South Carolina Law Review

Volume 48 | Issue 2 Article 9

Winter 1997

Where Should We Draw the Line?: South Carolina's Battle With Racial Gerrymandering

Michelle DeLuca

WHERE SHOULD WE DRAW THE LINE?: SOUTH CAROLINA'S BATTLE WITH RACIAL GERRYMANDERING

I. INTRODUCTION

In *Smith v. Beasley*[1] the United States District Court for the District of South Carolina considered the constitutionality of three South Carolina Senate and nine House of Representatives election districts. Ultimately, the court held that six of the house districts[2] and three senate districts[3] were unconstitutional because they violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[4] Using a standard of strict scrutiny, the court found that legislators had considered race as the predominant factor in their redistricting plans and that the districts were not narrowly tailored to accomplish the State's asserted interest of complying with sections 2 and 5 of the Voting Rights Act.[5] In sum, the court found evidence of racially gerrymandering and rejected the redistricting plans as unconstitutional.[6]

This article briefly describes the history of racial gerrymandering and how the *Beasley* decision is consistent with recent Supreme Court cases. Later sections will examine and question the propriety of judicial intervention into legislative redistricting plans. The analysis will end with a suggested solution to the *Beasley* dilemma—a system that would forego any need for judicial intermeddling.

II. BACKGROUND

The term "gerrymander" was coined over 180 years ago to describe a Massachusetts voting district sinuously shaped liked a salamander and so drawn to benefit Governor Elbridge Gerry's political party.[7] As such, racial

---

1. No. 3:95-3235-0, 1996 WL 673301 (D.S.C. Sept. 27, 1996) (to be reported at 946 F. Supp. 1174). *Beasley* was a consolidated case that also included *Able v. Wilkins*, No. 3:96-0003-0.

2. Districts 12, 54, 82, 91, 103 and 121. *See id.* at *42.

3. Districts 29, 34 and 37. *See id.*

4. *See id.* at *43.

5. *See id.*

6. *See id.* at *42.

7. *See* N. Jay Shepherd, Note, *"Abridge" Too Far: Racial Gerrymandering, the Fifteenth Amendment, and* Shaw v. Reno, 14 B.C. THIRD WORLD L.J. 337, 342 (1994); *see also* Jon M. Anderson, Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket after* Davis v. Bandemer, 136 U. PA. L. REV. 183, 183 (1987).

gerrymandering is the "deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes."[8] Gerrymandering involves the differential treatment of similarly situated people (for the purposes of drawing voting districts); therefore, it implicates the Equal Protection Clause of the Fourteenth Amendment and requires strict scrutiny.[9]

"Gerrymandering violates the American constitutional tradition by conceding to legislatures the power of self-selection."[10] Attempting to gain power by mechanical manipulation of the districts instead of appealing to voters is obviously wrong.[11] Yet, gerrymanderers make no attempt to appeal rationally to the public interest and common welfare. "[I]ndeed, their purpose is to eliminate the need for any such appeal."[12]

In *Reynolds v. Sims*[13] the Supreme Court held that the Equal Protection Clause requires legislative districts to consist of substantially equal populations.[14] As a result, states are required to redraw district lines every ten years to take into account population shifts.[15] Combining precise federal census data[16] with high-tech computer equipment,[17] legislators can manipu-

---

8. Shaw v. Reno, 509 U.S. 630, 640 (1993) (alteration in original) (quoting Davis v. Bandemer, 478 U.S. 109, 164 (1986)) [hereinafter *Shaw I*]; *see also* Hays v. Louisiana, 839 F. Supp. 1188, 1194 (W.D. La. 1993), *vacated on other grounds*, 114 S. Ct. 2731 (1994) (holding that a legislature is guilty of racial gerrymandering when it "*intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race.").

9. *See Shaw I*, 509 U.S. at 653. Strict scrutiny is also the standard of review for cases involving "benign" racial classifications. *See id.* A racial classification is benign if it seeks to help minorities remedy past discrimination by ensuring the election of minority officials in near proportion to the minority population. *See* Jeffery G. Hamilton, Comment, *Deeper Into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1555 (1994).

10. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 304 (1991). "Self-constitutive . . . legislatures make no sense under [the] Constitution," which mandates a dispersion of power. *Id.*

11. *See id.* at 314.

12. *Id.*

13. 377 U.S. 533 (1964).

