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Before the "Contract with America" was imposed upon the American public in the 1994 Republican Revolution, the tides of conservatism were shifting in our least visible branch of government: the judiciary. While liberals controlled Congress for fifty years and have come and gone as President, the Chief Justice of the United States Supreme Court has been an ideological conservative since 1969, a time when America was mired in Vietnam and the Great Society established by LBJ. But as our forefathers intended by the nature of the federal system, the Supreme Court has found, like the executive and legislative branches, that a change in leadership does not necessitate an immediate ideological shift. One can argue, however, that of all three of our branches of government, the judiciary has remained the most consistently conservative in the past few decades, steadily gaining control over our society via Republican nominations to the bench and a highly selective agenda. Under the leadership of Chief Justices Warren Burger and William Rehnquist, the modern Supreme Court has acquired a fundamentally different role in our society compared to the Court just thirty years ago under Earl Warren's tutelage. Nowhere is this increased conservatism in the Burger and Rehnquist Courts more clearly demonstrated than in the controversial issue of legislative redistricting.

This paper will provide an overview of the Supreme Court and its role as a political institution in our democratic society. The paper will then provide a general overview of the changes in climate which have led to the current ideological makeup of the Court as well as a cursory evaluation of Supreme Court decisions in major issue areas. Specifically, this paper will focus on the Burger and Rehnquist's Court treatment of cases involving the sensitive redistricting issue, whose case history shall also be traced in order to understand the recent changes in

Supreme Court ideological direction in this area. I shall argue that though the Supreme Court headed by William Rehnquist has been characterized as a Court turning ideologically conservative, the Court has, like its liberal predecessors, remained quite activist in its policies. The redistricting cases provide a clear example of an issue which has been addressed under this new conservative activism. As a result, the laws of redistricting have changed considerably when challenged in the Burger and particularly Rehnquist Court since the first case on redistricting, Baker v. Carr, was heard in the Court headed by Earl Warren.

As a relatively new issue for the Court to tackle, redistricting presents a challenge to the core of the civil rights movement. The issue of legislative redistricting has largely been left up to the state legislatures until the onslaught of litigation in the early 1990's prompted Court intervention. But to understand the rulings made by the Burger and Rehnquist Courts in redistricting cases, an explanation of the role of the Court and its power since 1969 must be made, for only by examining the general trends of the Burger and Rehnquist Courts can the decisions in the redistricting cases be placed in proper context.

INTRODUCTION

The Supreme Court is often regarded as the weakest branch of our federal government, for the question often arises asking who will enforce the decisions of the body. Moreover, the Framers believed that the Supreme Court would be "the least dangerous branch" of government "precisely because of the limited capability of the courts to cultivate and mobilize mass support" (Silverstein 1994, p. 35). In addition, the Court receives comparatively less media attention than

the Congress and the President, and many of the crucial decisions reached each term go unnoticed by the average American. After all, Justices of the nation's Highest Court never seek reelection; thus, they are accountable to no one but themselves and the law they have pledged to uphold. While Justices' tenure may seem rather apolitical, politics are not entirely excluded from the Supreme Court, and neither are Justices' personal beliefs and values. This inherent conflict between injecting personal views and overstepping the traditional bounds of the judiciary into policy-making underlies an essential debate at the heart of the Supreme Court: judicial activism versus judicial restraint.

THE ROLE OF THE COURT IN POLICY-MAKING

The controversy over the role of the Supreme Court in American democracy results from the anti-majoritarian nature of the Court given its perceived capacity to unilaterally achieve social change. For many it is incomprehensible how as few as five justices can formulate fundamental policy for an entire nation. Because the Court is a legal institution, it is expected to act according to strict legal principles "such as precedent, statute, and constitution" (Dahl 1956, p. 280). However, the Court is also a political institution. Most cases that come before the Court involve issues that are difficult to analyze such as due process and equal protection. This vagueness of language gives wide latitude for political influence into the legal interpretation of laws. As Dahl argues, cases before the Supreme Court "are usually cases where competent students of constitutional law, including the learned justices themselves, disagree; where the words of the Constitution are general, vague, ambiguous, or not clearly applicable; where

precedent may be found on both sides..." (Dahl 1956, p. 280). Thus, political factors permeate the legal realm of the Supreme Court decision-making process. For those who adhere to the idealistic belief that the Supreme Court is isolated from politics, the Supreme Court's role is only as an interpreter of law. This is where the problem arises, for as mentioned earlier, certain issues before the Court require "resolving questions of fact and value by introducing assumptions derived from their own predispositions, (Dahl 1956, p. 280), giving the Court a policy-making role similar to that of a constituent-bound legislator. So we then are faced with the reality of an unelected, elite body making policy for the majority, which seems to be inherently undemocratic. But just how undemocratic is the Supreme Court?

Dahl argues that indeed the Supreme Court is a policy-making institution, which is largely influenced by the ideological viewpoints of the Justices (Dahl 1956, p. 285). However, there are limits to judicial power which safeguard the polity against abuse. For example, the stances taken by the Justices are rarely too far out of line with the prevailing national views of the time because the Justices are appointed by presidents whom are ideologically similar, and there is a three out of four chance that a President will appoint a new Justice within the first three years of his term (Dahl 1956, p. 285). Moreover, the findings of several of Dahl's studies demonstrate once again the limited nature of the Court's policy-making power, for he cites that the Congress and the President will reverse many major policy problems it faces from the Supreme Court decisions within four years (Dahl 1956, p. 290). Dahl concedes that sometimes the Court does have a stalling effect on the changing of policy by Congress and the President, but overall, the legislative and executive branches express the will of the majority as the Framers of our Constitution intended. Thus, policy in America is safe from the potential tyranny of the Supreme

Court from a democratic standpoint. After all, the Supreme Court cannot really make policy; it must wait for policy issues to arise via cases that are appealed. In addition, the Court must depend on others to implement its decisions, once again limiting its political power (Carp and Stidham 1993, p. 29).

Further, Dahl argues that the Court is "inevitably a part of the dominant national alliance. By itself, the Court is almost powerless to affect the course of national policy" (293). This alliance, which consists of the executive, legislative, and judicial branches, shapes American policy for as long as it is in power. The Court, however, is neither a sole actor nor an agent of this "alliance", because it cannot act alone (as the New Deal backlash proved) nor can the alliance succeed without the Court. "It is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretation of the Constitution (Dahl 1956, p. 293). Dahl believes that the legitimation of democracy provided by the Court is more crucial than its policy-making abilities. The Court's real effect on policy is likened to setting boundaries within which policy can be formulated by the federal, state, and local governments. Nonetheless, the Court has demonstrated the powerful potential of its policy-making in the liberal policies created under the Warren Court and the more conservative policies pursued by the Burger Court and the Rehnquist Court.

THE IMPORTANCE OF SUPREME COURT NOMINATIONS

Finally, one must recall that Supreme Court Justices, though appointed for life, can be removed for bad behavior. Most recently one can recall Justice Abe Fortas' resignation after he faced ethical scrutiny in 1968 (Goldman 1991, p. 123). But because of the dominant role that the

Supreme Court has attained in interpreting cases involving civil liberties legislation, which affect many Americans lives, as opposed to the pre-1937 dominance of economic regulation cases, nominations to vacancies in the Supreme Court have become highly publicized and controversial events in the past twenty years. In the early Supreme Court, appointments were not taken as seriously by even the appointees themselves. For example, "The period 1790-1799 saw several individuals decline their nomination to the Court and one, Robert H. Harrison, chose to accept a *state* position rather than accept a Supreme Court justiceship" (Carp and Stidham 1993, p. 24). Much has changed in the past two hundred years, however. Even until the 1960's , Supreme Court nominations came and went virtually unnoticed by the American public (Silverstein 1994, p. 15). Once nominated by the President and approved by the Senate, the Justices took the bench for life; most nominees went through the process unscathed and unnoticed. But because of the increasing importance of the Supreme Court in sensitive issue areas as perceived by the American public, and because, since the activist Warren Court of the 1960's, minority groups have come to depend upon the Court as their potential protector, nominations to the Court are now the focus of intense scrutiny not only by the Senate Judiciary Committee, but also by the American public. Few will easily forget Clarence Thomas' confirmation hearings in 1991 which dominated the networks for days. In addition, many lobbyist and advocacy groups have involved themselves in the nomination hoopla. For example, in the Robert Bork nomination fiasco of 1986, "opponents of the nomination set about to compile a collection of Bork's scholarly writings and his opinions while an appeals Court Judge" (Silverstein 1994, p. 72). Such opponents who testified against Bork included everyone from the Audubon Society to the National Gay and Lesbian Task Force, which is certainly an unusual alliance (Silverstein 1994, p.

73). Bork's failed nomination goes to show the perceived power of the Court as well as the fact that a "radical" nominee is unpalatable to the American public. Since Bork's disaster and resulting embarrassment to fellow conservative President Ronald Reagan, ensuing nominees of the last three presidents have been generally moderate in their views and credentials. But this has not stopped the modern President from continuing the precedent established by George Washington in appointing Justices with whom the President is ideologically compatible. Hence the appointment of Kennedy, Scalia, Souter, and Thomas by Bush and Reagan in the last ten years. These four Justices, together with Rehnquist and Reagan holdout Sandra Day O'Connor make up the conservative majority so longed for by conservative presidents like Nixon, Ford, and even Reagan. This majority, while showing a trend toward the conservatism of their appointing Presidents and the current Congress, have still been largely an ideological disappointment because of the swing potential and moderate tendencies of certain Justices, particularly of Kennedy, Souter, and O'Connor. It is important to note, however, that Supreme Court Justices are not politically accountable to constituents or to their appointing Presidents, which often disappoints the President. A recent example is Nixon's appointment of Harry Blackmun, who was selected to the highest court in 1970 as a conservative agent of change in response to the Warren liberalism (Goldman 1991, p. 143). Blackmun's rather liberal voting record, coupled with his authorship of the majority opinion of the 1973's Roe, were swift blows to the hopes of returning to a conservative Court. Disappointments such as Blackmun demonstrate the potential importance of Supreme Court nominees by Presidents. The power of appointment was highlighted during Roosevelt's attempted Court-packing plan (Goldman 1991, p. 105). Instead, Roosevelt was able to transform the Court not by enlarging it to fifteen Justices but by appointing

nine men during his years in office. Only George Washington appointed more (Goldman 1991, p. 105). On the other hand, some Presidents' agendas were stalled by their inability to appoint to the Highest Court, as was the case with Jimmy Carter. Thus, as the importance of the Court and the outcomes it has on our national policy has increased in our society, so has the importance of Supreme court nominations increased.

JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT

Underlying the outcomes of the Supreme Court is a fundamental debate concerning the appropriate role of the Court in American society. This controversy, while often masking fundamental differences in political ideology, revolves around the conflict between judicial activism versus judicial restraint.

Judicial activism is defined as a Court's "willingness to overturn decisions of other political institutions" (O'Brien 1986, p. 42). Judicial activism, then, describes the potential role of the Supreme Court in the American system. Although often regarded as a twentieth century phenomenon, one can argue that judicial activism has existed since the Marshall Court's creation of judicial review in Marbury v. Madison. In creating judicial review, "Marshall established the Court as the final arbiter of the meaning of the Constitution and thereby made the judiciary an attractive institutional ally for powerful groups" (Silverstein 1994, p. 35). Marshall also established the Court's role by giving it the power to declare an act of Congress unconstitutional. Combined with the ability to declare state statutes as well as their own previous rulings unconstitutional, the Court holds a power denied the executive and legislative branches of government. After Marshall, " The Court did not challenge Congress again until the Taney Court's decision in Dread Scott v. Sandford in 1857" (O'Brien 1986, p. 42). Since Dread Scott,

the amount of judicial activism has increased and the issues in which the justices are active are more controversial to the American public at large. Thus, we often hear of judicial activism, particularly in connection with the highly activist Warren Court (1953-1969) (O'Brien 1986, p. 42). Over the past two hundred years the Supreme Court has steadily increased the number of state laws and municipal ordinances overturned as well as Acts of Congress held unconstitutional. For example, the White Court (1910-1921) overturned six Supreme Court decisions, twelve Acts of Congress, one hundred and seven state laws, and eighteen municipal ordinances (O'Brien 1986, p. 43). By mid-century, the power of the Vinson Court (1947-1952) had waned considerably, as only eleven Supreme Court decisions, one Act of Congress, thirty-eight state and seven municipal ordinances were overruled (O'Brien 1986, p. 43). But the very next Court, under Chief Justice Earl Warren, headed the Court in the direction it continues to take: Warren's court overruled forty-six Supreme Court decisions, twenty-five Acts of Congress, one hundred and fifty state laws, and sixteen city ordinances in his tenure (O'Brien 1986, p. 43). Finally, Burger's Court overturned fifty previous Supreme Court decisions, thirty-four Acts of Congress, one hundred and ninety-two state laws, and fifteen municipal ordinances between 1969 and 1986 (O'Brien 1986, p. 43). Thus, while the call for judicial restraint has been heralded by many, judicial activism is on the rise, even in the purportedly more conservative Burger Court. Again, this demonstrates the power of the Court in setting boundaries for American policy-making.

A certain amount of negativity is inherent with judicially active courts. Because judicial decisions necessarily create winners and losers, opposition inevitably emerges to Supreme Court positions. Losers often criticize the Court for intentionally expanding the powers of the Court

into areas that are political rather than justiciable. Specifically, judicial activism in modern American politics is closely associated with liberal justices who choose to interpret laws in favor of expanding the Constitution or Bill of Rights to include new freedoms. Obvious examples include Brown v. Board of Education's "unfair" treatment of minority school children, Griswold v. Connecticut's right to privacy, and Miranda v. Arizona's rights of the accused. These rights are not explicitly stated in the Constitution; however, activist justices have interpreted the Constitution and Bill of Rights to protect individuals.

Conservatives and other opponents of these policies have argued for judicial restraint. These critics have countered that activism has no place in interpreting the Constitution. Rather, they advocate a "strict constructionist" philosophy, relying on the original intent of the Framers of the Constitution. Strict constructionists hold to a literal reading of the Constitution informed by an understanding of historical context. They do not believe in inventing constitutional rights (Silverstein 1994, p. 37). Constructionists regard activists such as Warren's liberal rulings not as reflective of the "average American nor the authors of the Constitution. Rather, they reflect the liberal orthodoxy of the nation's elite lawyers and academics (Savage 1992, p. 46). Like judicial activism, judicial restraint traces its origins in history. Future Justice Felix Frankfurter, writing as a Harvard Law professor in the early twentieth century, proclaimed that "active judicial intervention in the affairs of state was incompatible with progressive politics" (Silverstein 1994, p. 39). Frankfurter instead "championed the jurisprudence of self-restraint that demanded that judges proceed in a statesmanlike manner, moderating the impact of judicial review through a real deference to the elected branches of government" (Silverstein 1994, p. 40). Justice Oliver Wendell Holmes espoused this philosophy of restraint as well, believing that "the

task of the modern judge was to defer to the legislative choice (Silverstein 1994, p. 41). During the New Deal, the Court was particularly restrained, instead allowing the executive and legislative branches to be liberal in their economic recovery policies. Justice Louis Brandeis emphasized this tenet of New Deal restraint by saying that "the most important thing we do is not doing" (Silverstein 1994, p. 42). Brandeis' views of the Court's role and of judicial restraint are best understood in examining his concurring opinion in Ashwander v. TVA: "

> The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it...When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided (Silverstein 1994, p. 45).

But Brandeis asserts a restraintist view and reaches a liberal outcome. This point is underscored by Brandeis' liberal voting record (Goldman 1991). Statistically, Brandeis voted 80.8 percent liberal in economics cases, and 60.7 percent liberal in civil rights and liberties cases. Though asserting restraintist rhetoric, Brandeis used this philosophy to justify liberal outcomes.

Modern judicial restraint, then, was born out of a deference to liberalism, not out of conservative protest, which is the current basis of the conservative revolution in American politics. But the deference of the Court was not long-lived. With the appointment of liberal champion and activist Hugo Black and an increasing number of individual rights cases on the docket, the unity the Court had enjoyed under Franklin Delano Roosevelt began to fracture (Silverstein 1994, p. 47). Enter new Chief Justice Earl Warren in 1953, who provided the impetus for the Court to return to Marshall's precedent: Court power.

> Marshall had established the possibility of extraordinary judicial power when judicial activism could be linked to the interests of powerful social, economic,

> and political forces...By linking the federal judiciary with Kennedy's New Frontier and Johnson's Great Society, the Justices of the Warren Court were confident that judicial activism in the service of the disadvantaged would be embraced as the new definition of judicial liberalism (Silverstein 1994, p. 49).

The new role undertaken by the Warren Court set the stage for its successors, the Burger and Rehnquist Courts, and explains the direction and decisions of these two most recent Courts.

THE BURGER COURT

The Supreme Court headed by Warren Earl Burger (1969-1986) was heralded by Nixon as part of a campaign promise to return America to law and order. Tired with the liberal judicial activism of Warren, particularly in the area of criminal rights, Nixon adhered to the strict constructionist view of judicial restraint. Critics of the Warren Court were not "so upset by what the Court was doing, but that a Court was doing it, (Silverstein 1994, p. 50), but Nixon had had enough. But while the change undertaken by the Warren Court seemed to occur overnight, the Burger Court could not halt the activist momentum as quickly as conservatives hoped it would. First of all, the makeup of the Court was still majority liberal. Burger's Court, to say the least, was ideologically a remnant of the Warren Court that was gradually replaced by conservative appointees. His Court in 1969 included Kennedy appointee Byron White, who proved to be much more conservative than his nominating President, (Goldman 1991, p. 123), Thurgood Marshall, a liberal Johnson appointee, Potter Stewart, an Eisenhower appointee and Warren Court holdover who was relatively moderate, Harry Blackmun, the new Nixon appointee who replaced resigning ultraliberal Justice Abe Fortas, Justices Black, Brennan, and Douglas, more Warren Court leftovers with solid liberal voting records, and Justice Harlan, the "frequent dissenter," (Goldman 1991, p. 121), of the Warren Court because of his belief in judicial

restraint. Thus, conservative Burger inherited a Court that was still majority liberal as well as fresh out of the Warren activist era. Even with the appointments of Rehnquist, Blackmun, Stevens, and O'Connor, the Court was still powered largely by liberal William J. Brennan. Thus, it is important to recognize that a Chief Justice, while powerful, is not omnipotent. Dissent levels were high in Burger's Court, particularly in the first decade. Through the end of the 1985 term, the lowest level of dissent was sixty percent (Goldman 1991, p. 144). This high rate illustrates the butting opinions and ideological disunity of the Court under Burger's tenure. Goldman points out that "if we compare the Burger and Warren Courts, we find that the Burger Court's average dissent rate was over twenty percent as compared to the fourteen percent average dissent rate on the Warren Court during the 1962-1968 terms" (Goldman 1991, p. 145-146). Other factors crippled Burger's potential for significant change as well. Burger was not particularly admired by his brethren, for he was seen by many as inefficient and unapproachable. He was even described as being highly paranoid about leaks to the press, much like the President who nominated him (Savage 1992, p. 42). Both of these characteristics limited Burger's ability to create the unity that the Warren Court had known and which had enabled much of Warren's success. In addition, Burger's Court faced a different political reality created by the Warren Court, which involved itself in many policy areas. For example, "The Warren Court began with 'Jim Crow', a vision of individuals deprived of their rights because they were Negroes. The Burger Court now faces affirmative action" (Blasi 1983, p. 227). In other words, concepts such as affirmative action and the right to remain silent that were created by the judicial policy-making of Warren's tenure have a direct effect on the Court today. The American public has come to expect more out of their Court because Warren's Court took it upon itself to become the defender

of the minorities. Thus, issues such as affirmative action and the rights of the accused and the right to an abortion still face the Court, though such issues were unheard of less than fifty years ago. Dealing with the legacy of the Warren Court was not an easy task, and continues to challenge the Court.

