, this focus on turmoil in the political arena seems somewhat misplaced. Certainly, *Shaw* and its progeny have changed the regularly scheduled decennial redistricting circus into an ongoing spectacle. But the constraints the Court places on the options available to politicians when drawing state legislative and congressional district boundaries have had highly systematic effects on political outcomes. Specifically, Republicans and African Americans have greatly benefited from the recent twists and turns in redistricting jurisprudence. Karlan suggests that "the proliferation of constraints on the reapportionment process may do as much to

17. See *id.* at 50-51; see also BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 49-51 (1992).

18. Pildes, *supra* note 15, at 2505. See generally Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

19. See Pildes, *supra* note 15, at 2505.

20. See Karlan, *supra* note 1, at 741-47.

paralyze legislatures as animate them"²¹ after the 2000 census, but we believe that recent decisions will encourage state legislators to draw district lines to the benefit of incumbents. The remainder of this brief response outlines why.

I. THE FIRE LAST TIME: RACIAL REDISTRICTING 1992-1994

The racial implications of racial redistricting in the early 1990s are perhaps not accorded the significance they deserve because they were so widely expected and are so well-understood. In 1992, Alabama, Florida, North Carolina, South Carolina, and Virginia elected their first African American members of Congress in this century thanks to the creation of new majority-black districts.²² Overall, thirteen new black representatives and six new Latino representatives were elected in 1992 due to the intentional creation of new majority-minority districts under the aegis of the Voting Rights Act.

The partisan implications of racial redistricting are much more fiercely debated, but the balance of evidence suggests that racial redistricting injured the Democrats a great deal.²³ The election of greater numbers of Republicans makes racial redistricting problematic because it makes it more difficult to pass legislation favored by blacks.²⁴ Racial redistricting, ironically, has helped assure that the largest contingent of African Americans ever elected to the House of Representatives plays little role in the passage of legislation.

Racial redistricting directly undermines the Democrats by changing how votes are aggregated into seats. Different district lines can produce widely divergent outcomes even if voting behavior remains unchanged. The concentration of black Democrats into majority-black districts endangers the electoral prospects of white Democrats by stripping away a key part of their electoral coalition. Republicans become more likely to win elections as the share of blacks in a district falls. The percentage of blacks in majority-black districts is far higher than the 30% usually required to assure the election of a Democrat, so racial redistricting causes Democratic votes to be distributed inefficiently from a purely partisan perspective.²⁵ Racial redistricting could

21. *Id.* at 735.

22. See DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* 12 (1997).

23. For a critique of studies on both sides of this question, see generally David Lublin & D. Stephen Voss, *Boll-Weevil Blues: The Partisan Impact of Voting Rights Law in the 1990s* (1997) (unpublished manuscript presented at the 1997 annual meeting of the American Political Science Association in Washington, D.C., and at the Stanford Law Review Symposium on Law and the Political Process) (on file with the *Stanford Law Review*).

24. See LUBLIN, *supra* note 22, at 117-18.

25. See *id.* at 99. See generally Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996); Bernard Grofman, Robert Griffin & Amihai Glazer, *The Effect of Black Population on Electing Democrats and Liberals to the House of Representatives*, 17 LEGIS. STUD.

help the Democrats by concentrating Democratic voters previously submerged in Republican districts, but as we explain below, this has occurred in only one isolated case.

Racial redistricting left the Republicans well-positioned to take advantage of national trends favoring their party. National trends favoring the Republicans mainly affect white but not black voting behavior because African Americans are more loyal Democrats. The concentration of black Democrats into safe majority-minority seats meant that relatively fickle white Democratic supporters were concentrated in marginal seats. Weak Democratic supporters were concentrated in the seats most vulnerable to Republican challenge. Not surprisingly, the Republicans carried a greater number of seats than they did in 1990, when blacks were more evenly distributed across districts.