14. *See id.* at 559-61. Of course, the rule of equal populations was first developed in the context of apportionment for the Federal House of Representatives. Expansion of the concept has been a matter of course rooted in the constitutional ideal that "one man's vote in a congressional election is to be worth as much as another's." *Id.* at 559.

15. "Every ten-years, the job of the legislature is to make changes in the representation plan that reflect the political makeup of the state as shown by the census." *Beasley*, 1996 WL 673301, at *12; *see* U.S. CONST. art. I, § 1, cl. 3; Polsby & Popper, *supra* note 10, at 301.

16. "Data from the U.S. Census Bureau is now readily accessible by computer. The Bureau's Topologically Integrated Geographic Encoding and Referencing (TIGER) System gives census information on a street-by-street format allowing districting authorities to include or exclude people in fantastic detail." Shepherd, *supra* note 7, at 344 (footnotes omitted); *see also* DAVID

late data to a politicians' specifications and almost guarantee the results of an election.[18]

In 1965 Congress enacted the Voting Rights Act[19] for "the broad purpose of remedying racial voting discrimination that had been practiced principally in southern states."[20] It is argued that sections 2 and 5 of the Voting Rights Act essentially "mandate that majority-minority districts be created whenever possible."[21] Section 2 provides a cause of action for minority vote dilution, and section 5 prohibits retrogression.[22] Section 5 also requires a state to obtain preclearance from the United States Attorney General[23] or to obtain a judgment from the United States District Court for the District of Columbia declaring that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[24]

Congress amended the Voting Rights Act in 1982[25] to guarantee minorities the right to a meaningful vote and to give litigants broad authority "to challenge the inequalities in the political process."[26] However, "[t]he tragedy of this new voting rights jurisprudence is that it has only served to polarize the races, doing little to substantively advance the interests of minority voters."[27] Because racial gerrymandering segregates minorities into their own electoral districts,[28] politicians no longer need to broadly

---

BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 60-61 (1992).

17. The South Carolina Senate and House of Representatives used sophisticated computer equipment and "software that showed precincts, streets, population, and racial composition of all areas based on the 1990 federal census data base." *Beasley*, 1996 WL 673301, at *10.

18. Hamilton, *supra* note 11, at 1544.

19. 42 U.S.C. § 1973 (1994).

20. David F. Walbert, *Georgia's Experience with the Voting Rights Act: Past, Present, and Future*, 44 EMORY L.J. 979, 979 (1995).

21. Hamilton, *supra* note 11, at 1556. A majority-minority district is a voting district that is composed of a majority of a particular racial minority group.

22. *See id.* at 1556 n.217. If it is possible for a state to create a majority-minority district, then it must do so to avoid a vote dilution claim. *See id.* Retrogression occurs when a state decreases the number of majority-minority districts it had previously created. *See id.*

23. *See id.* at 1556 n.220. The Attorney General determines whether or not the plan has enough majority-minority districts, and if not, the AG will deny preclearance. *See id.* at 1556.

24. *Shaw I*, 509 U.S. at 634.

25. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (codified at 42 U.S.C. § 1973 (1994)).

26. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1095 (1991).

27. Hamilton, *supra* note 11, at 1548.

28. *See id.* at 1549.

appeal to people of all races. They need appeal only to members of their own race.[29]

Although racial gerrymandering ensures more black representation, black electoral success may not necessarily result in a government more responsive to their interests.[30] "Minority empowerment requires minority legislative influence, not just minority legislative presence."[31] White representatives are now elected from homogeneous white districts, and that allows whites to ignore minority interests without the fear of adverse electoral consequences.[32] Instead of simply ensuring that black officeholders are elected from black districts, attention to minority interests might actually be better advanced "by increasing the number of officeholders, black or white, who have to appeal to blacks to win."[33] "When politicians of all races realize that they must appeal to voters of all races in order to win an election, only then will they effectively address minority concerns."[34]

The United States Supreme Court first dealt with racial gerrymandering in 1960 in *Gomillion v. Lightfoot*.[35] The Court struck down an Alabama law that excluded African-Americans from local elections by redrawing the city's boundaries as a "strangely irregular twenty-eight-sided figure."[36] Because the Alabama law singled out a racial minority for invidious treatment, the Supreme Court held the law unconstitutional.[37] Over thirty years later in *Shaw v. Reno* (*Shaw I*),[38] the Supreme Court "expanded its prohibition of racial gerrymandering to restrict 'affirmative gerrymandering' aimed at increasing the power of ethnic minorities."[39]