While the Warren Court placed individualism and the protection of minority interests on a pedestal, the Burger Court inherited a growing disdain for preferential treatments. Thus, the Burger Court was expected to overturn Warren's decisions overnight. When he was appointed Chief Justice, liberals around the country, particularly those involved with the American Civil Liberties Union and the NAACP feared for their recent victories. These groups had little to fear. Although four of the members (Rehnquist, Stevens, Blackmun, and O'Connor) were appointed to end the Warren Court revolution, the Burger Court became more involved in activist oriented areas than ever (Mason 1979, p. 321). Analysis of Burger's tenure shows how very little his Court retreated from Warren-era rulings. Statistically, Burger's' Court overturned more Supreme Court decisions, Acts of Congress, and state laws than did the Warren Court (O'Brien 1986, p. 43). And though Burger's Court became increasingly hostile to prisoners' suits, they maintained Warren-like decisions . For example, while Burger did not believe it was the Court's place to fix the prisons, he supported the exclusionary rule (Rosenberg 1991, p. 305). Of course, the most famous decision of the Burger Court was Roe v. Wade, which represented a brutal defeat for Nixon and other strict constructionists by continuing the Warren-era precedent of expanding the rights of the individual. Conservatives were not altogether unsuccessful in front of the Burger Court, however. "Conservative litigation groups had a greater than fifty percent chance of winning their cases through the 1981 Burger term," (Maveety 1991, p. 112), a higher success rate

than they knew under Warren. On an individual Justice level, the rate of dissent among liberal Justices increased dramatically during the early Burger years while conservative Justices like Harlan and Stewart reduced their rates of dissent considerably in comparison with their rates during Warren's tenure (Goldman 1991, p. 146). These trends by the Justices illustrate the move toward conservatism in the Court. In fact, during the Burger Court, Blackmun was the only conservative justice whose dissent rate did not decrease because of his pronounced liberal tendencies (Goldman 1991, p. 146).

Burger's modest changes and tendency to adhere to Warren's status quo is not unusual in Supreme Court history, however, for "the Court has always been the guardian of some particular interest and the promoter of preferred values" (Mason 1979, p. 283). While Burger himself declared as an appeals court judge that "our entire system of government would suffer incalculable mischief should judges attempt to oppose the judicial will above that of the Congress and the President,"(Mason 1979, p. 283), few of his decisions erased Warren's big changes, though minor revisions were made. Indeed, on August 11, 1976, Justice Powell noted a "leveling off of judicial activism, due in part to changes in the Court's membership" (Mason 1979, p. 311). Burger stated his opinion on the role of the Court as follows, saying just a few months after donning the robe:

> "Six months ago, if you had asked me what the Supreme Court should and should not do, I probably would have given you a quick answer. But now, I am not so sure. New problems arise that the authors of the Constitution did not anticipate. But the answers to the problems ought to be made to fit an existing pattern; a new pattern should not be made. The hardest question is when the Court should step in (Mason 1979, p. 319-320).

Case history from Burger's tenure shows that Burger chose to step in more often than not: " The pre-1937 Court blocked legislative initiative; the Warren and Burger Courts took policy-making

initiatives on their own (Mason 1979, p. 322).

Burger critics wondered how long the public would allow a Court that declares other's acts to be unconstitutional to function itself "unconstitutionally", that is, pursuing policy-making initiatives. Burger's tenure ended in 1986 with a majority liberal Supreme Court but a highly conservative President. Though Justices Black and Harlan retired due to poor health in 1971, and were replaced by conservative Nixon appointees William Rehnquist and Lewis Powell, only Rehnquist lived up to his conservative billing consistently (Goldman 1991, p. 141). Burger's Court had also seen the addition of Justice John Paul Stevens, a crucial Ford appointee who replaced the Court's leading liberal Justice Douglas (Goldman 1991, p. 141). Ford saw the opportunity to replace Douglas as golden, for he too was committed to returning the Court to conservatism. However, Stevens was also more moderate than expected (Goldman 1991, p. 141). The final change in Burger's Court occurred in 1981 when Ronald Reagan appointed the first woman to the Supreme Court, Sandra Day O'Connor. Replacing moderate retiree Potter Stewart, O'Connor was chosen again in hopes of moving the Court to the right. So throughout his tenure, Burger was given an almost entirely new Court, with the addition of four conservative appointees. But because of the moderate tendencies of conservatives O'Connor, Stevens, Blackmun, and Powell, combined with enduring liberals Brennan, Marshall, and moderate White, Burger's Court was divided not only ideologically but also emotionally, as many justices were frustrated with Burger personally. So when he decided to retire to devote his time to preparing for the celebration of the bicentennial of the Constitution, President Reagan seized the opportunity. Like Nixon, Reagan had promised a return to conservatism in the Court; only the lack of opportunity to change its membership except O'Connor until 1986 prevented this.

Finally, here was his chance to turn the conservative tide by elevating Associate Justice William Rehnquist to be the sixteenth Chief Justice of the United States.

THE REHNQUIST COURT

Rehnquist has seen the handing down of many controversial and influential rulings during his tenure. But the key behind the changes in his Court has made is the completely different makeup the Court now has. The early 1990's saw the first conservative majority on the Court in nearly fifty years. Rehnquist then was given the opportunity to utilize his strict constructionist philosophical views to garner a majority of restraint on the Court, particularly in civil liberties issues. One can argue, however, that Rehnquist's Court is just as guilty of activism as its predecessors, for "judicial self-restraint is often a thin guise for judicial advocacy" (Mason 1979, p. 288).

Rehnquist was nominated by Richard Nixon in 1971 to fill the seat vacated by Hugo Black largely because he shared Nixon's ideals. Rehnquist, a Stanford and Harvard graduate characterized by unflinching conservatism, was frustrated by his first fifteen years on the Court under Burger. He was often the lone dissenter in civil liberties cases and therefore was regarded by the public as a right-wing zealot. He was joined only by Byron White in dissenting from Roe, and voted to restrict criminal rights in each relevant case. A staunch supporter of states' rights, in Roe, Rehnquist attacked the Court as a superlegislature in determining when a states' interest is compelling enough (O'Brien 1986, p. 40). Rehnquist's ideological views of the Court's role have been remarkably consistent throughout his tenure, and his opinions demonstrate his consistency. Rehnquist stated his view of the role of the Court early in his legal career. As a clerk for Justice Robert Jackson, Rehnquist wrote a memo describing the Court as " an arbiter of

disputes between branches of government, rather than individual rights" (Savage 1992, p. 36). He further opined to Jackson that in Brown he felt a decision by the Court would require bringing in justices' outside views, for the Court should not "embody only the sentiments of a transient majority of nine men" (Savage 1992, p. 36). Rehnquist went on to say that "the Court is not a sociological watchdog to rear up every time private discrimination rears its ugly head" (Savage 1992, p. 37). Rehnquist's consistency is evidenced by his belief that "you have to be able to stand on your own two feet...not being bamboozled by current trendy ideas" (Boles 1987, p. X).

For all of his consistently conservative principles, Reagan chose to elevate Rehnquist to Chief Justice after Burger's formal retirement announcement on June 17, 1986. In a bitter confirmation battle in front of the Senate, Rehnquist received the most votes against the nomination of a Chief Justice in history, 65-33 (Pederson and Provizer 1993, p. 330). Once again, the media anticipated an abrupt shift to the right. Antonin Scalia had come to the Court in 1986 along with the elevation of Rehnquist. Scalia, the first Italian-American to sit on the Court, was chosen by Ronald Reagan to fill Burger's seat when he retired (Savage 1992, p. 18). Scalia is an important addition to the Court because of his firm belief in the conservative role of the Court; that is, he embodied Reagan's commitment to "judicial restraint in the realm of civil rights and civil liberties" (Goldman 1991, p. 141). The Burger Court had essentially left Warren's work intact, except in criminal law areas and with the affirmative action moderation in Bakke. Rehnquist got an early chance to shift right in a 1986 Alabama affirmative action case. However, he quickly found his attempt to end quotas blocked by Sandra Day O' Connor, the perennial swing voter who constantly seeks the middle ground. Rehnquist learned quickly as

Chief Justice that certain Justices whose votes tend to swing are important, particularly Roe ally Justice White and also Justice Stevens. And in losing 1987's Wallace v. Jaffree, the Alabama prayer case, Rehnquist learned the power of liberal William Brennan (Savage 1992, p. 123). "Indeed, the court displayed the same split personality it had shown through seventeen years of Burger: conservative on crime, liberal on civil rights and liberties. So far, the elevation of Rehnquist and the addition of Scalia changed nothing" (Savage 1992, p. 127).

Into the seat vacated by the retiring Lewis Powell, whom had often been a conservative ally, Reagan attempted to nominate Robert Bork. Reagan was faced with one of the most brutal confirmation battles in history. Finally he succeeded in nominating Anthony Kennedy to the Court. "Kennedy, a devout Roman Catholic, was expected by the administration to vote 'right' on abortion, and his replacing Lewis Powell, who had supported Roe v. Wade, provided the crucial vote in the Webster v. Reproductive Health Services decision" (Goldman 1991, p. 142). Rehnquist realized how lucky he had been in his confirmation quest after Reagan's' failed Bork nomination, for he and Bork have a lot in common ideologically. Perhaps he was aided by the fact that he was a sitting justice.