Perhaps more perniciously for the Democrats, racial redistricting not only made it possible for the Republicans to win more seats with the same number of votes, but it actually caused the Republicans to win a larger share of the vote.²⁶ Different candidates may opt to seek their party's nomination as the district's racial composition changes and their party's electoral chances rise and fall. For example, Louisiana Representative Cleo Fields did not seek reelection in 1996 after a court eliminated the majority-black district he had represented.²⁷ This effect of racial redistricting does not show up in the election returns but obviously shaped Louisiana's congressional politics. Shifts in district composition change who wins the nominations of the major parties and thus alters the choices available to voters. The nomination of an alternate candidate may in turn influence whether and how individual voters exercise their franchise. Unfortunately for the Democrats, these indirect influences heighten the negative impact of racial redistricting on their party by making it easier to unseat Democrats and elect Republicans. Racial redistricting helps propel the realignment toward the Republican party in the South by assuring the nomination of Democratic candidates who are unpalatable to many white Democrats while simultaneously encouraging the Republicans to nominate more serious candidates who are likely to attract these disaffected white voters.

Racial redistricting will result in Republicans winning a larger share of the vote in majority-black districts. The central purpose of racial redistricting is to allow African Americans to elect candidates supported by the black community. The Democrats will almost certainly nominate a black liberal in

Q. 365 (1992); Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205 (1995).

26. For an expanded discussion of this argument, see Lublin & Voss, *supra* note 23, at 3-10.

27. See *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996) (*Hays III*) (eliminating Louisiana's second majority-black district). Cleo Fields won this district in 1992 and 1994.

place of a white moderate in these districts.²⁸ African Americans won every black-majority district save one in 1992, 1994, and 1996, so it seems reasonable to conclude that "candidates of choice" are usually black Democrats.²⁹ Significant numbers of white voters within a new majority-black district who would have voted for a white Democrat will either vote Republican or not vote when presented with a black liberal nominee. After all, the rationale for the creation of black districts, supported by mounds of empirical evidence, is that whites, for either ideological or racist reasons, will not provide enough support for African American candidates to permit these candidates to carry more than a token number of majority-white districts.³⁰

Racial redistricting will also likely boost the Republican vote in the majority-white districts that lost black voters. Gary Jacobson's extensive studies of congressional elections show that high-quality candidates, defined as candidates with previous experience in elective office, receive a greater share of the vote than inexperienced candidates.³¹ Experienced candidates attract more campaign resources (e.g., money), are already known to many voters, and tend to make fewer mistakes on the campaign trail than untested candidates. High-quality candidates, in turn, respond to the electoral climate when deciding when to run for office. Republican candidate quality will probably climb in districts that lost black voters due to racial redistricting, since potential Republican nominees know their chances have improved. Voters respond by casting a greater number of votes for Republicans in these "bleached" districts. An increase in Democratic candidate quality likely does not occur to a similar extent among Democrats in majority-black districts

28. Most new black districts were created out of districts formerly between 30% and 45% black that elected white moderate Democrats in 1990. See Lublin and Voss, *supra* note 23, at 9 n.13.

29. See LUBLIN, *supra* note 22, at 23-34, 87; Grofman & Handley, *supra* note 25, at 249-53. See generally MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1994 (1993); MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1996 (1995); POLITICS IN AMERICA 1994: THE 103RD CONGRESS (Phil Duncan ed., 1993); POLITICS IN AMERICA 1996: THE 104TH CONGRESS (Philip D. Duncan & Christine D. Lawrence eds., 1995).

30. I use "white" to refer only to non-Hispanic whites. Blacks often win election from mixed majority-minority districts. See LUBLIN, *supra* note 22, at 41-48; FRANK PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965, at 132-66 (1990); Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Office-holding in Southern State Legislatures and Congressional Delegations*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 335, 336-37 (Chandler Davidson & Bernard Grofman eds., 1994); David Lublin, *The Election of African Americans and Latinos to the U.S. House of Representatives 1972-1994*, 25 AM. POL. Q. 269, 276-79 (1997). See generally Bernard Grofman & Lisa Handley, *Minority Population Proportion and Black and Hispanic Congressional Success in the 1970s and 1980s*, 17 AM. POL. Q. 436 (1989).