In *Shaw I* the Supreme Court stated that racial gerrymandering, even when used for remedial purposes, "may balkanize us into competing racial factions [and] threatens to carry us further from the goal of a political system in which race no longer matters."[40] Therefore, the Court created a new way to establish a prima facie case "under the Equal Protection Clause, recognizing geographical oddities in legislative redistricting plans as sufficient evidence of intentional discrimination to prove an equal protection violation."[41]

---

29. *See id.*

30. *See id.*

31. Guinier, *supra* note 26, at 1102.

32. *See id.* at 1126.

33. *See id.* at 1127 (quoting ABIGAIL THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 21 (1987)).

34. Hamilton, *supra* note 9, at 1552.

35. 364 U.S. 339 (1960).

36. Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 412 (1993).

37. *See Gomillion*, 364 U.S. at 346.

38. 509 U.S. 630 (1993).

39. *See* Lewyn, *supra* note 36, at 413.

40. *Shaw I*, 509 U.S. at 657.

41. Aimée D. Latimer, Note, Miller v. Johnson*: The Supreme Court Eases the Burden of*

To make out an equal protection claim of racial gerrymandering, a plaintiff need merely show that the "reapportionment scheme [is] so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification."[42] A state can, however, defeat a claim that a district has been racially gerrymandered by showing that it adhered to traditional districting principles such as compactness, contiguity, and respect for political subdivisions.[43]

In *Miller v. Johnson*[44] the Supreme Court affirmed the *Shaw I* holding that adherence to traditional districting principles may suffice to refute a claim of racial gerrymandering; however, the *Miller* Court added that a state cannot make such a refutation when compactness, contiguity, and respect for political subdivisions are subordinated to racial objectives.[45] The *Miller* Court further eased the plaintiffs' burden by freeing them of any requirement to submit evidence "regarding the district's geometry and makeup [and by not requiring plaintiffs] to make a threshold showing of bizarreness."[46] Thus, after *Miller* a plaintiff must show only that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[47]

If a plaintiff can prove that race was in fact the predominant factor in creating a redistricting plan, then the burden shifts to the State to satisfy strict scrutiny.[48] That is, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest.[49] The *Miller* Court held that a state's redistricting plan created to comply with federal anti-discrimination laws could withstand strict scrutiny, but only when the racially gerrymandered districts were reasonably necessary to satisfy the requirements of the federal laws.[50] Although courts normally defer to the Justice Department's interpretation of federal laws, the *Miller* Court stated that "blind judicial deference to legislative or executive pronouncements . . . has no place in equal protection analysis."[51]

Proving Racial Gerrymandering, 27 LOY. U. CHI. L.J. 97, 115 (1995).

42. *Shaw I*, 509 U.S. at 658.

43. *See id.* at 647.

44. 115 S. Ct. 2475 (1995).

45. *See id.* at 2489.

46. *See id.* at 2488.

47. *Id.*

48. *See Beasley*, 1996 WL 673301, at *37. Strict scrutiny requires the State to prove that its actions are in pursuit of a compelling interest and that its means chosen are necessary to achieve that compelling interest. *See* Shaw v. Hunt, 116 S. Ct. 1894, 1902 (1996) [hereinafter *Shaw II*].

49. *See Miller*, 115 S. Ct. at 2490; *see also* Bush v. Vera, 116 S. Ct. 1941, 1951 (1996); *Shaw II*, 116 S. Ct. at 1898; *Shaw I*, 509 U.S. at 643.

50. *See Miller*, 115 S. Ct. at 2491; *see also* Latimer, *supra* note 41, at 123.

51. *See Miller*, 115 S. Ct. at 2491 (quoting City of Richmond v. J.A. Croson Co., 488 U.S.

Most recently, in *Bush v. Vera*[52] and *Shaw v. Hunt* (*Shaw II*),[53] the Supreme announced again that strict scrutiny is the proper standard of inquiry when examining redistricting legislation that subordinates traditional race-neutral districting principles to clear racial considerations.[54] Furthermore, the *Shaw II* Court required that states must identify specific instances of past discrimination and present a strong basis in evidence supporting the conclusion that remedial action is necessary "*before* embark[ing] on an affirmative-action program."[55] Clearly the states are now faced with at least a more burdensome evidentiary task.