Now with Anthony Kennedy as a crucial fifth conservative vote, Rehnquist looked to triumph over the liberals in his second year as Chief Justice, and utilized his consistency to persuade other Justices to his conservative ideology. A classic example of Rehnquist's consistency is evidenced by 1987's Falwell case, in which Rehnquist ruled against religious leader Jerry Falwell because he was afraid of plunging into obscenity vagueness. Once again, in Rehnquist's view, " The court was not a pristine institution that stood above politics, nor were the Justices learned men who could 'discover' the meaning of the Constitution" (Savage 1992, p.

150). Thus, Rehnquist voted against Falwell, whom would seem to be a conservative ally, in favor of the Constitution. Rarely does Rehnquist vote for anyone asserting a Constitutional right because of his belief in restraint. Another example of Rehnquist's consistent pro-Constitution stance is demonstrated in his vote to uphold the Ethics in Government Act against the Reagan administration, which went against the separation of powers, because he almost always upholds laws against Constitutional challenges (Savage 1992, p. 201).

Affirmative action has been the one major issue area where the Rehnquist Court has not been restraintist (Savage 1992, p. 336). Rehnquist's activism looked to protect a different group via its ruling in Richmond v. Croson. " The Rehnquist Court, unlike the Burger Court, would not look upon affirmative action by local and state governments as a 'benign' effort to bring about equality. Rather, it would be considered racial discrimination and treated as such" (Savage 1992, p. 239-240). O'Connor's opinion in this case helped to protect the white male by saying that companies must consider race-neutral alternatives and use racial preferences as a last resort. The vagueness of these decisions has set the stage for the affirmative action and voting rights cases that currently jam the Court's docket.

Rehnquist's Court has been characterized by conservatism in allowing the people and the majority, not judges, to decide divisive issues (Savage 1992, p. 262). While many matters have been left for local and state governments to decide, the Rehnquist Court has shown its own activism in other civil liberties areas. Rehnquist Court rulings on abortion such as those in Webster and Thornburgh, have taken a conservative turn by restricting the right to an abortion, though the Court has still, largely because of O'Connor, refused to overturn Roe. Conservatism in criminal cases begun during Burger's tenure increases and continues to do so under Rehnquist.

Ronald Reagan, proud of his Court's toughness on crime, proclaimed that "his justices would practice judicial restraint. If state officials wanted to execute juvenile criminals, neither the Constitution nor the Supreme Court would stand in their way" (Savage 1992, p. 287).

By 1989, Rehnquist's power at the Supreme Court was manifest, and his power emphasized Burger's personal weakness. While Burger's role was as but one of nine justices, Rehnquist's "ideological consistency shaped the new emerging conservative Court just as surely as Brennan's firm faith in the rights of the individual shaped the Warren Court. In large measure, the Rehnquist Court is the ideology of William Rehnquist" (Savage 1992, p. 301). Rehnquist, unlike Burger, is highly regarded by all of his colleagues for his consistency, integrity, efficiency, and likability. Dissent rates among the justices have been on the decline from many justices except for liberal holdouts Marshall and Brennan, both of whom were gone by the end of 1991. However, all is not rosy for Rehnquist. Fellow justice Antonin Scalia has criticized Rehnquist for being too political in his opinions, caring only about getting the result, and not the wording of the opinion, right (Savage 1992, p. 326). Byron White also presented the occasional challenge by not being as obsessed with states' rights as is Rehnquist with his "moderate view of the Constitution" (Savage 1992, p. 341). This moderate view also regularly disappointed big business, because Rehnquist left most decisions to elected branches of government. "In the Rehnquist Court, a state's procedural rights could prevail over the rights guaranteed by the United States Constitution" (Savage 1992, p. 414).

Then, in 1990, Rehnquist's ideological enemy, Brennan, retired and was replaced by David Souter. This was significant because Justice Brennan was a persuasive coalition builder for liberal opinions during his tenure. Brennan was highly regarded for his intelligence and for

his commitment to civil liberties by his fellow Justices, and had often persuaded wavering moderate and conservative Justices to his liberal viewpoint. Conservatism prevailed when the Rehnquist Court, in McCleskey v. Zant, closed the door to second habeas corpus petitions. Last of the liberals Thurgood Marshall claimed that such a move was " new Court activism" (Savage 1992, p. 414). This new activism was largely representative not only of Rehnquist, but also of his freshman Court, who changed the meaning of the Constitution as they saw fit, thereby creating their own activism. "When the Supreme Court acted, it set national rules on matters that had once differed greatly by community...By 1991, the five-decade-long consensus on the role of the Court had reached an end. The activist Court that abolished official segregation, removed prayer from the schools, and legalized abortion is gone" (Savage 1992, p. 453). The old agenda of expanding and protecting freedom is dead, though the Court can hardly be regarded as restrained. The "Rehnquist Court's activities can hardly be characterized as a major withdrawal from judgment (Friedelbaum 1994, p. xv). And this new role of the Court is largely due to Chief Justice William Rehnquist, whom "twenty years ago...was seen in legal circles as an extremist...Now, thanks to Ronald Reagan and George Bush, Rehnquist stands as the unquestioned leader of the Supreme Court and the most powerful American jurist since Earl Warren retired in 1969. In his first five years, Rehnquist has shown he can lead the Court. He has the intellect, the commitment, and-most of all- the votes to reshape the law" (Savage 1992, p. 453). "The new Court has seen its first duty as upholding the will of the majority and the rules of the government, not the Constitutional rights of individuals" (Savage 1992, p. 454). Ultimately, the general trends during Burger and particularly Rehnquist's tenure have been towards increasing conservatism and a new type of judicial activism, not judicial restraint. Additional

changes in Court membership have also aided Rehnquist's quest for conservatism in the Court. When Thurgood Marshall retired in 1991, he was replaced by a Justice of the same heritage but opposite ideology: Clarence Thomas. Since Bill Clinton has been President, the second woman, Ruth Bader Ginsburg, and Steven Breyer , both moderates, have been appointed to the Court. Ginsburg and Breyer replaced White and Blackmun respectively, both of whom were swing voters. The full impact of the addition of these two newest Justices is yet to be completely seen, though Clarence Thomas's conservatism has provided a crucial vote in many cases, particularly those in civil liberties, and redistricting, cases.

REDISTRICTING

Every ten years, the redistricting of state and federal legislatures occurs. Redistricting represents a power struggle at its core, for " as each decade dawns, the prospect of redistricting renews the political hunt" (Elwing 1995, p. 4). The drawing of new district lines gives a fresh hope to certain groups whose interests are at stake: thus, redistricting is always controversial. For some groups, redistricting represents survival. For example, minorities have pointed out in the many claims of vote dilution under the Voting Rights Act that districts should be drawn to ensure the election of a minority candidate. Non-minority voters have disagreed, claiming that regardless of past discrimination, judicially-mandated remedies to ensure minority representation are unnecessary and are in fact a violation of equal protection under the Voting Rights Act. The one certainty about redistricting is that "each decade's remapping is controlled by the party in power", (Elwing 1995, p. 5), and this tenet applies to the Supreme Court as well. Therefore, the issue of redistricting has become central in American politics, and in the past several decades,

has moved into the judicial arena.

Though a field entered only thirty years ago by the courts, legislative redistricting cases have become prevalent on the Supreme Court docket. Redistricting cases address a wide variety of issues ranging from the justiciability of claims of violations of the Voting Rights Act to actual analysis of whether or not gerrymandering (racial or political) occurred in the drawing of legislative districts. A brief overview of the treatment by the Supreme Court of the major redistricting cases will provide a framework for understanding the Court's current attitude toward such cases, which has been increasingly active as well as increasingly conservative.

The first redistricting case ruled on by the Supreme Court was 1962' s Baker v. Carr. This six to two decision provided the impetus for the onslaught of cases that swamped the Court thereafter and continue to do so today. In Baker, the Warren Court ruled that the malapportionment of Tennessee's Congressional districts was justiciable (Goldman 1991, p. 189), under the Equal Protection Clause of the Fourteenth Amendment. This reversed the Court's 1946 ruling in Colegrove v. Green that such claims were not justiciable because they presented "political questions" (Goldman 1991, p. 188). However, the Court in 1962 was not only under the new leadership of Earl Warren, but also had several new members (see Table 1). Justice Brennan, writing the opinion of the Court in Baker, claimed instead that "protection of a political right does not mean it presents a political question," (Goldman 1991, p. 189), a point with which dissenters Harlan and Frankfurter sharply disagreed. Frankfurter's dissent foreshadows the quagmire that the Court would face involving redistricting cases, saying, " ...there is not under our Constitution a judicial remedy for every political mischief" (Goldman 1991, p. 191). But the door had been opened, and cases involving Voting Rights claims began

to pour in after the Act was adopted in 1965. Baker v. Carr's impact was not really felt, however, until 1969, when the Court ruled in Allen v. State Board of Elections that the Voting Right Act was to be given "the broadest possible scope" (Elwing 1995, p. 10). As a result, the Court suddenly found itself heavily involved in the drawing of legislative districts, a task Constitutionally delegated to the state legislatures. The legacy of the Court's imperialism endures in redistricting cases today.

When the Warren Court heard Baker v. Carr, "the questions of who had standing to sue and what grounds needed to be alleged were easy to answer. At that point in time, a potential plaintiff had to live in an overpopulated district and allege that his or her vote was devalued by the drawing of the district lines" (Weber 1995, p. 205). Today, however, cases can be brought to the Court on a number of grounds by practically any plaintiff. This has been a result of the numerous rulings by the Burger and Rehnquist Court in redistricting cases.