31. See generally GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS (1996); GARY C. JACOBSON & SAMUEL KERNELL, STRATEGY AND CHOICE IN CONGRESSIONAL ELECTIONS 19-34 (2d ed. 1983). The same holds true for Senate elections. See generally David Ian Lublin, *Quality, Not Quantity: Strategic Politicians in U.S. Senate Elections, 1952-1990*, 56 J. POL. 228 (1994).

because these districts were almost always safe Democratic seats even before the addition of greater numbers of black Democratic voters to the district.³²

Racial redistricting may influence whether voters choose to vote at all. Increases in black turnout may stem from excitement over the possibility of electing an African American who is closely attuned to black interests. Whites may similarly vote at a high rate in an effort to prevent the election of a black official. On the other hand, contests in majority-black districts are usually not close, so lack of suspense may depress turnout in majority-black districts. White Democrats may also abstain because they do not wish to vote for a black nominee, yet they may be unwilling to crossover and vote for the Republican candidate.

Claudine Gay conducted what is probably the most sophisticated study of the impact of racial redistricting on turnout.³³ She concludes that while African Americans vote at a higher rate when their district has a black candidate, white Democrats demobilize in black districts. The overall effect on state voting patterns is not clear, as the influx of black voters may compensate for the loss of white Democrats. However, the potential influx of African Americans should not be overstated. Gay's study found only a small increase in black voter turnout.

The incumbency advantage aids Republican efforts to extend their control of the House and solidify the realignment in the South. Andrew Gelman and Gary King show in their widely accepted analysis that incumbent congressional candidates receive a larger share of the vote than same-party candidates for open seats.³⁴ Utilizing the Gelman-King method, Gary Jacobson calculates the size of the incumbency advantage for 1994 as 7.1% for Democrats and 11.9% for Republicans.³⁵ If racial redistricting caused the Democrats to gain seats in one election, Republicans can expect to increase their share of the vote in future elections thanks to the incumbency advantage shifting from the Democrats to the Republicans. The Republicans won more votes in 1994, the second general election after the 1990 redistricting round, than they would have without racial redistricting due to Republican gains in the 1992 congressional elections. The shift in the incumbency advantage from the Democrats to the Republicans makes it much more difficult for the Democrats to win back the seats they lost and helps to entrench the Republi-

32. For historical information about partisanship in Alabama, Georgia, Louisiana, and South Carolina, see MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS 1992*, at 21-25, 304-26, 500-26, 1110-32 (1991), and Lublin & Voss, *supra* note 23, at 12 n.20.

33. See generally Claudine Gay, *Race and Political Context: The Impact of Black Congressional Representation on the Voting Behavior of White and Black Constituents* (1996) (unpublished manuscript, on file with the *Stanford Law Review*).

34. See generally Andrew Gelman & Gary King, *Estimating Incumbency Advantage Without Bias*, 34 AM. J. POL. SCI. 1142 (1990).

35. See Gary C. Jacobson, *The 1994 House Elections in Perspective*, in *MIDTERM: ELECTIONS OF 1994 IN CONTEXT* 1-20 (Philip A. Klinkner ed., 1995).

can majority. The shift toward the Republicans in 1994 was not all partisan swing; it also reflected the shift in incumbency from the Democrats to the Republicans in seats lost by the Democrats due to racial redistricting in 1992.

State-by-state analysis of the partisan effects of racial redistricting suggests that racial redistricting cost the Democrats a net loss of eleven seats.³⁶ In 1992, racial redistricting cost the Democrats two seats in Alabama, two seats in Florida, and three seats in Georgia. Democrats gained one seat in Virginia because the new black district was created through the collapse of two existing Republican districts. However, Democrats lost an additional three seats in North Carolina as well as seats in Illinois and New Jersey in 1994.³⁷

Democrats successfully prevented losses due to racial redistricting through aggressive political gerrymandering in Louisiana, Texas, and Virginia.³⁸ However, creating new majority-black districts while protecting white Democrats often requires the adoption of districts with severely contorted lines, so recent Supreme Court doctrine "has put a severe pinch on the Democratic party."³⁹ As Karlan explains, the bizarre shape of some of these districts has been the central piece of evidence in *racial* gerrymandering cases.⁴⁰ In fact, courts have invalidated every so-called "racial gerrymander" adopted for southern congressional districts in the 1990s.⁴¹

II. THE MORE THINGS CHANGE: RACIAL REDISTRICTING IN 1996 AND BEYOND

The elimination of racial gerrymanders should seemingly aid the efforts of Democrats to regain control of the House. At the same time, one should expect the election of fewer black representatives because racial redistricting played such a key role in the election of greater numbers of African Americans (but overall fewer Democrats) in 1992 and 1994. Unfortunately for Democrats (but not African Americans), this reasoning does not hold because the Court's rulings do not wipe the political slate clean. Incumbent Republicans and African Americans will have the advantage of incumbency.