III. SOUTH CAROLINA'S APPLICATION OF THE SUPREME COURT DECISIONS

On August 12, 1996 the United States District Court for the District of South Carolina considered, as a consolidated case, two challenges to the constitutionality of certain South Carolina election districts.[56] The district court eventually held that race had been considered as the predominant factor in drawing house districts 12, 54, 82, 91, 103, and 121 and senate districts 29, 34, and 37.[57] Further, the court found that the districts were not narrowly tailored to fulfill the state's asserted interest of complying with the Voting Rights Act and, therefore, concluded that the districts violated the Equal Protection Clause of the Fourteenth Amendment.[58]

According to the court, the evidence of racial gerrymandering was "overwhelming."[59] Among the host of documents and facts cited, the "bizarre shape"[60] of the districts and abnormal protrusions reaching out for the sole purpose of encircling areas of minority voters,[61] Representative Don Beatty's presentation of the redistricting plan in which he mentioned race as

---

469, 501 (1989)).

52. 116 S. Ct. 1941 (1996).

53. 116 S. Ct. 1894 (1996).

54. *See Bush*, 116 S. Ct. at 1951; *Shaw II*, 116 S. Ct. at 1901.

55. *Shaw II*, 116 S. Ct. at 1902 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

56. Smith v. Beasley, No. 3:95-3235-0, 1996 WL 673301 (D.S.C. Sept. 27, 1996) (to be reported at 946 F. Supp. 1174).

57. *Id.* at *42.

58. *See id.* at *43.

59. *Id.* at *38.

60. *Id.* at *38.

61. District 82 "snaked down into the City of Aiken to pick up black population." *Id.* at *26. District 91 "is bizarre because of the hook around the white population in central Barnwell County." *Id.* at *27. District 37 "meanders around the axis of U.S. Highway 17 (Alt.), stretching . . . 98 miles long." *Id.* at *35. District 34 "snakes along the northern half of South Carolina's Atlantic shoreline," narrows to a width of less than a block, and extends about 90 miles. *Id.* at *36.

the only factor for drawing the lines,[62] "the lack of any analysis [of the traditional redistricting principles] of compactness, communities of interest, or contiguity,"[63] "the insistence on minimum racial percentages in certain districts,"[64] and "the numerous calls and conferences with Department of Justice attorneys"[65] weighed heavily.

The district court recognized the good faith of the state legislature in drawing the districts to "what they thought was required by the law and by the Department of Justice at the time."[66] The court noted, however, that good faith is not enough to excuse the constitutional violation inherent in drawing election districts according to race.[67] In addition, the court was unwilling to grant any special deference to the Justice Department's interpretation of the Voting Rights Act. *Miller v. Johnson*[68] guided this latter decision. Indeed, Justice Kennedy, writing for the *Miller* majority, flatly chastised the Justice Department for "utilizing [section] 5 [of the Voting Rights Act] to require States to create majority-minority districts wherever possible."[69] Further, Justice Kennedy described the Justice Department's interpretation as an "expan[sion of] its authority under the statute beyond what Congress intended and we have upheld."[70]

The *Beasley* court, in an attempt to comply with *Miller* and other Supreme Court precedent,[71] ruled that any fashion of race-based districting must meet the tests of strict scrutiny analysis.[72] Thus, the house and senate faced the burden of producing evidence that race was not the predominant basis of their districting schemes. But the plaintiffs maintained the ultimate burden of

---

62. Representative Beatty mentioned race twenty-four times in his short presentation. There was no mention or consideration of any other factor in drawing the district lines. *See id.* at *18.

63. *Id.* at *38. The challenged house plan created 32 majority-minority districts, split 222 precincts, and split all but two counties. *See id.* at *9. The challenged senate plan created 12 majority-minority districts and divided 167 voting tabulation districts (VTDs). *See id.* at *33.

64. *Id.* at *38.

65. *Id.*

> The Department of Justice's advocacy position is evidenced in many memoranda, letters and notes of telephone conversations, but most particularly by the apparent epidemic of amnesia that has dimmed the memory of many DOJ attorneys who were involved with South Carolina's efforts to produce a reapportionment plan that would pass preclearance

Id. at *18.