BURGER COURT RULINGS ON REDISTRICTING

Redistricting cases were not as prevalent during Burger's tenure as they seem to be under Rehnquist's modern tenure, though many important decision were made. One important change was that the overall ideological position on the issue began to shift during the 1970's. For example, "While the Court under the chief justiceship of Earl Warren insisted that districts be as mathematically equal as possible, the Burger Court was less sympathetic to malapportionment claims particularly as they concerned state legislative districts" (Goldman 1991, p. 789). One of the biggest cases during Burger's chief justiceship was 1979's United Jewish Organizations v. Carey, in which the Court ruled 7-1 (Burger dissenting) that " the use of racial criteria by the

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County, New York, erroneously attempted to prove a violation of their Constitutional rights because the New York legislature had used race as a factor in apportionment (*United Jewish Organizations of Williamsburgh, Inc., v. Carey*, 1977). In allowing race to be used as a factor in drawing districts, this decision marked a step back by the Court from the Warren era, which tended to support voter discrimination claims.

A change that occurred in the legislative arena further had effect on the redistricting cases of the Burger and subsequently the Rehnquist era. In 1982, Congress amended Section 2 of the Voting Rights Act to give it a results test (Weber 1995, p. 206). Such test, enacted in response to the Court's ruling in Mobile v. Bolden, aimed to clarify that a violation of Section 2 could be "proved by showing discriminatory effect alone, rather than having to show a discriminatory purpose" (*Thornburg v. Gingles* 1986). The amended Section 2, then, provided that a violation of Section 2a, which prohibits anything which would, on account of race or color, interfere with or impair a citizen's right to vote, occurs when a "totality of circumstances" inhibits equal participation in voting (*Thornburg v. Gingles* 1986). Ensuing cases dealt with the amended section 2. The most notable of these occurred in Burger's last year on the Court. 1986's Thornburg v. Gingles involved the legislative districts of the North Carolina state senate and house of representatives (*Thornburg v. Gingles* 1986). Five black citizens sued Thornburg, the Attorney General of North Carolina, "on the ground that the redistricting plan impaired black citizens' ability to elect representatives of their choice in violation of Section 2 as amended" (*Thornburg v. Gingles* 1986). Though the Court was unanimous in invalidating North Carolina's plan, the justices split markedly over the standards for determining racial vote dilution (Maveety 1991, p. 122). Justice Brennan, who

wrote the majority opinion, interpreted Section 2's totality of circumstances to mean that "in light of past racial discrimination and polarized voting, the plan impaired the black voters' ability to elect their preferred candidate" (Maveety 1991, p. 122). Thus, because the black voters were excluded or denied access to electoral competition, the changes made in the legislative districts were legitimate. His opinion was joined by the liberal bloc voters: Marshall, Blackmun, Stevens, and White. Dissenters were Powell, O'Connor, Burger, and Rehnquist, who concluded that Section 2 had not been violated because the minority candidates had "enjoyed consistent and sustained success" (*Thornburg v. Gingles* 1986), but also that "there is no rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns" (Thornburg v. Gingles 1986). The result of Thornburg was the establishment of the three criterion known as the Gingles test which must exist for legislatures to draw minority districts: "sufficient concentration of numbers, an established pattern of voting, and of white voting en-bloc to defeat minority candidates" (Elwing 1995, p. 11). (Table 2) Thornburg, then, was a landmark case.

The Supreme Court was not the only actor to join in the redistricting process. In response to the Civil Rights movement, sixteen states, mostly southern, are required to have their redistricting plans approved by the Department of Justice (Elwing 1995, p. 10) under Section 5 of the Voting Rights Act (Koepp 1995, p. 10). Since 1976, the Department of Justice had been limited by the Beer decision, which mandated that the standard to be used by the Department of Justice in determining Section 5 violations required the demonstration of "retrogressive effect or intentional discrimination" (Weber 1995, p. 207). In 1987, the United States Department of Justice adopted revised regulations governing the submission and

handling of cases involving Section 2. Under these new regulations, "the Department of Justice obligated itself to determine whether or not a submitted electoral change would violate section 2. The DOJ determined that wherever voting was racially polarized, a covered state would be required to draw majority-minority districts" (Weber 1995, p. 207). This new stance by the Department of Justice has led to the increase in the involvement of the judiciary in drawing legislative districts today, for it is now easier for a plaintiff to prove a Voting Rights Act statutory claim against redistricting (Weber 1995, p. 209).

The final major case involving redistricting during Burger' tenure was Davis v. Bandemer. (*Davis v. Bandemer* 1986). This case was landmark because the Court ruled that political gerrymandering was justiciable, though they ruled that the plaintiffs should not be awarded relief because their claim that any interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protectional violation, would "invite attack on all or almost all reapportionment statutes" (Goldman 1991, p. 805). Justices O'Connor, Rehnquist, and Burger, while concurring in the judgment to reverse the Indiana District Court's ruling, believed that the claim was nonjusticiable because "to turn these matters over to a federal judiciary is to inject the Courts into the most heated partisan issues" (Goldman 1991, p. 807). However, as is often the case with Justice O'Connor, her vote in future redistricting cases would swing to allow Court justiciability. The other five more liberal justices, White, Brennan, Marshall, Stevens, and Blackmun formed the majority for the case, thereby finding the claim justiciable and allowing the Court to step in.

REHNQUIST REDISTRICTING CASES

The elevation of Associate Justice Rehnquist to Chief Justice in 1986 initiated a change in redistricting law. As mentioned, the Court Rehnquist inherited underwent numerous changes in membership during his first five years. The new conservative majority on the Court has led to a series of decisions which have resulted in stricter scrutiny of legislative districts created to protect minority voters. While becoming more judicially active in overturning these legislative plans, the conservative ideology of the Court has led to a greater protection of majorities who claim a reverse discrimination violation. This trend is underscored by the case history of Rehnquist's tenure up to the present.

Rehnquist's first five years as Chief Justice provided little to no opportunity for significant change in redistricting case law. The 1990's, however, have presented the Court with a series of rulings that have expanded the involvement of the courts in the redistricting process while making minority discrimination claims more difficult to sustain. Four major cases in the 1990's have led up to the Court's most recent, and also most strict, ruling on redistricting: Miller v. Johnson.

The first major case decided by the Rehnquist Court involving redistricting was 1992-1993's Growe v. Emison. This unanimous decision reversed a Minnesota district court's ruling that "imposed a reapportionment plan creating a minority-dominated state senate district in Minnesota's legislature" (O'Brien 1993, p. 78). The Court's decision to mandate the deference of federal to state courts regarding redistricting plans is evidenced in Justice Scalia's opinion for the Court which says, "The Constitution leaves with the states primary responsibility for apportionment "(O'Brien 1993, p. 78). This decision represents a classic

example of the Rehnquist Court's deference to the state when considering issues of judicial imperialism and a defeat for defenders of minority rights who believe that minority rights are better defended by federal courts (Idelson and Kaplan 1993, p. 477).

Another redistricting case faced the Supreme Court in 1993: Voinovich v. Quilter (*Voinovich v. Quilter* 1993). This case involved a challenge by Ohio Democrats to a Republican-sponsored plan that Democrats claimed "packed minorities into voting districts that already elected black state legislators, while diluting blacks' voting strength in other predominantly white districts" (O'Brien 1993, p. 78). The Court once again reached an unanimous decision, ruling that the states' creation of majority-minority districts is constitutional so long as "the end result does not violate the Voting Rights Act by diminishing or abridging the voting strength of a protected class" (O'Brien 1993, p. 78). Justice O'Connor's opinion went on to state her belief that each case would have to be decided individually based on the circumstances of each case, but in this case, the Democrats' strength had not been diluted (Facts on File 1994, p. 161g3). This opinion foreshadowed future decisions in Shaw v. Reno, de Grandy v. Florida, and Miller v. Johnson.

The landmark redistricting case prior to Miller was also decided in 1993. Shaw v. Reno, a highly publicized case, represented a true litmus test of the strength of the conservative ideology of the Rehnquist Court. Would the Court overturn a states' creation of minority-majority districts that had been created to remedy past discrimination because they constituted a racial gerrymander?

The case is complex and interesting. The appellants, white North Carolina voters, brought suit against federal and state officials because of the new reapportionment plan that

had been created by the North Carolina legislature as a result of the 1990 Census. The plan, which was granted preclearance in compliance with Section 5 of the Voting Rights Act by the Department of Justice after including a second majority-black district that "stretched approximately 160 miles along Interstate 85, and, for much of its length was no wider than the I-85 corridor," (*Shaw v. Reno* 1993), was challenged by the appellants as a racial gerrymander because the district had been drawn with only race as a consideration. Ignored were such redistricting principles as compactness, contiguousness, and geographical boundaries in creating the majority-minority district. Thus, appellants felt that their Fourteenth Amendment rights had been violated under the Equal Protection Clause. The district Court in North Carolina had dismissed the suit, ruling that the "appellants had failed to state an equal protection claim because favoring the minority voters was not discriminatory in the constitutional sense and the plan did not lead to proportional underrepresnetation of white voters statewide" (*Shaw v. Reno* 1993). The Supreme Court, however, ruled differently, finding that the appellants did indeed have a claim under the Equal Protection Clause. The opinion expressly stated that "classifications of citizens based solely on race are by their nature odious to a free people whose institutions are founded upon the doctrine of equality..."(*Shaw v. Reno* 1993). The opinion, which was a close 5-4 (Stevens, Blackmun, Souter, and White dissenting), went on to say that state legislation which is explicable only on the account of race must be "narrowly tailored to further a compelling governmental interest" (*Shaw v. Reno* 1993). Essentially, the Court held that appearances do matter in reapportionment cases, because one cannot assume that just because people look alike they will vote alike. Thus, in assigning districts based solely upon race, representatives whose

districts have been gerrymandered will find that "their primary obligation is to represent only the members of that (minority) group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy" (*Shaw v. Reno* 1993). The case was then remanded to the federal district court, who ruled that though the plan was a racial gerrymander, North Carolina had a compelling state interest in "complying with the Voting Rights Act and remedying a history of past discrimination in voting and that the state had narrowly tailored a plan to fulfil these state interests" (Weber 1995, p. 208). Thus, while the Supreme Court had ruled that racial gerrymanders were unconstitutional, they had deferred to the state courts in determining what was best for the state. Still, the Supreme Court's ruling in Shaw v. Reno made it more difficult for minority-majority districts to be upheld. (See Table 3).