Democratic candidates must now challenge entrenched Republican incumbents. This position of weakness for Democrats will discourage high-

36. For more detailed state-by-state analysis of the partisan impact of racial redistricting, see Lublin and Voss, *supra* note 23, at 20-30.

37. *See id.*

38. North Carolina also enacted a Democratic gerrymander, but this plan failed to protect Democrats against Republican gains in 1994.

39. *See* Lublin & Voss, *supra* note 23, at 27-28.

40. *See* Karlan, *supra* note 1, at 740-41, 743-44.

41. For the invalidating opinions, see *Bush v. Vera*, 116 S. Ct. 1941 (1996) (plurality opinion); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); and *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996) (*Hays III*).

quality Democratic challengers.⁴² Racial redistricting at the state and local level, combined with trends favoring the Republicans, has boosted the size of the Republican “farm team,” but has decimated the number of potential white Democratic candidates.

However, the incumbency advantage will also favor African American representatives originally elected under unconstitutional plans. Under the guise of protecting incumbents, states can draw districts that are 40% to 50% black and are carefully designed to reelect black incumbents. The new districts must still be substantially more compact and have fewer blacks than the old districts in order to avoid a new *Shaw* challenge. However, the absence of a black majority may provide primary evidence that race was not the “predominant factor” in composing new district boundaries. The presence of a black incumbent may at the same time give the state greater licence to use race in redrawing the district because, within limits, the state can honestly claim that it focused on the traditional districting principle and “compelling state interest” of protecting incumbents.

Karlan’s critique of the Supreme Court’s use of so-called traditional “objective” rules is particularly perceptive because these rules bias the redistricting process in favor of the incumbent Republicans and are therefore not neutral.⁴³ Thus, the Supreme Court’s conflicting decisions provide strong legal incentive for states to adopt “objective” incumbency protection plans. In light of the Court’s decisions, states must navigate between the Scylla of racial gerrymandering (based in *Shaw* and *Miller*) and the Charybdis of minority vote dilution (based in section 2 of the Voting Rights Act). Thus, the best means to avoid a successful challenge is to use incumbency as the primary criterion for drawing districts, which the Supreme Court has conveniently accepted as a legitimate state goal.

The Court’s constraints on the multiple demands of legislators involved in this highly conflictual zero-sum game would seemingly suggest that “political deadlock”⁴⁴ is likely in the wake of *Shaw*. However, Karlan may be misguided in her belief that the Court’s constraints inherently promote political deadlock and inevitably result in the judiciary taking over the responsibility of redistricting.⁴⁵ Republicans have made so many gains since 1990 that their main goal now is to preserve them. Black Democrats similarly

42. The incumbency advantage, which works by scaring off high-quality challengers, is apparently greater in a district soon after it undergoes redistricting. See Gary W. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 AM. J. POL. SCI. 478-97 (1996). At least one of the results of this amplified incumbency advantage must be that, because districts take so long to emerge from the political system, potential challengers are not sure if they will be included in the unsettled district, let alone know where they should build a campaign organization.

43. See Karlan, *supra* note 1, at 741-43.

44. *Id.* at 734.

45. See *id.* at 740-41.

wish to preserve their recent gains. In many states, white Democrats also want to protect against losses due to the elimination of racial gerrymanders. Because courts are less mindful of incumbents when drawing district maps, the parties often have incentives to settle their differences through the adoption of "objective" incumbency protection plans. For example, the Florida and North Carolina legislatures successfully managed to redistrict after courts vitiated their plans.⁴⁶

Analyzing the results of changes of district boundaries stemming from *Shaw* shows that not a single Republican lost election in 1996 due to the elimination of a majority-black district. Nor are any likely to lose election over the short term due to district boundary changes. After the invalidation of the Third District of Florida, the Florida legislature drew the new plan to minimize the impact of boundary changes, altering only five districts and carefully crafting them so that incumbents could win them.⁴⁷ Incumbents won reelection in 1996 with over 60% of the vote in every district in which an incumbent ran for reelection.⁴⁸