66. *Id.* at *39. The court even conceded that drawing voting districts may be the "most difficult task a legislative body ever undertakes." *Id.*

67. *See id.*

68. 115 S. Ct. 2475 (1995).

69. *Id.* at 2493, *quoted in Beasley*, 1996 WL 673301, at *40.

70. *Id.*

71. *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941, 1956 (1996); *Shaw II*, 116 S. Ct. at 1902; *Miller*, 115 S. Ct. at 2488; *Shaw I*, 509 U.S. at 647.

72. *See Beasley*, 1996 WL 673301, at *41.

persuading the court that the state did not in fact serve some alternative and compelling interest or that the redistricting plan was not narrowly tailored to further this interest.[73] The district court did recognize that remedying specific past discrimination was a compelling state interest;[74] however, neither the house nor the senate could offer any evidence of their desire to remedy past discrimination.[75]

The house and senate defended their plans by arguing that they had a compelling state interest in obtaining preclearance under the Voting Rights Act.[76] In response, the *Beasley* court did not expressly decide whether compliance with the Act was a compelling interest.[77] Instead, the court assumed that intended compliance was compelling and focused on determining whether the districting legislation was narrowly tailored to achieve that objective.[78]

By implication, the district court suggested that the reapportionment plan could have obtained preclearance if it (1) eliminated the bizarre configurations of the districts,[79] (2) established no more majority-minority districts than necessary to avoid retrogression,[80] (3) did not create "super-safe" majority-minority districts with at least a fifty-five percent Black voting age population,[81] and (4) adhered to traditional redistricting principles when drawing district lines.[82] Neither the house nor senate plans could satisfy the strict scrutiny test; therefore, the district court ruled the redistricting plan was unconstitutional.[83]

Notwithstanding its finding of racial gerrymandering, the court allowed the 1996 general elections to proceed as scheduled. The court recognized it had a duty not to disrupt an election already in progress.[84] The court did

---

73. *See id.* at *39.

74. *See id.* at *40.

75. *See id.*

76. *See id.* at **40-41.

77. *See id.* The *Beasley* court also pointed out that the *Shaw I* and *Miller* decisions had avoided to specifically hold that compliance with the Voting Rights Act was or was not a compelling state interest. *See id.* at *40.

78. *See id.* at *41.

79. Districts are bizarre if they are not geographically compact and when minority pockets of populations are brought in by using land bridges, tentacles, and appendages reaching out from the core of the district. *See id.* at *38.

80. "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the state went beyond what was reasonably necessary to avoid retrogression." *Id.* at *41 (quoting *Shaw I*, 509 U.S. at 655).

81. *See id.*

82. *See id.* at *42.

83. *See id.*

84. "[W]here an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of

enjoin the State, however, from conducting any subsequent elections using these unconstitutional districts.[85] Furthermore, the court ordered that legislators elected in the 1996 general election from these racially gerrymandered districts will only be able to serve for one year and that special elections must be held in 1997 to elect representatives and senators to serve the balance of the terms in the amended districts.[86]

The General Assembly will have until April 1, 1997[87] to redraw these election districts and have them precleared by the Department of Justice.[88] If the legislature fails to pass a constitutional redistricting plan, the court will place its own remedial plan into effect.[89]

The district court followed Supreme Court precedent by allowing the state to have the first opportunity to create a constitutional redistricting plan. In *Wise v. Lipscomb*[90] the Court recognized that "redistricting . . . legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."[91] The Court further noted that federal courts should give the legislature a reasonable opportunity to develop a substitute measure whenever practicable,[92] and only after allowing an adequate opportunity will judicial relief be appropriate.[93]

According to the South Carolina Constitution,[94] the General Assembly has the responsibility, subject to the approval of the Governor, to redistrict the South Carolina Senate and House of Representatives.[95] The General Assembly can, of course, override a Governor's veto by a two-thirds vote of

---

immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." Reynolds v. Sims, 377 U.S. 533, 585 (1964), *quoted in Beasley*, 1996 WL 673301, at *43. The district court decided not to change the districting plan for the 1996 elections because the election was only six weeks away, the primary elections had already been held, the candidates had spent significant time and money campaigning, and the delay would cause significant confusion for the voters. *See Beasley*, 1996 WL 673301, at *44.

85. *See id.* at *45.