The decision in Shaw left the door open for a host of other claims beginning in 1994. The case of De Grandy v. Johnson, Speaker of the Florida House of Representatives, dealt with the subissue of vote dilution in redistricting cases. The case consolidated appellants who were black and Hispanic voters as well as the federal government against the legislative plan which diluted minority voting strength by creating an insufficient number of minority majority districts. Using the aforementioned three-part Gingles test, (See Table 2)which required the "sufficient concentration of numbers, an established pattern of voting, and of white voting en-bloc to defeat minority candidates," (Elwing 1995, p. 11), the district court ruled that the Florida plan was unconstitutional because the totality of circumstances, particularly Florida's past record of discrimination, justified a remedial plan. The Supreme Court placed greater emphasis on the Gingles test by requiring that not only must the factors be met, but "a court

must assess the probative significance of the Gingles factors after considering all circumstances with arguable bearing on the issue of equal political opportunity" (*DeGrandy v. Johnson* 1994). Thus the Supreme Court reversed the district court's ruling that a remedial plan was necessary to make up for vote dilution in the Florida house. This decision, which was 7-2, (Scalia and Thomas dissenting), represented yet another shift right in the judicial activism of the Rehnquist Court. In the Rehnquist Court, compliance with the Voting Rights Act is determined on a case-by-case basis. "The simple packing of minorities into either small and compact districts or tortured geographical shapes,"(Elwing 1995, p. 20), will no longer be tolerated. Thanks to a new, conservatively active Court with a solid six to three conservative majority, chances are now very high that majority-minority districts will not be upheld. This is exactly what the state of Georgia discovered when their Congressional districts were called into question in 1995's Miller v. Johnson.

The case of Zell Miller, et. al. v. Davida Johnson, et. al. began on January 13, 1994, when the appellees, who were five white voters from the Eleventh Congressional District in Georgia, filed an appeal against the government (Zell Miller is Governor of Georgia) in the United States District Court for the Southern District of Georgia (*Miller v. Johnson* 1995). Their claim was that the eleventh district constituted a racial gerrymander because the districts had been drawn based entirely on racial grounds. Therefore, they alleged that the gerrymander violated their constitutional rights under the Equal Protection Clause as a result of the ruling in Shaw v. Reno. Interpreting Shaw to hold states accountable and to require strict scrutiny for cases wherever race appears to be the overriding factor, the Federal Court ruled 2-1 that the eleventh district was indeed unconstitutional. Their ruling also criticized

the role that the Justice Department had played in creating and approving the Georgia Legislature's redistricting plan in 1992. This plan created three majority black districts, one of which stretches from Atlanta, which is in north central Georgia, all the way to Savannah, a city in the southeast corner of Georgia. This is the eleventh district, the district in question.

BACKGROUND OF THE ELEVENTH DISTRICT

A glimpse at the factual background of the district as well as its history helps to understand the basis of the litigation.

As a result of the 1990 Census, Georgia was allotted an additional congressperson, who would represent the eleventh district. Thus, the Georgia legislature was forced to redraw their district lines in 1992 (Cook 1995a). The legislature redrew the districts to create three majority black districts, one of which was the eleventh. The eleventh district, which took in "all or part of twenty-two counties," (Cook 1995c) was represented by a young black woman, Cynthia McKinney, who was elected in 1992. Her district was sixty-four percent black, while the entire state of Georgia is only twenty-seven percent black (Eddings 1994). A closer look at the eleventh district shows that its was created by connecting "an unpopulated land bridge in Henry County with voters in DeKalb County" (Cook 1995b) and that it is composed of parts of six pre-1992 congressional districts.

More interesting are the five white voters who signed on to the Johnson claim. The case was initiated by Mr. George DeLoach, a funeral home director who was defeated by Ms. McKinney in 1992's Democratic Primary. In 1994, he was elected as a Republican to the Georgia House of Representatives (Cook 1995e). Congresswoman McKinney, in writing an

editorial to the Atlanta Journal-Constitution, mused whether or not the suit would have ever been initiated had Mr. DeLoach won the primary. This raises an interesting question: was Mr. DeLoach merely a sore loser, or did he really feel that his constitutional rights had been violated?

The other four plaintiffs were the namesake, Davida Johnson, a devoted Republican party activist; Pam Burke, a bookkeeper who is a friend of Johnson's; George Seaton, a seventy-five year old retired government worker; and Henry Zittrouer, a retired insurance adjuster whose "home in Effingham County was a narrow strip that linked Savannah to the rest of the district. His son's home across the road was in the first district (Cook 1995e). Interestingly, none of these plaintiffs knew each other except Johnson and Burke. Yet they managed to unite in bringing forth their claim and ultimately having their district dismantled.

THE DECISION

The case was decided by a three-judge federal panel who ruled 2 to 1 that the eleventh district was unconstitutional based on the principles set forth in the 1993 Shaw decision. In applying strict scrutiny under Shaw, the Court determined that due to the odd shape of the eleventh and based on much evidence showing that the intent of the legislature was race-motivated, "race was the overriding and predominant force in the districting determination" (*Miller v. Johnson* 1995). Further, the district was found to be unnecessary in complying with the Voting Rights Act regardless of Georgia's past discrimination.

The government then appealed to the United States Supreme Court and was granted a stay of the District Court's judgment so that Georgia's Congressional election could be held under the 1992 plan with the three majority-minority districts in November 1994 (*Miller v.*

Johnson 1995). The appellants did not question the facts of the case that prove the racial gerrymandering of the district. "Rather, they contend that evidence of a legislature's deliberate classification of voters on the basis of race cannot alone suffice a claim under Shaw" (*Miller v. Johnson* 1995). The appellants believed that, in order for a racially gerrymandered district to be declared unconstitutional, a plaintiff's claim cannot rest on the intention of the state legislature: instead, the district must be shown to be so bizarre in shape that it can be explained by nothing other than race.

The decision of the Court came on the very last day of the 1994-1995 term : June 29, 1995. The decision was much anticipated and represented an expansion of the Shaw decision. The Supreme Court dismissed Miller's and therefore Georgia's claims, citing in their opinion that "appellants' conception misapprehended our holding in Shaw and the Equal Protection precedent upon which Shaw relied" (*Miller v. Johnson* 1995). The essence of the Equal Protection claim recognized in Shaw is that the state has used race as a basis for separating voters into districts. The rationale behind this principle set forth by the Supreme Court is that, constitutionally, individuals are to be treated as such regardless of race, gender, or ethnicity. Thus, the lumping together of individuals into voting districts based upon their race inherently stereotypes these people by assuming that, "because of their race (people) think alike, share the same political interests, and will prefer the same candidate at the polls" (*Miller v. Johnson* 1995). Racial gerrymandering really represents a step backward in assuring equal representation for all. The five white Georgia appellees felt that they were discriminated against in that the eleventh district had been created specifically to be majority black. The Court went on to say that proving a Shaw claim is difficult, for evidence other

than bizarreness of appearance must be produced. Further, the Court realized that "some districts which may not appear bizarre on their face are truly Shaw claims," (*Miller v. Johnson* 1995), and will be harder to prove. (See Table 4).

The Court in its majority opinion also established that the burden of proof would rest on the plaintiff in proving a Shaw claim. There are several criteria in order to prove a violation of the equal protection clause in redistricting cases as spelled out by the Court as a result of Miller. First, plaintiffs must show, "either through circumstantial evidence of a district's shape and demographics or more direct evidence...that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district" (*Miller v. Johnson* 1995). Further, the Court said that "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions, or communities defined by actual shared interests, to racial considerations" (*Miller v. Johnson* 1995). If a plaintiff cannot prove that the decisions made in redrawing legislative districts were based upon race, then the state can defeat their claim.

In Miller, the District Court had ruled that plaintiffs had proved their burden because indeed race was the predominant factor. Further, the legislature had subordinated race-neutral principles in deferring to the demands of the Department of Justice, which had refused preclearance of the Georgia plan until three black districts were created. The pressure that the Justice Department applied was definitely felt by the Georgia legislature, who said that they would not have drawn the eleventh the way they did were it not for " the need to include additional black population" (*Miller v. Johnson* 1995). Even Georgia's Attorney General

Michael Bowers attempted to rebuke the power of the Justice Department by objecting to the splitting of precincts and the bizarreness of shape because the state was ignoring other districting principles such as commonality of interests and contiguity (Cook 1995b). Thus, the Supreme Court concluded that the actions of the Justice Department were completely beyond the scope of their powers. The drawing of Georgia's congressional districts, a task assigned to state, and not federal, government, was motivated not by the claim purported by the state that the constituents of the eleventh district had common political interests, but instead by the pressure applied by the Justice Department to adopt three majority-minority districts in order to be granted preclearance. As a result, the plaintiffs had established the burden of proof and the Supreme Court subjected Georgia's congressional districts to its most "rigorous and exacting standard of constitutional review: strict scrutiny" (*Miller v. Johnson* 1995).

When the Supreme Court applied the strict scruinty test to the Georgia redistricting plan, the only way for the plan to pass was "if the district was narrowly tailored to achieve a compelling state interest" (*Miller v. Johnson* 1995). While it was uncontested that Georgia had a compelling interest in eradicating the past effects of discrimination, the Court determined that" the state must have convincing evidence that remedial action is necessary before implementing affirmative action" (*Miller v. Johnson* 1995). The Rehnquist Court, based on the Shaw ruling, required that the redistricting plan could only be justified under strict scrutiny if it directly remedied the past harm. While the Department of Justice claimed that the past harm could only be remedied by the creation of as many majority-minority districts as possible, the Georgia legislature, the District Court, and ultimately the Supreme

Court, disagreed: creating three black districts violated other redistricting principles. In addition, since Georgia had only one black district until 1992, the creation of a second black district was regarded as enough remediation for past discrimination.