North Carolina redrew the boundaries of all of its congressional districts after the Supreme Court invalidated the Twelfth District in *Shaw v. Hunt*.⁴⁹ The legislature did not adopt a new plan until after the 1996 election, so the plan will face its first test in 1998. The new plan should please all twelve incumbents: It enhances the reelection chances of all four white Democrats if only because the percentage of blacks rose in all of their districts. The new plan barely altered the racial composition of the six Republican districts—an impressive accomplishment since Democrats had cleverly minimized the share of blacks in the Republican districts under the original gerrymander so that they could be saved for Democratic districts.⁵⁰

The legislative record shows that incumbency was a major factor in the construction of the new districts and that legislators were keenly aware of the constraints they faced in attempting to draw a constitutional plan. State Senator Roy Cooper, chairman of the Select Committee on Redistricting, offered a description of the new plan geared toward fending off another constitutional challenge and stressing the orientation toward incumbents: "We said from the beginning in the Senate that in 1996 the people made a deci-

46. See Juliana Gruenwald, *Florida Lawmakers Agree on New Map*, 54 CONG. Q. 1241, 1241 (1996); State Senator Roy Cooper, Chairman of the Select Committee on Redistricting, Verbatim Transcript of Floor Debate on H.B. 586 (Committee Substitute) Congressional Redistricting, Senate Chamber 4-6 (Mar. 27, 1997) [hereinafter NC Senate Debate].

47. See Gruenwald, *supra* note 46, at 1241.

48. *Results of Contests for the U.S. House, District by District*, N.Y. TIMES, Nov. 7, 1996, at B8 [hereinafter *Results of Contests*].

49. 116 S. Ct. 1894 (1996).

50. For maps and data on the racial composition of North Carolina's pre- and post-*Shaw* redistricting plans, see *North Carolina General Assembly: Geography and Representation* (visited Nov. 24, 1997) <<http://www.ncga.state.nc.us/html1997/geography/main.html>>.

sion to elect six members of Congress from the Democratic Party and six members of Congress from the Republican Party and we should not use court-ordered redistricting to alter that result."⁵¹

Court-ordered plans in Georgia, Louisiana, and Texas also did not benefit the Democrats. The boundaries of Georgia's congressional districts were radically altered after the 1994 elections, but all eleven incumbent representatives sought and won reelection in 1996.⁵² The incumbency advantage allowed all of the eight Republicans to win despite the marked increase in the share of blacks in the Eighth and Tenth Districts. Democrats can take consolation from the failure of the incumbents to win more than 53% of the vote in either of these two districts because they indicate that redistricting made it easier for Democrats to regain them as open seats. Past victories nevertheless gave the incumbency advantage to Republicans and thus greatly aided their efforts to maintain control of these seats, and the House, in 1996. Court-ordered redistricting eradicated Louisiana's Democratic gerrymander and cost the party one seat in 1996. The court-ordered plan in Texas changed the boundaries of thirteen of the state's thirty districts. Two of the thirteen redrawn districts changed parties in 1996, but redistricting does not appear to explain the outcome of the elections in either district.

Three African American incumbents, Representatives Corrine Brown in Florida and Sanford Bishop and Cynthia McKinney in Georgia, retained their congressional seats in 1996 despite losing their majority-black districts. Analysis of election returns indicates that all three received the support of at least one-third of white voters.⁵³ Moreover, two more African American incumbents, Representatives Eva Clayton and Mel Watt of North Carolina, appear likely to win reelection from redrawn districts in 1998.

Opponents of racial redistricting contend that these victories definitively refute the notion that black candidates cannot win in white districts in the South.⁵⁴ This conclusion could not be further from the truth. The incumbency advantage likely explains their victories. Three black incumbents sought reelection and won in the South, but three black nonincumbents also

51. NC Senate Debate, *supra* note 46, at 4.

52. See *Abrams v. Johnson*, 117 S. Ct. 1925, 1940 (1997) (describing the differences between the invalidated plan and the court-drawn plan); *Results of Contests*, *supra* note 48, at B8.

53. These estimates were produced using Gary King's Ecological Inference ("EI") model. See GARY KING, A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM: RECONSTRUCTING INDIVIDUAL BEHAVIOR FROM AGGREGATE DATA 28-34 (1997); Lublin & Voss, *supra* note 23, at 41-44.