86. *See id.* Individuals in the infirm districts "are entitled to have their rights vindicated as soon as possible so that they can vote for their representatives under a constitutional apportionment plan." *Id.* (citing Cosner v. Dalton, 522 F. Supp. 350, 364 (E.D. Va. 1981)).

87. *See id.* at *45.

88. Section 5 of the Voting Rights Act requires a state to obtain approval from the Attorney General before enacting the districting plan. The purpose of the section 5 review "does not require maximization; it is intended to prevent retrogression." *Id.* at *41.

89. *See id.*

90. 437 U.S. 535 (1978).

91. *Id.* at 539.

92. *See id.* at 540.

93. *See* Reynolds v. Sims, 377 U.S. 533, 586 (1964).

94. S.C. CONST. art. III, § 3.

95. *See Beasley*, 1996 WL 673301, at *2.

both the senate and the house.[96] "Only when a legislature fails to redistrict according to the federal Constitution and applicable federal statutes in a timely fashion does judicial relief become appropriate."[97]

Although the *Miller* Court emphasized its hesitancy in reviewing redistricting legislation,[98] it, nevertheless, reviewed the legislative decision. Justice Ginsburg criticized the majority's holding because it expanded the judiciary's role in the redistricting process.[99] Justice Ginsburg argued that the principles of federalism and separation of powers justify giving deference to state legislatures' redistricting plans.[100] Relying on Supreme Court precedent, Ginsburg stated that "reapportionment is primarily the duty and responsibility of the State through its legislature . . . , rather than of a federal court."[101]

IV. CONCLUSION

Judicial interference with legislative redistricting plans creates serious separation of powers concerns. At its base, it means unelected officials will decide issues that should be decided only by a representative body.[102] Before Congress passed the Voting Rights Act, some judicial intervention was admittedly necessary in voting rights cases to protect important constitutional rights. Since passing the Act, however, Congress has ensured that state legislatures recognize minority voting rights through such safeguards as requiring preclearance from Department of Justice officials, who set uniform guidelines for the states to follow.[103] Today's courts should, therefore, consider, at great length, the propriety of judicial intervention before taking over the job of legislators.

Repairing the faulty, gerrymandered districts is exactly the job the United States District Court for the District of South Carolina may yet be required to do. That is, the South Carolina Senate and House of Representatives may not be able to approve new plans and obtain preclearance from the Department of

---

96. *See* S.C. CONST. art. IV, § 21.

97. *Beasley*, 1996 WL 673301, at *2 (citing White v. Weiser, 412 U.S. 783, 794-95 (1973)).

98. "Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 115 S. Ct. at 2488.

99. *See id.* at 2499 (Ginsburg, J., dissenting).

100. *See* Latimer, *supra* note 41, at 134 (citing *Miller*, 115 S. Ct. at 2500 (Ginsburg, J., dissenting)).

101. *Miller*, 115 S. Ct. at 2500 (Ginsburg, J., dissenting) (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975)).

102. *See* Latimer, *supra* note 41, at 143. "Fixing gerrymandering would only bring worse evils . . . , such as requiring judges to perform a crucial regulatory function at the heart of the political process." Polsby & Popper, *supra* note 10, at 316.

103. *See supra* notes 21-25 and accompanying text.

Justice before April 1, 1997. It is unlikely that incumbent senators and representatives will approve a plan that alters their districts and requires them to run again in November 1997.[104]

The South Carolina General Assembly is clearly in a difficult situation. Without restraint, legislators will be tempted to draw district lines to favor the political party in power, and without preclearance, the courts will be forced to interfere with a function given exclusively to the legislatures by the South Carolina Constitution.

A better solution may be to form a commission consisting of non-politicians appointed by the legislature to propose new election districts that adhere to the traditional districting principles of compactness, contiguity, and respect for political subdivisions. The legislature would likely be able to obtain preclearance from the Department of Justice for such a non-partisan redistricting plan. At the same time, the legislature would maintain a satisfying modicum of control over the reapportionment process. In any event the legislative and judicial branches must reach a compromise; without compromise, the dance is sure to begin again. The only question is whether the next challenge will be based on equal protection or separation of powers.

Michelle DeLuca

104. As of January 31, 1997, the South Carolina Senate attached its reapportionment plan to the House plan, H. 3002. The Senate passed H. 3002 with amendments and returned it to the House for approval.