Thus, Georgia's contentions and its districting plan did not satisfy the Court's strict scrutiny test. Race was found to be the only reason for the eleventh district, and, in the conclusion of the majority opinion, Justice Kennedy wrote that," it takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids" (*Miller v. Johnson* 1995).

The opinion was not unanimous, however, as Justices' Ginsburg, Stevens, Breyer, and Souter filed dissenting opinions. The essence of their disagreement with the conservative majority was their fear that a host of litigation would flood the Court as a result of the decision. Justice Ginsburg assessed the majority's activism, stating that, "

> today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours predominantly motivated by race: strict scrutiny will be triggered not only when traditional districting principles are abandoned, but also when those practices are subordinated to, or given less weight than, race (*Miller v. Johnson* 1995).

Ginsburg goes on to say in her dissent that what differed between the claims in Shaw and Miller was that " race did not crowd out all the other factors" (*Miller v. Johnson* 1995). She further claimed that the eleventh is not bizarre in shape compared to the North Carolina district in Shaw, that the Justice Department's role was not too great in the redistricting process, that there was indeed a commonality of interests among constituents of the eleventh district, and that the strict scrutiny requirement subjects the state to too rigorous of a test.

The dissent 's ultimate concern was that objective redistricting principles would be difficult for courts to interpret under the Miller precedent, as each case will be different. Will consistency ever be ensured?

Justice Stevens' dissent goes even further than Ginsburg's. He believed that, like the respondents in United States v. Hays, the Louisiana Congressional redistricting case, that Johnson et. al. had no standing to sue because they had not been injured by the creation of the eleventh. He said that because the appellees do not claim vote dilution, and only that their Equal Protection rights had been violated, that the drawing of the eleventh to include more blacks was justifiable and did the white plaintiffs no harm. Stevens further was upset by what he called " the Court's equation of traditional gerrymanders, designed to maintain or enhance a dominant group's power, with a dominant group's decision to share its power with a previously under represented group" (*Miller v. Johnson* 1995). He did not see the reverse discrimination alleged by the plaintiffs and viewed the Court's decision as a step backward for minority rights. It is ironic to think that this very liberal opinion was penned by a man appointed just twenty years ago as a conservative by Republican President Ford.

Justice O'Connor's concurring opinion defended her belief that "application of the Court's standard (strict scrutiny) does not throw into doubt the vast majority of the nation's 435 districts,...even though race may well have been considered in the redistricting process" (*Miller v. Johnson* 1995). While the Congressional Black Caucus was somewhat encouraged by this comment, many voting rights experts disagreed with Justice O'Connor's prediction; instead, they envisaged an onslaught of redistricting cases being brought to the Supreme Court (Carver 1995, p. 8).

IMPLICATIONS OF THE DECISION

The decision issued by the Supreme Court in Miller rocked the legal world, following the Court's increasingly conservative trend. Earlier in the term, the Court had ruled in other affirmative action-related cases to limit the rights of minorities. But while the decision indicated their finding on the case of Miller itself, many questions about the future of redistricting legislation were left unanswered. Of course, there were two basic reactions to the decision: support and opposition. Many parties were affected by the Court's decision, and the impact of Miller reverberates throughout our nation today. What follows recounts the aftermath of the Miller decision and its implications for the future.

June 29, 1995, was regarded by many as "the day conservatives on the United States Supreme Court pulled the rug out from under gains they have made from courthouse to Congress in the last thirty years" (Christensen 1995). Blacks across the nation, particularly those who were southern and involved in politics, were among the most outraged of groups after the Miller decision. Many representatives of the ACLU and other civil rights and liberties organizations viewed the decision as impetus enough for societal war. For example, Laughlin McDonald, an ACLU attorney from Atlanta, expressed his fear that "this Court is sending us back to the dark days of the nineteenth century" (Christensen 1995). At the heart of their protest was the concern that all of the gains that blacks have made in the past thirty years will be lost, as the eighteen congressional districts in the South which have been tailored to ensure black or Hispanic representation now lay in question. These districts were created to assure minority representation, for, according to the ACLU, "only five blacks have ever been elected to Congress from majority-white districts" (Christensen 1995). Further, on

a nationwide level, there is only one black Senator and only three black Congresspersons elected from majority-white districts out of the twenty-two non-southern black members (Atlanta Journal-Constitution 1995).

Congresswoman McKinney, obviously, was outraged by the Court's opinion, as she suddenly found herself without a district. Upon hearing the decision, Ms. McKinney pledged to fight for her district and for majority-minority districts nationwide. The night of the decision, Representative Cleo Fields of Louisiana spoke on the floor of the United States House of Representatives to express his disdain with the decision. He claimed that he found it "ironic that, at a time in our history that we are trying to bring about a colorblind society,"(*Congressional Record* 1995), such a decision could be handed down by the Court, and that districts created to maximize minority representation could be ruled unconstitutional by the Supreme Court. Mr. Fields was joined by Representatives McKinney and Jackson-Lee in expressing their displeasure with the Supreme Court, further noting the high caliber of representation that Ms. McKinney provided her constituents (*Congressional Record* 1995). Finally, a prominent African-American scholar, Dr. John Hope Franklin of Duke University, claimed that " Gerrymandering has not disturbed this county until it was applied to blacks," (Sherman 1995a), thereby insinuating that the Court had made their decision along racial lines.

Blacks and civil rights activists were not the only parties concerned by the Miller decision. Many voting rights experts agreed with Justice Ginsburg's prediction that a host of litigation would flood the Court as a result of their ruling. Policy experts claimed that "the Court's ruling opens to legal challenge all redistricting plans that purposely place blacks and

Hispanics in districts where they constitute a majority" (Holmes 1995), because of the vague nature of the decision. While the Court expressed another conservative opinion towards ending race-based public policy, the Miller decision left many questions unanswered.

Larry Chesin, attorney for the plaintiffs, admitted that the "decision does not give a road map," (Cook 1995e) because, while the Miller decision spells out many requirements that cannot be violated in drawing districts, it is not clear as to just how large a role the race factor can play in redistricting. Susan MacManus, a political scientist at the University of Florida, said that, while the decision elaborated on Shaw in deciding that race cannot be the only reason for the drawing of a district and that bizarre shape need not be proven, little direction was given the government as to what to do. It will be very subjective for legislatures to determine when race has been the predominant factor in drawing districts, and it seems as if each case will have to be decided individually, thereby opening the floodgates for cases (Greenhouse 1995a).

One entity that did receive a clear directive from the Supreme Court in Miller was the Department of Justice. The majority opinion lashed out at the role that the Department of Justice had played in Georgia's redistricting process. Simply, the Department of Justice had gone too far--the task of redrawing districts is to be left up to state legislatures, and the Department of Justice is supposed to approve or reject the plan, not submit their own (Cook 1995d).

But not all groups were discouraged by the Miller decision. Many conservatives applauded the decision, regarding it as a referendum on affirmative action. Georgia's Attorney General Bowers expressed his satisfaction with the decision, viewing it as yet

another step on the road to ending affirmative action within the decade (Cook 1995d). David Cole, a law professor at Georgetown, echoed these sentiments in saying that the direction of the Court's recent rulings have "essentially said that neither the courts nor the Congress can do much to respond to continuing racial inequality in our society" (Grier 1995).

But Republicans should be warned to consider the benefits that racial gerrymandering conferred upon them before applauding the Court's decision. It is important to remember that many Democratic voters will now be spread throughout several districts instead of being lumped together, thereby posing a threat to Republican incumbents (Grier 1995). Interestingly, Georgia's current Congressional delegation is racially polarized along party lines: there are eight white Republicans and three black Democrats. However, now that the districts have been redrawn, many incumbent Republicans suddenly find themselves with a substantial number of minority constituents. Of course, they would then be forced to build biracial coalitions in order to win an election. Many believe that this will result in more effective representation and will restore the essence of democracy (Martin 1995) as candidates will be chosen based upon their abilities, not their race.

So why did the Court decide Miller the way it did? Does the decision mark the beginning of a new era in conservative judicial activism, or is the Court returning to its constraintist self in allowing the states to redistrict themselves? I shall argue that both of these factor into the Court's new ideological calculus, which resulted in the Miller decision.

Some argue that, had the Court not ruled as it did to expand the Shaw decision to include factors other than bizarre shape in discrimination claims, that "the Supreme Court's decision two years ago was 'sound and fury, signifying nothing" (Shanor 1995). However,

Kennedy's opinion for the majority of the Court expresses their belief that Shaw had been misunderstood to apply only to bizarre-shaped districts. Rather, Shaw was meant to be expanded to include factors other than shape when considering redistricting issues. The Court further ruled that redistricting plans were subject to strict scrutiny, its toughest form of review (Greenhouse 1995a). Thus, the Court truly tightened the belt on states who were interested in designing districts for minorities.

Many court watchers regarded the 1994-1995 term of the Supreme Court as one of the most conservative in nearly half a century, for they had "ruled aggressively to the right in rulings on affirmative action, voting rights, school desegregation, religion, and privacy" (Carelli 1995). These rulings were the result of the conservative bloc of majority votes, consisting of Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor, and were only made possible by the votes of key swing voters O'Connor and Kennedy, who have largely determined the rightward shift of the Court. According to James Simon, dean of the New York University Law School, O'Connor and Kennedy are "pivotal because they hold the balance of power" (Marquand 1995b). This has become increasingly important since they have a tendency to swing right to join the three core conservatives: Scalia, Thomas, and Rehnquist. On the opposite end of the political spectrum, "Justice John Paul Stevens, Ginsburg, and Steven Breyer are moderate centrists. Usually they are joined by David Souter, who has become the Court's intellectual counterweight (Marquand 1995b). Thus, many decisions of the Court have been a narrow five to four vote.