54. See generally CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 116-41 (1995); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 482-86 (1997).

ran and lost in the South in 1996.⁵⁵ All three black incumbents won reelection from districts that are greater than 35% black and thus virtually assured of electing Democrats. The real battle for these seats was consequently held in the Democratic primary. Incumbents almost never lose primary elections unless they are under indictment or involved in a public scandal. The resources at the command of the incumbent are critical in these low turnout elections. Once they passed the primary barrier, Brown, Bishop, and McKinney were likely to carry these Democratic districts *despite* their race. As nonincumbents, all three would have found it much more difficult to win the Democratic nomination necessary to compete in the general election.

Additionally, legislators in Florida and North Carolina specifically designed the revised districts so that the black incumbents could win them by retaining a high share of blacks in the districts and combining them with Democratic-leaning whites. The redrawing of Florida's Third District reduced the black share of the population to only 47% (42% registered voters). The new First and Twelfth Districts of North Carolina remain highly favorable for black candidates. African Americans form 50% of the total population of the new First District and 47% of the new Twelfth District. Both new districts contain the political bases of their black incumbents and retain their basic shape.

The legislative record suggests that the state legislature of North Carolina intentionally drew districts that were not majority black, but that would still elect black incumbents. State legislators were concerned with drawing a district that could win preclearance from a Justice Department that was still determined to enforce the Voting Rights Act and, at the same time, would not be held unconstitutional by the courts. As State Representative Ed McMahan explained during his defense of North Carolina's new redistricting plan, "[W]e have tried to agree on a Plan that will be approved by the Justice Department and also found constitutional."⁵⁶

The racial composition of court-drawn districts similarly influenced electoral outcomes. The new plan for Texas did not eliminate any majority-minority districts. Georgia's revised plan retained John Lewis's majority-black Fifth District. As has already been explained, Sanford Bishop and Cynthia McKinney were placed into new majority-white districts that were greater than 35% black and thus likely to elect Democrats. The minority population of McKinney's district has continued to increase since the 1990 Census, and the Director of the Georgia Reapportionment Services specu-

55. See generally David A. Bositis, *The Future of Majority-Minority Districts and Black and Hispanic Legislative Representation* (1997) (unpublished manuscript, on file with the *Stanford Law Review*).

56. Verbatim Transcript of House Congressional Redistricting Committee, Discussion on the House Floor 1-2 (Mar. 26, 1997); see also NC Senate Debate, *supra* note 46, at 4-6.

lates that it may be a majority-minority district by 2000.⁵⁷ In Louisiana, African American Cleo Fields decided not to run after redistricting eliminated his majority-black district. Fields does not appear to have been unduly pessimistic in his decision. He had just lost the state's 1995 gubernatorial runoff with slightly more than 10% of the white vote. In any case, Fields had no viable district from which to seek reelection. Redistricting placed his electoral base in a district held by a heavily entrenched Republican incumbent.

CONCLUSION

Perhaps, as Pam Karlan intuits, racial redistricting *is* like reproduction.⁵⁸ Timing is everything, and the product is often funny looking. The drawing of new majority-minority districts helped Republicans take advantage of trends favoring their party. Moreover, the abolition of racial gerrymanders after Republicans won control of the House seems about as likely to help the Democrats as inquiring about birth control four years after the child is born. Over the short term, black representatives are likely to hold on to their seats even if they lose their majority-black districts. However, to the extent their racial redistricting was designed to assure greater responsiveness on the part of the House to African Americans and thus help legitimate the system, this policy backfired badly. Individual African American representatives may be deeply committed to the black community, but they cannot change policy without allies. One cannot help but wonder if the election of greater numbers of blacks who have little influence will only increase African American frustration with government institutions. Indeed, blacks are likely to find their numerical gains ephemeral as whites replace retiring black incumbents in redrawn majority-white districts. While future frustrations may lie ahead, it is doubtful that the millennial redistricting will cause the amount of chaos and litigation that Karlan conjures. Instead, powerful incumbents will work hard to make sure that the districts are redrawn for the benefit of those who matter most—themselves.

57. See Telephone Interview with Linda Meggers, Director, Georgia Reapportionment Services (Oct. 23, 1997).

58. See Karlan, *supra* note 1, at 733.