Kennedy and O'Connor share a common vision of the limited role of the Court, often voting to uphold state decisions like Miller. But they tend to be more socially liberal than

their conservative counterparts, as evidenced by O'Connor's vote in 1992's Planned Parenthood v. Casey, which prevented the rolling back of Roe (Marquand 1995b). In Miller, O'Connor suggested in her concurring opinion that she might be more tolerant than her conservative counterparts of using race as a factor in redistricting cases (Sherman 1995a). Further, both Justices are committed to the legal concept of *stare decisis*. This could partially explain their vote in Miller as they did not want to repeal Shaw. And while O'Connor is regarded as being difficult to persuade, Kennedy is known for swaying his vote for mysterious reasons (Marquand 1995b). Though the impact of Kennedy and O'Connor's votes is certainly felt in the Court, some court watchers believe that the Court has shifted right due to the heavy influence of Chief Justice Rehnquist in setting the conservative-friendly agenda of the Court rather than the swing votes of these two Justices. For example, the Rehnquist agenda has allowed many issues to be decided by the conservative Court, particularly in enhancing states' rights. Further proof of Rehnquist's ideological influence is that more people were given the death penalty during the 1994-1995 term than in the early 1960's (Marquand 1995a).

Regardless of who is responsible for shifting the Court right, it is indisputable that such a shift has occurred. Since the decision, the future of redistricting law has been thrown into question and a number of cases and questions have been brought before courts across the nation.

POST-MILLER EVENTS

The decisions that will be handed down in the current term of the Court will determine if the Court is truly in the midst of a conservative revolution or if they have just

temporarily swung right. As Justice Ginsburg predicted, many cases have been brought to court as a result of the Miller decision. Immediately following the decision, the Court agreed to hear two more redistricting cases from Texas and North Carolina. These cases involve new issues in the redistricting arena and the fact that the Court immediately chose to hear the cases shows that their direction is yet uncertain. At the onset of their 1995-1996 term in October, the Court refused hearing but affirmed a lower Court's decision that the Tennessee state senate districts should be upheld. Their conservative rationale was not unlike that in Miller, for they ruled that the three majority black districts out of thirty-three were enough "because blacks made up roughly thirty percent of voting age population in three other districts, enough to influence if not determine the outcome of elections there" (Greenhouse 1995b). This decision is important because it signals state legislatures that the use of influence districts, or districts whose minority population is great enough to determine the outcome of an election, is sufficient enough in assuring minority representation. Majority-minority districts need not be created (Greenhouse 1995b). Once again, minorities and civil rights proponents regarded the decision as a retrogressive step in the equal representation battle.

For Georgia, the impact of Miller was direct. First of all, the case was remanded back to the lower court, who eventually drew their own plan for the Georgia Congressional districts after the Georgia legislature could not agree on a new plan among many submitted in a special session convened in August, 1995 (Sherman 1995b). The court-drawn plan leaves only one of the three majority-minority districts, for the District Court judges held that "creating a second majority-minority district would require this court to engage in the

unconstitutional racial gerrymandering characteristics of the plan we now replace. Georgians deserve a better fate" (Sherman 1995b).

Interestingly, the plan leaves the Republican districts largely intact, though several find themselves with a substantial number of minorities in their newly-drawn districts. Therefore, the 1996 elections could be a challenge. This new map was then cleared by the United States Supreme Court on February 6, 1996, allowing the new districts to be used in the 1996 Congressional elections (Sherman 1996). The results of these races in these new districts will be interesting: will white Democrats regain any of their pre-1994 seats? Will any blacks be elected in the ten majority-white districts?

CONCLUSION

The full impact of the Miller decision has yet to be determined, and its effects will certainly reverberate for years to come unless the Court dramatically shifts to reverse its current ideology. In light of the fact that most of the Justices have been appointed in the 1980's and 1990's, it is doubtful that a major ideological shift will occur soon. Further, as Representative Lee Hamilton of Indiana indicated, this Court has a great opportunity to seize power and to have a profound impact on the formation of American policy because this is "a Court with an activist's appetite and reach" (*Congressional Record* 1995). In applauding the Miller decision, Hamilton recognized the reversal of the views of the role of the Court between the liberals and conservatives. Now, the liberals are those who advocate restraint after years of activism and the conservatives, who have long deplored judicial activism, have assumed a conservative activist role. I suggest that this seemingly hypocritical shift in the Court's opinion of itself is merely its means for accomplishing its policy objectives: that is,

the conservatives on the Court are actively pursuing conservative goals because the liberal policies created under the Warren Court and sustained under the Burger Court must be acted upon to be changed. If the Rehnquist Court was restraintist, affirmative action could not have been scaled back as it has the past few years, the death penalty would not be so tough, and abortion rights would be more inclusive.

It is difficult to predict if this conservative activism is truly indicative of the will of the Court or if it is merely the result of the swinging of voters like O'Connor and Kennedy in crucial cases. Therefore, it is also difficult of know whether the Court's conservative activism will continue. Most cases have been decided by a close five to four conservative majority, and Chief Justice Rehnquist is to retire soon (*Congressional Record* 1995). We can only wait to see what decisions will be handed down by the Court, and, once again, this 1995-1996 term is of particular importance because it provides the opportunity for the Court to continue its conservative revolution.

So whither the Rehnquist Court? When compared to the Burger Court, much progress has been made to the right. The changes made in the past five years have been phenomenal. Truly, the amount of litigation involving redistricting cases has increased dramatically between the Burger and Rehnquist tenure. Further, with the addition of new conservatives to the Court like Thomas and Kennedy, Chief Justice Rehnquist has been able to garner a conservative majority to push his agenda through. Part of his success is also due to his ability to reason with the Court more effectively than the ill-respected Burger. Thus, the increasingly active but highly conservative decisions of the Rehnquist Court in redistricting cases demonstrate that indeed, the Rehnquist Court is increasingly more conservative than the

Burger Court is such cases. The decision in Miller is proof of the Court's new conservative toughness and their willingness act on legislation that they find incompatible with conservative goals. The modern Rehnquist Court can be described in but three simple adjectives: conservative, active, and young, all three of which will determine not only the future decisions of the Court, but also the policy of our nation.

TABLE 1:
Chronology of Major Events in the Supreme Court
Affecting Redistricting Cases, 1946-1995

1946	Colegrove; Court conservative majority: Vinson, Burton, Reed, Frankfurter, and Jackson
1953	Earl Warren, Republican, appointed Chief Justice by Eisenhower
1955	Harlan, Republican, appointed to Court by Eisenhower
1956	Brennan, liberal Democrat, appointed to Court by Eisenhower
1958	Stewart, Republican, appointed to Court by Eisenhower (replaces Burton)
	****** LIBERAL ACTIVISM IN THE COURT, 1962-1986: ******
1962	**Baker v. Carr: dissenters Harlan and Frankfurter**
1965	**Fortas, Democrat, appointed to Court by Johnson**
1965	**Voting Rights Act adopted**
1967	**Marshall, Democrat, appointed by Johnson (replaces Clark)**
1969	**Warren Burger, Republican, appointed Chief Justice by Nixon**
1970	**Blackmun, Republican, appointed by Nixon**
1971	**Rehnquist and Powell, both Republicans, appointed by Nixon to replace Black and Harlan**
1976	**Stevens, Republican, appointed by Ford (replaces Douglas)**
1979	**United Jewish Organizations v. Carey (Burger dissenting)**
1981	**O'Connor, Republican, appointed by Reagan (replaces Stewart)**
1982	**Congress amends Voting Rights Act**
1986	**Thornburg v. Gingles (O'Connor, Rehnquist, Powell, Burger differing)**
1986	**Davis v. Bandemer (same dissenting block)**
September, 1986	**Rehnquist elevated to Chief Justice by Reagan; Burger retires**
1986	**Scalia, Republican, appointed by Reagan (replaces Rehnquist)**
	******CONSERVATIVE ACTIVISM, 1986-PRESENT******
1988	Kennedy, Republican, appointed by Reagan (replaces Powell)
1990	Souter, Republican, appointed by Bush (replaces Brennan)

1991	Thomas, Republican, appointed by Bush (replaces Marshall)
1992	Growe v. Emison (unanimous)
1993	Ginsburg, moderate Democrat, appointed by Clinton (replaces White)
1993	Voinovich v. Quilter (unanimous)
1993	Shaw v. Reno (Stevens, Blackmun, Souter, and White dissenting)
1994	Breyer, moderate Democrat, appointed by Clinton (replaces Blackmun)
1994	De Grandy v. Johnson (Scalia and Thomas dissenting)
1995	Miller v. Johnson

THREE PRONGS OF THE GINGLES TEST:
TABLE 2

In order for the state legislatures to draw minority districts, these criteria must exist:
1. Sufficient concentration of numbers
2. An established pattern of voting
3. Proof of white voting en-bloc to defeat minority candidates

HIGHLIGHTS OF THE SHAW DECISION:
TABLE 3

1. Separation of voters on the basis of race that is so irrational on its face must be justified
2. Classifying citizens based solely on race threatens to stigmatize people
3. Redistricting plans must be determined whether or not the creation of majority-minority districts furthers a compelling government interest
4. Cases would be decided on an individual basis because of the unclear guidelines set forth by the decision

HIGHLIGHTS OF THE MILLER DECISION:
TABLE 4

1. The drawing of legislative districts is a duty of state legislatures
2. Districts do not have to merely look bizarre to be racially gerrymandered
3. Districts that are inexplicable on grounds other than race will be subject to strict scrutiny
4. Traditional race-neutral redistricting principles should be utilized in creating districts

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